No. _____

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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February 18, 2020

QUESTION PRESENTED

The Natural Gas Act authorizes a private gas company to exercise the federal government's power of eminent domain to secure necessary rights-of-way for the construction of an interstate pipeline if FERC grants the company a certificate of public convenience and necessity for the project. 15 U.S.C. §717f(h). This Court has long recognized that the federal eminent domain power may be exercised against state-owned property. *See, e.g.*, *Kohl v. United States*, 91 U.S. 367 (1875). Consistent with that rule, for the better part of a century, certificate holders have invoked §717f(h) to secure rights-of-way across private- and state-owned property alike. Yet the decision below, issued without the benefit of the federal government's views, deemed this long-settled understanding mistaken and held that the federal eminent domain power in §717f(h) cannot be exercised by certificate holders as to property in which a state has an interest. In reaching that conclusion, the Third Circuit conceded that its decision "may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates." App.30. FERC has since confirmed that the Third Circuit's interpretation of §717f(h) is mistaken, but that the court's prediction about the dire consequences is correct.

The question presented is:

Whether the NGA delegates to FERC certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a state claims an interest.

PARTIES TO THE PROCEEDING

Petitioner is PennEast Pipeline Company, LLC ("PennEast"). It was the plaintiff-appellee below.

Respondents are the State of New Jersey; the New Jersey Department of Environmental Protection; the New Jersey Agriculture Development Committee; the Delaware & Raritan Canal Commission; the New Jersey Water Supply Authority; the New Jersey Department of Transportation; the New Jersey Department of the Treasury; and the New Jersey Motor Vehicle Commission. Respondents were the defendant-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

PennEast Pipeline Company is a joint venture owned by Red Oak Enterprise Holdings, Inc., an indirect subsidiary of The Southern Company (20% interest); NJR Midstream Company, an indirect subsidiary of New Jersey Resources Corporation (20% interest); SJI Midstream, LLC, a subsidiary of South Jersey Industries, Inc. (20% interest); UGI PennEast, LLC, an indirect subsidiary of UGI Corporation (20% interest); and Spectra Energy Partners, LP, an indirect subsidiary of Enbridge Inc. (20% interest).

Publicly traded companies The Southern Company, New Jersey Resources Corporation, South Jersey Industries, Inc., UGI Corporation, and Enbridge Inc. have a 10% or greater interest in PennEast Pipeline Company.

STATEMENT OF RELATED PROCEEDINGS

1. *In re: PennEast Pipeline Co. LLC v. Verizon New Jersey Inc.*, *et al.*, No. 19-2596 (3d Cir.) (consolidated with Nos. 19-2597, 19-2598, 19-2599, 19-2600, 19-2601). On January 28, 2020, the Third Circuit vacated the district court's June 6, 2019 order condemning New Jersey's property interests in separate parcels in light of the decision challenged in this petition and remanded to the district court to determine whether New Jersey's conduct with regard to those separate parcels constitutes a waiver, estoppel, or other relinquishment of its sovereign immunity defense.

2. *Delaware Riverkeeper Network, et al. v. FERC*, No. 18-1128 (D.C. Cir.) (consolidated with Nos. 18-1144, 18-1220, 18-1225, 18-1226, 18-1233, 18-1256, and 18-1274). The petitioners in that case, including New Jersey, seek review of the FERC order granting PennEast a certificate of public convenience and necessity. On October 1, 2019, the D.C. Circuit held the consolidated cases in abeyance pending disposition of this case.

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The Natural Gas Act delegates to a gas company that obtains the requisite approvals to construct an interstate pipeline the power to secure the "necessary right[s]-of-way" to construct, operate, and maintain the pipeline "by the exercise of the right of eminent domain." 15 U.S.C. §717f(h). Since its inception, that provision has been used to secure rights-of-way over all manner of property, including property owned by a state. That practice is unremarkable. It was settled law when §717f(h) was enacted that states have no sovereign immunity from the federal eminent domain power. Accordingly, when Congress delegates that power, it delegates its power to exercise it against private- and state-owned property alike. Indeed, Congress has made that crystal clear by occasionally carving out some or all state-owned land when delegating the federal eminent domain power—something it conspicuously did not do in the NGA, which was specifically designed to overcome state efforts to hamstring pipeline development.

Notwithstanding that long-settled understanding and practice, the Third Circuit, without soliciting the views of FERC or the United States, held that private parties may not exercise the federal eminent domain power delegated by §717f(h) to secure rights-of-way over property owned by a state—or even over property in which a state merely holds a recreational or conservation easement. While the court acknowledged that §717f(h) delegates the federal domain eminent domain power, it concluded that §717f(h) cannot be read to "delegate" the federal government's "exemption" from state sovereign

immunity under the Eleventh Amendment, and hence leaves private parties with an eminent domain power that cannot be exercised as to state property.

The court forthrightly acknowledged that its construction of §717f(h) "may disrupt how the natural gas industry" has operated "for the past eighty years." App.30. FERC has since confirmed as much, issuing an order explaining that giving states an effective veto over the construction of interstate pipelines will resurrect the very same problems that §717f(h) was enacted to remedy. As FERC's order likewise explains, the decision below is not just profoundly disruptive, but also profoundly wrong, as settled principles of statutory construction readily confirm that §717f(h) contains no exception for property owned by a state. The Third Circuit's concern that this raises some sort of constitutional problem was misplaced, as the eminent domain authority certificate holders exercise under §717f(h) is the federal government's eminent domain power, as to which the Eleventh Amendment is a non sequitur. All manner of governments have long delegated eminent domain power, and nothing prevents the federal government from delegating that authority to certificate holders that have satisfied FERC review of their proposals to construct interstate pipelines.

In short, the decision below gets an exceptionally important question exceptionally wrong, as the federal agency charged with enforcing the NGA has confirmed. The Court should grant certiorari and restore the tools Congress provided to ensure the orderly development of critical interstate natural gas infrastructure.

OPINIONS BELOW

The Third Circuit's opinion is reported at 938 F.3d 96 and reproduced at App.1-31. The district court's opinion is unreported but available at 2018 WL 6584893 and reproduced at App.34-100.

JURISDICTION

The Third Circuit issued its decision on September 10, 2019, and denied a timely petition for rehearing en banc. App.32-33. Justice Alito extended the time to file a petition for writ of certiorari until March 4, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant provisions of the NGA, 15 U.S.C. §§717-17z, are reproduced at App.103-66.

15 U.S.C. §717f(h) provides in relevant part:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or 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, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which

such property may be located, or in the State courts.

STATEMENT OF THE CASE

A. Statutory Background

1. The right of eminent domain "appertains to every independent government" and has long been used by the United States to acquire land for public use. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). While the federal government is a government of limited and enumerated powers, the proper execution of some of those limited powers depends on eminent domain authority. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."). That reality is implicit in the Takings Clause, and this Court recognized the federal government's eminent domain power as early as *Kohl v. United States*, 91 U.S. 367 (1875). In doing so, the Court concluded that a state's interests must give way to the federal eminent domain power, for a voluntary condemnation power is an oxymoron, and if the federal government has such power, "it must be complete in itself." *Id.* at 374. Accordingly, "[t]he consent of a State can never be a condition precedent" to the "enjoyment" of the condemnation power; "[n]or can any State prescribe the manner in which [that power] must be exercised." *Id.*

Since *Kohl*, the federal government's practice of invoking its eminent domain power to take property for public use has consistently been upheld, including when that property is owned by a state. *See Chappell v. United States*, 160 U.S. 499, 510 (1896); *Okla. ex rel.*

Phillips v. Atkinson Co., 313 U.S. 508 (1941). The federal government has exercised the eminent domain power to accomplish everything from securing adequate water supply to establishing federal parks like Rock Creek National Park.

For more than 200 years, Congress has followed the lead of governments at every level by delegating the federal eminent domain power to private parties through statutes and agency action, with this Court's approval. *See, e.g.*, *Luxton v. N. River Bridge Co.*, 153 U.S. 525 (1894); *Curtiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810). When private parties exercise that power, they are exercising a delegated power, and accordingly may take property only to the extent the federal government may do so itself—*i.e.*, for a public purpose, and in exchange for just compensation. *See, e.g.*, *Luxton*, 153 U.S. at 532-34. But within those constraints, Congress has long understood that it may authorize a private party to take any property the federal government itself could take. Sometimes Congress identifies the property that may be taken; other times it reserves that right to a federal agency; still other times it sets forth in the delegating statute constraints to govern the private party's selection of appropriate land to take. And when Congress wants to make clear that certain property may *not* be taken, it says so expressly. For example, when Congress delegated to Amtrak the power to condemn property "necessary for intercity rail passenger transportation," it expressly carved out "property of … a State [or] a political subdivision of a State, or a governmental authority." 49 U.S.C. §24311; *see also* 16 U.S.C. §824p (delegating eminent domain power for electric transmission facilities, but

only for facilities located "on property other than property owned by the United States or a State").

2. In the mid-1930s, Congress enacted the Federal Power Act ("FPA") and the NGA. The FPA authorized the Federal Power Commission to regulate interstate transmission and sales of electric energy and the licensing of hydropower facilities. *See generally* 16 U.S.C. §§791-828. The NGA, for its part, established a framework for regulating the interstate transportation and sale of natural gas, *see* 15 U.S.C. §717(a), and gave the Federal Power Commission (now FERC) exclusive jurisdiction over the transportation and sale of natural gas for resale in interstate commerce. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). Section 814 of the FPA, as originally enacted, granted hydropower licensees who were unable to acquire necessary rights-of-way to transmit electricity by contract "the right of eminent domain." The NGA, by contrast, gave FERC more limited powers with respect to the construction of new pipelines, and did not in its original form give FERC a mechanism to authorize natural gas companies to acquire land to develop new infrastructure under FERC's supervision.

That role was instead largely left to the states, which inevitably led to the kinds of complications and inefficiencies that arise when instrumentalities of interstate commerce are not subject to uniform regulation. *See Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 646 (5th Cir. 1950). To remedy those problems, in 1942, Congress amended the NGA to give FERC more comprehensive regulatory authority over the construction of new interstate

pipelines as well as the use of existing ones. *See* Pub. L. No. 49-444, 56 Stat. 84 (1942). Since 1942, a natural gas company that wants to construct a new interstate pipeline must obtain FERC's approval. FERC must hold a hearing before granting any such approval, and may issue the requisite certificate of public convenience and necessity for the construction of a new pipeline only if, among other things, it determines that the new pipeline "is or will be required by the present or future public convenience and necessity." *Id.*

Notwithstanding this new federal approval process, some states continued to frustrate the development of interstate pipelines in the wake of the 1942 amendments, by imposing strict protectionist constraints on a natural gas company's ability to exercise eminent domain to secure the necessary rights-of-way to build and operate a pipeline. For example, the Arkansas constitution prohibited a foreign corporation from condemning property; Wisconsin granted the eminent domain power only to Wisconsin-based companies; and Nebraska permitted companies to exercise eminent domain only if they distributed gas within the state. *See* S. Rep. No. 80-429, 2-3 (1947). Other states provided that "property may be taken for public use," but narrowly defined "public use" as "the use of the public of the particular State conferring the right of eminent domain." *Id*. at 2. The various state restrictions posed intolerable obstacles to the development of a classic channel of *interstate* commerce.

Congress responded to these state restrictions by amending the NGA again in 1947, this time to grant

certificate holders the power as a matter of federal law to acquire the "necessary right[s]-of-way" to construct, operate, and maintain interstate pipelines "by the exercise of the right of eminent domain." *See* 15 U.S.C. §717f(h); Pub. L. No. 80-245, 61 Stat. 459 (1947). As one of its sponsors explained, this delegation of the federal government's eminent domain power was a "necessary tool[] to make effective the orders and certificates" of FERC. *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore).

To step into the shoes of the federal government and exercise its eminent domain power, a natural gas company must have a certificate from FERC. 15 U.S.C. §717f(h). The NGA directs that a certificate may issue only if the proposed pipeline "is or will be required by the present or future public convenience and necessity"; if the applicant fails to establish the necessity of the project, its "application shall be denied." *Id.*; §717f(e). FERC approves not just the necessity of the proposed pipeline *vel non*, but also evaluates the proposed route for the pipeline through a process in which affected property owners are free to appear and object. *See, e.g.*, App.35-43. And to bring a condemnation proceeding, the certificate holder must show that it "cannot acquire by contract" or was "unable to agree with the owner" on the compensation to be paid for the property or right-of-way it seeks to condemn. 15 U.S.C. §717f(h). If (and only if) all those prerequisites are satisfied, the certificate holder may "acquire" the necessary property or rights-of-way "by the exercise of the right of eminent domain in the district court of the United States for the district in

which such property may be located, or in the State courts." *Id.*[1] The provision delegating the federal government's eminent domain power to certificate holders in the NGA was modeled after, and tracked nearly verbatim, the delegation in §814 of the FPA. *See* 16 U.S.C. §814; S. Rep. No. 80-429 (1947).

Over the ensuing 70 years, the NGA's delegation of the federal eminent domain power effectively put an end to state efforts to frustrate interstate infrastructure development, and provided "a necessary protection of the free flow of commerce." S. Rep. No. 80-429, at 3. Often, the very existence of that power facilitated negotiations and obviated the need to invoke it. And when efforts to negotiate proved futile, the authority has been critical to ensuring that needed natural gas reaches consumers (often consumers in a different state). Natural gas companies have long deployed that power, moreover, with respect both to private property and to property in which a state (including New Jersey) claimed an interest. *See, e.g.*, *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015). Those efforts rarely drew any objection from states, and Congress has never made any effort to constrain the use of the §717f(h) eminent domain power against state-owned property.

Congress' silence on that score in the NGA contrasts with its actions concerning the FPA. While hydropower licensees continue to enjoy the federal eminent domain power under that statutory regime,

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[1] To proceed in federal rather than state court, the certificate holder also must establish that the value of the property at issue exceeds $3,000. *Id.*

in 1992, Congress amended the FPA—but not the NGA—to carve out a subset of state-owned properties. In particular, the FPA provides that "no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law." 16 U.S.C. §814. For parks, recreation areas, and wildlife refuges established after that date, a licensee may still exercise the eminent domain power, but only after a "public hearing held in the affected community," and only after FERC finds that "the license will not interfere or be inconsistent with the purposes for which such lands or property are owned." *Id.*

Notably, the legislative history explained that this amendment was necessary to grant these lands this special status because "[u]nder current law, when FERC issues a hydropower license, the licensee is granted a Federal power of eminent domain to condemn all non-Federal lands required for the project. This power *includes the power to condemn lands owned by States*." H.R. Rep. No. 102-474, 99-100 (1992) (emphasis added). Even with that recognition, moreover, Congress withdrew the eminent domain power under the FPA only as to certain specified state-owned lands, not as to all lands in which a state holds any interest at all. And Congress limited the ability of states to block development by acquiring new property interests along the route of a proposed development. By contrast, Congress did not take even those modest steps in the NGA, which instead continues to

authorize a certificate holder to exercise the federal eminent domain power to obtain the necessary property rights to cross any lands that FERC authorizes a new interstate pipeline to cross.

B. Factual Background and Procedural History

1. In 2015, PennEast applied for a certificate to construct and operate a 116-mile natural gas pipeline that will transport gas from Pennsylvania to New Jersey. App.3. The pipeline is expected to provide approximately one billion cubic feet per day of natural gas transportation capacity from northern Pennsylvania to markets in New Jersey, eastern and southern Pennsylvania, and surrounding states. 3CA-JA373. The certificate-approval process was extensive, involving thousands of public comments and several public meetings. Following the initial public comment period, FERC issued a draft Environmental Impact Statement (EIS) assessing the environmental impacts of the pipeline project, including the impacts on the specific properties the pipeline route would cross. FERC provided public notice of that statement and solicited public comments.

New Jersey was an active participant in that process, filing protests, comments, and other correspondence with FERC during the public comment period.[2] Many of the properties the pipeline

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[2] *See, e.g.*, Letter from J. Gray, Deputy Chief of Staff, N.J. Dept. of Envtl. Prot., to K. Bose, Sec'y, FERC (Dec. 20, 2016) (on file FERC Docket No. CP15-558); Letter from M. Catania, Chair, N.J. Nat. Lands Tr., to K. Bose, Sec'y, FERC (Feb. 9, 2018) (on file FERC Docket No. CP15-558); Comments of the N.J. Div. of Rate

would cross implicated New Jersey's interests and were the subject of its comments and letters on the proposed pipeline project. PennEast endeavored to work cooperatively with New Jersey and others whose property interests the proposed pipeline would implicate. In response to environmental and engineering concerns raised by New Jersey, members of the public, property owners, and others, PennEast proposed 33 route modifications, as well as various other changes to the project. FERC Order Issuing Certificates, 162 FERC ¶61,053, ¶96. And PennEast ultimately incorporated a total of 70 route modifications based on "comments and feedback from landowners, agencies and municipalities." *Id.* ¶211.

As part of its review process, FERC evaluated the potential environmental impact on the properties along PennEast's proposed route. That review included the properties in which New Jersey asserted an interest. In its final EIS published in the Federal Register, FERC concluded that nearly all of the parcels in which New Jersey asserted an interest that were "subject to types of conservation or open space protective easements" would "generally retain their conservation or open space characteristics" if the pipeline were constructed. App.4 n.1.

Counsel, FERC Docket No. CP15-558 (Sept. 12, 2016); Letter from K. Marcopul, Dep. State Hist. Pres. Officer, N.J. Hist. Pres. Off., to K. Bose, Sec'y, FERC (April 12, 2019) (on file FERC Docket No. CP15-558); Letter from M. Nordstrom, Exec. Dir., N.J. Highlands Water Prot. & Plan. Council, to K. Bose, Sec'y, FERC (Aug. 23, 2016) (on file FERC Docket No. CP15-558); Letter from S. Payne, Exec. Dir., N.J. Agric. Dev. Comm., to K. Bose, Sec'y, FERC (May 31, 2017) (on file FERC Docket No. CP15-558).

In 2018, after careful consideration of PennEast's application and supplements, the EIS, field investigations, and an alternatives analysis (among other information), FERC ultimately determined that "the public convenience and necessity require[d] approval of PennEast's proposal" and granted PennEast the certificate. App.4; 3CA-JA247. The certificate ensures ongoing federal involvement and oversight of both the construction and the operation of the pipeline. 3CA-JA295-309.

2. PennEast successfully negotiated with most property owners to obtain the necessary rights-of-way to properties the pipeline would cross. New Jersey, however, refused to grant PennEast the requisite rights as to the properties over which the state asserted an interest. Eventually, PennEast was forced to bring a series of condemnation actions as to those properties in federal court. This case involves 42 of the 49 properties in which the state claims an interest. As to these 42 parcels, the state claims a possessory interest in only two; the remaining 40 involve only non-possessory state interests, mostly in the form of easements "requiring that the land be preserved for recreational, conservation, or agricultural use." App.5.

While New Jersey had acquiesced in NGA and FPA condemnation proceedings in the past, *see* App.66 n.30 and *Halecrest Co.*, 60 FERC ¶61,121, 1992 WL 12567263 (1992) (granting a license, without objection from New Jersey as to the exercise of eminent domain, to construct and operate a hydroelectric storage project pursuant to FPA's eminent domain provision), this time it came armed with a new theory: According

to New Jersey, the Eleventh Amendment bars a certificate holder from using §717f(h) to condemn property in which a state holds any type of interest—even a non-possessory one. The district court was "not persuaded." App.66. As it explained, "PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign," and it is undisputed that the federal government could exercise that power as to property in which a state has an interest. App.65. Accordingly, the court concluded that the Eleventh Amendment has no role to play. App.66.

3. New Jersey and the various state agencies involved (collectively, respondents) appealed, contending that they have Eleventh Amendment immunity from PennEast's condemnation claims that §717f(h) does not abrogate. App.11. In the alternative, they argued that the NGA should not be interpreted to delegate the power to exercise eminent domain against property in which a state has an interest unless it does so "clearly and unequivocally," which they insisted it does not.

The Third Circuit agreed with respondents and vacated the district court's condemnation orders. According to the Third Circuit, when the federal government condemns state property—as all agree it may—it employs two federal powers, not one: the federal eminent domain power, and the federal government's "exemption" from the Eleventh Amendment. *Id*. The court therefore concluded that it could not read §717f(h) to apply to property in which a state has an interest unless Congress "clearly" delegated *both* the federal eminent domain power *and*

"the federal government's exemption from sovereign immunity." App.11, 27. Because §717f(h) "does [not] reference 'delegating' the federal government's ability to sue the States," the court found its newly minted rule unsatisfied. App.27.

The court acknowledged that its holding broke new ground and "may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates." App.30-31. And while it suggested a "work-around" under which the federal government could bring the condemnation proceedings itself, and "then transfer the property to the natural gas company," the court acknowledged that it had not solicited the federal government's views about the feasibility or legality of this "work-around," and conceded that, even if feasible, "such a change would alter how the natural gas industry has operated for some time." *Id*. The court ultimately dismissed such concerns as "an issue for Congress, not a reason to disregard sovereign immunity." App.31.

C. FERC's Declaratory Order

PennEast sought rehearing en banc and implored the Third Circuit to at least solicit the views of FERC before effectively invalidating an Act of Congress and fundamentally disrupting the NGA. PennEast also solicited those views itself, filing a petition with FERC seeking a declaratory order on the scope of the eminent domain power that §717f(h) delegates. But the Third Circuit denied PennEast's rehearing petition without either soliciting or awaiting FERC's views.

In the meantime, FERC proceeded with notice and comment on the declaratory order petition, and after obtaining comments and holding a hearing, FERC ultimately issued an order explaining that §717f(h) "does not limit a certificate holder's right to exercise eminent domain authority over state-owned land." FERC Declaratory Order, 170 FERC ¶ 61,064, Dkt. No. RP20-41-000, ¶25 (January 30, 2020) ("FERC Order"). FERC further explained that the Third Circuit's contrary conclusion will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system, and will significantly undermine how the natural gas transportation industry has operated for decades." *Id.* ¶56. In particular, it will "impair Congress's intent in providing certificate holders with this vital tool because it would allow states to nullify the effect of Commission orders affecting state land … through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." *Id.* ¶58.

FERC also explained that the Third Circuit's "work-around" is in fact not workable at all. Although §717f(h) "requires the Commission's determination as to which land may be condemned for the public convenience and necessity," it "delegates eminent domain authority solely to certificate holders and not to the Commission," so FERC has no power to carry out a condemnation proceeding in a certificate holder's stead. *Id.* ¶¶26, 49, 53. Allowing states "to block natural gas infrastructure projects that cross state lands by refusing to grant easements" thus will inevitably "impair the NGA's superordinate goal of

ensuring the public has access to reliable, affordable supplies of natural gas." *Id.* ¶58.

Commissioner Glick dissented, principally on the ground that FERC should leave interpretation of §717f(h) to the courts. *Id.* ¶1 (Glick, dissenting). Commissioner Glick did not ultimately take a position on whether §717f(h) applies to land in which a state has an interest, but rather opined only that, in his view, "the evidence simply is not clear one way or the other." *Id.* ¶2.

REASONS FOR GRANTING THE PETITION

The decision below effectively invalidates an Act of Congress and will "disrupt how the natural gas industry" has operated "for the past eighty years" to boot. App.30. To the extent there were any doubt about that, FERC laid it to rest in its recent order, which cogently explains both why §717f(h) cannot be read to exempt property in which a state has an interest, and why the Third Circuit's contrary conclusion will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system." FERC Order ¶56. Simply put, state veto power and interstate pipelines are incompatible, as Congress recognized more than 70 years ago in arming pipeline certificate holders with the federal eminent domain power. As FERC explained, the decision below is both profoundly wrong and profoundly consequential—a combination that cries out for this Court's review.

Applying ordinary principles of statutory construction, there can be no serious dispute that §717f(h) applies to private property and state property alike. The statutory text admits of no exception for

state property, the statutory purpose is incompatible with such an exception, and for the better part of a century the statute has uniformly been understood to contain none. The contrast with the FPA is telling. In that context, Congress acted to carve out a narrow subset of state property, while leaving the NGA authority undisturbed. Yet the decision below would render the NGA's eminent domain authority useless against all manner of state property interests, even a recently acquired easement.

It is little surprise, then, that the decision below did not rely on ordinary principles of statutory construction. Instead, it invented a new "clear statement" rule that requires Congress not just to clearly delegate the federal eminent domain authority, but to clearly indicate that Congress intended to abrogate the states' Eleventh Amendment immunity in the resulting condemnation proceedings. But that rule requires Congress to clearly abrogate something that does not exist. States sacrificed any immunity from the federal government's eminent domain authority in the plan of the convention. As long as the delegation of that authority is sufficiently clear, there is no state sovereign immunity to abrogate. That is all the more true because the condemnation action is an *in rem* proceeding and provides states with just compensation. Thus, the normal Eleventh Amendment concern that private-party suits will drain state treasuries is wholly inapplicable here.

The Third Circuit's contrary conclusion is not only wrong, but immensely consequential. Left standing, the decision will "allow states to nullify the effect of

Commission orders affecting state land"—even "private land in which the state has an interest"—through "the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." FERC Order ¶58. Congress certainly did not intend that result, and the Constitution in no way commands it. The Court should grant certiorari and restore to certificate holders the power to take the steps necessary to construct, maintain, and operate the interstate pipelines that FERC approves.

I. The Decision Below Effectively Invalidates An Act Of Congress, Out Of A Misguided Effort To Avoid Constitutional Concerns That Do Not Exist.

For more than 70 years, §717f(h) of the NGA has been understood by everyone—certificate holders, states, courts, and the federal agency that administers the NGA—to delegate to certificate holders the power to exercise federal eminent domain to obtain any property rights needed to construct a FERC-approved interstate pipeline, whether those property rights belong to a private party or to a state. That is unsurprising, as a straightforward application of settled principles of statutory construction compels that conclusion, and the history behind the provision proves that a state veto and interstate pipelines are not compatible. The Third Circuit reached a contrary conclusion not by applying those settled principles or accounting for Congress' evident intent in adding the eminent domain provision to the NGA, but by inventing a clear statement rule to avoid a constitutional concern that does not exist. In doing so,

the court effectively invalidated an Act of Congress and upset nearly a century of settled industry practice.

A. Statutory Text and Context Make Clear That the NGA Delegates the Federal Government's Eminent Domain Power.

"As in any statutory construction case," the Court "start[s], of course, with the statutory text." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Here, it can end there too. Section 717f(h) provides that, "[w]hen any holder of a certificate" to construct an interstate pipeline cannot acquire by contract or negotiation "the necessary right-of-way to construct, operate, and maintain" the pipeline, it "may acquire the same by the exercise of the right of eminent domain in the district court of the United States." 15 U.S.C. §717f(h). By its plain terms, that language admits of no exceptions; it instead applies to *any* property "necessary … to construct, operate, and maintain a pipe line." *Id.* The plain language of the NGA thus makes clear that Congress delegated to certificate holders the power to exercise eminent domain to obtain *any* property rights that cannot be obtained by consent and are needed to construct a pipeline, regardless of whether the property is in private or state hands. That sweeping authority reflects the basic realities that eminent domain power is unnecessary when property owners consent, and that a state veto power is incompatible with interstate pipelines.

The notion that a sweeping grant of federal eminent domain authority extends to all manner of property is underscored by the express inclusion of

limited exceptions in other statutes. For instance, Congress delegated the federal eminent domain power to Amtrak, but it expressly carved out of that authority "property of … a State" or "a political subdivision of a State." 49 U.S.C. §24311. And the FPA's delegation of the eminent domain power was amended to carve out a narrow subset of pre-existing state lands and to require special procedures for the condemnation of "lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge." 16 U.S.C. §814. More recently, in amending the FPA in 2005 to give FERC siting and permitting authority over electric transmission facilities in National Interest Electricity Corridors, Congress provided permit holders the right of eminent domain, but only for facilities located "on property other than property owned by the United States or a State." 16 U.S.C. §824p. As these provisions confirm, Congress assumes that a broad grant of federal eminent domain authority reaches all manner of needed property, and when Congress wants to exempt state-owned land, "it has done so clearly and expressly." *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003).

The state-land proviso in §814 of the FPA is particularly instructive because it is a more recent addition and §717f(h) of the NGA was modeled on §814 of the FPA. *See* S. Rep. No. 80-429. Section 814 did not contain any exception for state land when §717f(h) was enacted. That proviso was only added in 1992—and was added precisely because, "[u]nder current law" at the time (*i.e.*, the version of §814 after which §717f(h) was modeled), the eminent domain power

delegated by §814 "includes the power to condemn lands owned by the States." H.R. Rep. 102-474, 99-100. Yet while Congress carved out exceptions for a subset of state-owned land in the FPA, it made no comparable amendment to the NGA. Moreover, even as to §814 of the FPA, Congress did not exempt *all* land in which a state has an interest out of a newfound concern for state sovereignty. Its concern was focused on park lands, as it exempted only lands that are (1) "owned by a State or political subdivision," and (2) "part of or included within a public park, recreation area or wildlife refuge." 16 U.S.C. §814. That language setting out a carefully circumscribed subset of state property interests would be nonsensical surplusage if the delegation of federal eminent domain power that preceded it did not reach state property. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

Particularly when read in conjunction with the revisions to the FPA provision on which it was modeled, there can be no serious dispute that, as a textual matter, §717f(h) admits of no exception for state-owned lands (let alone an exception for any state interest in property, no matter how minor, non-possessory, or recently acquired). But to the extent the text left any doubt on that score, the context in which it was enacted eliminates it. When Congress added §717f(h) to the NGA in 1947, it was already settled law that "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States." *Atkinson*, 313 U.S. at 534. That was not lost on Congress; an opponent of the bill specifically urged

its rejection on the ground that it would "permit the taking of State-owned lands … by a private company." *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947). Yet Congress forged ahead without seeing fit to adopt any exception for state property.

Congress forged ahead because a principal reason it was adding §717f(h) to the NGA was to counteract state efforts to frustrate the exercise of eminent domain by interstate pipeline developers. *See supra* pp.7-8; S. Rep. No. 80-429, 2-3. A decade of experience with an NGA that lacked a federal eminent domain provision made clear to Congress that reliance on consensual state actions was incompatible with the development of interstate pipelines. Having gone to the trouble of adding an eminent domain provision to overcome state obstacles to interstate pipelines, Congress would not have exempted states or otherwise given them a de facto veto power over interstate pipeline routes.

It is little surprise, then, that FERC, the agency tasked with implementing the NGA, agrees that §717f(h) reaches property owned by a state. As FERC explained, that conclusion follows directly from the text, which "contains no limiting language concerning state land." FERC Order ¶25. Moreover, "Congress's decision to amend an analogous statute to expressly carve out [some] state lands, but not to similarly amend NGA section 7(h)," makes crystal clear that "the eminent domain authority exercised by certificate holders" under the NGA and the FPA both pre- and post-amendment "does, in fact, apply to state lands."

Id. FERC further explained that the text is consistent with the legislative history, which describes Congress' "specific intent to prevent states from conditioning or blocking the use of eminent domain by certificate holders," and its own orders, which have long rejected arguments to limit the exercise of eminent domain over state-owned property. *Id.* at ¶¶25-26 (citing *Tenneco Atl. Pipeline Co.*, 1 FERC ¶63,025, 65,204 (1977); *E. Tenn. Nat. Gas Co.*, 102 FERC ¶61,225, at ¶68 (2003)).

History and practice likewise confirm what the plain text and context make clear. For 70 years, pipeline developers have been employing §717f(h) to obtain *whatever* property rights FERC has determined they need to construct an interstate pipeline, without regard to whether those rights must be condemned from a private party or a state. For 70 years, FERC has expressly condoned this practice. For 70 years, states (including New Jersey, *see* App.66 n.30) have raised any concerns with FERC before a certificate issues, and then acceded to any resulting condemnation actions if negotiations stalled. *See, e.g.*, *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015) (condemnation action over state land in New Jersey proceeded without objection); *Transcon. Gas Pipe Line Co.*, *v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013) (same); *Halecrest Co.*, 60 FERC ¶61,121 (same). And for 70 years, the courts did not even hint at the notion that any of this poses a constitutional concern.

B. The Decision Below Is the Product of a Misguided Effort to Avoid Constitutional Concerns That Do Not Exist.

As the foregoing makes clear, as a matter of statutory interpretation, the question presented is not a close call. The text of §717f(h) admits of no exception for any state-owned property; its purposes are incompatible with a state veto power; it has never been understood to contain a state-property exception; and unlike its FPA cousin, it has never been amended to add one. The Third Circuit reached a contrary conclusion only by eschewing settled tools of construction in favor of a newly minted double "clear statement" rule. According to the Third Circuit, a delegation of the federal eminent domain power cannot be read to authorize the delegee to condemn state property unless Congress makes it "unmistakably clear" that it has delegated two things: (1) the federal eminent domain power, and (2) "the federal government's exemption from Eleventh Amendment immunity." App.30. That approach is at best double counting; at worst it fundamentally misunderstands eminent domain and sovereign immunity. As to the federal government's eminent domain authority, states sacrificed any immunity they had in the plan of the convention. Thus, asking for a clear abrogation of sovereign immunity even when the grant of federal eminent domain power is clear is to ask Congress to clearly abrogate something that does not exist.

Eminent domain is an inherently governmental power that "appertains to every independent

government" as an "attribute of sovereignty." *Boom Co.*, 98 U.S. at 406 (1878). Because the power is inherently and exclusively governmental in nature, it may be exercised *only* by the government, or by a private party acting on its behalf. Such delegations have long been common at every level of government, particularly when it comes to railroads and utilities. *See, e.g.*, *Luxton*, 153 U.S. 525; *see also* A. Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 545 (2009) ("In the nineteenth century, every state in the union delegated the power of eminent domain to turnpike, bridge, canal, and railroad companies. These delegations essentially put the private actor—the company beneficiary of the delegation—in the place of the government with regard to the law of eminent domain."). But even when the power is delegated, it remains an exercise of a distinctly governmental power, which is why the delegee must provide just compensation and is a government actor for constitutional purposes. *See Luxton*, 153 U.S. 525; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *Private Takings* at 545. At least in our common-law traditions, there is no such thing as a purely "private" condemnation action. If one private party wants property that concededly belongs to another, he must convince the latter to part with it; he cannot get a court to compel its surrender, no matter how just or generous the compensation he offers in exchange.

That fundamentally differentiates an exercise of the federal domain power from contexts in which this Court has applied Eleventh Amendment abrogation principles, nearly all of which have involved private suits for money damages. *See, e.g.*, *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Tr.*

of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706, 730-54 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). When Congress empowers private parties to bring damages actions against a state, it is empowering them to bring a *private* action, to enforce *private* rights, for their own *private* benefit. Such a suit is not distinctly governmental. Many of those statutes authorized a private cause of action against any employer. A condemnation action, by contrast, is not an action that a private party could bring against *anyone* on its own behalf. A private party may exercise that power only via a delegation, and only for a public purpose, and must provide just compensation in exchange. *See Luxton*, 153 U.S. at 529-30.

The governmental nature of the eminent domain power is critical because states do not have sovereign immunity from the federal eminent domain power. When the federal government needs land for a public purpose, it may take it, with or without the consent of the state. *See Chappell*, 160 U.S. at 510. And it may do so even if that land belongs to the state itself. *See, e.g.*, *Atkinson*, 313 U.S. at 534; *Wayne County v. United States*, 53 Ct. Cl. 417, *aff'd* 252 U.S. 574 (1920). New Jersey conceded as much below, and the Third Circuit agreed. App.65. While the federal government's ability to force states to yield state-owned lands may intrude on state sovereign interests, any immunity from such actions was yielded in "the plan of the [c]onvention" as reflected in the Supremacy Clause. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006); U.S. Const. art. VI, cl.2.

Because the eminent domain authority is both inherently governmental and inherently federal, the search for a separate "delegation" of the federal government's "exemption from Eleventh Amendment immunity," App.27, is mistaken. When the federal government exercises its own eminent domain authority via a condemnation action it does not need to invoke any "exemption from Eleventh Amendment immunity." The states yielded any immunity they had from such actions in the plan of the convention. The federal government may bring the action because states have no immunity from *the federal eminent domain power*. Thus, when Congress delegates the federal eminent domain power to a third party, asking for a separate abrogation of state sovereign immunity from the federal eminent domain power is asking for an abrogation of something that does not exist. The delegee is a federal actor for both Takings Clause and sovereign immunity purposes, and thus is not subject to a state sovereign immunity objection.

Indeed, the delegated power is not just inherently federal, but inherently compulsory. A purely consensual power of eminent domain and strictly voluntary condemnation actions are oxymoronic. What differentiates the eminent domain power from normal arms-length negotiations is the ability to invoke governmental power to condemn the land at issue. U.S. Const. amend. V. It thus makes no sense to ask Congress to delegate separately both its eminent domain authority against all property owners (including states) and its ability to bring condemnation actions against all property owners (including states). They are one and the same. Indeed, if there is any difference between them, it is

that the federal government's ability to take state-owned property through eminent domain is the real intrusion on state sovereignty (albeit one plainly inherent in the plan of the convention). The accompanying condemnation action is not some distinct affront to state sovereignty, but a means of providing just compensation to the state. Thus, asking for a separate authorization for the condemnation action gets matters exactly backward.

The Third Circuit's concern with the prospect of condemnation proceedings being filed by someone other than "an accountable federal official," App.30, is misplaced for largely the same reasons. The right way for Congress to ensure appropriate oversight over delegations of the eminent domain power is by exercising authority over *what property may be taken*, not by hamstringing the ministerial power of effectuating the resulting land transfer. And that is precisely the dichotomy that the NGA sensibly draws. As FERC has explained, *FERC* is the one who makes the "determination as to which land may be condemned for the public convenience and necessity." FERC Order ¶53. The only thing Congress delegated to the private companies is the power to execute FERC's determination by negotiating for the transfer of the requisite property rights or bringing a condemnation proceeding when negotiation fails. The Third Circuit's concern thus not only is misplaced, but produced a bizarre regime under which certificate holders cannot do the one thing that Congress most wanted them to be able to do: relieve the government of the burden of effectuating FERC's decision that land is appropriate for condemnation if negotiation fails.

The cases on which the Third Circuit relied neither compel nor even support the result it reached. The Eleventh Amendment cases the court invoked do not involve the federal eminent domain power, and thus provide no support for the notion that states may assert sovereign immunity when a private party is exercising a delegated federal governmental power. As for *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), that case involved a claim that the government had delegated its bare power to sue states, not a delegation of a distinct governmental power as to which states have no sovereign immunity. Whatever concerns may arise if Congress were to simply empower a private party to bring any and all suits against states, those concerns have nothing to do with whether Congress may empower a narrow band of private parties to condemn state land to effectuate a federal public interest.

Moreover, as noted, condemnation actions do not even implicate the Eleventh Amendment, as condemnation actions are *in rem* proceedings, *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), designed to provide just compensation. This Court has expressly recognized that an *in rem* suit is "not a suit against the State for purposes of the Eleventh Amendment." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443, 450-51 (2004). A judgment in an *in rem* case "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). Accordingly, *in rem* actions "do[] not implicate state sovereignty to nearly the same degree as other kinds of [lawsuits]." *Katz*, 546 U.S. at 378. The Third Circuit dismissed those cases

as involving "specialized areas of bankruptcy and admiralty." App.24. But few areas are more specialized or unlike *in personam* damages actions than a condemnation action. Indeed, to the extent that a principal concern of the Eleventh Amendment is that private suits would drain the state treasury, extending Eleventh Amendment immunity to condemnation proceedings designed to ensure just compensation gets matters backward and underscores that the real intrusion into state sovereignty here is the federal government's ability to take state property for public use. Asking for a separate abrogation for the condemnation actions that ensure just compensation for the taking is deeply mistaken.

In all events, even assuming there may be some sovereign immunity limits on the types of *private in rem* actions a private party may bring, *see Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), an exercise of the delegated federal eminent domain power is a different matter. That likely explains why, for the first 70 years of its existence, §717f(h)'s application to property owned by a state went virtually uncontested—and was accepted even by New Jersey itself. The Third Circuit's contrary conclusion thus effectively invalidates a core application of §717f(h) for reasons that find no grounding in the Constitution.

II. The Decision Below Threatens To Disrupt The Development Of Energy Infrastructure All Throughout The Nation.

There can be no serious question that this case is of immense national importance. The Third Circuit not only effectively invalidated an Act of Congress, but admitted that its decision "may disrupt how the

natural gas industry" has operated "for the past eighty years." App.30. FERC has since confirmed that prediction, opining that the decision will "have profoundly adverse impacts" on infrastructure development and will "significantly undermine how the natural gas transportation industry has operated for decades." FERC Order ¶56.

Congress long ago recognized that interstate pipelines and state veto powers are incompatible. Yet as FERC explained, left standing, the Third Circuit's decision will "allow states to nullify the effect of Commission orders affecting state land—and, apparently, private land in which the state has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." FERC Order ¶58. That is no small matter, as it is commonplace for pipelines to cross property in which a state holds some sort of interest.[3] States often have fee interests in the beds of navigable rivers that form state boundaries. That is true for every state east of the Mississippi River. If those state boundaries are converted into barriers to pipeline development, the federal interest in ensuring the interstate transport of natural gas could be critically frustrated, particularly when a state blocks pipelines designed to service consumers in other states. And fee interests in navigable rivers are just the tip of the iceberg. New Jersey is a case in point. New Jersey claims a property interest in more

[3] *See, e.g.*, Plaintiff's Reply in Support of its Motion for an Order of Condemnation and for Preliminary Injunction 5, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land*, No. 1:19-cv-01444-GLR (D.Md. July 8, 2019) (compiling examples).

than 1,300 square miles—more than 15% of all the land in the state—including through recently conveyed non-possessory easements. *See* FERC Order ¶12. Those widespread interests vindicate the wisdom of Congress' approach in the FPA of exempting only the states' pre-existing ownership of park lands from the federal eminent domain authority. The decision below, by contrast, grants an effective state immunity for a wide variety of non-possessory interests.

The decision's disruptive effects on the natural gas industry are reason enough to grant review. After all, natural gas accounts for almost a quarter of the country's total energy consumption, and the "most reliable and safest way" to "transport [] huge volumes of hazardous liquids and gas" is through pipelines. "Pipeline Basics," Pipeline & Hazardous Materials Safety Administration, U.S. Department of Transportation, available at https://bit.ly/36Ztu7L. The 2.6 million miles of pipelines that crisscross the country provide volumes of energy "well beyond the capacity of other forms of transportation." *Id*., "General Pipeline FAQs," available at https://bit.ly/36Yehnu.

The baleful impacts of the decision below go well beyond the pipeline. The pipeline projects that the decision will stymie are by definition projects where FERC has determined there is a need for additional energy resources. The cost of giving states a veto power over interstate pipelines will be measured in thousands of lost jobs, millions of forgone tax revenues, and tens of millions in increased consumer costs. This pipeline alone would provide one billion cubic feet per day of natural gas transportation

capacity—not to mention saving the region more than $1 billion and creating 12,000 new jobs. *See* "Economic Impact," PennEast Pipeline, available at https://bit.ly/2Uuw1Ee. And, of course, the decision threatens the precise kind of economic balkanization the Constitution was designed to prevent. Individual states have different priorities and will derive different benefits from pipelines depending on whether they are resource-rich, energy-challenged, or a pass-through state. Interstate pipelines are classic channels of interstate commerce. They are the last place states should enjoy a veto power.

The Third Circuit's only answer to all of this disruption was to suggest the possibility of a "work-around" whereby FERC would bring the condemnation action itself, and then somehow transfer the property or rights-of-way to the certificate holder. App.31. But as FERC explained, that "work-around" is merely theoretical, as Congress has not given the Commission the power to bring eminent domain proceedings, let alone given it the power to "pay just compensation" or to "transfer[] the property from the Commission to the pipeline" once it is condemned. FERC Order ¶¶52-53. Instead, under the system Congress actually designed, FERC is tasked with determining whether an exercise of eminent domain would be appropriate, while the certificate holder is tasked with implementing that determination and providing just compensation.

That is no accident; that structure allows FERC to focus on the issues that necessitate its oversight and expertise—*i.e.*, determining whether a pipeline is needed, and whether its proposed route is

appropriate—while leaving to the certificate holder the ministerial task of negotiating for the requisite property rights or bringing a condemnation action to the extent necessary to obtain them. Congress should not be forced to empower FERC to expend inordinate government resources litigating condemnation proceedings just because one court misunderstood how state sovereign immunity principles apply (or, more aptly, do not apply) in this context.

In sum, the decision below threatens direct, immediate, and severe consequences for the nation's energy markets, and injects uncertainty that undoubtedly will chill investments in infrastructure projects all across the country. The NGA has supported the energy needs of this country for nearly a century, but it cannot continue to do so with the effective veto power of a state lurking in every corner. This Court should grant review and restore the statutory regime that Congress created.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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February 18, 2020

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1191 thru 19-1232

IN RE: PENNEAST PIPELINE COMPANY, LLC

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,

Appellants.

Argued: June 10, 2019
Filed: September 10, 2019

Before: JORDAN, BIBAS, and NYGAARD,
Circuit Judges.

OPINION

JORDAN, *Circuit Judge.*

The Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z, allows private gas companies to exercise the federal government's power to take property by eminent domain, provided certain jurisdictional

requirements are met. This appeal calls on us to decide whether that delegation of power allows gas companies to hale unconsenting States into federal court to condemn State property interests.

PennEast Pipeline Company ("PennEast") is scheduled to build a pipeline through Pennsylvania and New Jersey. The company obtained federal approval for the project and promptly sued pursuant to the NGA to condemn and gain immediate access to properties along the pipeline route. Forty-two of those properties are owned, at least in part, by the State of New Jersey or various arms of the State. New Jersey sought dismissal of PennEast's condemnation suits for lack of jurisdiction, citing the Eleventh Amendment to the United States Constitution, and, separately, arguing that PennEast failed to satisfy the jurisdictional requirements of the NGA. Broadly speaking, the Eleventh Amendment recognizes that States enjoy sovereign immunity from suits by private parties in federal court. New Jersey has not consented to PennEast's condemnation suits, so those legal proceedings can go forward only if they are not barred by the State's immunity. The District Court held that they are not barred and granted PennEast orders of condemnation and preliminary injunctive relief for immediate access to the properties. New Jersey has appealed.

We will vacate because New Jersey's sovereign immunity has not been abrogated by the NGA, nor has there been—as PennEast argues—a delegation of the federal government's exemption from the State's sovereign immunity. The federal government's power of eminent domain and its power to hale sovereign

States into federal court are separate and distinct. In the NGA, Congress has delegated the former. Whether the federal government can delegate its power to override a State's Eleventh Amendment immunity is, however, another matter entirely. While there is reason to doubt that, we need not answer that question definitively since, even if a delegation of that sort could properly be made, nothing in the text of the NGA suggests that Congress intended the statute to have such a result. PennEast's condemnation suits are thus barred by the State's Eleventh Amendment immunity. We will therefore vacate the District Court's order with respect to New Jersey's property interests and remand the matter for the dismissal of any claims against New Jersey.

I. BACKGROUND

The NGA authorizes private gas companies to acquire "necessary right[s]-of-way" for their pipelines "by the exercise of the right of eminent domain[,]" if three conditions are met. 15 U.S.C. § 717f(h). First, the gas company seeking to condemn property must have obtained a Certificate of Public Convenience and Necessity (a "Certificate") from the Federal Energy Regulatory Commission ("FERC"). *Id.* Second, it must show that it was unable to "acquire [the property] by contract" or "agree with the owner of property" about the amount to be paid. *Id.* Third and finally, the value of the property condemned must exceed $3,000. *Id.*

In the fall of 2015, PennEast applied for a Certificate for its proposed 116-mile pipeline running from Luzerne County, Pennsylvania to Mercer County, New Jersey (the "project"). After a multi-year

review,[1] FERC granted PennEast's application and issued a Certificate for the project, concluding that, so long as PennEast met certain conditions, "the public convenience and necessity require[d] approval of PennEast's proposal[.]"[2] (App. at 226.)

Certificate in hand, PennEast filed verified complaints in the United States District Court for the District of New Jersey, asking for orders of condemnation for 131 properties along the pipeline route, determinations of just compensation for those

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[1] That review unfolded as follows: In February 2015, FERC published notice in the *Federal Register* and mailed it to some 4,300 interested parties. FERC received over 6,000 written comments in response and heard from 250 speakers at three public meetings. The following summer, FERC issued a draft Environmental Impact Statement ("EIS") for the project. It also published notice in the *Federal Register* and mailed the draft EIS to over 4,280 interested parties. In response, FERC received more than 4,100 letters and heard from 420 (out of 670) attendees at six public meetings.

To address environmental and engineering concerns raised by the public, PennEast filed 33 route modifications. FERC then provided notice to newly affected landowners. The following spring, FERC published a final EIS in the *Federal Register*. That final EIS sought to address all substantive comments on the draft EIS. FERC concluded that nearly all New Jersey parcels "subject to types of conservation or open space protective easements will generally retain their conservation and open space characteristics[.]" (App. at 268.)

[2] Multiple parties, including New Jersey, challenged FERC's decision in the United States Court of Appeals for the District of Columbia. Petition for Review, *Delaware Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. filed May 9, 2018). That petition remains pending. Several property owners also petitioned FERC for rehearing. Those petitions were all "rejected, dismissed, or denied[.]" (App. at 31.)

properties, and preliminary and permanent injunctive relief to gain immediate access to and possession of the properties to begin construction of its pipeline. Forty-two of the 131 property interests PennEast sought to condemn belong to New Jersey or arms of the State (collectively, the "State" or "New Jersey").[3] The State holds possessory interests in two of the properties and non-possessory interests—most often, easements requiring that the land be preserved for recreational, conservation, or agricultural use—in the rest.[4]

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[3] This appeal was filed on behalf of the State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), the State Agriculture Development Committee ("SADC"), the Delaware & Raritan Canal Commission ("DRCC"), the New Jersey Department of the Treasury, the New Jersey Department of Transportation, the New Jersey Water Supply Authority, and the New Jersey Motor Vehicle Commission. It is undisputed that those various entities are arms of the State, and PennEast does not suggest that any of those entities should have anything less than Eleventh Amendment immunity to the same extent as the State of New Jersey.

[4] New Jersey owns those property interests as part its attempt to preserve farmland and open space in the State. *Cf.* N.J. Const. art. VIII, § 2 ¶¶ 6-7 (setting aside tax dollars for open space and farmland preservation). For decades now, the State has operated preservation programs aimed at preserving such land. For example, NJDEP's "Green Acres" program authorizes the State to purchase, and help local governments purchase, land for recreation and conservation. N.J. Stat. Ann. §§ 13:8A-1 to -56. New Jersey's Agriculture Retention and Development Act also empowers the SADC to preserve farmland by buying such land in fee simple or by buying development easements to preserve the land for agricultural uses. *Id.* §§ 4:1C-11 to -48. The State also owns and maintains easements along the Delaware Canal through DRCC to protect the State's water quality and vegetation. *Id.* §§ 13:13A-1 to -15; N.J. Admin. Code § 7:45-9.3.

After PennEast filed its complaints, the District Court ordered the affected property owners to show cause why the Court should not grant the relief sought.[5] New Jersey filed a brief invoking its Eleventh Amendment immunity and arguing for dismissal of the complaints against it. It also argued that PennEast had failed to satisfy the jurisdictional requirements of the NGA by not attempting to contract with the State for its property interests.

After hearings on the show-cause order,[6] the District Court granted PennEast's application for orders of condemnation and for preliminary injunctive relief. At the outset, the Court rejected New Jersey's assertion of Eleventh Amendment immunity. It found that "PennEast ha[d] been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign[,]" making Eleventh Amendment immunity inapplicable. (App. at 33.) The

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The State has spent over a billion dollars on its preservation efforts. As of 2017, New Jersey had "helped to preserve over 650,000 acres of land[,]" and the "SADC and its partners had preserved over 2,500 farms and over 200,000 acres of farmland." (Opening Br. at 6 (citing App. at 94, 108).)

[5] The defendants include the State, as well as various townships, property trusts, utility companies, and individual property owners.

[6] The Court held three hearings to accommodate the large number of defendants involved. Each hearing "generally proceeded the same way: First, PennEast was permitted to address the Court, followed by [property owners] represented by counsel. Next, any property owner in attendance was permitted to address the Court, giving first priority to any party who had filed an opposition. PennEast was permitted to respond." (App. at 29.)

Court reasoned that, because "the NGA expressly allows 'any holder of a certificate of public convenience and necessity'" to condemn property, PennEast could do so here—even for property owned by the State. (App. at 33 (quoting 15 U.S.C. § 717f(h)).)

Next, the Court held that PennEast met the three requirements of the NGA, entitling it to exercise the federal government's eminent domain power. First, it found that PennEast holds a valid Certificate for the project. Next, it concluded that PennEast had been unable to "acquire by contract, or [was] unable to agree with the owner of property to the compensation to be paid for" the affected properties. (App. at 48 (alteration in original) (quoting 15 U.S.C. § 717f(h)).) On that point, the Court rejected the State's contention that PennEast had to negotiate with the holders of all property interests, including easement holders. In the District Court's view, § 717f(h) refers only to the "*owner* of [the] property[,]" meaning the owner of the possessory interest. (App. at 48 n.49.) Finally, the Court found that the statute's property value requirement was satisfied because PennEast had extended offers exceeding $3,000 for each property. The Court thus granted PennEast's request for orders of commendation.

The District Court went on to hold that PennEast had satisfied the familiar four-factor test for preliminary injunctive relief. To obtain a preliminary injunction, the movant must show "1) that there is reasonable probability of success on the merits, 2) that there will be irreparable harm to the movant in the absence of relief, 3) that granting the injunction will not result in greater harm to the nonmoving party,

and 4) that the public interest favors granting the injunction." *Transcon. Gas Pipe Line Co. v. Conestoga Twp.*, 907 F.3d 725, 732 (3d Cir. 2018). As to the first factor, the Court said that PennEast had already effectively succeeded on the merits, given that "the Court ha[d] found PennEast satisfied the elements of § 717f(h) and is therefore entitled to condemnation orders." (App. at 50.) As to the second factor, the Court found that, without an injunction, PennEast would suffer irreparable harm in the form of non-recoupable financial losses and construction delays. For the third factor, the Court noted that, while it had "carefully considered a wide range of arguments from Defendants regarding the harm PennEast's possession will cause," the property owners would not be harmed "by the Court granting immediate possession" because they would receive just compensation. (App. at 53, 55.) Lastly, the Court was persuaded, especially in light of FERC's conclusion about public necessity, that the project is in the public interest. Having found all four factors weighed in favor of granting a preliminary injunction, the Court ordered that relief.[7] It then appointed five individuals to serve as special masters and condemnation commissioners to determine just compensation awards.

New Jersey moved for reconsideration of the District Court's denial of sovereign immunity and sought a stay of the District Court's order to prevent

[7] In addition to allowing PennEast to take immediate possession of the properties, the Court ordered that the U.S. Marshals could investigate, arrest, imprison, or bring to Court any property owner who violated the Court's order.

PennEast from taking immediate possession of the State's properties. As described more fully herein, *see infra* Part III-B.1., it argued that, based on the Supreme Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the United States lacks the constitutional authority to delegate to private entities like PennEast the capacity to sue a State. The District Court denied that motion, concluding that *Blatchford* does not apply to condemnation actions brought pursuant to the NGA.

The State timely appealed. It also moved to stay the District Court's order pending resolution of this appeal and to expedite our consideration of the dispute. We granted that motion in part, preventing construction of the pipeline and expediting the appeal.

II. JURISDICTION AND STANDARD OF REVIEW

New Jersey contests jurisdiction in these condemnation actions, asserting here, as it did in the District Court, its sovereign immunity. For the reasons that follow, we agree with it that the District Court lacked subject matter jurisdiction over the suits insofar as they implicated the State's property interests. We, however, have jurisdiction under 28 U.S.C. § 1291 to review the denial of New Jersey's claim of Eleventh Amendment immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *see Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 298 (3d Cir. 2008) ("An order denying Eleventh Amendment immunity is immediately appealable as a final order under the collateral order doctrine."). And, pursuant to 28 U.S.C.

§ 1292(a)(1), we have jurisdiction to review the grant of an injunction.

We exercise plenary review over a claim of sovereign immunity. *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018). We review the grant of a preliminary injunction for abuse of discretion but review de novo the legal conclusions underlying the grant. *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 357 (3d Cir. 2007).

III. DISCUSSION

The Eleventh Amendment declares that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The States' immunity from suit in federal court, however, "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Rather, that immunity is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]"[8] *Id.* The Eleventh Amendment thus embodies a "recognition that the States, although a union, maintain certain

[8] State sovereign immunity "includes both immunity from suit in federal court and immunity from liability[.]" *Lombardo v. Pa., Dep't of Pub. Welfare*, 540 F.3d 190, 193 (3d Cir. 2008). Immunity from suit in federal court is known by the shorthand "Eleventh Amendment immunity." *Id.* That is the only type of State sovereign immunity at issue here.

attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct*, 506 U.S. at 146.

Because of that immunity, States are not "subject to suit in federal court unless" they have consented to suit, "either expressly or in the 'plan of the convention.'"[9] *Blatchford*, 501 U.S. at 779 (quoting *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990)). As part of "the 'plan of the [Constitutional] convention[,]'" the States consented to suit by the federal government in federal court. *Blatchford*, 501 U.S. at 779-82; *see United States v. Texas*, 143 U.S. 621, 641-46 (1892); *City of Newark v. United States*, 254 F.2d 93, 96 (3d Cir. 1958) ("The consent of states to suits by the United States is implied as inherent in the federal plan."). The federal government thus enjoys an exemption from the power of the States to fend off suit by virtue of their sovereign immunity, an exemption that private parties do not generally have.[10] *Alden*, 527 U.S. at 755.

New Jersey asserts that it is entitled to sovereign immunity from these condemnation suits. It argues that the federal government cannot delegate its exemption from state sovereign immunity to private parties like PennEast and that, even if it could, the

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[9] That immunity extends to agents and instrumentalities of the State. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 83 (3d Cir. 2016).

[10] Citizens can, however, file suit against a State's officers where the litigation seeks only prospective injunctive relief based on an ongoing constitutional violation. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989); *Ex parte Young*, 209 U.S. 123 (1908). No one suggests that that doctrine of *Ex parte Young* is applicable here.

NGA is not a clear and unequivocal delegation of that exemption. PennEast disagrees. The company argues that a delegation of the federal government's eminent domain power under the NGA necessarily includes the ability to sue the States and that concluding otherwise would frustrate the fundamental purpose of the NGA to facilitate interstate pipelines.

A.

In view of PennEast's argument, it is essential at the outset to distinguish between the two powers at issue here: the federal government's eminent domain power and its exemption from Eleventh Amendment immunity. Eminent domain is the power of a sovereign to condemn property for its own use. *Kohl v. United States*, 91 U.S. 367, 371, 373-74 (1875). The federal government can exercise that power to condemn State land in federal court. *United States v. Carmack*, 329 U.S. 230, 240 (1946). But its ability to do so is not due simply to "the supreme sovereign's right to condemn state land. Rather, it is because the federal government enjoys a special exemption from the Eleventh Amendment." *Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131, 140 (E.D. Tex. 2017). Thus, the federal government's ability to condemn State land—what PennEast contends it is entitled to do by being vested with the federal government's eminent domain power—is, in fact, the function of two separate powers: the government's eminent domain power and its exemption from Eleventh Amendment immunity. A delegation of the former must not be confused for, or conflated with, a delegation of the latter. A private party is not endowed with all the rights of the United States by virtue of a

delegation of the government's power of eminent domain.

PennEast tries to ignore that distinction, arguing that Congress intended for private gas companies to which the federal government's eminent domain power has been delegated under the NGA to be able to condemn State property. Focusing on Congress's intent to enable gas companies to build interstate gas pipelines, PennEast fails to adequately grapple with the constitutional impediment to allowing a private business to condemn State land: namely, Eleventh Amendment immunity.

That failure is a consequence of the easier road PennEast chooses, namely citing the NGA and asserting, in effect, that Congress must have meant for pipeline construction to go forward, regardless of the Eleventh Amendment. That approach has the advantage of avoiding the difficulty of facing up to what the law requires to overcome Eleventh Amendment immunity. As discussed below, *see infra* Part III-B.3., Congress cannot abrogate state sovereign immunity under the Commerce Clause, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996), and because Congress enacted the NGA pursuant to that Clause, the statute cannot be a valid congressional abrogation of sovereign immunity. To maintain these suits, then, PennEast had to offer a different answer for why its suits do not offend New Jersey's sovereign immunity. But, as just noted, the only reason it gives—an argument of implied delegation of the federal government's Eleventh Amendment exemption under the NGA—ignores rather than confronts the distinction between the

federal government's eminent domain power and its exemption from Eleventh Amendment immunity. Unfortunately for PennEast, that distinction is essential, and there are powerful reasons to doubt the delegability of the federal government's exemption from Eleventh Amendment immunity.

B.

Three reasons prompt our doubt that the United States can delegate that exemption to private parties. First, there is simply no support in the caselaw for PennEast's "delegation" theory of sovereign immunity. Second, fundamental differences between suits brought by accountable federal agents and those brought by private parties militate against concluding that the federal government can delegate to private parties its ability to sue the States. Finally, endorsing the delegation theory would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity.

1.

Looking in more detail at the caselaw, it lends no credence to the notion that the United States can delegate the federal government's exemption from state sovereign immunity. In *Blatchford*, the Supreme Court dealt with this issue. In that case, Native American tribes sued an Alaskan official for money allegedly owed to them under a state revenue-sharing statute. *Blatchford*, 501 U.S. at 777-78. Relevant here, the tribes argued that their suit did not offend state sovereign immunity because Congress had delegated to the tribes the federal government's ability to sue the States. *See id.* at 783 (explaining the tribes' assertion that, in passing 28 U.S.C. § 1362, which grants district

courts jurisdiction over suits brought by Indian tribes arising under federal law, Congress had "delegate[d]" the federal government's authority to sue on behalf of Indian tribes "back to [the] tribes themselves").

The Court rejected that argument, expressing its "doubt … that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation … to persons on whose behalf the United States itself might sue." *Id.* at 785. The Court explained why: "[t]he consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select[.]" *Id.* The delegation theory, the Court explained, was nothing more than "a creature of [the tribes'] own invention." *Id.* at 786.

PennEast would have us dismiss *Blatchford* as "so distinguishable" as to be "useless by analogy." (Answering Br. at 41.) As PennEast sees it, the statute at issue in *Blatchford* was a jurisdictional statute that did not confer any substantive rights on the tribes, while the NGA confers the substantive power of eminent domain on private parties. But the Supreme Court's statements in *Blatchford* had nothing to do with the jurisdictional nature of the statute at issue and everything to do with the Court's deep doubt about the "delegation" theory itself.

Courts of Appeals have been similarly skeptical that the federal government can delegate to private parties its exemption from state sovereign immunity—even when the private party seeks to assert the interests of the United States, rather than the party's own. The D.C. Circuit's decision in *U.S. ex*

rel. Long v. SCS Business & Technical Institute, Inc., 173 F.3d 870 (D.C. Cir. 1999), is a case in point. There, the court stated that "permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned." *Id.* at 882. That conclusion accords with others from our sister circuits. *See United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (holding, in the *qui tam* context, that "the United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment"); *see also Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011) (rejecting argument that the federal government could authorize a private plaintiff to sue on its behalf as "unpersuasive" based on *Blatchford*). *But cf. United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992) (concluding that "the United States is the real party in interest" in *qui tam* suits and therefore such suits are not barred by the States' Eleventh Amendment immunity).

While the Supreme Court and federal Courts of Appeals have not addressed the precise issue that we have here—whether condemnation actions under the NGA are barred by Eleventh Amendment immunity—the one reported district court decision to do so held that Eleventh Amendment immunity is indeed a bar. In *Sabine Pipe Line, LLC v. Orange, County, Texas*, the pipeline company plaintiff argued that, because the federal government could exercise its eminent domain power to condemn State property, there was "no reason to treat a delegation of the same authority

any differently." 327 F.R.D. at 139. The court disagreed. It explained that, like PennEast's arguments, the plaintiff's "theory of the case erroneously assumes that by delegating one power [, that of eminent domain], the government necessarily also delegated the other [, the ability to sue the States]." *Id.* at 140. The court was careful not to conflate the two powers and, based on *Blatchford*, concluded that "a private party does not become the sovereign such that it enjoys all the rights held by the United States by virtue of Congress's delegation of eminent domain powers." *Id.* at 141."[11] *Id.*

We are in full agreement. Quite simply, there is no authority for PennEast's delegation theory of sovereign immunity. Indeed, the caselaw strongly suggests that New Jersey is correct that the federal government cannot delegate to private parties its exemption from state sovereign immunity.

2.

Non-delegability makes sense, since there are meaningful differences between suits brought by the United States, an accountable sovereign, and suits by private citizens. *Blatchford*, 501 U.S. at 785. Suits

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[11] PennEast is, of course, at pains to distinguish *Sabine*. It notes that the property at issue in *Sabine* had been privately owned at the time of the project's approval and only later transferred to the State of Texas. Thus, it argues, FERC's predecessor was not aware that it was approving a project that implicated State-owned land and that the State opposed. Moreover, it asserts, the *Sabine* court did not consider the arguments pressed here. But those arguments are unresponsive to the fundamental concern: whether the federal government can delegate its immunity exemption at all.

brought by the United States are "commenced and prosecuted … by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed[.]'" *Alden*, 527 U.S. at 755 (quoting U.S. Const., art. II, § 3). Private parties face no similar obligation. Nor are they accountable in the way federal officials are. *See id.* at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

Those considerations are clearly in play in the eminent domain context. There, the condemning party controls the timing of the condemnation actions, decides whether to seek immediate access to the land, and maintains control over the action through the just compensation phase, determining whether to settle and at what price. The incentives for the United States, a sovereign that acts under a duty to take care that the laws be faithfully executed and is accountable to the populace, may be very different than those faced by a private, for-profit entity like PennEast, especially in dealing with a sovereign State. In other words, the identity of the party filing the condemnation action is not insignificant.

3.

There is, however, a way that Congress can subject the States to suits by private parties. It can abrogate the sovereign immunity of the States. The Supreme Court "ha[s] stressed, however, that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a

considerable strain on the principles of federalism that inform Eleventh Amendment doctrine[.]" *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (alterations, internal quotation marks, and citations omitted). Accordingly, the Court has held that Congress can abrogate the sovereign immunity of the States "only by making its intention [to do so] unmistakably clear in the language of the statute" in question.[12] *Id.* at 228 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "Unmistakable" clarity is a high bar, and one that must be cleared without resort to nontextual arguments. *See Atascadero*, 473 U.S. at 246 ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically."); *see also Dellmuth*, 491 U.S. at 230 ("If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.").

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[12] The same kind of clarity is demanded for waivers of sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) ("[W]e require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in *Edelman v. Jordan*, '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.'" (second alteration in original) (citation omitted)), *superseded in other respects by* Rehabilitation Act Amendments, 42 U.S.C. § 2000d-7.

Moreover, Congress may abrogate state sovereign immunity only pursuant to a valid exercise of federal power. *Seminole Tribe*, 517 U.S. at 59. Particularly relevant here, Congress cannot abrogate sovereign immunity under its Commerce Clause powers. *Id.* at 59, 72-73. Instead, the Supreme Court has recognized that Congress can abrogate sovereign immunity only when it acts pursuant to § 5 of the Fourteenth Amendment.[13] *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress can abrogate state sovereign immunity pursuant to § 5); *cf. Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (declining to decide whether Congress can abrogate state sovereign immunity pursuant to the Bankruptcy Clause of the Constitution).

What we take from those rules is that state sovereign immunity goes to the core of our national government's constitutional design and therefore must be carefully guarded. Yet accepting PennEast's delegation theory would dramatically undermine the careful limits the Supreme Court has placed on abrogation. Indeed, "[t]o assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption [by delegation] is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices." *SCS Bus.*, 173 F.3d at 883. We are

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[13] For a relatively short period of time, the Supreme Court held that Congress could abrogate state sovereign immunity pursuant to the Commerce Clause. *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 13-15 (1989). But that decision was overruled. *Seminole Tribe*, 517 U.S. at 66; *see also infra note* 20.

loath to endorse a never-before-recognized doctrine that would produce such a result.

4.

None of PennEast's arguments for the delegability of the Eleventh Amendment exception are persuasive. PennEast contends that "[t]here simply is no interference with state sovereignty when the United States itself has found that an interstate infrastructure project is both necessary and in the public's interest"[14] and that New Jersey "faces no real 'harm' … given FERC's plenary oversight over pipeline projects and their respective routes." (Answering Br. at 18-19.) And, the company says, if the State is aggrieved, it "has recourse against the

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[14] In support of that proposition, PennEast relies on *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). There, according to PennEast, the Supreme Court held there was no Eleventh Amendment bar to a private party condemning State land because the dam project at issue had been authorized by Congress and so "there was 'no interference with the sovereignty of the state.'" The same reasoning applies here, it asserts, because the NGA authorizes PennEast to condemn property that FERC has found necessary to complete a project that is in the public interest.

That misreads *Guy*. In *Guy*, the State of Oklahoma sued to enjoin the construction of a congressionally authorized dam, as well as related condemnations. *Id.* at 511. While the respondents were private entities, federal government attorneys had instituted the condemnation actions. *Id.* at 511 n.2. And the United States, not the dam company, was going to "acquire title to the inundated land." *Id.* at 511. So while it is true that Oklahoma argued the dam would be a "'direct invasion and destruction' of the sovereign and proprietary rights of Oklahoma[,]" *id.* at 512, that was not because the State was being sued by private parties.

federal government" by way of challenging FERC's decision to grant the Certificate. (Answering Br. at 22.) Those arguments miss the point. This case is not about whether the States have a chance to register their dissent or concerns about pipeline plans. It is about whether the federal government can delegate its ability to hale fellow sovereigns into federal court and force the States to respond. It is the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" that New Jersey seeks to avoid. *Puerto Rico Aqueduct*, 506 U.S. at 146 (citation omitted). FERC's blessing of the project does not speak to that problem in any way.[15]

In the same vein, PennEast cites *qui tam* suits under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733,[16] as proof "that the federal government

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[15] Again, adopting PennEast's position that federal agency involvement is enough to conclude that the United States has delegated its ability to sue the States to a private entity would fundamentally erode the Eleventh Amendment and the rules regarding abrogation. If PennEast were correct, Congress could simply amend a statute pursuant to its Commerce Clause powers, give an agency some review responsibility, and thereby skirt any limit on Congress's ability to abrogate state sovereign immunity.

[16] The FCA authorizes private plaintiffs to sue "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." 31 U.S.C. § 3730(b)(1). The FCA places several conditions on those suits. Before suing, the private plaintiff must first notify the federal government and allow it to intervene. *Id.* §§ 3730(b)(2), (4). The government can then decide whether to pursue the claim itself or leave it to the individual to pursue on behalf of and in the name of the government. *Id.* § 3730(b)(4). At that point, the government can intervene in the suit only for "good cause." *Id.* § 3730(c)(3).

can delegate its authority to sue" the States, provided the parties act on the government's behalf and under its control, as PennEast says is the case here. (Answering Br. at 36.) We disagree. To begin with, there is a split of authority on whether *qui tam* suits against States are barred by the Eleventh Amendment. *Compare, e.g.*, *United States ex rel. Milam*, 961 F.2d at 50 (allowing *qui tam* suits to proceed based on that court's view that the United States was the "real party in interest"), *with United States ex rel. Foulds*, 171 F.3d at 289, 292-94 (concluding that *qui tam* suits are barred by the Eleventh Amendment, based on *Blatchford*). While we take no position on that question now, even the cases upholding *qui tam* suits are of little help to PennEast. As New Jersey highlights, courts upheld suits under the FCA because the suits are brought "in the name of the Government" based on "false claims submitted to the government"; the federal government receives most of any amount recovered; it can intervene in the suit after it has begun; and the case cannot be settled or voluntarily dismissed without the government's consent. *United States ex rel. Milam*, 961 F.2d at 48-49 (citations omitted). None of that is true here: PennEast filed suit in its own name; PennEast will gain title to the land; there is no special statutory mechanism for the federal government to intervene in NGA condemnation actions; and PennEast maintains sole control over the suits. Most importantly, while the Supreme Court has "express[ed] no view on the question whether an action in federal court by a *qui*

But the private plaintiff also cannot dismiss the suit without the consent of the government. *Id.* § 3730(b)(1).

tam relator against a State would run afoul of the Eleventh Amendment," it has noted "there is 'a serious doubt' on that score." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). Accordingly, the attempted analogy to *qui tam* suits falls far short of supporting PennEast's broad delegation theory.

PennEast is also incorrect that New Jersey's sovereign immunity simply "does not apply" in condemnation actions because they are *in rem* proceedings. (Answering Br. at 48.) The cases PennEast cites are confined—by their terms—to the specialized areas of bankruptcy and admiralty law. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 445, 450 (2004) (concluding "a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity" because "the bankruptcy court's jurisdiction is premised on the res, not on the persona"); *California v. Deep Sea Res.*, 523 U.S. 491, 506 (1998) ("Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests, it does not necessarily follow that it applies to *in rem admiralty actions*, or that in such actions, federal courts may not exercise jurisdiction over property that the State *does not actually possess*." (emphases added)).[17] In contrast, the Supreme Court has made

[17] Moreover, States can assert their sovereign immunity in *in rem* admiralty proceedings, when the State possesses the res. *See Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1334 (11th Cir. 2010) ("In *Deep Sea Research*, the Supreme Court reaffirmed the vitality of a series of cases dating back to the nineteenth century that hold a government can assert sovereign immunity in an *in*

clear that the general rule is "[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."[18] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (O'Connor, J., concurring). And the Supreme Court has consistently recognized that sovereigns can assert their immunity in *in rem* proceedings in which they own property. *Cf. Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *see also Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982)

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rem admiralty proceeding only when it is in possession of the res."). Here, of course, New Jersey possesses the property interests PennEast is seeking to condemn, so PennEast's argument is wholly unsupported.

[18] PennEast argues that *Coeur d'Alene*, in which the Supreme Court held that a tribe's suit was barred by Eleventh Amendment immunity, does not show New Jersey is entitled to sovereign immunity because, in *Coeur d'Alene*, a state forum was available, the tribe was effectively seeking a "determination that the lands in question are not even within the regulatory jurisdiction of the State[,]" and submerged lands were at issue, a "unique" type of property under the law. (Answering Br. at 39 (quoting *Coeur d'Alene*, 521 U.S. at 282-83).) But those facts were only important for determining whether the tribe could bring suit pursuant to *Ex parte Young*, 209 U.S. at 155-56, which allows suits against state officials for injunctive relief. *Coeur d'Alene*, 521 U.S. at 281-83. The facts PennEast relies on had nothing to do with the general rule that the Eleventh Amendment applies when a State's property is at issue. *See Coeur d'Alene*, 521 U.S. at 281-82 ("It is common ground between the parties … that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it.); *id.* at 289 ("The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." (O'Connor, J., concurring)).

(plurality). New Jersey's sovereign immunity remains very much a concern in these *in rem* proceedings.[19]

C.

Like the Supreme Court, our sister circuits, and the district court in *Sabine*, we are thus left in deep doubt that the United States can delegate its exemption from state sovereign immunity to private

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[19] The only support for PennEast's position is *Islander East Pipeline Co. v. Algonquin Gas Transmission Co.*, 102 FERC ¶ 61054 (Jan. 17, 2003). In that final order, FERC concluded that the Eleventh Amendment "has no significance" for condemnation actions under the NGA because those suits are not "suit[s] in law or equity" against a State. *Id.* ¶ 61132. FERC's conclusion is an outlier and one that was reached with little, if any, analysis. More importantly, it is flatly wrong. FERC did not deign to explain what type of suit a condemnation action under the NGA is, if not a suit at law or equity. And the drafters of the Eleventh Amendment evidentially meant that term to be all-encompassing. *See Alden*, 527 U.S. at 721 ("Each House spent but a single day discussing the [Eleventh] Amendment, and the vote in each House was close to unanimous. All attempts to weaken the Amendment were defeated." (citations omitted)); *see also id.* at 722 ("The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. Although earlier drafts of the Amendment had been phrased as express limits on the judicial power granted in Article III, the adopted text addressed the proper interpretation of that provision of the original Constitution[.]" (citations omitted)). In any event, condemnation suits have historically been understood as suits in law. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) ("Just compensation [for a taking] … differs from equitable restitution…. As its name suggests, … just compensation is, like ordinary money damages, a compensatory remedy."); *Kohl*, 91 U.S. at 376 ("The right of eminent domain always was a right at common law."). We are therefore unpersuaded by FERC's decision and owe it no deference.

parties. But we need not definitively resolve that question today because, even accepting the "strange notion" that the federal government can delegate its exemption from Eleventh Amendment immunity, *Blatchford*, 501 U.S. at 786, nothing in the NGA indicates that Congress intended to do so. "As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis." *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008).

Recall that congressional intent to abrogate state sovereign immunity must be "unmistakably clear in the language of the statute." *Blatchford*, 501 U.S. at 786 (citation omitted); *see also United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (explaining that statutes granting eminent domain power to non-governmental actors "do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers" and that "[i]n such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority"). If delegation were a possibility, one would think some similar clarity would be in order. But the NGA does not even mention the Eleventh Amendment or state sovereign immunity. Nor does it reference "delegating" the federal government's ability to sue the States. It does not refer to the States at all. If Congress had intended to delegate the federal government's exemption from sovereign immunity, it would certainly have spoken much more clearly. *Cf. Dellmuth*, 491 U.S. at 232 (rejecting the argument that a statute's frequent references to the States were clear enough to abrogate sovereign immunity);

Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 223 (3d Cir. 2018) (explaining courts must "assume that Congress does not intend to pass unconstitutional laws" given the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" (citation and alterations omitted)). And while the NGA confers jurisdiction where the amount in controversy exceeds $3,000, "it would be quite a leap" to infer from that "grant of jurisdiction the delegation of the federal government's exemption from the Eleventh Amendment." *Sabine*, 327 F.R.D. at 141. In short, nothing in the text of the statute even "remotely impl[ies] delegation[.]" *Blatchford*, 501 U.S. at 786.

Despite that, PennEast contends that, because the NGA does not differentiate between privately held and State-owned property, Congress intended to make *all* property subject to a Certificate-holder's right of eminent domain. The company also argues that the NGA is best understood in light of its legislative history and purpose, as well as by comparing the NGA to two other condemnation statues, both of which include explicit carve-outs for property owned by States. Whatever the force of those arguments—and it is slight, at best[20]—it does not change the text of the

[20] As for the legislative history, it demonstrates that Congress intended to give gas companies the federal eminent domain power. *See* S. Rep. No. 80-429, at 2-3 (1947) (discussing need to grant natural gas companies the right of eminent domain to ensure the construction of interstate pipelines). But it says nothing about Congress's intent to allow suits against the States.

statute. In the absence of any indication in the text of the statute that Congress intended to delegate the federal government's exemption from state sovereign immunity to private gas companies, we will not assume or infer such an intent. That is to say, we will not assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional

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And, as one of the amici, the Niskanen Center, argues, the history of Eleventh Amendment jurisprudence explains the difference in language between the NGA and the two statutes PennEast cites, the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq*., and the statute authorizing Amtrak to exercise eminent domain over property necessary to build rail lines, 49 U.S.C. § 24311(a) (the "Amtrak Act"). When Congress passed the NGA and 15 U.S.C. § 717f(h), in 1938 and 1947, respectively, Congress "was legislating under the consensus that it could not abrogate states' Eleventh Amendment immunity pursuant to the Commerce Clause[.]" (Niskanen Br. at 14.) Because of that, there was no reason to include a carve-out for State-owned property. *See Union Gas*, 491 U.S. at 35 (Scalia, J., concurring in part and dissenting in part) ("It is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.").

Then came *Union Gas*, which permitted Congress to abrogate state sovereign immunity pursuant to its Commerce powers. *Id.* at 23 (plurality opinion). Seven years later, however, in *Seminole Tribe*, the Supreme Court overruled *Union Gas* and affirmed that Congress can only abrogate state sovereign immunity pursuant to the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 65-66.

The FPA and Amtrak Act, however, "were enacted or amended during [the] eight-year period" between *Union Gas* and *Seminole Tribe*, a time during which Congress was careful to address state sovereign immunity when drafting legislation. (Reply Br. at 12.) Given that context, the lack of similar language in the NGA is not as persuasive of PennEast's point as the company would like.

design. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2494 (2018) (rejecting a proposed interpretation of a statutory scheme because "[i]t is implausible that Congress meant the Act to operate in this manner"); *Guerrero-Sanchez*, 905 F.3d at 223 (explaining doctrine of constitutional avoidance). Accordingly, we hold that the NGA does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity.[21]

D.

PennEast warns that our holding today will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt—the precise outcome Congress sought to avoid in enacting the NGA. We are not insensitive to those concerns and recognize that our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.

But our holding should not be misunderstood. Interstate gas pipelines can still proceed. New Jersey is in effect asking for an accountable federal official to file the necessary condemnation actions and then transfer the property to the natural gas company. *Cf. Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (discussing how broadly the Supreme Court has defined "public purpose" under the Takings Clause). Whether, from a policy standpoint, that is or is not the

[21] Because we hold that New Jersey is entitled to Eleventh Amendment immunity from these suits, we need not address the State's alternative arguments.

best solution to the practical problem PennEast points to is not our call to make. We simply note that there is a work-around.

PennEast protests that, because the NGA does not provide for FERC or the federal government to condemn the necessary properties, the federal government cannot do so. But one has to *have* a power to be able to delegate it, so it seems odd to say that the federal government lacks the power to condemn state property for the construction and operation of interstate gas pipelines under the NGA. In any event, even if the federal government needs a different statutory authorization to condemn property for pipelines, that is an issue for Congress, not a reason to disregard sovereign immunity. To be sure, such a change would alter how the natural gas industry has operated for some time. But that is what the Eleventh Amendment demands.

IV. CONCLUSION

Accordingly, we will vacate the District Court's order insofar as it condemns New Jersey's property interests and grants preliminary injunctive relief with respect to those interests, and we will remand for dismissal of claims against the State.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1191 thru 19-1232

IN RE: PENNEAST PIPELINE COMPANY, LLC

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,

Appellants.

Filed: November 5, 2019

Present: SMITH, *Chief Judge*, CHAGARES, JORDAN, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and NYGAARD,* *Circuit Judges.*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellee PennEast Pipeline Co LLC in the above-entitled case having been submitted to the judges who participated

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* Judge Nygaard's vote is limited to panel rehearing only.

in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: November 5, 2019
Lmr/cc: Counsel of Record

Appendix C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 18-1585
(See Exhibit A for all Case Numbers)

IN RE: PENNEAST PIPELINE COMPANY, LLC

Filed: Dec. 14, 2018

OPINION

MARTINOTTI, DISTRICT JUDGE

Before the Court is Plaintiff PennEast Pipeline Company, LLC's ("PennEast") application for orders of condemnation and orders granting preliminary injunctive relief under the federal power of eminent domain pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(h), authorizing immediate access to and possession of the rights of way ("Rights of Way") as defined in the respective Verified Complaints in Condemnation of Property Pursuant to Federal Rule of Civil Procedure 71.1[1] (the "Condemnation Application"), for the purpose of "constructing, operating, and maintaining a natural gas

[1] PennEast filed verified complaints in over 130 cases related to the properties referenced therein. The Court refers to the filings in this litigation generally and identifies case-specific documents where necessary.

transmission pipeline and appurtenant facilities (part of an interstate natural gas transmission system) and conducting all other activities required by the Order of the Federal Energy Regulatory Commission [('FERC' or the 'Commission') issuing certificates ('FERC Certificates')] dated January 19, 2018, [FERC] Docket No. CP15-558-000 ('FERC Order')" (Am. Not. of Condemn. 2; Compl. ¶ 8). PennEast's request is made in advance of any award of just compensation.

In response thereto, upon the request of PennEast, and for good cause appearing, the Court entered an Order to Show Cause[2] ordering Defendants, as defined herein, to show cause why an order for condemnation should not be granted. Due to the number of cases and Defendants, the Court held three show cause hearings—April 5, 2018; April 19, 2018; and April 26, 2018—at which Defendants, both represented and *pro se*, appeared in opposition to PennEast's Condemnation Application. Having heard the arguments of the parties pursuant to Federal Rule of Civil Procedure 78(a), and having carefully reviewed the numerous submissions filed in support of and in opposition to PennEast's application and in response to the Order to Show Cause, for the reasons set forth below and for good cause shown, PennEast's application for orders of condemnation and for preliminary injunctive relief allowing immediate possession of the Rights of Way in advance of any award of just compensation is **GRANTED**. The State

[2] A subsequent Amended Order to Show Cause was entered allowing PennEast additional time to serve all Defendants.

Defendants', as defined herein, request for dismissal is **DENIED**.

I. BACKGROUND[3]

A. The Parties

PennEast is a Delaware limited liability company, duly registered to do business in New Jersey, with its principal place of business in Pennsylvania. (Compl. ¶ 2.) According to FERC, "[u]pon commencement of [its] operations … , PennEast will become a natural gas company within the meaning of section 2(6) of the NGA, and will be subject to [FERC]'s jurisdiction."[4] FERC Order ¶ 3.

Defendants are a collection of individual fee simple owners and interest holders of property (collectively, "Defendants") on which PennEast is seeking to acquire the Rights of Way as described in the respective complaints.[5]

B. PennEast's Application to FERC and the FERC Order[6]

On September 24, 2015, PennEast filed an application (the "FERC Application") with FERC

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[3] The majority of the facts herein are a matter of public record. When necessary and appropriate, the Court relies further on the well-pled allegations in the complaints.

[4] Section 2(6) defines "[n]atural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6).

[5] Unless otherwise noted, the Court consolidates Defendants' arguments and addresses them jointly.

[6] As discussed below, this Court does not serve as an appeals court for FERC and therefore does not review the FERC Order in

pursuant to section 7(c) of the NGA and Parts 157 and 284 of FERC's regulations for the construction and operation of a new 116-mile, 36-inch-diameter greenfield pipeline system from Luzerne County, Pennsylvania to Mercer County, New Jersey (sometimes referred to by FERC as the "PennEast Project"). (Compl. ¶ 12); FERC Order ¶ 1. As described in the FERC Order based on the FERC Application:

> PennEast proposes to construct a new greenfield pipeline system to provide up to 1,107,000 [dekatherms per day (Dth/d)] of firm natural gas transportation service to markets in New Jersey, New York, Pennsylvania, and surrounding states. The project extends from various receipt point interconnections with the interstate natural gas pipeline system of Transcontinental Gas Pipe Line Company, LLC (Transco) and with gathering systems in the eastern Marcellus Shale region operated by UGI Energy Services, LLC, Williams Partners, L.P., and Energy Transfer Partners, L.P., to multiple delivery point interconnections in natural gas-consuming markets in New Jersey and Pennsylvania, terminating at a delivery point with Transco in Mercer County, New Jersey. PennEast states that the project is designed to bring lower cost natural gas to markets in New Jersey, Pennsylvania, and New York

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that capacity. *See infra* note 42 and text accompanying note 42. It is summarized here for the benefit of the reader, only.

> and to provide shippers with additional supply flexibility, diversity, and reliability.

FERC Order ¶ 4. As part of the FERC Application, PennEast: (1) requested to construct several facilities costing approximately $1.13 billion; (2) stated it executed long-term agreements with several shippers for firm transportation service; (3) requested approval of its *pro forma* tariff; (4) requested "a blanket certificate of public convenience and necessity pursuant to Part 284, Subpart 284 of the [FERC]'s regulations authorizing it to provide transportation service to customers requesting and qualifying for transportation"; and (5) requested "a blanket certificate of public convenience and necessity pursuant to Part 157, Subpart F of the [FERC]'s regulations authorizing certain future facility construction, operation, and abandonment." FERC Order ¶¶ 5-9 (citing 18 C.F.R. §§ 157.204, 284.221).

On October 15, 2015, the FERC Application was published in the Federal Register. *Id.* ¶ 10 (citing 80 Fed. Reg. 62,068 (2015)). In response, FERC granted various motions to intervene, and "[n]umerous entities, landowners, individuals, and New Jersey State representatives filed protests and adverse comments raising the following issues: (1) the need for an evidentiary hearing[7]; (2) the need for the project;

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[7] FERC denied the request for a trial-type evidentiary hearing, finding it was "necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record" and "the existing written record provides a sufficient basis to resolve the issues relevant to this proceeding." Therefore, FERC held, "The Commission has satisfied the hearing requirement by giving all interested parties a full and complete

and (3) whether the use of eminent domain is appropriate for this project," as well as "numerous comments … raising concerns over the environmental impacts of the project." *Id.* ¶¶ 10-12. According to FERC, these issues were either "addressed in the Final Environmental Impact Statement" ("EIS") or in the FERC Order. *Id.* ¶¶ 11, 12; s*ee also id.* ¶ 97 n.121 ("All comments received prior to the end of the comment period and in response to the November 4, 2016 letter that included additional substantive concerns are included in the comment responses contained in Appendix M of the final EIS (Volume II). Any new issues raised after December 31, 2016, which were not previously identified, are addressed in this [FERC O]rder.").

On January 19, 2018, after undergoing an extensive review process as discussed herein, the FERC Order was issued authorizing the project and granting PennEast a Certificate of Public Convenience and Necessity, subject to certain conditions. FERC Order ¶ 2. In granting the authorization, FERC found "the benefits that the PennEast Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities." *Id.* And while FERC agreed "the project will result in some adverse environmental impacts," as concluded by FERC staff in the EIS, it found that, through the conditions imposed, "these impacts will be reduced to acceptable levels." *Id.*

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opportunity to participate through evidentiary submission in written form." FERC Order ¶ 14.

In its 99-page Order[8], FERC detailed the thorough evaluation and review process it used in reaching its decision on the FERC Application. Specifically, FERC evaluated whether "the construction and operation of the facilities" satisfy "the requirements of subsections (c) and (e) of section 7 of the NGA." *Id.* ¶ 15. First, FERC considered the Application of the Certificate Policy Statement and "whether there [was] a need for a proposed project and whether the proposed project will serve the public interest." *Id.* ¶ 16. The Certificate Policy Statement establishes certain criteria for making this determination, and FERC found PennEast "sufficiently demonstrated that there is market demand for the project" and that it "will provide reliable natural gas service to end use customers and the market." *Id.* ¶¶ 16, 28, 36. Therefore, FERC concluded:

> Based on the benefits the project will provide to the shippers, the lack of adverse effects on existing customers, other pipelines and their captive customers, and effects on landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of PennEast's proposal, subject to the conditions discussed below.

FERC Order ¶ 40.

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[8] Inclusive of Appendix A—"Environmental Conditions for the PennEast Pipeline Project."

Next, FERC addressed PennEast's eminent domain authority. Despite arguments that "PennEast is a for-profit company[] and has not shown that there is a genuine need for the project, or that the public it is intended to serve will benefit from it," FERC recognized that, "[i]n constructing [section 7(h) of the NGA], Congress made no distinction between for-profit and non-profit companies." FERC Order ¶¶ 41, 42. Specifically, FERC stated:

> Under section 7 of the NGA, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, it is section 7(h) of the NGA that authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.... Further, as discussed above, need for the project has been demonstrated by the existence of long-term precedent agreements for approximately 90 percent of the project's capacity. Just as the precedent agreements provide evidence of market demand/need, they are also evidence of the public benefits of the project.

Id. ¶ 42.

With respect to the requested blanket certificates, FERC observed the objectors took "general issue with the [FERC]'s blanket certificate program" rather than

presenting "arguments why PennEast's specific request … should be denied." *Id.* ¶ 46. Consequently, FERC granted PennEast a blanket certificate under Part 157, Subpart F of FERC's regulations, as well as a Part 284, Subpart G blanket certificate, "subject to the [environmental] conditions imposed [in Appendix A of the FERC Order]." *Id.* ¶¶ 43-48.

Additionally, FERC outlined its environmental review process and analysis at length as follows: Prior to entering the FERC Order, on January 13, 2015, FERC staff issued a Notice of Intent to Prepare an EIS for the Planned PennEast Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings ("NOI"), which "briefly described the project and the [EIS] process, provided a preliminary list of issues identified by staff, invited written comments on the environmental issues that should be addressed in the EIS, and listed the date and location of five public scoping meetings." *Id.* ¶ 93. On February 3, 2015, the NOI was published in the Federal Register and was

> sent to more than 4,300 interested entities, including representatives of federal, state, and local agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners as defined in the Commission's regulations (i.e., landowners crossed or adjacent to pipeline facilities or within 0.5 mile of a compressor station); concerned citizens; and local libraries and newspapers.

Id. In response, "more than 6,000 letters were filed," and "250 speakers provided verbal comments" at the

public scoping meetings, which were held between February 10 and 12, 2015 and February 25 and 26, 2015 in Bethlehem, Jim Thorpe, and Wilkes-Barre, Pennsylvania; and Trenton and Hampton, New Jersey. *Id.* ¶ 93 & n.115.

Pursuant to requirements of the National Environmental Policy Act ("NEPA"), and with the cooperation and participation of the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and the U.S. Department of Agriculture's Natural Resources Conservation Service, FERC staff issued the draft EIS for the project on July 22, 2016. *Id.* ¶ 94. Notice was again published in the Federal Register allowing public comment, and "[t]he draft EIS was mailed to over 4,280 stakeholders, which included the entities that were mailed the NOI and additional interested entities." *Id.* ¶ 95. Six public comment sessions were held between August 15 and 17, 2016, where approximately 670 individuals were in attendance, 420 of which provided verbal comments. *Id.* Additionally, "[a] total of 4,169 comment letters were filed in response to the draft EIS before the comment period closed on September 12, 2016." *Id.*

In response, PennEast filed route modifications "to address environmental and engineering concerns." *Id.* ¶ 96. Newly affected landowners received notice of the change and were invited to comment. *Id.*

On April 7, 2017, FERC issued the final EIS "address[ing] all substantive comments received on the draft EIS, the November 4, 2016 letter, and comments received prior to December 31, 2016," and, on April 14, 2017, a public notice was published in the Federal Register. *Id.* ¶ 97 & n.121. Significantly, the

FERC Order summarized and affirmed the final EIS as follows:

> 98. The final EIS concludes that while the project will result in some adverse environmental impacts, these impacts will be reduced to less than significant levels with the implementation of PennEast's proposed impact avoidance, minimization, and mitigation measures, together with staff's recommended environmental conditions, now adopted, as modified, as conditions in the attached Appendix A of this order. While, the Commission recognizes that there are incomplete surveys due to lack of access to landowner property, the conclusions in the final EIS, and affirmed by the Commission here, were based on the information contained in the record, including PennEast's application and supplements, as well as information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternatives analysis, and contacts with federal, state, and local agencies, as well as with individual members of the public. As part of its environmental review, staff developed specific mitigation measures that we find will adequately and reasonably reduce the environmental impacts resulting from the construction and operation of the PennEast Project. We believe that the substantial environmental record and mitigation measures sufficiently support reaching a decision on this project.

99. Once a certificate is issued, the Commission's environmental staff is charged with ensuring that the project will be constructed in compliance with the Commission's order, including the conclusions regarding the project's expected impacts upon the environment. Recognizing that there are necessary field surveys that are outstanding on sections of the proposed route where survey access was denied, we are imposing several environmental conditions that require filing of additional environmental information for review and approval once survey access is obtained. This includes items such as site-specific plans, survey results, documentation of consultations with agencies, and additional mitigation measures. The additional information ensures the EIS's analyses and conclusions are verified based on the best available data, enabling us to improve and finalize certain mitigation plans and ensure stakeholder concerns are addressed. The information will also provide Commission staff with the site-specific details necessary to appropriately evaluate compliance during the construction process. In addition, Environmental Condition 10 requires that before construction can commence, PennEast must file documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

100. Further, the final EIS has adequately identified, as required by section 1502.22 of

the Council on Environmental Quality (CEQ) regulations, where information is lacking. CEQ regulations recognize that some information simply may not be available. Moreover, the final EIS contains mitigation plans that provide for using the correct mitigation measures, sediment control measures, and restoration requirements based on the actual site conditions experienced during construction. The conditions in the order will ensure that all environmental resources will be adequately protected.

101. The Commission needs to consider and study environmental issues before approving a project, but it does not require all environmental concerns to be definitively resolved before a project's approval is issued. NEPA does not require every study or aspect of an analysis to be completed before an agency can issue a final EIS, and the courts have held that agencies do not need perfect information before it takes any action. In *U.S. Department of the Interior v. FERC*, [952 F.2d 538, 546 (D.C. Cir. 1992),] the court held that "[v]irtually every decision must be made under some uncertainty; the question is whether the Commission's response, given uncertainty, is supported by substantial evidence and is not arbitrary and capricious." Similarly, in *State of Alaska v. Andrus*, [580 F.2d 465, 473 (D.C. Cir. 1978),] the court stated that "[i]f we were to impose a requirement that an impact statement can

> never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." There must, however, be sufficient information in the record to enable the Commission to take the requisite "hard look" required by NEPA. As indicated above, we believe the record in this proceeding meets that requirement.

Id. ¶¶ 98-101 (footnotes omitted).

The FERC Order went on—for over 40 pages—to address the major environmental issues raised with respect to the EIS, namely: (1) geology; (2) soils; (3) water resources; (4) wetlands; (5) vegetation, forested land, and wildlife; (6) threatened, endangered, and other special status species; (7) land use, recreation, and visual resources; (8) socioeconomics; (9) cultural resources; (10) air quality impacts; (11) noise; (12) safety; (13) upstream and downstream impacts; and (14) alternatives. *Id.* ¶¶ 104-215. Ultimately, FERC modified and adopted the recommendations in the final EIS and included them as environmental conditions to the FERC Order, "find[ing] that the project is in the public convenience and necessity" but noting "[c]ompliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses." *Id.* ¶¶ 216-17. Additionally, FERC stated that "state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate" and that "this does

not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission." *Id.* ¶ 218. In the end, FERC ordered:

> (A) A certificate of public convenience and necessity is issued to PennEast, authorizing it to construct and operate the proposed PennEast Project, as described and conditioned herein, and as more fully described in the application.
>
> (B) The certificate authority issued in Ordering Paragraph (A) is conditioned on:
>
> (1) PennEast's proposed project being constructed and made available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
>
> (2) PennEast's compliance with all applicable Commission regulations, particularly the general terms and conditions set forth in Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
>
> (3) PennEast's compliance with the environmental conditions listed in Appendix A to this order.
>
> (C) A blanket construction certificate is issued to PennEast under Subpart F of Part 157 of the Commission's regulations;

(D) A blanket transportation certificate is issued to PennEast under Subpart G of Part 284 of the Commission's regulations;

(E) PennEast shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(F) PennEast's initial rates and tariff are approved, as conditioned and modified above.

(G) PennEast is required to file actual tariff records reflecting the initial rates and tariff language that comply with the requirements contained in the body of this order not less than 30 days and not more than 60 days prior to the commencement of interstate service consistent with Part 154 of the Commission's regulations.

(H) As described in the body of this order, PennEast must file any negotiated rate agreement or tariff record setting forth the essential terms of the agreement associated with the project at least 30 days, but not more than 60 days before the proposed effective date of such rates.

(I) No later than three months after the end of its first three years of actual operation, as discussed herein, PennEast must make a filing to justify its existing cost-based firm and interruptible recourse rates. PennEast's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, PennEast is

> advised to include as part of the eFiling description, a reference to Docket No. CP15-558-000 and the cost and revenue study.
>
> (J) The requests for an evidentiary hearing are denied.
>
> (K) PennEast shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies PennEast. PennEast shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

Id. at 82-83.

C. Verified Complaints

On February 6, 2018, PennEast filed complaints against Defendants, verified by Jeffrey England of UGI Energy Services, LLC as Project Manager, Project Management and Construction, on behalf of PennEast, asserting claims related to the respective properties for: (1) award of possession by eminent domain pursuant to the NGA, 15 U.S.C. § 717f(h); (2) determination of just compensation; and (3) preliminary and permanent injunctive relief allowing

> immediate possession and entry onto the Property, in advance of any award of just compensation, in order to construct, operate, and maintain an interstate natural gas transmission pipeline and appurtenances as approved by FERC, and enjoining Defendants and his/her agents, servants, and

> representatives from interfering in any way with the construction of the pipeline, including, without limitation, land surveys, tree-clearing, excavation, trenching, pipe laying, and post-construction restoration.

(Compl. ¶¶ 1, 35-41.) In support, PennEast contends (1) the FERC Order authorizes it to install the pipeline, (2) the Rights of Way for the respective property were "reviewed and approved by [the] FERC prior to the issuance of the FERC Order," and (3) the Rights of Way "are necessary to construct, install, operate, and maintain the pipeline facilities approved in the FERC Order." (*Id.* ¶¶ 18-21.) Further, PennEast alleges it offered to pay the landowners at least $3000 for the Rights of Way and attempted several times, through its land agent Western Land, to negotiate in good faith for the acquisition of the Rights of Way for the properties but was unable to acquire same. (*Id.* ¶¶ 29-30, 32.) Consequently, it argues it has satisfied the conditions required to exercise eminent domain under Section 7(h) of the NGA and is therefore entitled to immediate possession. (*Id.* ¶ 34.)

D. Order to Show Cause

On February 14, 2018, having reviewed the complaints and exhibits attached thereto, the Court entered an Order to Show Cause why an order should not be entered:

> 1. Determining that PennEast has satisfied all of the statutory requirements of the Natural Gas Act, 15 U.S.C. § 717f(h) and is duly vested with the authority to condemn

> the Rights of Way as defined in the Verified Complaint;
>
> 2. Granting PennEast's application for an Order of Condemnation of the Rights of Way;
>
> 3. Finding that PennEast is entitled under the equitable powers of the Court to a preliminary injunction in the form of an order for immediate access to and possession of the property rights being condemned.
>
> 4. Requiring PennEast to post appropriate security in the form of a surety bond or other undertaking as the Court may direct into the Court's Registry pursuant to Local Civil Rule 67.1(a).
>
> 5. Finding that upon this deposit with the Court, PennEast is authorized to immediately enter and take possession of the Rights of Way for all purposes allowed under the Federal Energy Regulatory Commission's Order granting PennEast a Certificate of Public Convenience and Necessity, including, without limitation, the performance of survey activities required by the FERC to be completed before construction of the pipeline may commence.

(Order to Show Cause 2-3; Am. Order to Show Cause 2-3; *see supra* note 2.) Public hearings on the Order to Show Cause were held on three dates: April 5, 2018; April 19, 2018; and April 26, 2018.[9] The Order to Show

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[9] Due to the volume of complaints, the Court assigned a hearing date of April 5, 2018, or April 19, 2018, to Defendants based on their property's docket number (*see* Am. Order 2), with the final

Cause also set forth a deadline,[10] prior to the hearings, for any interested party to file any papers responsive to the Order to Show Cause. (*Id.* at 3.) PennEast was permitted, by way of the Order to Show Cause, to respond to any opposition it received. (*Id.*)

E. Responses to the Order to Show Cause[11]

i. Opposition by the State Defendants and Mercer County[12]

Appearing as Defendants in over twenty cases, the State, the Department of Environmental Protection (the "DEP"), the Delaware and Raritan Canal Commission, and the State Agriculture Development Committee (collectively, the "State

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April 26, 2018 hearing date being used as a catch-all. While the Defendant's specific hearing date was set forth in his or her Order to Show Cause, all interested property owners were permitted to comment at any hearing at which they appeared. In preparation for the hearings, PennEast was ordered to provide the Court with a master case list. (*See* Text Order dated March 23, 2018.)

[10] This deadline initially included the time by which Defendants had to file their answers. If and when requested, Defendants were granted an extension for time to answer or respond to the complaints, but the date by which to file papers in response to the Court's Amended Order to Show Cause was not extended by way of that extension. In light of the State's jurisdictional challenges, their deadline to answer was tolled pending the Court's decision regarding jurisdiction.

[11] Many parties' arguments overlap or are common among briefs. For the sake of brevity in what is already a complex matter, the Court highlights novel portions of each brief and discusses the arguments *infra* as necessary.

[12] Mercer County joined the State Defendants' arguments to the extent applicable, *e.g.*, they did not (and could not) argue they were entitled to Eleventh Amendment immunity.

Defendants") filed briefs in opposition to PennEast's requested relief and seeking dismissal of the complaints. (*See generally* State Defs.' Br.) The State Defendants argue the State is entitled to Eleventh Amendment immunity and therefore, this Court does not have jurisdiction. The State contends it is a necessary party for determining just compensation, and therefore, they ask the Court to "refrain from proceeding with any condemnation related to these properties." (State Defs.' Br. 1.) Alternatively, the State Defendants assert the actions should be dismissed because PennEast has failed to meet its burdens both under the NGA and for injunctive relief. Specifically, they argue New Jersey has a public policy of protecting its open space and farmland and, under the New Jersey Constitution, tax dollars are set aside to preserve same. The State Defendants point to several programs they contend evidence how highly they value this "long-held polic[y]," including programs supported by the DEP and the State Agriculture Development Committee ("SADC"). (*Id.* at 5-7.) The State Defendants claim a preliminary injunction is premature given the ongoing FERC proceedings and the likelihood that the pipeline route could change, causing unnecessary condemnation. (*Id.* at 37-45.)

ii. Opposition by the Stark Defendants[13]

Stark & Stark filed notices of appearance and oppositions in over eighty cases on behalf of

[13] The Columbia Environmental Law Clinic serves as co-counsel for the Hunterdon Land Trust and the New Jersey Conservation Foundation.

Hunterdon County, West Amwell Township, Hopewell Township, Delaware Township, Alexandria Township, the New Jersey Conservation Foundation ("NJCF"), the Hunterdon Land Trust Alliance ("Hunterdon Land Trust"), and dozens of private property owners (collectively, the "Stark Defendants"). The Stark Defendants' briefs are largely consistent. They join the arguments of the State Defendants but additionally argue, *inter alia*, "PennEast does not hold a final FERC Certificate of Public Convenience and Necessity upon which it could ask this Court to determine that it possesses a right to condemn," constituting an improper taking under the Fifth Amendment. (Stark Defs.' Br. 1.) Further, the Stark Defendants contend PennEast is improperly attempting a "quick-take or immediate possession" in contravention to the NGA, where, instead, "PennEast should have moved by Summary Judgment to obtain an order of condemnation declaring that it has the substantive right to condemn prior to receiving preliminary injunctive relief to gain access to the property." (*Id.* at 8.)

iii. Opposition by the McKirdy Riskin Defendants[14]

McKirdy Riskin, Olson & Della Pelle ("McKirdy Riskin") filed opposition briefs in approximately eight cases on behalf of property owners (the "McKirdy Riskin Defendants").[15] They argue PennEast failed to

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[14] McKirdy Riskin also filed non-contesting answers in several cases on behalf of individual property owners.

[15] *See, e.g.,* Dkt. Nos. 18-1722, opposition filed o/b/o Joseph and Adela Gugiotta; 18-1771 (having since been resolved), filed o/b/o Philip and Linda Snyder; 18-1779, filed o/b/o Richard and

comply with state substantive law, PennEast failed to negotiate, and that the McKirdy Riskin Defendants were denied substantive due process rights because the parcel map and description is unclear as to the parcel to be acquired.[16] (*See generally* McKirdy Riskin Defs.' Br.)

iv. Cole of Hopewell

Cole of Hopewell Township, NJ, LLC ("Cole of Hopewell") (Dkt. Nos. 18-1951 and 18-1976), represented by Giordano, Halleran & Ciesla, filed a brief in opposition, joining the arguments of Hopewell Township, the State Defendants, and Mercer County, arguing PennEast is not entitled to injunctive relief.

v. Opposition by the Township of Kingwood

The Township of Kingwood, represented by Lavery, Selvaggi, Abromitis & Cohen, filed opposition to PennEast's request for an injunction and joined the arguments of Hunterdon Land Trust. (*See* Dkt. Nos. 18-1638, 18-1855, 18-1995.)[17]

Elizabeth Kohler; 18-1798, filed o/b/o Carl and Valarie Vanderborght; 18-1853, filed o/b/o Jacqueline Evans; 18-2014, filed o/b/o Dan and Carla Mackey; 18-2028, filed o/b/o Frank and Bernice Wahl; and 18-2508, filed o/b/o Foglio and Assocs. LP (in this matter, Decotiis, Fitzpatrick, Cole & Giblin, LLP serves as conflict counsel for PennEast).

[16] The Court notes the Kohlers, for example, are not opposed to "allow[ing] PennEast access to the Property on reasonable notice and conditions to conduct all necessary environmental, cultural, and species surveys required under the FERC Certificate." (*See, e.g.*, Kohler Br. 2 n.1.)

[17] The Township of Kingwood was named and later dismissed in several other cases.

vi. Answer and Statement of Objections filed by Holland Township

In approximately six cases, Gebhardt & Kiefer, on behalf of Holland Township, filed Answers with counterclaims, asserting PennEast is in violation of the Takings Clause and the Due Process Clause of the Fifth Amendment. Holland Township contends "[t]his Court is not bound by the FERC's findings based upon an incomplete record and/or unconstitutional practice of conferring eminent domain authority without looking beyond precedent agreements." (Holland Stat. of Obj. ¶¶ 3-4.)

vii. Answer and Affirmative Defenses by Mark G. Korman 2007 Residence Trust

The Mark G. Korman 2007 Residence Trust (the "Korman Trust") (Dkt. No. 18-1814), by and through its attorneys Piro, Zinna, Cifelli, Paris & Genitempo, filed an answer with affirmative defenses, contending PennEast "failed to negotiate in good faith for access to survey the Korman Property in that [PennEast] refused to use a licensed surveyor for activities." Further, but without explanation, the Korman Trust asserts a defense of lack of subject matter jurisdiction and that the claims are barred by the doctrines of waiver, estoppel, and unclean hands. (Korman Ans. 10.)

viii. Consent by Jersey Central Power & Light

Jersey Central Power & Light Company ("JCP&L") is named as a Defendant in over 110 cases as either an "'[i]nterest [h]older' by reason of JCP&L's interest in an easement of right of way in the [named

p]roperty … or [] a [l]andowner by reason of JCP&L's fee simple interest in the [named p]roperty." (Consent Order 1.) By way of Consent Order, which was submitted by JCP&L and entered by the Court, JCP&L agreed to allow access to PennEast "for the purposes of performing non-invasive surveys and studies in furtherance of PennEast obtaining requisite governmental permits and approvals for its construction of the [p]roject." (*Id.* ¶ 1.) Further, the parties agreed to "exercise good faith, diligent efforts to (i) determine whether the proposed location of the PennEast pipeline in the [p]roject through [the named property] shall involve any overlapping co-location with [JCP&L's interest in the named property] and (ii) enter an appropriate encroachment consent agreement with respect to [JCP&L's property interest]." (*Id.* ¶ 2.) PennEast also agreed that, pending execution of an encroachment consent agreement, it would not "file or record a declaration of taking … and shall not commence any construction." (*Id.* ¶ 4.) To date, the parties have not reached an agreement and continue to extend the time period by which they shall enter into an encroachment consent agreement. (*See* Consent Order dated November 16, 2018 (extending agreement to December 17, 2018).)

ix. Consent by Verizon

Verizon New Jersey Inc. and Cellco Partnership d/b/a Verizon Wireless ("Verizon") was named as a Defendant in approximately twenty complaints, in which JCP&L is also listed as Defendants. Following suit, Verizon requested, and PennEast agreed to, similar protections as JCP&L, allowing PennEast access to the properties to perform non-invasive

surveys and studies. (Verizon Ltr. dated March 22, 2018; PennEast Ltr. dated March 28, 2018.) Verizon has since been voluntarily dismissed from all matters in which it was a named Defendant.[18]

x. Additional Represented Property Owners

The Court received opposition from several represented property owners:

- By Gaetano De Sapio, Esq. o/b/o himself (Dkt. No. 18-1809) and the Estate of Anthony De Sapio, Anthony De Sapio, Jr., Martin De Sapio, and James De Sapio (Dkt. No. 18-1806) (collectively, the "De Sapio Defendants"). The De Sapio Defendants allege they were not properly served, if at all, with the summons and complaint, nor were they furnished with an appraisal from which they could attempt to negotiate. Beyond that, their opposition largely mirrors the Stark Defendants'.
- By Hill Wallack o/b/o Philip and Suzanne Muller ("Mullers")[19] (Dkt. No. 18-1915). The Mullers argue the NGA "does not authorize private gas companies to utilize so-called 'quick-take' procedures" and that PennEast is not entitled to an order allowing the properties to be patrolled by armed federal marshals.

[18] PennEast has also been able to resolve AT&T's interest in several properties.

[19] The Mullers are now represented by McKirdy Riskin.

(Muller Br. 13, 17.) The Mullers further contend bond, if required, should be at least equal to the fair market value of the specified property. (*Id*. at 19.)

xi. *Pro Se* Property Owners

The Court received and reviewed oppositions from the following *pro se* Defendants:

- Janet Mowder (Dkt. No. 18-1656)
- Raymond Aron Jr., in the form of an answer and request for dismissal (Dkt. No. 18-1801)
- Leonard and Sharon Goins (Dkt. No. 18-1996)
- Michael and Maureen Santoro, and Thomas and Barbara Callahan (Dkt. No. 18-2016)
- Lydia Gombosi, Lana Salsano, and Lydia Dunne (Dkt. No. 18-1621)

F. Public Hearings on the Orders to Show Cause

Each of the hearings on the Orders to Show Cause generally proceeded the same way: First, PennEast was permitted to address the Court, followed by Defendants represented by counsel. Next, any property owner in attendance was permitted to address the Court, giving first priority to any party who had filed an opposition. PennEast was permitted to respond. At each subsequent hearing, the Court

advised counsel they need only supplement their prior arguments.[20]

Based on this procedure, at the April 5, 2018 hearing, following arguments by PennEast and counsel for Defendants[21], the Court opened the floor to individual Defendants wishing to address the Court. No individuals came forward with objections. Nevertheless, following PennEast's rebuttal, the Court provided individual Defendants with another opportunity to address the Court. At that point, Frances Silkotch and Gary Salata[22] spoke, expressing dissatisfaction with PennEast's attempts to negotiate. The April 19, 2018 hearing proceeded in the same manner, with the Court limiting the parties to new arguments and supplements to the record.[23] The following individuals addressed the Court: Michael Voorhees, Cynthia Niciecki, Leonard Goins, Michael and Maureen Santoro, Barbara Callahan, Janet Mowder, Gary Salata, Vincent DiBianca, Kevin Kuchinski, Jacqueline Evans, and Dan Mackey.[24]

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[20] The parties' specific arguments raised at the hearing are incorporated and discussed *infra*.

[21] Specifically, counsel spoke on behalf of the following Defendants: the State, NJCF, Hunterdon Land Trust, the Stark Defendants, the McKirdy Riskin Defendants, Mercer County, JCP&L, Kingwood Township, and Holland Township.

[22] Both Silkotch (Dkt No. 18-1765) and Salata (Dkt. No. 18-1918) are represented by counsel but, by invitation of the Court and with permission of counsel, spoke on behalf of themselves.

[23] Counsel spoke on behalf of the following Defendants: the Mullers, the Stark Defendants, the McKirdy Riskin Defendants, the De Sapio Defendants, NJCF, and the Hunterdon Land Trust.

[24] Individual Defendants' arguments included but was not limited to dissatisfaction with PennEast's negotiation attempts,

Prior to the third and final hearing on April 26, 2018, the Court ordered PennEast to reserve certain Defendants[25] it had not been able to personally serve and who had not otherwise appeared or filed a response to the Order to Show Cause.

Counsel had little to add to the oral record at the April 26, 2018 hearing. The following individuals addressed the Court: Michael Voorhees, Jackie Freedman on behalf of Woodside View Estates Homeowner's Association, and Joseph Caparoso.[26]

G. Summation Briefs

Following the hearings, the Court ordered the parties to submit written summation briefs in lieu of closing oral arguments.[27] The Court received and

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disagreement with PennEast's offer and valuation, objections to use of the United States Marshal Service, and objections to the route of the pipeline.

[25] Defendants are listed in Exhibit A to the April 20, 2018 Order. (*See* Dkt Nos. 18-1585; 18-1590; 18-1658; 18-1669; 18-1695; 18-1776; 18-1811; 18-1905; 18-1909; 18-1924 (having since been resolved); 18-1942; 18-1989; 18-2001; 18-2003; 18-2004; and 18-2025.)

[26] Voorhees and Freedman objected to their late service and notice of the hearings. Therefore, the Court permitted them three weeks to retain counsel or answer or otherwise respond to the complaint and Order to Show Cause.

[27] Following the submission of summation briefs, the D.C. Circuit, the Third Circuit, the District Court for the District of New Jersey, and the District Court for the Middle District of Pennsylvania issued pipeline-related decisions, including but not limited to *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, 895 F.3d 102 (D.C. Cir. 2018); *Township of Bordentown v. Federal Energy Regulatory Commission*, 903 F.3d 234 (3d Cir. 2018); *New Jersey Conservation Foundation v. Federal Energy Regulatory Commission*, No. 17-11991, 2018 WL

carefully reviewed summation briefs from the following parties: PennEast, the State, NJCF, Hunterdon Land Trust, Mercer County, Cole of Hopewell, the De Sapio Defendants, the Stark Defendants, and the McKirdy Riskin Defendants.

H. FERC Rehearing Requests and Denial

While PennEast was filing complaints in this Court based on the FERC Order, several Defendants petitioned for a rehearing of FERC's decision. After issuing tolling orders giving FERC additional time to review the rehearing requests[28], on August 10, 2018, "the requests for rehearing [were] rejected, dismissed,

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5342833 (D.N.J. Oct. 29, 2018); *Transcontinental Gas Pipe Line Co., LLC v. 2.14 Acres*, 907 F.3d 728 (3d Cir. 2018); *Penneast Pipeline Company v. A Permanent Easement of 0.60 Acre ± And A Temporary Easement Of 0.60 Acre ± In Towamensing Township, Carbon County, Pennsylvania*, No. 18-281, 2018 WL 6304191 (M.D. Pa. Dec. 3, 2018) (granting motion for preliminary injunction); and *Penneast Pipeline Company v. A Permanent Easement of 0.60 Acre ± And A Temporary Easement Of 0.60 Acre ± In Towamensing Township, Carbon County, Pennsylvania*, No. 18-281, 2018 WL 6304192 (M.D. Pa. Dec. 3, 2018) (granting partial summary judgment). At the request of counsel or at the request of the Court, the parties supplemented their briefs when these decisions were issued, as well as when FERC issued its Order on Rehearing. Supplemental briefs were received almost monthly and as recently as December 10, 2018. This opinion has been revised to reflect these recent decisions, as well as the parties' responses thereto, as necessary.

[28] Pursuant to the NGA, rehearing requests are to be heard within thirty days. Despite this, courts have upheld the use of tolling order to grant FERC additional time to review the requests. Rehearing requests do not constitute stays of the FERC Order. *Delaware Riverkeeper Network*, 895 F.3d at 111; *Atl. Coast Pipeline, LLC Dominion Energy Transmission, Inc.*, 163 FERC ¶ 61098 (May 4, 2018).

or denied and the requests for stay [were] dismissed as moot." FERC Order on Rehearing, Aug. 10, 2018 ¶ 4.

II. JURISDICTION

A. Under The NGA

This action is properly before this Court pursuant to 15 U.S.C. § 717f(h), which allows the holder of a certificate of public convenience and necessity to acquire the necessary right of way for a pipeline "by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located." Whether PennEast has established that it is entitled to this right—and Defendants argue it is not—is addressed below.

B. Eleventh Amendment Immunity

The State Defendants seek dismissal based on Eleventh Amendment immunity. An assertion of Eleventh Amendment immunity is a challenge to a district court's subject matter jurisdiction. *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996) ("[T]he Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction.") (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984)). Typically, when jurisdiction is challenged, the party asserting this Court's jurisdiction bears the burden of persuading the Court that subject matter jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). However, because "Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter

jurisdiction in the ordinary sense," and therefore, a party asserting Eleventh Amendment immunity bears the burden of proving its applicability. *Christy v. Pa. Turnpike Comm.*, 54 F.3d 1140, 1144 (3d Cir. 1994); *see also Carter v. City of Phila.*, 181 F.3d 339, 347 (3d Cir. 1999). Accordingly, the State Defendants must prove the Eleventh Amendment immunity's applicability in this case. For the reasons set forth below, the Court finds the State Defendants are not entitled to Eleventh Amendment immunity.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Courts have interpreted this to mean that State agencies and State officials acting in their official capacities cannot be sued under the principles of sovereign immunity and the Eleventh Amendment, subject to exceptions. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989).

Fatally, the State Defendants concede their Eleventh Amendment immunity applies only to suits by private citizens (State Opp'n to Order to Show Cause 17) and that their arguments would be different if the United States government were pursuing eminent domain rights (Apr. 5, 2018 Hearing Tr. 34:9-17). Indeed, PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign. *City of Newark v. Cent. R.R. of N.J.*, 297 F. 77, 82 (3d Cir. 1924); *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1181

(5th Cir. 1977); *City of Davenport v. Three Fifths of an Acre of Land*, 252 F.2d 354, 356 (7th Cir. 1958). The Court is not persuaded by the State Defendants' argument that the NGA is silent as to the rights of a private gas company; the NGA expressly allows "any holder of a certificate of public convenience and necessity" to acquire rights of way "by the exercise of the right of eminent domain" in this District Court.[29] 15 U.S.C. § 717f(h). As more thoroughly discussed below, PennEast holds a valid certificate as issued by the FERC Order. Therefore, the Eleventh Amendment is inapplicable, and the State Defendants are not entitled to immunity.[30] The State Defendants' request for dismissal for lack of jurisdiction based on Eleventh Amendment immunity is **DENIED**.

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[29] Recently, and more to the point, the Third Circuit specifically stated, "Congress may grant eminent domain power to private companies acting in the public interest .... The NGA gives natural gas companies the power to acquire property by eminent domain ...." *Transcon. Gas Pipe Line Co.*, 907 F.3d at 728-29. *See also* FERC Order ¶ 41, 42 ("Congress made no distinction between for-profit and non-profit companies .... Once the Commission makes [a] determination [that the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity], it is section 7(h) of the NGA that authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.")

[30] The Court is further persuaded by the State's apparent failure to raise this Eleventh Amendment argument in prior pipeline cases in this district.

III. APPLICABLE PROCEDURE FOR PENNEAST'S CONDEMNATION APPLICATION

PennEast asks this Court: (1) to find it has satisfied the statutory requirements of the NGA under 15 U.S.C. § 717f(h) and is therefore vested with the authority to condemn the Rights of Way; (2) for an Order of Condemnation of the Rights of Way; and (3) to enter a preliminary injunction allowing immediate access to and possession of the Rights of Way because PennEast "has succeeded on the merits of its claim." (PennEast's Proposed Order 2-3.) Defendants argue PennEast's application is improper because, *inter alia*, PennEast is required to seek relief by way of summary judgment motion and that PennEast's request equates to a "quick-take" or immediate possession. Defendants further contend PennEast's application is improper because it does not comply with New Jersey state law. In response, PennEast claims the Court may—and indeed, must—summarily find the § 717f(h) factors are satisfied prior to and as part of the injunctive relief inquiry and that such a finding is not improper or premature. Additionally, PennEast argues the NGA preempts New Jersey state law.

A. Absence of Summary Judgment and Alleged Quick-Take

There is no doubt the NGA, "like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick-take or immediate possession." *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004); *accord Transcon. Gas Pipe Line Co.*, 907 F.3d at 728-29.

However, it is also undeniable[31] that "a certificate of public convenience and necessity gives its holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement." *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 304 (3d Cir. 2014). Courts are generally in agreement that, within this framework, immediate possession is permitted through a preliminary injunction without being considered a quick-take. *Transcon. Gas Pipe Line Co.*, 907 F.3d at 738-39;[32] *Sage*, 361 F.3d at 818, 824.

Therefore, the arguably novel question before this Court is whether PennEast was required to file a

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[31] Defendants challenge the effect of PennEast's FERC Certificate. This Court discusses and rejects these arguments *infra*. *See Columbia Gas Transmission, LLC*, 2015 WL 389402, at *3 & n.7-8; *infra* note 42 and text accompanying note 42.

[32] The Third Circuit rejected landowners' argument that "because the NGA does not grant 'quick take' power, the statute does not permit immediate possession," stating:

> Nothing in the NGA suggests either explicitly or implicitly that the rules governing preliminary injunctions should be suspended in condemnation proceedings....
>
> [W]e see no reason to read a repeal of Rule 65, governing preliminary injunctions, into the NGA. In fact, subsection (a) of Rule 71.1 incorporates the other Federal Rules of Civil Procedure—including the preliminary injunction rule, Rule 65—in condemnation proceedings to the extent Rule 71.1 does not govern. We do not so easily exterminate equitable remedies.

Transcon. Gas Pipe Line Co., 907 F.3d at 738-39.

motion for summary judgment (or partial summary judgment) with respect to § 717f(h) before or in conjunction with its motion for a preliminary injunction.[33] For the reasons set forth herein, the Court finds such a motion is not required in order for this Court to make a finding as to PennEast's substantive right to eminent domain under § 717f(h).

District courts in the Third Circuit have repeatedly granted immediate possession and preliminary injunctions without the benefit of summary judgment motions or briefings. *See, e.g., Columbia Gas Transmission, LLC v. 2.510 Acres of Land in the Borough of Swedesboro, Gloucester Cty.*, 86 F. Supp. 3d 291 (D.N.J. 2015); *Columbia Gas*

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[33] The Third Circuit did not directly address this discreet issue in its recent *Transcontinental* opinion. *Transcon. Gas Pipe Line Co., LLC*, 907 F.3d at 734-35. There, plaintiff filed motions for a partial summary judgment and for a preliminary injunction. The district court in Pennsylvania granted partial summary judgment and, because it made a favorable decision on the merits in doing so, granted the preliminary injunction. On appeal, the Third Circuit found this did not constitute an impermissible quick-take. However, it did not specifically discuss whether anything less that summary judgment on plaintiff's substantive right to take would suffice. (*See id.* at 739 (agreeing with the Fourth Circuit's decision in *Sage* that immediate possession through a preliminary injunction was permissible in a condemnation proceeding, stating, "And this Court, too, albeit with less discussion, has ruled that where summary judgment is properly granted on a condemnation complaint, a preliminary injunction is appropriate as well. We effectively granted immediate access on the basis that the gas company had demonstrated success on the merits and strong arguments on the other prongs of the preliminary injunction test."). For the reasons set forth herein, the Court finds the Third Circuit's decision instructive here.

Transmission, LLC v. 1.092 Acres of Land, No. 15-208, 2015 WL 389402 (D.N.J. Jan. 28, 2015); *Tennessee Gas Pipeline, LLC v. 1.693 Acres of Land in the Twp. of Mahwah*, No. 2:12-cv-07921, 2013 WL 244821 (D.N.J. Jan. 22, 2013); *Tennessee Gas Pipeline Co. v. 0.018 Acres of Land in Twp. of Vernon, Sussex Cty., N.J.*, No. 10-4465, 2010 WL 3883260 (D.N.J. Sept. 28, 2010); *Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, No. 08-168, 2008 WL 4346405 (W.D. Pa. Sept. 19, 2008). In each of these cases, the court first found "[p]laintiff had demonstrated an established right to condemn the landowner defendants' properties under the [NGA], 15 U.S.C. § 717f(h)," followed by a finding that "preliminary relief in the form of immediate possession was appropriate." *See Columbia Gas Transmission, LLC*, 86 F. Supp. 3d at 292-93 (citing *Columbia Gas Transmission*, 2015 WL 389402, at *3-5). This is precisely the procedure PennEast asks the Court to follow.[34]

Still, Defendants argue this seemingly standard procedure operates as an impermissible quick-take. The Court disagrees. The Third Circuit in *Transcontinental Gas Pipe Line Co.* recently confirmed there are two types of eminent domain:

> One is "quick take," permitted by the [Declaration of Taking Act ("DTA")], 40 U.S.C. § 3114, in which the government files a "declaration of taking" that states the

[34] The pervasiveness of this practice is enough to convince the Court that this procedure is proper. However, the Court will address Defendants' arguments, particularly in light of *Transcontinental Gas Pipe Line Co.*, 907 F.3d 725.

authority for the taking, the public use, and an estimate of compensation. Upon depositing the estimated compensation, title vests automatically with the United States. The other is standard condemnation, permitted by 40 U.S.C. § 3113, in which title passes and the right to possession vests after a final judgment and determination of just compensation. The procedures for standard condemnations are set forth in Fed. R. Civ. P. 71.1. The NGA is an example of a grant of eminent domain power from Congress to a private actor to condemn land for public use, but it only embodies the second type—standard condemnation power, not "quick take."

In the case before us, Transcontinental followed standard condemnation procedure. The company filed condemnation complaints under Rule 71.1, not a declaration of taking. Rule 71.1 has requirements that go beyond the DTA. Transcontinental followed these procedures by filing condemnation complaints under Rule 71.1; it then established its substantive right to the property by filing for summary judgment. Only after the District Court granted summary judgment in Transcontinental's favor did it grant injunctive relief. Transcontinental also posted bond at three times the appraised value of the rights of way, as required by the orders of condemnation. If Transcontinental had in fact exercised "quick take," it would have simply filed a declaration

> of taking with an estimate of compensation; title would have vested automatically. Here, unlike in a "quick take" action, Transcontinental does not yet have title but will receive it once final compensation is determined and paid. Unlike in a "quick take" action, the Landowners had the opportunity to brief the summary judgment motions and participate in the preliminary injunction hearing. The different procedures and opportunities for participation distinguish the grant of the injunction here from an exercise of "quick take" power.

Transcon. Gas Pipe Line Co., 907 F.3d at 734-35 (footnotes omitted).

Against this background, it is undeniable PennEast is permissibly seeking condemnation under the NGA by way of a preliminary injunction and not by way of a quick-take under the DTA. The Third Circuit made clear that a quick-take under the DTA would have required "a declaration of taking with an estimate of compensation," and "title would have vested automatically." *Id.* at 735. Like Transcontinental, PennEast "filed condemnation complaints under Rule 71.1, not a declaration of taking.... [I]t then[35] established its substantive right to the property...." *Id.* at 734. And while the Third Circuit did not specifically address whether something less than summary judgment would suffice for determining whether a plaintiff's substantive rights

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[35] *See infra* Section IV (finding PennEast has established its substantive right to eminent domain under § 717f(h)).

under § 717f(h) of the NGA were satisfied, it indicated that its previous decisions to grant immediate access were based on "the gas company … demonstrat[ing] success on the merits and strong arguments on the other prongs of the preliminary injunction test." *Id.* at 739 (citing *Columbia Gas*, 768 F.3d at 315-16); *see supra* note 33. Therefore, the Court finds a summary judgment motion is not required to determine substantive rights for condemnation under NGA. All that is required is a finding, first, that the certificate holder has satisfied § 717f(h), demonstrating a success on the merits. Then, based on this finding "and strong arguments on the other prongs of the preliminary injunction test," a court may grant preliminary injunctive relief in the form of immediate possession. *Transcon. Gas Pipe Line Co.*, 907 F.3d at 739.

Nevertheless, Defendants argue PennEast's failure to file a summary judgment motion acts as a quick-take. The Court disagrees. Logically, if PennEast did not file a quick-take under the DTA and if there are only two types of eminent domain, it stands to reason PennEast filed its Condemnation Application under Rule 71.1 and the NGA. Failure to file a summary judgment motion does not convert PennEast's NGA condemnation action into a DTA quick-take, nor does it create a third type of eminent domain in contravention of Third Circuit directive. *Transcon. Gas Pipe Line Co.*, 907 F.3d at 736 ("To the contrary, we conclude that the equitable means by which Transcontinental's possession vested through the preliminary injunction differed in significant ways from 'quick take' under the DTA. We decline the invitation to conflate the two processes. These are not trivial differences of procedure or paperwork.").

Therefore, having found PennEast's Condemnation Application does not constitute an impermissible quick-take, and having found a summary judgment motion was not required to be filed as part of PennEast's request for orders of condemnation, the Court will, as other courts in this district have, evaluate and make a determination as to PennEast's substantive right to the property under § 717f(h) prior to reviewing the preliminary injunction motion.

B. Applicability of State Law

Next, Defendants argue the substantive law of New Jersey does not conflict with federal law and therefore is not preempted. In particular, Defendants argue New Jersey state law requires good-faith negotiations before condemnations. And while the Court finds, *infra*, such an obligation does not exist under the NGA, the Court will address, generally, the issue of preemption.

Defendants argue that New Jersey law is controlling in this matter because § 717f(h) requires "[t]he practice and procedure in any action or proceeding for [the] purpose [of exercise of the right of eminent domain] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." However, Defendants fail to cite any New Jersey or Third Circuit law or case for this proposition.[36] Conversely, since the adoption of

[36] To the extent Defendants disagree with the Third Circuit and the cases on which the Court relies (*see e.g.*, McKirdy Riskin Defs. Supp. Auth Ltr. dated Nov. 2, 2018), the argument is not

Federal Rule of Civil Procedure 71.1, the Third Circuit has ended its reliance on the state conformity language in the NGA upon which Defendants rely, expressly stating:

> Reliance on state eminent domain procedures ended with the adoption of Rule 71.1 (previously numbered 71A), which created a nationally uniform approach to eminent domain proceedings, and which, because it conflicted with § 717f(h), superseded the state-conformity language in the NGA. Courts now generally agree that condemnation proceedings under the NGA should follow Rule 71.1.

Transcon. Gas Pipe Line Co., 907 F.3d at 738 (footnotes omitted); s*ee also Columbia Gas Transmission*, 2015 WL 389402, at *3 n.8 ("Federal Rule of Civil Procedure 71.1, however, supersedes the language in [§] 717f(h) to the extent it requires conformity with the state court '"practice and procedure"' concerning condemnation." (citation omitted)); *Steckman Ridge GP, LLC*, 2008 WL 4346405, at *3, *18 ("[T]he Third Circuit has determined that 'Congress intended to preempt state regulation of rates and facilities of natural gas companies and it [is] clear that the Natural Gas Act was intended by Congress to occupy the field.'" (quoting *Pa. Med. Soc. v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991)) (citing *Schneidewind v. ANR Pipeline*

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persuasive. This Court "does not have the discretion to disregard controlling precedent simply because it [or a party] disagrees with the reasoning behind such precedent." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1030 n.4 (3d Cir. 1988).

Co., 485 U.S. 293, 300-01 (1988))) (emphasis omitted); FERC Order ¶ 218 ("Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.").[37]

Accordingly, the Court will proceed with its analysis under Rule 71.1, which allows for preliminary injunction proceedings under Rule 65, and § 717f(h) of the NGA.[38]

IV. SUBSTANTIVE RIGHT OF EMINENT DOMAIN UNDER THE NGA

Pursuant to 15 U.S.C. § 717f(h):

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the

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[37] Similarly, for these reasons, the Court finds the State's Farmland Preservation Programs and the law governing it, including but not limited to the Agriculture Retention and Development Act, N.J. Stat. Ann. 4:1C, *et seq.*, are preempted to the extent they conflict with the condemnation procedures set forth in NGA and Rule 71.1.

[38] *See supra* note 32.

> 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, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Therefore, in order to condemn property, the petitioner must show: (1) that it is the holder of a FERC certificate of public convenience and necessity; (2) that it has been unable to acquire the necessary property interests by contract or agreement; and (3) that the alleged value of the property interest exceeds $3000. *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, 709 F. App'x 109, 111 (3d Cir. 2017); *accord Columbia Gas Transmission, LLC*, 768 F.3d at 304. The Court addresses each element in turn.

A. FERC Certificate of Public Convenience and Necessity

PennEast maintains it is the holder of a valid FERC certificate—the FERC Order issuing blanket certificates—and that the scope of the FERC Order includes the properties against which it filed complaints.

Several Defendants argue, for a variety reasons, the FERC Order is not a final determination, while other Defendants concede it is. (*See, e.g.*, State Opp'n 9 ("The Order is a final order, making it eligible for a rehearing request....").) The Court finds, for the reasons set forth below, PennEast holds a final, valid FERC certificate upon which it can, and has standing to, pursue its right of eminent domain. *Columbia Gas Transmission, LLC*, 768 F.3d at 304 ("Accordingly, a certificate of public convenience and necessity gives its holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement.").

Pursuant to subsection (e) of 15 U.S.C. § 717f:

> [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder,

> and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. *The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.*

(emphasis added).

Here, on January 19, 2018, after issuing a final EIS, FERC granted PennEast a Certificate of Public Convenience and Necessity, exercising its right to attach conditions to the Certificate. FERC Order ¶ 2. *See* 15 U.S.C. § 717f(e). These conditions do not undermine the finality of the Certificate under § 717f(h) and were permitted under subsection (e). *See Penneast Pipeline Co.*, 2018 WL 6304192, at *3 ("'It is true that there are conditions in the FERC certificate that [PennEast] will need to meet prior to commencing actual construction of the pipeline, but the fulfillment of these conditions is not a prerequisite to [PennEast's] exercise of eminent domain'; if it were, some requirements—like surveying the property to comply with certificate conditions—would never be met and as a result, the pipeline would never be built." (quoting *Transcon. Gas Pipe Line Co.*, 2017 WL 3624250, at *6, *aff'd*, 907 F.3d 725 (3d Cir. 2018) (alterations in original)); *Constitution Pipeline Co. v. A Permanent Easement for 0.67 Acres & Temp. Easement for 0.68 Acres in Summit, Schoharie Cty.,*

N.Y., No. 14-2023, 2015 WL 1638477, at *2 (N.D.N.Y. Feb. 21, 2015) (holding that "the FERC Order cannot reasonably be read to prohibit [the gas company] from exercising eminent domain authority until it has complied with all conditions set forth in the Appendix" and rejecting "the argument that [the gas company] must wait until it has obtained a [Clean Water Act] 401 Certificate before it can initiate eminent domain proceedings").

Moreover, since the filing of this matter, FERC has reviewed and rejected, denied, or dismissed requests for a rehearing on the Order and, in another lengthy order with findings, affirmed its findings as set forth in the final EIS and the FERC Order. *See generally*, FERC Order on Rehearing. Notably absent from the many reasons the requests were rejected, denied, or dismissed was PennEast's alleged lack of a final certificate. Indeed, FERC treated the Certificate as final without question. *See, e.g.*, *id.* ¶ 5 (rejecting requests for a rehearing because "only a party to a proceeding has standing to request rehearing of a *final* Commission decision" (emphasis added)); *see also N.J. Conservation Found.*, 2018 WL 5342833, at *11 n.12 (describing the PennEast FERC process as final and complete). This Court will do the same here and finds the Certificate to be final and valid.

Several Defendants argue the Certificate is "non-final" and is only an "incipient authorization without current force or effect." (*See, e.g.,* Stark Defs.' Opp'n 12-13.) That argument is misplaced, and the FERC orders cited in support thereof are inapposite. For example, in *Crown Landing LLC*, 117 FERC ¶ 61,209,

at 62,106 (2006), on which Defendants rely, FERC denied rehearing and stated:

> The approval we issued in the June 20 Order is expressly conditioned upon completion of Crown Landing's remaining and unchallenged duties under [the Coastal Zone Management Act and the Clean Air Act]. Our order is an incipient authorization without current force and effect, since it does not yet allow Crown Landing to begin the activity it proposes[—*i.e.*, construction and operation of a pipeline].

Id. ¶ 21. The *Crown Landing* order[39] does not suggest the holder of the certificate cannot exercise its eminent domain rights consistent with the NGA, nor do Defendants provide FERC order or case that does.

The remaining arguments generally relate to the effect of the then-pending requests for rehearing. In light of FERC's Order on Rehearing, those arguments are moot.[40] To the extent Defendants argue the FERC Order and/or Certificate did not make a finding of public necessity, and is incomplete on those grounds,

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[39] The *Crown Landing* order goes on to say that "[c]onditional Commission orders have been described *in the context of constitutional standing analysis* as 'without binding effect,'" further distancing that FERC order from relevance to PennEast's case. *Id.* ¶ 21 n.27 (emphasis added) (citing *New Mexico Attorney Gen. v. FERC*, No. 04-1398, slip op. at 3 (D.C. Cir. October 13, 2006) (also discussing standing)).

[40] For example, the McKirdy Riskin Defendants argue FERC's approval was not final, and therefore not ripe for adjudication, because of the pending rehearing requests. That argument is moot in light of FERC Order on Rehearing.

a clear reading of the FERC Order and final EIS adopted thereby, followed by the Rehearing Order, demonstrates FERC did, in fact, make such a finding.[41] This Court is not empowered to criticize that decision. *See* 15 U.S.C. § 717r(a), (b); *N.J. Conservation Found.,* 2018 WL 5342833, at *3; *Columbia Gas Transmission, LLC*, 2015 WL 389402, at *3 & n.7 ("Disputes over the reasons and procedures for issuing certificates of public convenience and necessity must … be brought before FERC.").[42]

Therefore, for the reasons set forth above, the Court finds PennEast is the holder of a Certificate of Public Convenience and Necessity and has satisfied that portion of the NGA.

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[41] For this reason, the Court finds no merit in Defendants' argument that their Fifth Amendment rights are being violated by PennEast's failure to show the taking is for a public use. Specifically, FERC found the public convenience and necessity requires approval of the project, concluding:

> Based on the benefits the project will provide to the shippers, the lack of adverse effects on existing customers, other pipelines and their captive customers, and effects on landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of PennEast's proposal, subject to the conditions discussed [in Appendix A].

FERC Order ¶ 40.

[42] Similarly, any arguments challenging FERC's procedures, including that FERC's use of tolling orders denied Defendants of due process in this proceeding, are beyond this Court's review. *See N.J. Conservation Found.,* 2018 WL 5342833, at *6 (finding no jurisdiction over a collateral attack on the FERC order or FERC's procedures).

B. Acquisition by Contract or Agreement

The next requirement under 15 U.S.C. § 717f(h) is that the holder of the certificate was not able to "acquire by contract, or [was] unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way." It is undisputed that PennEast has been unable to come to an agreement with the remaining Defendants.[43] Defendants argue, however, PennEast did not negotiate in good faith.[44]

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[43] Since the filing of this case, PennEast has come to agreements with several property owners to allow the pipeline rights of way as requested in the Complaint. These matters have been dismissed in their entirety. In other cases, PennEast was able to reach agreements with one or more interest holder other than the property owner and, in those cases, those parties have been dismissed but the case remains active. For example, the interest holder may have discharged a mortgage, disclaimed an interest in the property, resolved its interest with PennEast or otherwise does not wish to participate.

[44] Some Defendants argue that the language used in PennEast's offers improperly sought permission for rights of way beyond what is permitted by § 717f(h). That argument is unsupported by facts or law and, based on the findings herein, is not dispositive. PennEast's "proposed orders simply cannot have the effect of granting any right of ingress or egress not approved by FERC." *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, & Maintain a Nat. Gas Pipeline Over Tracts of Land in Giles Cty., Craig Cty., Montgomery Cty., Roanoke Cty., Franklin Cty., & Pittsylvania Cty., Virginia*, No. 17-0492, 2018 WL 1193021, at *2 (W.D. Va. Mar. 7, 2018) (quoting *Mountain Valley Pipeline, LLC v. Simmons*, No. 17-211, Dkt. No. 157 (N.D.W. Va. Feb. 20, 2018)). Defendants alternatively argue PennEast's parcel map and description of the Rights of Way was unclear as to the parcel to be acquired or that PennEast did not properly serve Defendants. The Court has reviewed the complaints, certifications, and maps and descriptions attached thereto, and finds notice and service to be satisfactory. *See* Fed.

PennEast contends the NGA does not impose a good faith negotiation requirement and, even so, relies on the certification of Daniel Murphy, a Project Manager for PennEast to demonstrate its efforts.

The Third Circuit has not taken a position on whether good faith negotiations are required,[45] and courts around the country are split. *Millennium Pipeline Co., L.L.C. v. Certain Permanent and Temporary Easements*, 777 F. Supp. 2d 475, 482-3 (W.D.N.Y. 2011) (citing *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 F. App'x 495, 498 (1st Cir. 2005)) (declining to require good faith); *Transcontinental Gas Pipe Line Co. v. 118 Acres of*

R. Civ. P. 71.1 (requiring "a description sufficient to identify the property" and "the interests to be acquired"); *Columbia Gas Transmission, LLC v. 370.393 Acres*, No. 14-0469, 2014 WL 5092880, at *12-13 (D. Md. Oct. 9, 2014). To the extent Defendants allege the descriptions are incorrect, vague, or ambiguous, PennEast will be able to amend the condemnation orders once it has accessed the property.

[45] While the Third Circuit has not made a specific finding regarding this requirement, it can be inferred there is no good faith requirement. In its October 30, 2018 *Transcontinental Gas Pipe Line Co.* Opinion, the court stated:

> The second and third requirements for using the eminent domain powers under § 717f(h) of the NGA are that the gas company negotiate with the landowner for the necessary right of way and that value of the right of way exceeds $3000. Transcontinental extended written offers of compensation exceeding $3000 to each of the Landowners, but these offers were not accepted.[] Transcontinental thus satisfied the second and third requirements.

Transcon. Gas Pipe Line Co., 907 F.3d at 731 (footnote omitted) (citing declaration from senior land representative).

Land, 745 F. Supp. 366, 369 (E.D. La. 1990) (requiring good faith). Absent direction from the Third Circuit,[46] district courts in this circuit have declined to find such a requirement, noting "the plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain." *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 0.78 Acres*, No. 17-0571, 2017 WL 3485755, at *3 (M.D. Pa. Aug. 15, 2017) (quoting *UGI Sunbury LLC v. A Permanent Easement for 0.4944 Acres*, No. 16-0783, 2016 WL 3254986, at *6 (M.D. Pa. June 14, 2016)) (*citing Steckman Ridge GP, LLC*, 2008 WL 4346405 at *13 n.3; *see also Kansas Pipeline Company v. A 200 Foot By 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002)).

This Court is persuaded by the other district courts in this Circuit and finds no good faith requirement exists in the NGA.[47] *See Transcon. Gas Pipe Line Co.*, 2017 WL 3485755, at *3. Accordingly, PennEast need only show, quite simply, that it has been unable to acquire the property by contract or has been unable to agree with the owner of the property as to the compensation to be paid. *See* 15 U.S.C. § 717f(h); *Columbia Gas Transmission, LLC v. 76 Acres More or Less*, No. 14-110, 2014 WL 2919349, at

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[46] *But see supra* note 45.

[47] Even if the NGA did require a showing of good faith, the Court finds such a requirement has been met. The Court is mindful of the impact this decision may have on property owners who have resided in their homes for years and have taken issue with the offers and forms of offers. Nonetheless, the Court finds PennEast has satisfied this portion of § 717f(h).

*3 (D. Md. June 25, 2014) (rejecting the good faith requirement and finding plaintiff "need only show that it made an offer to the [d]efendants in order to demonstrate compliance with the second condition of [§] 717f(h). The burden to satisfy this condition is not onerous." (citing *E. Tenn. Natural Gas, LLC v. 1.28 Acres*, No. 06-0022, 2006 WL 1133874, at *29 (W.D. Va. Apr. 26, 2006))).

PennEast filed a declaration of Daniel Murphy in each case. Murphy is employed by Western Land Services ("WLS") as a Project Manager for the PennEast Pipeline Project and, in that capacity, oversees all communications with owners of property on the pipeline route. (Murphy Decl. ¶¶ 6-7.) These communications include negotiations for access to properties for surveys and to acquire the necessary rights of way. (*Id.* ¶ 7.) Specifically, Murphy supervises various land agents "who, over a period of more than three years, have made numerous contacts with [p]roperty [o]wners related to WLS's attempts on behalf of PennEast to obtain (1) property rights for the [p]roject and (2) access to conduct surveys and investigations." (*Id.* ¶ 8.) Based on the record before the Court describing the efforts of WLS[48], the Court finds PennEast has met its burden to "show that it made an offer to the [d]efendants," *Columbia Gas Transmission, LLC*, 2014 WL 2919349, at *3, and was not able to "acquire by contract, or [was] unable to agree with the owner of property to the compensation

[48] Including but not limited to numerous attempts to contact the property owners either through visits or by mail; failure to obtain permission for either survey access or to acquire an easement; and rejection of offers in excess of $3000.

to be paid for, the necessary right-of-way," 15 U.S.C. § 717f(h).[49] Therefore, this factor is satisfied.

C. Property Value Exceeds $3000

The parties do not dispute the property value exceeds $3000. PennEast has made offers exceeding that amount (Murphy Decl. ¶ 19) and, as expected, Defendants do not argue their property is worth less. Therefore, this factor is satisfied for purposes of 15 U.S.C. § 717f(h).[50]

V. CONDEMNATION ORDER

Because PennEast has established it has a substantive right to eminent domain under § 717f(h), PennEast is "entitled to exercise eminent domain over the those [sic] specified portions of the landowner [d]efendants' properties, under the authority of the [NGA] and the FERC [C]ertificate," and the Court "may, under its equitable powers, enter an order of condemnation concerning the subject properties." *Columbia Gas Transmission*, 2015 WL 389402, at *4 (citing *Sage*, 361 F.3d at 823); *accord Columbia Gas Transmission, LLC*, 768 F.3d at 304; *Columbia Gas Transmission, LLC v. 2.510 Acres of Land in the Borough of Swedesboro, Gloucester Cty.*, 86 F. Supp. 3d 291 (D.N.J. 2015); *Tennessee Gas Pipeline, LLC v. 1.693 Acres of Land in the Twp. of Mahwah*, No. 12-

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[49] Several Defendants argue this burden is not met because PennEast did not attempt to negotiate with all interest holders. The Court disagrees. To satisfy its burden under § 717f(h), PennEast need only show it "cannot acquire by contract, or is unable to agree with the *owner* of property." (emphasis added). PennEast has met this burden. There is no obligation to make a showing as to all interest holders.

[50] *See also supra* note 45.

07921, 2013 WL 244821 (D.N.J. Jan. 22, 2013). Therefore, PennEast's request for orders of condemnation is **GRANTED**.

The next question is "whether such right entitles [PennEast] to intermediate, equitable relief in the form of immediate possession." *Columbia Gas Transmission*, 2015 WL 389402, at *4. Having found injunctive relief is an appropriate remedy in condemnation actions, *see supra* Section III.A, the only remaining question is whether PennEast meets its burden in "demonstrat[ing] success on the merits and strong arguments on the other prongs of the preliminary injunction test." *Transcon. Gas Pipe Line Co.*, 907 F.3d at 738-39. For the reasons set forth below, the Court finds injunctive relief in the form of immediate possession is warranted.

VI. INJUNCTIVE RELIEF

To obtain a temporary restraining order or preliminary injunction, the moving party must show:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured … if relief is not granted.... [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). The movant bears the burden of establishing

"the threshold for the first two 'most critical' factors .... If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.* at 179. Significantly, a motion for injunctive relief following a determination of plaintiff's substantive right to eminent domain

> is not a "normal" preliminary injunction, where the merits await another day. In those situations, the probability of success is not a certainty such that weighing the other factors is paramount. Here, there is no remaining merits issue; we have ruled that [plaintiff] has the right to the easements by eminent domain. The only issue is the amount of compensation—… the result of which can have no affect on [plaintiff]'s rights to the easements. That [plaintiff]'s entitlement to relief comes in the form of injunctive relief should not dictate that we impose similar constraints on our grant of that relief in this context.

Columbia Gas Transmission, LLC, 768 F.3d at 315. Against this landscape, the Court weighs the injunctive relief factors.

A. Reasonable Probability of Eventual Success in the Litigation

PennEast has more than established reasonable probability of success on the merits; indeed, the Court has found PennEast satisfied the elements of § 717f(h) and is therefore entitled to condemnation orders.

Accordingly, the Court finds this factor is satisfied and weighs in favor of granting the preliminary injunction. *See Columbia Gas Transmission*, 2015 WL 389402, at *4 (citing *Columbia Gas Transmission*, 768 F.3d at 314-15; *Steckman Ridge*, 2008 WL 4346405, at *15).

B. Irreparable Harm

PennEast argues it requires immediate access to and possession of the Rights of Way in order to meet the FERC-mandated in-service date of January 1, 2020. In support thereof, PennEast provided the certification of Jeffrey D. England, Manager, Project Management and Construction of UGI Energy Services, LLC on behalf of PennEast. (England Cert.) England states, "PennEast has entered into precedent agreements with seven foundation shippers and eleven shippers in total, which combined have committed to purchase 975,000 dekatherms per day of the natural gas to be supplied by the [p]roject. These precedent agreements are based on the [p]roject being in service by certain dates." (*Id.* ¶ 9.) While the Court understands Defendants' objections,[51] courts have held that a financial loss may be sufficient to establish irreparable harm "if the expenditures cannot be

[51] Defendants argue the in-service date is not a hard deadline by which the project must be built; rather it is "simply FERC's inclusion of PennEast's anticipated length of project completion, to ensure that its nascent authorization does not languish indefinitely while an applicant sits on its rights," and, to the extent PennEast is bound by the timeline, "FERC can and routinely does grant extensions upon simple request." (*See* Stark Defs.' Br. 28-29.) While this may be true, the Court is persuaded by its sister courts' findings which respect to the matter, cited herein, and, nevertheless, finds additional irreparable injuries on which it bases its decision.

recouped," such as where the delay would prevent the pipeline company from completing necessary pre-construction survey and conditions or could cause the company to breach contracts with subcontractors and vendors. *See Transcon. Gas Pipe Line Co.*, 709 F. App'x at 112-13; *Columbia Gas Transmission, LLC*, 768 F.3d at 315-16; *Penneast Pipeline Co.*, 2018 WL 6304191, at *2; *Columbia Gas Transmission, LLC*, 2015 WL 389402, at *4; *Tennessee Gas Pipeline Co.*, 2010 WL 3883260, at *2-3. (*See also* England Decl. ¶ 29 ("If PennEast is unable to complete these activities in an expeditious manner, the project will be delayed causing PennEast irreparable harm in terms of lost contracts....").)

Moreover, FERC has tasked PennEast with a number of environmental conditions which must be satisfied before PennEast can begin construction. Many of these conditions require immediate access to the properties, including but not limited to Conditions 3, 4, 6, 10, 15-17, 21, 23, 30-32, 35, 39, 41, 47, and 51. (England Cert. ¶ 18 (citing FERC Order, App'x A).) Immediate access will additionally allow PennEast to survey and collect information needed to complete its Application to the DEP for a Freshwater Wetlands Individual Permit and Water Quality Certificate. (*Id.* ¶ 17.)

Defendants argue PennEast's lack of DEP approval is grounds for this Court to deny injunctive relief. The Court is not persuaded by this chicken-and-egg argument. The DEP is requiring that PennEast have 100% of the surveys "completed before the agency will undertake to complete its review and render decisions on the Permit and Certificate

Application." (*Id.* ¶ 22.) Therefore, the Court finds PennEast will be irreparably harmed if it is not granted immediate access to the properties to begin surveys, complete its DEP Application, and satisfy FERC's Environmental Conditions.[52] *See Constitution Pipeline Co.*, 2015 WL 1638477, at *2 (holding that "the FERC Order cannot reasonably be read to prohibit [the gas company] from exercising eminent domain authority until it has complied with all conditions set forth in the Appendix" and rejecting "the argument that [the gas company] must wait until it has obtained a CWA 401 Certificate before it can initiate eminent domain proceedings").[53]

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[52] To the extent the State Defendants argue this preliminary relief will cause irreparable harm and is against the stated policies of the State, the Court has already found that the condemnation procedures under the NGA and Rule 71.1 preempt any proscriptions regarding eminent domain conveyance set forth in the State law.

[53] On December 3, 2018, the District Court for the Eastern District of Pennsylvania issued opinions pertaining to PennEast's motions for summary judgment and injunctive relief. *Penneast Pipeline Co.*, 2018 WL 6304191 (granting motion for preliminary injunction); *Penneast Pipeline Co.*, 2018 WL 6304192 (granting partial summary judgment). In granting summary judgment, the court denied any argument that the FERC Order was not final because, *inter alia*,

> If the FERC certificate was to be interpreted as requested by [defendant], no entry onto private property could take place before all pre-conditions were met, and yet, many of the pre-conditions cannot be met without access to the property. This contorted reasoning would make the FERC certificate nothing more than a meaningless piece of paper. Said another way, such action would effectively preclude PennEast from ever being able to submit a completed application

Accordingly, this factor weighs in favor of granting the preliminary injunction.

C. Balancing Against Harm to Defendants

This Court has heard, reviewed, and carefully considered a wide range of arguments from Defendants regarding the harm PennEast's possession will cause, many of which have already been addressed.[54] Other arguments, however, relate to

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> to the PADEP. Since the approval of the PADEP is a condition of the FERC certification that must be met prior to receiving authorization to begin construction of the pipeline, without access to the [defendant's] property, PennEast will never be able to fulfill the necessary preconditions and receive those approvals. Such a result would make a mockery of the process.

Penneast Pipeline Co., 2018 WL 6304192, at *4. In its opinion granting PennEast's motion for a preliminary injunction, with respect to irreparable harm, the court noted that "[m]any of [defendant's] arguments are identical to those raised in opposition to partial summary judgment and have already been addressed in a separate memorandum issued today." The aforementioned portion of the summary judgment decision is particularly applicable to the irreparable harm analysis for injunctive relief. To that end, this Court agrees with the conclusions of the Eastern District of Pennsylvania.

[54] For example, Defendants argue PennEast is in violation of the Fifth Amendment because it cannot show the taking is for a public use and because the FERC Order is non-final. The Court has already dismissed both arguments. *See supra* Section IV.A and note 41. And while the Court is aware of Defendants' concerns related to Constitution Pipeline's inability to obtain a permit under section 401 of the CWA after it took possession, *see Constitution Pipeline Co. v. New York State Dep't of Envt'l Conservation*, 868 F.3d 87 (2d Cir. 2017), the Court again finds it is not persuaded by this chicken-and-egg argument. *See Constitution Pipeline Co.*, 2015 WL 1638477, at *2 (rejecting defendants' argument regarding the CWA permit). Here,

the value of the property and just compensation for same. Because this is not a quick-take under the DTA, PennEast is not required to deposit an estimated compensation,[55] which would cause title to pass automatically. This action is proceeding under Rule 71.1 and the NGA, and title will not pass until this Court has entered a final judgment and determination of just compensation. That determination is not before this Court at this time. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 735 ("Here, unlike in a 'quick take' action, Transcontinental does not yet have title but will receive it once final compensation is determined

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PennEast cannot attempt to obtain its permits without access, nor can it provide more adequate descriptions of the work to be completed on the individual parcels, until it is granted access. *See id.* and *supra* note 53. Having satisfied its substantive rights under § 717f(h), PennEast is entitled to a condemnation order and possession; granting preliminary relief only permits access sooner. Therefore, Defendants' request to grant some form of interim possession pending satisfaction of the permits is inherently granted to the extent that title and permanent possession will not transfer until this Court has entered a final judgment and determination of just compensation. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 734.

[55] While PennEast will not be required to deposit an estimated compensation, they will be required to post a bond in order to obtain a preliminary injunction. The Third Circuit recently rejected the argument that depositing a bond and entering a preliminary injunction equates to a quick-take, because PennEast "does not yet have title but will receive it once final compensation is determined and paid." *Transcon. Gas Pipe Line Co.*, 907 F.3d at 735-36 ("[W]e conclude that the equitable means by which Transcontinental's possession vested through the preliminary injunction differed in significant ways from 'quick take' under the DTA. We decline the invitation to conflate the two processes. These are not trivial differences of procedure or paperwork.").

and paid."); *Columbia Gas Transmission, LLC*, 768 F.3d at 304 ("[A] certificate of public convenience and necessity gives its holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement.").

With respect to Defendants' argument that they will be harmed by the presence of the United States Marshal Service ("USMS"), the Court reminds Defendants, as it did at the public hearings, that the Court will not be granting PennEast or the USMS permission to stand guard on individuals' property. The order allows for PennEast to call upon the USMS in the event this Court's order is violated and PennEast is actively prohibited from entering the property.[56] The Court finds Defendants will not be harmed by PennEast's mere ability to call upon the USMS to enforce the order.

Ultimately, Defendants will not be harmed by the Court granting immediate possession.[57] While the

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[56] At the hearing, counsel for PennEast stated:

> [W]hat we're asking for is if somebody is put in danger, if somebody violates the Court order, that PennEast can make an application to the federal marshals to have the marshals investigate that. They're not going to stand on the property with automatic weapons. They're going to investigate whether someone is violating the court order and then execute, if they need to, as they would to enforce any other order of this Court.

(Apr. 19, 2018 Hearing Tr., 16:3-11.)

[57] Even if the Court were to find the harm to Defendants weighed against possession, the balance of the remaining

Court is sympathetic to each property owners' individual interests, the taking of property can be monetarily compensated. *Transcon. Gas Pipe Line Co.*, 709 F. App'x at 112. ("[T]he impact of the taking … is an issue for the determination of just compensation."); s*ee Columbia Gas Transmission, LLC*, 2015 WL 389402, at *4 (citing *Columbia Gas Transmission, LLC*, 768 F.3d at 316; *Steckman Ridge GP, LLC*, 2008 WL 4346405, at *16). Therefore, this factor weighs in favor of granting the preliminary injunction.

D. Public Interest

By granting the certificate, FERC made a determination that the pipeline is necessary and in the public interest.[58] This conclusion was reached after an extensive administrative process that weighed the harm to the public against the need for the pipeline.[59] The FERC Order issued the Certificate contingent upon PennEast complying with certain conditions in order to address these concerns, and FERC reviewed and rejected, denied, or dismissed requests for a rehearing on the Order, affirming its findings as set forth in the final EIS and the FERC Order. *See generally*, FERC Order on Rehearing. The Court is persuaded by FERC's finding that "the public convenience and necessity requires approval of PennEast's proposal, subject to the conditions discussed [in Appendix A]." FERC Order ¶ 40. As

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equitable factors still weighs in favor of awarding PennEast a preliminary injunction for immediate possession of the Right of Way.

[58] *See supra* note 41 and text accompanying note 41.

[59] *See supra* Section I.B.

already discussed, any challenges to FERC's findings are not properly before this Court. *Columbia Gas Transmission, LLC*, 2015 WL 389402, at *3 & n.7- 8.

Therefore, this factor weighs in favor or granting the preliminary injunction.

VII. BOND

Pursuant to Federal Rule of Civil Procedure 65(c), "The court may issue a preliminary injunction … only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." In the context of eminent domain proceedings under the NGA, this amount serves as a safeguard to protect the landowner. *Sage*, 361 F.3d at 826. For example,

> if the gas company's deposit (or bond) is less than the final compensation awarded, and the company fails to pay the difference within a reasonable time, "it will become a trespasser, and liable to be proceeded against as such." *Cherokee Nation*[*v. S. Kan. Ry. Co.*], 135 U.S. [641,] 660, 10 S. Ct. 965 [(1890)]. Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any damages resulting to the [land] and to fixtures and improvements, or for the cost of restoration." 4 J. Sackman, Nichols on Eminent Domain § 12E.01 [07] (rev.3d ed).

Id. at 825-26.

PennEast asks the Court to set the bond in the amount of the appraised value for the Rights of Way as determined by the independent appraiser retained by PennEast. Defendants ask for a larger bond amount based on the market value of the entire property and contemplating the loss of use of the property and well as construction and rebuilding costs.

The amount of the bond must be reasonably related to the property interest at issue. Often, this amount is two or three times the appraisal value provided by plaintiff's appraiser. *See, e.g., Transcon. Gas Pipe Line Co.*, 907 F.3d at 735 (posting a bond at three times the appraised value of the rights of way); *Transcon. Gas Pipe Line Co.* v. *Permanent Easement for 0.16 Acres*, No. 17-0545, 2017 WL 3412375 at *10 (M.D. Pa. August 9, 2017) (requiring plaintiff to post bond based on three times the appraisal value of the easement); *In re Transcon. Gas Pipeline Co.*, No. 16-02991, 2016 WL 8861714 at *11 (N.D. Ga. Nov. 10, 2016) (requiring a bond of twice the appraisal value of the easement); *Sabal Trail Transmission, LLC v. Real Estate*, No. 16-cv-97, 2016 WL 3248367 at *6 (M.D. Ga. June 10, 2016) (setting the amount of security bond at twice market value of the easement).

Accordingly, PennEast will be required to post a bond in an amount totaling three times the appraised value of the Rights of Way.

VIII. CONCLUSION

To be clear, this Court is not entering a final judgment, granting a permanent injunction, or permitting construction to start prior to PennEast satisfying the environmental conditions in the FERC

Order. Rather, this Court finds: (1) PennEast is entitled to the condemnation orders pursuant to § 717f(h); and (2) they are entitled to them on an immediate and expedited basis having appropriately sought such relief under Rule 65. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 736, 738-39 (finding preliminary injunctions under Rule 65 are permissible under the NGA and do not constitute a quick-take so long as condemnation orders have been obtained); *Columbia Gas Transmission, LLC*, 86 F. Supp. 3d at 292-93 (finding "[p]laintiff had demonstrated an established right to condemn the landowner defendants' properties under the [NGA], 15 U.S.C. § 717f(h)," and finding that "preliminary relief in the form of immediate possession was appropriate") (citing *Columbia Gas Transmission*, 2015 WL 389402, at *3-5).

Final judgment under Rule 71.1 and the NGA will be entered following a decision on just compensation; title will transfer upon payment of the adjudicated just compensation amount. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 734-35. PennEast remains bound by the FERC Order and the conditions therein.

Accordingly, for the reasons set forth above and for good cause shown, the State Defendants' request for dismissal is **DENIED**; PennEast's application for orders of condemnation and for preliminary injunctive relief allowing immediate possession of the Rights of Way in advance of any award of just compensation is **GRANTED**.

Further, the Court, on its own motion, hereby appoints as Special Masters/Condemnation Commissioners the Honorable James R. Zazzali, C.J.

(ret.); the Honorable Joel A. Pisano, U.S.D.J. (ret.); the Honorable Kevin J. O'Toole; Joshua Markowitz, Esq.; and Shoshana Schiff, Esq. to adjudicate and determine the quantum of just compensation.

Appropriate orders will follow.

Date: December 14, 2018

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

United States District Judge

EXHIBIT A

3:18-cv-1585-BRM-DEA	3:18-cv-1701-BRM-DEA
3:18-cv-1588-BRM-DEA	3:18-cv-1706-BRM-DEA
3:18-cv-1590-BRM-DEA	3:18-cv-1709-BRM-DEA
3:18-cv-1597-BRM-DEA	3:18-cv-1715-BRM-DEA
3:18-cv-1603-BRM-DEA	3:18-cv-1721-BRM-DEA
3:18-cv-1609-BRM-DEA	3:18-cv-1722-BRM-DEA
3:18-cv-1613-BRM-DEA	3:18-cv-1726-BRM-DEA
3:18-cv-1621-BRM-DEA	3:18-cv-1729-BRM-DEA
3:18-cv-1624-BRM-DEA	3:18-cv-1731-BRM-DEA
3:18-cv-1638 BRM-DEA	3:18-cv-1743-BRM-DEA
3:18-cv-1641-BRM-DEA	3:18-cv-1745-BRM-DEA
3:18-cv-1643-BRM-DEA	3:18-cv-1748-BRM-DEA
3:18-cv-1646-BRM-DEA	3:18-cv-1750-BRM-DEA
3:18-cv-1648-BRM-DEA	3:18-cv-1754-BRM-DEA
3:18-cv-1654-BRM-DEA	3:18-cv-1756-BRM-DEA
3:18-cv-1656-BRM-DEA	3:18-cv-1757-BRM-DEA
3:18-cv-1658-BRM-DEA	3:18-cv-1759-BRM-DEA
3:18-cv-1660-BRM-DEA	3:18-cv-1763-BRM-DEA
3:18-cv-1662-BRM-DEA	3:18-cv-1765-BRM-DEA
3:18-cv-1665-BRM-DEA	3:18-cv-1774-BRM-DEA
3:18-cv-1666-BRM-DEA	3:18-cv-1776-BRM-DEA
3:18-cv-1668-BRM-DEA	3:18-cv-1778-BRM-DEA
3:18-cv-1669-BRM-DEA	3:18-cv-1779-BRM-DEA
3:18-cv-1670-BRM-DEA	3:18-cv-1798-BRM-DEA
3:18-cv-1672-BRM-DEA	3:18-cv-1801-BRM-DEA
3:18-cv-1673-BRM-DEA	3:18-cv-1802-BRM-DEA
3:18-cv-1682-BRM-DEA	3:18-cv-1806-BRM-DEA
3:18-cv-1684-BRM-DEA	3:18-cv-1809-BRM-DEA
3:18-cv-1689-BRM-DEA	3:18-cv-1811-BRM-DEA
3:18-cv-1694-BRM-DEA	3:18-cv-1812-BRM-DEA
3:18-cv-1695-BRM-DEA	3:18-cv-1814-BRM-DEA
3:18-cv-1697-BRM-DEA	3:18-cv-1816-BRM-DEA
3:18-cv-1699-BRM-DEA	3:18-cv-1819-BRM-DEA

3:18-cv-1822-BRM-DEA
3:18-cv-1832-BRM-DEA
3:18-cv-1838-BRM-DEA
3:18-cv-1845-BRM-DEA
3:18-cv-1846-BRM-DEA
3:18-cv-1851-BRM-DEA
3:18-cv-1853-BRM-DEA
3:18-cv-1855-BRM-DEA
3:18-cv-1859-BRM-DEA
3:18-cv-1863-BRM-DEA
3:18-cv-1866-BRM-DEA
3:18-cv-1868-BRM-DEA
3:18-cv-1869-BRM-DEA
3:18-cv-1874-BRM-DEA
3:18-cv-1896-BRM-DEA
3:18-cv-1897-BRM-DEA
3:18-cv-1904-BRM-DEA
3:18-cv-1905-BRM-DEA
3:18-cv-1909-BRM-DEA
3:18-cv-1915-BRM-DEA
3:18-cv-1918-BRM-DEA
3:18-cv-1934-BRM-DEA
3:18-cv-1937-BRM-DEA
3:18-cv-1938-BRM-DEA
3:18-cv-1942-BRM-DEA
3:18-cv-1951-BRM-DEA
3:18-cv-1973-BRM-DEA
3:18-cv-1974-BRM-DEA
3:18-cv-1976-BRM-DEA
3:18-cv-1983-BRM-DEA
3:18-cv-1986-BRM-DEA
3:18-cv-1989-BRM-DEA
3:18-cv-1990-BRM-DEA
3:18-cv-1991-BRM-DEA
3:18-cv-1995-BRM-DEA
3:18-cv-1996-BRM-DEA
3:18-cv-1997-BRM-DEA
3:18-cv-1998-BRM-DEA
3:18-cv-1999-BRM-DEA
3:18-cv-2000-BRM-DEA
3:18-cv-2001-BRM-DEA
3:18-cv-2003-BRM-DEA
3:18-cv-2004-BRM-DEA
3:18-cv-2014-BRM-DEA
3:18-cv-2015-BRM-DEA
3:18-cv-2016-BRM-DEA
3:18-cv-2020-BRM-DEA
3:18-cv-2025-BRM-DEA
3:18-cv-2028-BRM-DEA
3:18-cv-2031-BRM-DEA
3:18-cv-2033-BRM-DEA
3:18-cv-2139-BRM-DEA
3:18-cv-2508-BRM-DEA

Appendix D

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over

the sale, sale for resale, or transportation of vehicular natural gas.

15 U.S.C. § 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

(10) "Vehicular natural gas" means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) "LNG terminal" includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

15 U.S.C. § 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order

of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and

applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b-1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find[1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates,

[1] So in original. Probably should be "finds".

charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term "military installation"—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring

that the Commission coordinate and consult[2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

15 U.S.C. § 717b-1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the

[2] So in original. Probably should be "coordinates and consults".

Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

(1) the kind and use of the facility;

(2) the existing and projected population and demographic characteristics of the location;

(3) the existing and proposed land use near the location;

(4) the natural and physical aspects of the location;

(5) the emergency response capabilities near the facility location; and

(6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and

regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the

Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions

pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

15 U.S.C. § 717c-1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any

increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

15 U.S.C. § 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed

regarding the cost of all additions, betterments, extensions, and new construction.

15 U.S.C. § 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the

Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate

is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine

the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or 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, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however,* That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of

accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the

Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

15 U.S.C. § 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit

the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

15 U.S.C. § 717i. Periodic and special reports

(a) Form and contents of reports

Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves,

cost of facilities, cost of maintenance and operation of facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) Unlawful conduct

It shall be unlawful for any natural-gas company willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

15 U.S.C. § 717j. State compacts for conservation, transportation, etc., of natural gas

(a) Assembly of pertinent information; report to Congress

In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and

economic production, transportation, and distribution of natural gas.

(b) Assembly of information relative to operation of compact; report to Congress

It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

(c) Availability of services, etc., of other agencies

In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission.

15 U.S.C. § 717k. Officials dealing in securities

It shall be unlawful for any officer or director of any natural-gas company to receive for his own benefit, directly or indirectly, any money or thing of value in respect to the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued, by such natural-gas company, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends, other than

liquidating dividends, of such natural-gas company from any funds properly included in capital account.

15 U.S.C. § 717*l*. Complaints

Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this chapter may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

15 U.S.C. § 717m. Investigations by Commission

(a) Power of Commission

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provisions of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 825k of Title 16, and make

available to State commissions and municipalities, information concerning any such matter.

(b) Determination of adequacy of gas reserves

The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

(c) Administration of oaths and affirmations; subpena of witnesses, etc.

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(d) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) Testimony of witnesses

The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any

time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(f) Deposition of witnesses in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witness fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the

same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

15 U.S.C. § 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term "Federal authorization"—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

15 U.S.C. § 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

15 U.S.C. § 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by

the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act.

The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

15 U.S.C. § 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

15 U.S.C. § 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the

modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

15 U.S.C. § 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of

any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

15 U.S.C. § 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $50,000 for each and every day during which such offense occurs.

15 U.S.C. § 717t-1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

15 U.S.C. § 717t-2. Natural gas market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b).

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

(b) Information exempted from disclosure

(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each

agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Compliance with requirements

(1) The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

(2) The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Retroactive effect

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 717t-1(b) of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the transportation or sale of natural gas subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 717c-1 of this title.

15 U.S.C. § 717u. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

15 U.S.C. § 717v. Separability

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

15 U.S.C. § 717w. Short title

This chapter may be cited as the "Natural Gas Act."

15 U.S.C. § 717x. Conserved natural gas

(a) Determination of entitlement

(1) For purposes of determining the natural gas entitlement of any local distribution company under any curtailment plan, if the Commission revises any base period established under such plan, the volumes of natural gas which such local distribution company demonstrates—

(A) were sold by the local distribution company, for a priority use immediately before the implementation of conservation measures, and

(B) were conserved by reason of the implementation of such conservation measures,

shall be treated by the Commission following such revision as continuing to be used for the priority use referred to in subparagraph (A).

(2) The Commission shall, by rule, prescribe methods for measurement of volumes of natural gas to which subparagraphs (A) and (B) of paragraph (1) apply.

(b) Conditions, limitations, etc.

Subsection (a) shall not limit or otherwise affect any provision of any curtailment plan, or any other provision of law or regulation, under which natural gas may be diverted or allocated to respond to emergency situations or to protect public health, safety, and welfare.

(c) Definitions

For purposes of this section—

(1) The term "conservation measures" means such energy conservation measures, as determined by the Commission, as were implemented after the base period established under the curtailment plan in effect on November 9, 1978.

(2) The term "local distribution company" means any person engaged in the transportation, or local distribution, of natural gas and the sale of natural gas for ultimate consumption.

(3) The term "curtailment plan" means a plan (including any modification of such plan required by the Natural Gas Policy Act of 1978) in effect under the Natural Gas Act which provides for recognizing and implementing priorities of service during periods of curtailed deliveries.

15 U.S.C. § 717y. Voluntary conversion of natural gas users to heavy fuel oil

(a) Transfer of contractual interests

(1) In order to facilitate voluntary conversion of facilities from the use of natural gas to the use of heavy petroleum fuel oil, the Commission shall, by rule, provide a procedure for the approval by the Commission of any transfer to any person described in paragraph 2(B)(i), (ii), or (iii) of contractual interests involving the receipt of natural gas described in paragraph 2(A).

(2)(A) The rule required under paragraph (1) shall apply to—

(i) natural gas—

(I) received by the user pursuant to a contract entered into before September 1, 1977, not including any renewal or extension thereof entered into on or after such date other than any such extension or renewal pursuant to the exercise by such user of an option to extend or renew such contract;

(II) other than natural gas the sale for resale or the transportation of which was subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as of September 1, 1977;

(III) which was used as a fuel in any facility in existence on September 1, 1977.

(ii) natural gas subject to a prohibition order issued under section 717z of this title.

(B) The rule required under paragraph (1) shall permit the transfer of contractual interests—

(i) to any interstate pipeline;

(ii) to any local distribution company served by an interstate pipeline; and

(iii) to any person served by an interstate pipeline for a high priority use by such person.

(3) The rule required under paragraph (1) shall provide that any transfer of contractual interests pursuant to such rule shall be under such terms and conditions as the Commission may prescribe. Such rule shall include a requirement for refund of any consideration, received by the person transferring contractual interests pursuant to such rule, to the extent such consideration exceeds the amount by which the costs actually incurred, during the remainder of the period of the contract with respect to which such contractual interests are transferred, in direct association with the use of heavy petroleum fuel oil as a fuel in the applicable facility exceeds the price under such contract for natural gas, subject to such contract, delivered during such period.

(4) In prescribing the rule required under paragraph (1), and in determining whether to approve any transfer of contractual interests, the Commission shall consider whether such transfer of contractual interests is likely to increase demand for imported refined petroleum products.

(b) Commission approval

(1) No transfer of contractual interests authorized by the rule required under subsection (a)(1) may take effect unless the Commission issues a certificate of public convenience and necessity for such transfer if such natural gas is to be resold by the person to whom such contractual interests are to be transferred. Such certificate shall be issued by the Commission in accordance with the requirements of this subsection and those of section 7 of the Natural

Gas Act, and the provisions of such Act applicable to the determination of satisfaction of the public convenience and necessity requirements of such section.

(2) The rule required under subsection (a)(1) shall set forth guidelines for the application on a regional or national basis (as the Commission determines appropriate) of the criteria specified in subsection (e)(2) and (3) to determine the maximum consideration permitted as just compensation under this section.

(c) Restrictions on transfers unenforceable

Any provision of any contract, which provision prohibits any transfer of any contractual interests thereunder, or any commingling or transportation of natural gas subject to such contract with natural gas the sale for resale or transportation of which is subject to the jurisdiction of the Commission under the Natural Gas Act, or terminates such contract on the basis of any such transfer, commingling, or transportation, shall be unenforceable in any court of the United States and in any court of any State if applied with respect to any transfer approved under the rule required under subsection (a)(1).

(d) Contractual obligations unaffected

The person acquiring contractual interests transferred pursuant to the rule required under subsection (a)(1) shall assume the contractual obligations which the person transferring such contractual interests has under such contract. This section shall not relieve the person transferring such contractual interests from any contractual obligation of such person under such contract if such obligation

is not performed by the person acquiring such contractual interests.

(e) Definitions

For purposes of this section—

(1) The term "natural gas" has the same meaning as provided by section 2(5) of the Natural Gas Act.

(2) The term "just compensation", when used with respect to any contractual interests pursuant to the rule required under subsection (a)(1), means the maximum amount of, or method of determining, consideration which does not exceed the amount by which—

(A) the reasonable costs (not including capital costs) incurred, during the remainder of the period of the contract with respect to which contractual interests are transferred pursuant to the rule required under subsection (a)(1), in direct association with the use of heavy petroleum fuel oil as a fuel in the applicable facility, exceeds

(B) the price under such contract for natural gas, subject to such contract, delivered during such period.

For purposes of subparagraph (A), the reasonable costs directly associated with the use of heavy petroleum fuel oil as a fuel shall include an allowance for the amortization, over the remaining useful life, of the undepreciated value of depreciable assets located on the premises containing such facility, which assets were directly associated with the use of natural gas and are not usable

in connection with the use of such heavy petroleum fuel oil.

(3) The term "just compensation", when used with respect to any intrastate pipeline which would have transported or distributed natural gas with respect to which contractual interests are transferred pursuant to the rule required under subsection (a)(1), means an amount equal to any loss of revenue, during the remaining period of the contract with respect to which contractual interests are transferred pursuant to the rule required under subsection (a)(1), to the extent such loss—

(A) is directly incurred by reason of the discontinuation of the transportation or distribution of natural gas resulting from the transfer of contractual interests pursuant to the rule required under subsection (a)(1); and

(B) is not offset by—

(i) a reduction in expenses associated with such discontinuation; and

(ii) revenues derived from other transportation or distribution which would not have occurred if such contractual interests had not been transferred.

(4) The term "contractual interests" means the right to receive natural gas under contract as affected by an applicable curtailment plan filed with the Commission or the appropriate State regulatory authority.

(5) The term "interstate pipeline" means any person engaged in natural gas transportation subject to the jurisdiction of the Commission under the Natural Gas Act.

(6) The term "high-priority use" means any use of natural gas (other than its use for the generation of steam for industrial purposes or electricity) identified by the Commission as a high priority use for which the Commission determines a substitute fuel is not reasonably available.

(7) The term "heavy petroleum fuel oil" means number 4, 5, or 6 fuel oil which is domestically refined.

(8) The term "local distribution company" means any person, other than any intrastate pipeline or any interstate pipeline, engaged in the transportation, or local distribution, of natural gas and the sale of natural gas for ultimate consumption.

(9) The term "intrastate pipeline" means any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the Natural Gas Act.

(10) The term "facility" means any electric powerplant, or major fuel burning installation, as such terms are defined in the Powerplant and Industrial Fuel Use Act of 1978.

(11) The term "curtailment plan" means a plan (including any modification of such plan required by the Natural Gas Policy Act of 1978), in effect under the Natural Gas Act or State law, which

provides for recognizing and implementing priorities of service during periods of curtailed deliveries by any local distribution company, intrastate pipeline, or interstate pipeline.

(12) The term "interstate commerce" has the same meaning as such term has under the Natural Gas Act.

(f) Coordination with the Natural Gas Act

(1) Consideration in any transfer of contractual interests pursuant to the rule required under subsection (a)(1) of this section shall be deemed just and reasonable for purposes of sections 4 and 5 of the Natural Gas Act if such consideration does not exceed just compensation.

(2) No person shall be subject to the jurisdiction of the Commission under the Natural Gas Act as a natural gas-company (within the meaning of such Act) or to regulation as a common carrier under any provision of Federal or State law solely by reason of making any sale, or engaging in any transportation, of natural gas with respect to which contractual interests are transferred pursuant to the rule required under subsection (a)(1).

(3) Nothing in this section shall exempt from the jurisdiction of the Commission under the Natural Gas Act any transportation in interstate commerce of natural gas, any sale in interstate commerce for resale of natural gas, or any person engaged in such transportation or such sale to the extent such transportation, sale, or person is subject to the jurisdiction of the Commission under such Act without regard to the transfer of

contractual interests pursuant to the rule required under subsection (a)(1).

(4) Nothing in this section shall exempt any person from any obligation to obtain a certificate of public convenience and necessity for the sale in interstate commerce for resale or the transportation in interstate commerce of natural gas with respect to which contractual interests are transferred pursuant to the rule required under subsection (a)(1).

(g) Volume limitation

No supplier of natural gas under any contract, with respect to which contractual interests have been transferred pursuant to the rule required under subsection (a)(1), shall be required to supply natural gas during any relevant period in volume amounts which exceed the lesser of—

(1) the volume determined by reference to the maximum delivery obligations specified in such contract;

(2) the volume which such supplier would have been required to supply, under the curtailment plan in effect for such supplier, to the person, who transferred contractual interests pursuant to the rule required under subsection (a)(1), if no such transfer had occurred; and

(3) the volume actually delivered or for which payment would have been made pursuant to such contract during the 12-calendar-month period ending immediately before such transfer of contractual interests.

15 U.S.C. § 717z. Emergency conversion of utilities and other facilities

(a) Presidential declaration

The President may declare a natural gas supply emergency (or extend a previously declared emergency) if he finds that—

(1) a severe natural gas shortage, endangering the supply of natural gas for high-priority uses, exists or is imminent in the United States or in any region thereof; and

(2) the exercise of authorities under this section is reasonably necessary, having exhausted other alternatives (not including section 3363 of this title) to the maximum extent practicable, to assist in meeting natural gas requirements for such high-priority uses.

(b) Limitation

(1) Any declaration of a natural gas supply emergency (or extension thereof) under subsection (a), shall terminate at the earlier of—

(A) the date on which the President finds that any shortage described in subsection (a) does not exist or is not imminent; or

(B) 120 days after the date of such declaration of emergency (or extension thereof).

(2) Nothing in this subsection shall prohibit the President from extending, under subsection (a), any emergency (or extension thereof) previously declared under subsection (a), upon the expiration

of such declaration of emergency (or extension thereof) under paragraph (1)(B).

(c) Prohibitions

During a natural gas emergency declared under this section, the President may, by order, prohibit the burning of natural gas by any electric powerplant or major fuel-burning installation if the President determines that—

(1) such powerplant or installation had on September 1, 1977 (or at any time thereafter) the capability to burn petroleum products without damage to its facilities or equipment and without interference with operational requirements;

(2) significant quantities of natural gas which would otherwise be burned by such powerplant or installation could be made available before the termination of such emergency to any person served by an interstate pipeline for use by such person in a high-priority use; and

(3) petroleum products will be available for use by such powerplant or installation throughout the period the order is in effect.

(d) Limitations

The President may specify in any order issued under this section the periods of time during which such order will be in effect and the quantity (or rate of use) of natural gas that may be burned by an electric powerplant or major fuel-burning installation during such period, including the burning of natural gas by an electric powerplant to meet peak load requirements. No such order may continue in effect

after the termination or expiration of such natural gas supply emergency.

(e) Exemption for secondary uses

The President shall exempt from any order issued under this section the burning of natural gas for the necessary processes of ignition, startup, testing, and flame stabilization by an electric powerplant or major fuel-burning installation.

(f) Exemption for air-quality emergencies

The President shall exempt any electric powerplant or major fuel-burning installation in whole or in part, from any order issued under this section for such period and to such extent as the President determines necessary to alleviate any imminent and substantial endangerment to the health of persons within the meaning of section 7603 of Title 42.

(g) Limitation on injunctive relief

(1) Except as provided in paragraph (2), no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued under this section unless such relief is in connection with a final judgment entered with respect to such order.

(2)(A) On the petition of any person aggrieved by an order issued under this section, the United States District Court for the District of Columbia may, after an opportunity for a hearing before such court and on an appropriate showing, issue a preliminary injunction temporarily enjoining, in whole or in part, the implementation of such order.

(B) For purposes of this paragraph, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States, except that no writ of subpena under the authority of this section shall issue for witnesses outside of the District of Columbia at a greater distance than 100 miles from the place of holding court unless the permission of the District Court for the District of Columbia has been granted after proper application and cause shown.

(h) Definitions

For purposes of this section—

(1) The terms "electric powerplant", "powerplant", "major fuel-burning installation", and "installation" shall have the same meanings as such terms have under section 8302 of Title 42.

(2) The term "petroleum products" means crude oil, or any product derived from crude oil other than propane.

(3) The term "high priority use" means any—

(A) use of natural gas in a residence;

(B) use of natural gas in a commercial establishment in amounts less than 50 Mcf on a peak day; or

(C) any use of natural gas the curtailment of which the President determines would endanger life, health, or maintenance of physical property.

(4) The term "Mcf", when used with respect to natural gas, means 1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch (absolute) and a temperature of 60 degrees Fahrenheit.

(i) Use of general terms

In applying the provisions of this section in the case of natural gas subject to a prohibition order issued under this section, the term "petroleum products" (as defined in subsection (h)(2) of this section) shall be substituted for the term "heavy petroleum fuel oil" (as defined in section 717y(e)(7) of this title) if the person subject to any order under this section demonstrates to the Commission that the acquisition and use of heavy petroleum fuel oil is not technically or economically feasible.