ORAL ARGUMENT SCHEDULED
TUESDAY, MARCH 31, 2020

No. 17-1098 (consolidated with 17-1128, 17-1263, 18-1030)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEGHENY DEFENSE PROJECT, *et al.*,
and
HILLTOP HOLLOW LIMITED PARTNERSHIP, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
ANADARKO ENERGY SERVICES COMPANY, *et al.*,
Intervenors.

Rehearing *En Banc* from the August 2, 2019 Panel Decision of the United States Court of Appeals for the District of Columbia Circuit (Garland, C.J. Tatel, Millett, JJ.)

PETITIONERS' JOINT BRIEF ON REHEARING *EN BANC*

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January 10, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Petitioners: Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman [Case Nos. 171128, 18-1030]; Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. [Case Nos. 17-1098, 17-1263].

Respondent: Federal Energy Regulatory Commission [all cases].

Intervenors: Transcontinental Gas Pipe Line Company, LLC [all cases]; Anadarko Energy Services Company, Chief Oil & Gas LLC, ConocoPhillips Company, Southern Company Services, Inc. (agent of Alabama Power Company, Georgia Power Company Gulf Power Company, Mississippi Power Company, Southern Power Company) [Case No. 17-1098].

Amici Curiae:

None at this time.

II. RULINGS UNDER REVIEW

The following five orders issued by Respondent Federal Energy Regulatory Commission are under review:

A. Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017) (A.80).

B. Order Granting Rehearings for Further Consideration (March 13, 2017) (FERC Accession No. 20170313-3024) (A.305).

C. Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017) (FERC Accession No. 20170915-3021) (A.324).

D. Order Granting Rehearing for Further Consideration, Transcontinental Gas Pipe Line Company, LLC (Oct. 17, 2017) (FERC Accession No. 20171017-3050) (A.326).

E. Order on Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017) (A.327).

III. RELATED CASES

This case was initially presented to this Court by the Petitioners on December 15, 2017 and January 29, 2018. Oral Argument was heard on December 7, 2018 and, on August 2, 2019, this Court denied the Petitions for Review based upon circuit precedent. (A.389). On September 16, 2019, Petitioners, Hilltop

Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman ("Homeowners") filed a Petition for Rehearing *En Banc*, which was granted on December 5, 2019.

Homeowners previously filed an appeal in the Third Circuit Court of Appeals for review of the Orders issued on August 23, 2017 by the United States District Court for the Eastern District of Pennsylvania in Civil Action Nos. 5:17-cv-00715 and 5:17-cv-00723, which granted Transco's request for permanent injunctive relief condemning rights of way and easements pursuant to the same Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017), that is at issue in this case. That case, however, did not address the merits of the Certificate Order and the Homeowners' appeal was denied on October 30, 2018.

RULE 26.1 DISCLOSURE STATEMENT

Hilltop Hollow Limited Partnership is organized under the laws of Pennsylvania for the sole purpose of maintaining the property located at 415 Hilltop Road, Conestoga, PA 17516, which is the primary residence of Gary and Michelle Erb. Hilltop Hollow Limited Partnership has no parent companies, and there are no publicly held companies have a 10 percent or greater ownership interest in Hilltop Hollow Limited Partnership.

Hilltop, LLC is a limited liability company organized and existing under the laws of Pennsylvania and is the general partner of Hilltop Hollow Limited Partnership. Hilltop, LLC has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Hilltop, LLC.

Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. are non-profit organizations who have no parent companies, and there are no companies that have a 10 percent or greater ownership interest in them.

Allegheny Defense Project, a corporation organized and existing under the laws of Pennsylvania, is a nonprofit organization dedicated to the protection and restoration of the Allegheny Bioregion, including the Allegheny National Forest and other public lands in Pennsylvania.

Clean Air Council is a 501(c)(3) non-profit corporation whose mission is to serve as a collaborative dedicated to preserving and protecting clean air, land, and water as a civil and basic human right in the face of the threat posed by the shale gas extraction industry and other threats to human and environmental health.

Heartwood, a corporation organized and existing under the laws of the State of Indiana, is a nonprofit organization that works regionally to protect forests and support community activism in the eastern United States through education, advocacy, and citizen empowerment.

Lancaster Against Pipelines, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is a nonprofit organization dedicated to protecting farmland, forests, homes, and history of Lancaster County, Pennsylvania, from the Atlantic Sunrise Project.

Lebanon Pipeline Awareness, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is a nonprofit organization dedicated to protecting the rights, health, and safety of the residents of Lebanon County, Pennsylvania, from the Atlantic Sunrise Project.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a nonprofit organization dedicated to the protection and enjoyment of the environment.

Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. ***(AMP Creeks)***, is a 501(c)(4) non-profit corporation dedicated to protecting the environment, and ensuring the sustainability of natural resources and the basic human right to clean air and water.

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Allegheny Petitioners	Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.
Certificate Order	Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC, 158 FERC ¶ 61, 125 Feb. 3, 2017)*
Draft EIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
Final EIS or FEIS	Final Environmental Impact Statement
FERC or the Commission	Federal Energy Regulatory Commission
Homeowner Petitioners or Homeowners	Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, and Stephen D. Hoffman
NEPA	National Environmental Policy Act
Notice to Proceed	Authorization to Construct Central Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017) FERC Accession No. 20170915-3021)
Petitioners	Allegheny Petitioners and Homeowner Petitioners
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747

	(Sept. 15, 1999), *clarified*, 90 FERC ¶61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (July 28, 2000)
Project	Atlantic Sunrise Pipeline Project
Rehearing Order	Order on Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017)
Rehearing Request	Allegheny Petitioners' request for rehearing and motion for stay of the Certificate Order (Feb. 10, 2017)
Request for Revised or Supplemental EIS	Allegheny Petitioners' comments regarding the need for a Revised or Supplemental Draft EIS for the Atlantic Sunrise Project (Oct. 10, 2016)
Transco	Transcontinental Pipe Line Company, LLC
Transco Application	Application for Certificate of Public Convenience and Necessity (Atlantic Sunrise, Project) (March 31, 2015)

JURISDICTIONAL STATEMENT

In accordance with 15 U.S.C. § 717r(b), Petitioners seek review of five orders issued by the Federal Energy Regulatory Commission ("FERC" or the "Commission"), all of which pertain to the Commission's February 3, 2017 order under Section of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing Transcontinental Pipe Line Company, LLC ("Transco") to construct and operate the Atlantic Sunrise Pipeline (the "Certificate Order"). *See Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017) (A.80). Petitioners filed timely requests for rehearing and stay of the Certificate Order on February 10, 2017 and March 6, 2017, respectively.

On December 6, 2017, FERC issued an order denying Petitioners' rehearing requests. On December 15, 2017 and January 29, 2018, Petitioners filed petitions for review. No party disputes that FERC issued a final order in the proceedings below and that FERC's Certificate Order is now properly subject to judicial review in this Court pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On August 2, 2019, this Court denied the petitions for review. On September 16, 2019, Homeowners requested *en banc* review. On December 5, 2019, this Court granted Homeowners' petition for *en banc* review.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF ISSUES

(1) Does the Natural Gas Act, and specifically 15 U.S.C. § 717r(a), authorize FERC to issue tolling orders that extend the statutory 30-day period for Commission action on an application for rehearing when, by statute, FERC is authorized only to grant or deny rehearing or to abrogate or modify its order without further hearing and when such tolling orders prevent landowners from seeking judicial review of FERC's Fifth Amendment public-use determinations?

(2) Was FERC's public-use determination arbitrary and capricious when FERC relied solely on the fact that Transco secured long-term commitments from other shippers as evidence of demand for the project, and ignored other evidence that the pipeline was not in fact necessary for the public convenience?

STATEMENT OF THE CASE

The Atlantic Sunrise Pipeline

In March 2015, Transco filed an application with the Federal Energy Regularly Commission for the Atlantic Sunrise Project. (A.1).[1] The purpose of the Project was to reconfigure Transco's mainline to create a bi-directional line to transport natural gas from the Marcellus and Utica formations in northern Pennsylvania to the Southeast and Gulf Coast regions. The Project required

[1] "A" refers to the Appendix on Rehearing *En Banc* filed concurrently with this Brief.

construction of nearly 200 miles of large-diameter pipeline across Pennsylvania to "increase firm incremental transportation service on the Transco system by 1,700,002 dekatherms (Dth) per day." Certificate Order, ¶¶ 1, 5-6 (A.80-82).

FERC's Impermissible Scheme

In October 2015, FERC notified the Homeowners that portions of their property might be taken, pursuant to the Natural Gas Act, for construction of a pipeline. (A.109). From November 16, 2015 forward, Homeowners joined in public comments objecting to the pipeline, the proposed route of which changed several times. It was not until January 9, 2017 that FERC informed the Homeowners that the final proposed route of the pipeline would definitely cross through their properties and run close to their homes. Certificate Order 31-32 at ¶ 75 (A.93). In response, Homeowners filed another comment with FERC, on January 27, 2017, requesting authorization to agree on route variations across their properties in the event FERC approved the certificate application. On February 3, 2017, just one week later, and without any response to the Homeowners' comment, FERC issued a Certificate of Public Convenience and Necessity to Transco to build the Atlantic Sunrise Pipeline across Homeowners' land. Certificate Order (A.80). In evaluating the public need for the Project, FERC relied solely on the fact that Transco entered into contracts with gas shippers for all of the Project's anticipated capacity. *Id*. at ¶¶ 28-29 (A.91-92).

On February 10 and March 6, 2017, Allegheny Petitioners and Homeowners submitted timely requests to FERC for rehearing and a stay of the Certificate Order. (A.175; A.266). In short, Petitioners argued that FERC did not adequately consider the cumulative environmental impacts of the Project and did not adequately consider whether the Project truly served the public convenience and necessity, rather than the economic interests of the Project's proponents.

Section 717r(a) of the Natural Gas Act gave FERC 30 days to grant Petitioners' requests for rehearing, deny them, or amend or abrogate the Certificate Order. But FERC took none of those actions. Instead, on March 13, 2017, FERC issued a "Tolling Order," which purported to "grant" Petitioners' requests for rehearing but only for the limited purpose of giving FERC more than 30 days to consider the requests.[2] (A.305). As a result of the Tolling Order, Petitioners' ability to seek timely judicial review of the Certificate Order, as provided for in Section 717r(b) of the Natural Gas Act, was foreclosed.

In response to the Tolling Order, Petitioners sought review of both the Certificate Order and the Tolling Order before this Court. Homeowners argued, among other things, that FERC's issuance of the Tolling Order impermissibly

[2] FERC's Secretary took this action despite the lack of a quorum of Commissioners necessary for FERC to ultimately grant or deny rehearing. (Doc. 1674354). Petitioners were thus barred from seeking judicial review not just while FERC was *unwilling* to grant or deny Petitioners' rehearing requests, but while it was indefinitely *legally incapable* of doing so.

foreclosed their ability to obtain judicial review of FERC's public-use determination under the Natural Gas Act. In response, both FERC and Transco sought dismissal of Petitioners' request as "incurably premature" because, by virtue of the Tolling Order, the rehearing requests had not been resolved. Concurrence 3 (A.392).

In the meantime, Transco initiated condemnation proceedings in federal district court and immediately sought summary judgment and permanent injunctive relief based on the presumptive validity of the Certificate Order. *See Transcontinental Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Township, Lancaster County, PA., Tax Parcel No. 1201606900000*, 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017). On August 23, 2017, the district court granted Transco's motion for summary judgment and declared Transco's right to immediate possession of the Homeowners' property. (A.382). Although Homeowners argued to the district court that the Tolling Order prevented them from obtaining the judicial review they were entitled to under the Natural Gas Act and that their property could not be taken before they were heard, the district court rejected the Homeowners' objections as "attacks on the FERC order itself," which "can only be challenged in front of FERC, and then in the United States Court of Appeals for the District of Columbia Circuit." Concurrence 5 (A.394).

"On August 31, 2017 — eight days after Transco prevailed in its eminent domain action and more than six months after the Homeowners asked the Commission for a stay of the Certificate Order — the Commission denied the Homeowners' request for a stay." Concurrence 4 (A.393). "The Commission reasoned that the Homeowners' objections to Transco bulldozing and blasting its pipeline into their homesteads were nothing more than 'generalized claims of environmental harm [that] do not constitute sufficient evidence of irreparable harm that would justify a stay.'" *Id.*

"On September 15, 2017, while the petitions for rehearing were still pending, the Commission issued an order authorizing Transco to begin construction of the Project." Opinion 5 (A.382). "Transco broke ground that same day." *Id.*

On December 6, 2017, more than nine months after rehearing was sought and three months after construction began, FERC denied Homeowners' request for rehearing. (A.327). Although Homeowners again filed a petition for review with this Court, their property had already been taken and construction had already begun. By the time Homeowners argued their rehearing request before this Court, the Atlantic Sunrise Pipeline was in the ground beside their homes and fully operational.

Importantly, this was neither the first nor the last time that FERC's issuance of a tolling order forestalled the very judicial review that Congress provided for in the Natural Gas Act. Indeed, "between 2009 and 2017, the Commission issued tolling orders in response to 99% of requests for rehearing of pipeline certification decisions." Concurrence 7 (A.396) (citing *In re Appalachian Voices, et al.*, No. 18-1006 at Exhibit G (Jan. 8, 2018) (cataloging tolling orders issued in 74 out of 75 pipeline certifications between 2009 and 2017)). FERC also issued boilerplate tolling orders in response to ***every*** motion for rehearing of a pipeline certification decision since 2017. Concurrence 7 (A.396).

SUMMARY OF ARGUMENT

In order to construct a natural gas pipeline under the Natural Gas Act, the proponent of the pipeline must apply for and obtain a certificate of public convenience and necessity from FERC. Importantly, that certificate automatically extends the sovereign's power of eminent domain to the proponent of the project and allows the proponent to take any private property necessary for the pipeline that the proponent could not otherwise obtain through negotiation.

Once issued, any aggrieved party who wishes to challenge the certificate must file a petition for rehearing with FERC before seeking judicial review. In response to a request for rehearing, Congress identified only ***three actions*** that FERC may take: (1) grant rehearing; (2) deny rehearing; or (3) abrogate or modify

its order without rehearing. Unless FERC acts upon the application for rehearing within 30 days after it is filed, such application may be deemed to have been denied. Once FERC decides the rehearing request, aggrieved parties may then obtain judicial review of the certificate in the court of appeals for any circuit where the natural gas company has its principal place of business or in the United States Court of Appeals for the District of Columbia.

Despite its limited authority, FERC has developed an unfortunate and ultimately unconstitutional procedure over the past 50 years of issuing "tolling orders" that indefinitely extend the amount of time that FERC may take to decide a request for rehearing. The result of such a tolling order is that aggrieved parties cannot seek judicial review in the appropriate circuit court because the administrative review process remains open. While homeowners remain in procedural limbo, FERC routinely grants orders authorizing construction. This allows homesteads to be destroyed while homeowners wait indefinitely for judicial review of FERC's public-use determination. This process results in an improper taking of the homeowner's private property without respect for their due process rights, as guaranteed by the Fifth Amendment to the United States Constitution. FERC's tolling orders are plainly unconstitutional and cannot continue.

Additionally, in reaching its public use determination, it was not reasonable for FERC to rely solely on precedent agreements submitted by Transco and the

statements of other interested parties. In doing so, FERC ignored important evidence that a potentially large portion of the natural gas carried by the pipeline would be exported, and that additional pipeline capacity was not actually necessary for the public convenience. Therefore, FERC's public convenience and necessity determination did not meet the public use requirement of the Fifth Amendment and the Certificate Order is arbitrary and capricious.

STANDING

Homeowners' property was taken by eminent domain pursuant to the Certificate Order. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain). Vacatur of the Certificate Order would allow them to keep their property. Allegheny Petitioners are non-profit organizations with members who reside, work, and recreate in the areas adversely affected by the project whose injuries could be redressed through vacatur. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013).

ARGUMENT

I. STANDARDS OF REVIEW

Appellate review of constitutional due process claims is *de novo*. *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009).

FERC must base its determination of public convenience and necessity on "substantial evidence." 15 U.S.C. § 717r(b). "The 'substantial evidence' standard

requires more than a scintilla, but can be satisfied by something less than a preponderance ….” *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). The standard is functionally the same as the arbitrary and capricious standard. *Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016).

II. FERC’S ISSUANCE OF TOLLING ORDERS IN RESPONSE TO REQUESTS FOR REHEARING IS CONTRARY TO THE NATURAL GAS ACT AND DENIES PETITIONERS THEIR RIGHT TO DUE PROCESS

When Congress enacted the Natural Gas Act in 1938, it expressly recognized that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest.” 15 U.S.C. § 717(a). As such, the Natural Gas Act allows natural gas companies to acquire private property by eminent domain to construct, operate, and maintain natural gas pipelines. 15 U.S.C. § 717f(h).

Congress also recognized, however, that it is necessary to balance the ability of private gas companies to take property with the rights of individual consumers and landowners. *See Tennessee Gas Pipeline Company, LLC v. Permanent Easement for 7.053 Acres, et al.*, 931 F.3d 237, 253 (3d Cir. 2019). As the Third Circuit recently stated in *Tennessee Gas*, “[n]othing in the Natural Gas Act suggests that Congress was particularly concerned with protecting natural gas companies from the additional costs that varying state laws might impose, or even with making natural gas companies’ transactions streamlined or efficient.” *Id.*

"Rather, the Supreme Court has articulated that, in enacting the Natural Gas Act, Congress was instead concerned with protecting the interests of the public, including consumers and property owners." *Id*. (citing *Sunray Mid-Continent Oil Co. v. Fed. Power Comm'n*, 364 U.S. 137, 147 (1960) ("[T]he primary aim of the [Natural Gas Act is] to protect consumers against exploitation at the hands of natural gas companies.") (citations and quotations omitted)).

Accordingly, Congress delegated regulatory authority to FERC, but given the important constitutional interests involved with the permanent taking of property, the extension of sovereign power to private entities, and the regulation of utilities, Congress also provided for prompt judicial review of FERC's determinations.

Contrary to the express provisions of the Natural Gas Act, FERC has developed a practice of issuing "tolling orders" that grant the Commission unlimited time to issue an appealable order, while allowing property to be seized through eminent domain, land to be cleared, wetlands filled, and other environmental and aesthetic interests to be irreparably altered pursuant to a certificate that FERC claims is not "final" for the purposes of judicial review. This Court should put an end to FERC's practice, which "is in substantial tension with statutory text and runs roughshod over basic principles of fair process." Concurrence 5 (A.394).

A. The Plain Language of the Natural Gas Act Requires FERC to Act on Rehearing Requests in One of Several Specifically Enumerated Ways Within 30 Days or the Request Will Be Deemed Denied

"When a court construes a statute, the starting point must be the language of the statute." *Mar. v. United States*, 506 F.2d 1306, 1313 (D.C. Cir. 1974). The language of the Natural Gas Act demands that FERC act promptly on requests for rehearing of its orders, lest those requests be deemed denied and the underlying orders become subject to judicial review.

The Act provides that any party aggrieved by the issuance of any FERC order may apply to FERC for rehearing of that order within thirty days. 15 U.S.C. §717r(a). Indeed, the filing and disposition of a rehearing request is a mandatory prerequisite to judicial review of FERC's decision. *Id.* In response to an application for rehearing, "the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id.* Congress, however, ensured that aggrieved parties would not be indefinitely barred from the Courthouse door while FERC considered which of those actions to take, by providing in the very next sentence that "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." *Id.* In other words, Congress identified three specific ways FERC may respond to requests for rehearing: FERC "shall have power to": (1) grant rehearing; (2) deny rehearing; or (3) abrogate or modify its

order without granting rehearing. *Id.* If it fails to "act[] upon the application" within thirty days, aggrieved parties may seek judicial review. *Id*.

The plainest reading of that language is that FERC must take one of the three enumerated actions—grant rehearing, deny rehearing, or abrogate or modify its order—within thirty days or else the rehearing request will be deemed to be denied. "Casting aside Congress's time limit" and thereby "[t]rapping an aggrieved party in administrative limbo … is not an option" given to FERC. Concurrence 6 (A.395). But that is exactly what FERC does when it issues tolling orders that purport to "grant" rehearing solely "for the limited purpose of further consideration." *Id*. (A.305). By interpreting the word "act" in the phrase "unless the Commission acts upon the application" to mean any action at all, FERC divorces that language from the larger context of Section 717r(a), which in the preceding sentence states what actions FERC is empowered to take "[u]pon such application." *See Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F. 3d 638, 644 (D.C. Cir. 2000) (Where items or powers are specifically enumerated, other items or powers are assumed not to be included or conferred); *PDK Laboratories Inc. v. U.S. D.E.A.*, 362 F.3d 786, 796 (D.C. Cir. 2004) ("The words of the statute should be read in context." (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). FERC's blinkered reading eviscerates Congress's goal of providing prompt judicial review for parties who face permanent takings and harm

to their property and other interests. *See Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1067 (D.C. Cir. 1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). "There is no point to [Congress's thirty-day] time limit if the Commission can ignore it for no reason at all and with no consequence at all." (Concurrence 6) (A.395).

FERC's interpretation not only runs counter to the plain language of the statute but, as explained below, permits the Commission to deprive landowners facing eminent domain actions of the due process guaranteed by the Fifth Amendment. The statutory construction canon of constitutional avoidance thus further counsels in favor of rejecting FERC's counter-textual reading of Section 717r(a). *Almendarez-Torres v. United States*, 523 U.S. 224, 237–38 (1998) ("As Justice Holmes said long ago: 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (citing *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Congress set forth a list of powers that the Commission "shall have" in response to a request for rehearing and neither an extension of time nor an interim order to allow further consideration are among them. Those enumerations, and attendant omissions, indicate that Congress did not intend to authorize the

Commission to "act" in any way other than the specific options that Congress set forth and thereby render meaningless Congress's thirty-day deadline. FERC does not have the power to indefinitely toll the requests, particularly when, as here, due process and personal property rights are at stake.

B. FERC's Interpretation is Not Entitled to Deference

FERC has interpreted Natural Gas Act Section 717r to allow it to "act" on requests for rehearing by issuing "tolling orders" that grant unlimited time to definitively rule on rehearing requests and thus indefinitely preclude judicial review of FERC's orders. When reviewing the permissibility of such tolling orders for the first time in *California Company*, this court explained that it would defer to FERC's interpretation, despite it being "far from self-evident" in the text of the statute, because "it is the Commission's contention of long standing, and entitled to respect as such." 411 F.2d at 722. As Judge Millett's concurrence explained, however, *California Company* "long predates modern statutory construction jurisprudence," Concurrence 7 (A.396), including jurisprudence establishing when deference to agency constructions of statutes is proper.

In *Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 478-80 (D.C. Cir. 2001), this Court held that an agency's statutory interpretation should receive no deference when the statute at issue bestows jurisdiction on the courts. There, the Department of Interior asked for deference to

its interpretation of a provision of the Federal Oil and Gas Royalty Simplification and Fairness Act that conferred jurisdiction on courts to hear challenges to "administrative proceedings." That statute provided that, if the Department failed to resolve such proceedings within 33 months, it "shall be deemed to have issued a final decision in favor of the [Department] . . . and the appellant shall have a right to judicial review of such deemed final action." *Compare* 15 U.S.C. § 717r(a), (b) (deeming a rehearing request to have been denied and subject to judicial review if FERC fails to act on it within 30 days). The Department had issued regulations interpreting what actions would "commence" an "administrative proceeding" such that the 33-month clock would begin to run, and the district court had deferred to that interpretation, applying the two-step framework established in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *Id.* at 476-77. This Court reversed, finding that deference was inappropriate because "jurisdiction-conferring statutes do not delegate authority to administrative agencies" and "administrative agencies have no particular expertise in determining the scope of an Article III court's jurisdiction." *Id.* at 479. The agency's memorialization of its interpretation in a regulation was irrelevant. *Id.* ("The fact that an agency has made a determination such as the establishment of regulations governing administrative appeals, does not empower it to 'bootstrap itself in an area in which it has no jurisdiction.'" (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

Thus, pursuant to circuit precedent that did not exist at the time of *California Company*, the Court here "must determine the scope of a congressional conferral of jurisdiction without consulting the views of [the] agency." *Id*. at 480; *see also id.* at 478 ("As the Supreme Court has explained, when Congress has 'established an enforcement scheme' that gives a party 'direct recourse to federal court,' it is 'inappropriate to consult executive interpretations of [the [jurisdiction-conferring statute] to resolve ambiguities surrounding the scope of [the party's] judicially enforceable remedy.' *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990)").

C. FERC'S Impermissible Tolling Orders Violate Due Process

The process FERC developed over the last half century is not only contrary to its limited statutory authority, the practice completely deprives homeowners of ***any path*** to meaningful judicial review of FERC's public convenience and necessity determinations. Such a practice cannot continue.

The Fifth Amendment imposes two limitations on the sovereign's right to exercise eminent domain: the property taken must be for public use, and the owner must receive just compensation. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation")). Although public-use jurisprudence affords legislative bodies broad latitude in determining what public needs justify use of the takings power, the inquiry is nevertheless an

important constitutional limitation, which must be undertaken with due diligence. *Kelo v. City of New London*, 545 U.S. 469, 482 (2005).

Accordingly, the United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931); *Dent v. West Virginia*, 129 U.S. 114, 124-25 (1889)). "The right to be heard before being condemned to suffer grievous loss of any kind, is a principle basic to our society." *Id*. (internal quotes omitted). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id*. (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Congress recognized these important limitations in the Natural Gas Act and delegated to FERC the duty to conduct an inquiry as to whether a proposed natural gas pipeline is necessary for the public convenience. Congress also recognized that aggrieved parties are entitled to question whether FERC's inquiry was sufficient, and its determination correct, and provided a clear path for judicial review of FERC's decisions. FERC's use of improper tolling orders ignores these important limitations that Congress expressly recognized and set forth in the Natural Gas Act. But even if Congress had not included a clear path to judicial

review in the Natural Gas Act, it is nevertheless required by the Constitution. *See Mathews*, 424 U.S. at 332. In short, FERC's use of tolling orders allows eminent domain proceedings to go forward based on the mere presumed validity of a certificate order, but, at the same time, prevents landowners from seeking judicial review of FERC's Fifth Amendment public-use determinations, which aggrieved parties are entitled to under the Natural Gas Act and the Constitution. *See* 15 U.S.C. §717r(a); U.S. CONST. amend. V.

Nevertheless, FERC and the Intervenor natural gas companies argue here, and in the many cases that came before this one, that tolling orders do not violate aggrieved parties' constitutional rights to due process because: (1) aggrieved parties have the ability to participate in the public comment process that precedes FERC's issuance of certificate orders; (2) the Fifth Amendment does not require FERC to conduct a separate "public use" inquiry in order to satisfy due process concerns; and (3) aggrieved landowners, like the Homeowners here, will eventually have a hearing to fix compensation for the taking of their property. *See* FERC's Opp. to Rehearing *En Banc* at 5; Intervenors' Opp. to Rehearing *En Banc* at 4, 12-13. Both FERC and the Intervenor gas companies fundamentally misunderstand and mischaracterize the nature of the Homeowners' due process challenge.

The fundamental basis for Homeowners' due process challenge is that FERC's public convenience and necessity determination for the Atlantic Sunrise Pipeline was flawed, and regardless of whether they would have prevailed in challenging that determination or not, they were entitled to challenge it through timely judicial review of FERC's decision ***before*** their property was irrevocably taken. Therefore, pursuant to the Fifth Amendment, the Natural Gas Act, and federal common law, the taking of their property by eminent domain, while they were jurisdictionally barred from obtaining review of the underlying public use determination, was wrongful and it violated their right to due process. *See* U.S. CONST. amend. V; 15 U.S.C. § 717r(a)-(b); *Mathews*, 424 U.S. at 332.

Contrary to the assertions of FERC and the Intervenor gas companies in their prior briefing, Homeowners' due-process challenge is not that FERC is required to make a separate public use finding under the Fifth Amendment, and it is not that Homeowners were prevented from participating in the public comment period. Homeowners' due-process challenge is that: (1) FERC's public convenience and necessity determination (singular) must, in and of itself, satisfy the public use requirement of the Fifth Amendment; and (2) if it does not, as Homeowners have argued here, then FERC cannot foreclose timely, meaningful, judicial review of that determination as provided by the Natural Gas Act, the Constitution, and federal common law. Homeowners further argue that the ability

to participate in a public comment period, among hundreds of other parties with varying rights and interests, is not sufficient to satisfy their right to be heard before they are finally deprived of their property interests.

Therefore, as FERC correctly points out, Homeowners are indeed asking this Court "to overturn fifty years of precedent construing the Natural Gas Act to permit the Commission to issue 'tolling orders.'" FERC may not allow permanent takings and irreparable construction and environmental harm to move forward while aggrieved parties are held in administrative limbo. In this administrative limbo, an aggrieved party cannot even seek judicial review of FERC's underlying determinations, much less have it completed before their property is taken. Thus, FERC's tolling order process violates the express provisions of the Natural Gas Act and property owners' rights to due process.

As the panel (including Judge Millett), and Judge Millett writing separately in her Concurrence both recognized, circuit precedent established in *California Company* gave FERC the unfortunate tools to create its tolling order practice and it tied the panel's hands to put a stop to it in this case. But as Judge Millett also wrote, a second look at the constitutionality of this scheme is long overdue. Concurrence 18 (A.407).

III. IT IS TIME TO OVERTURN THIS COURT'S UNFORTUNATE PRECEDENT AS SET FORTH IN *CALIFORNIA COMPANY*, *DELAWARE RIVERKEEPER*, AND *MOREAU*

When, as here, a prior decision on an important question of law is fundamentally flawed or the precedent poses a direct obstacle to the realization of important objectives embodied in other laws (here, due process), an *en banc* court has the authority to set aside its own precedent. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (*en banc*); *Holmes v. FERC*, 823 F.3d 69, 73 (D.C. Cir. 2016).

In considering whether to set aside its own precedent, "'the doctrine of *stare decisis* is of fundamental importance to the rule of law,'" but it "'is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)); *Adarand Constructors v. Pena*, 515 U.S. 200, 231 (1995) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

A. *Delaware Riverkeeper* and *Moreau* Were Bound by Precedent that is Irreconcilable with the Due-Process Objectives of the Fifth Amendment and Contrary to the Natural Gas Act

Although this Court's decisions in *Delaware Riverkeeper* and *Moreau* both upheld FERC's tolling order practice, those decisions were bound by the 50-year-old precedent of *California Company*, which should now be overturned. *See Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (citing *California Co. v. Federal Power Comm'n*, 411 F.2d 720, 721 (D.C. Cir. 1969) (per curiam)).

In *California Company*, this Court examined the Federal Power Commission's practice of issuing tolling orders to, "rebut the statutory presumption" set forth in Section 717r(a) of the Natural Gas Act, "that an application for rehearing is denied unless the Commission acts upon it within thirty days." 411 F.2d at 720-21. As this Court explained, the California Company petitioners and many of over 100 parties to the Commission proceeding filed applications for review with the Commission regarding the Commission's decision in *Area Rate Proceeding* (Southern Louisiana Area) issued on September 25, 1968. *Id*. In response to the numerous applications, the Commission "'granted rehearing' on all applications in order to consider them together rather than seriatim." *Id.* at 720. "But the Commission was careful to note that its action 'shall not be deemed a grant or denial of the applications on their merits in whole or in part.'" *Id*. As a

result, and to avoid possible prejudice, petitioners sought judicial review despite the tolling order. *Id*. at 721.

Recognizing the impending possibility of a conflict among circuits regarding the Commission's tolling-order practice, this Court found it desirable to articulate its understanding of the applicable law. *Id*. After setting forth the positions of both the Commission and the petitioners, which were not unlike the positions of FERC and Petitioners here, this Court explained:

> We are presented with two interpretations of the 30-day provision, resting on fundamentally different assumptions of congressional purpose. None of the parties has cited relevant statutory history, and we have found none. We are thus faced with 'a choice between uncertainties,' and 'must be content to choose the lesser'

Id. (quoting *Burnet v. Guggenheim*, 288 U.S. 280, 288 (1933)).

This Court further explained that while the Commission's proposition was "far from self-evident," it was "the Commission's contention of long standing, and entitled to respect as such." *Id*. at 722. In contrast, this Court explained that the petitioners had failed to advance "a strong reason . . . why Congress would have wished to impose such a rigid [thirty-day] straight jacket on the Commission," and as a result, the Court chose "to follow the Commission's interpretation, for it avoids the administrative and judicial problems created by appellants' position without robbing the statute of all effect." *California Company*, 411 F.2d at 721-22.

This case, and many others like it, differ from *California Company* in several very important ways and, as a result, the decision there should no longer bind the Court's decision here. First, Homeowners have advanced the strongest reasons why Congress would have wished to impose a 30-day time limit on FERC's rehearing decision. The first such reason is to protect against "the risk of an erroneous deprivation." *See Mathews*, 424 U.S. at 335. The second is because "[p]rompt access to federal court review of the lawfulness of the taking, including the public use determination, is part of the protection the Fifth Amendment affords." Concurrence at 14 (A.403). The third is because, "the question what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). The fourth is because "'individual freedom finds tangible expression in property rights,' particularly where the 'privacy of the home and those who take shelter within it' is at stake." Concurrence at 12 (A.401) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1933)). The fifth is because "physical invasion" of a family's home is a "government intrusion of an unusually serious character." *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

These reasons, and these rights, are among those held most dear by American citizens and Congress recognized that through the safeguards it wrote into the Natural Gas Act. These reasons are strong enough, in and of themselves,

to rebut the presumption this Court made in *California Company* that Congress did not intend to impose a rigid 30-day requirement on the Commission. That presumption may have been reasonable in *California Company*, but it is unreasonable now.

As set forth by Judge Millet in her Concurrence, this Court's decision in *California Company* "long predate[d] modern statutory construction jurisprudence," "and it 'involved disputes over money, not property.'" Concurrence 7-8 (A.396-97) (citing C*alifornia Company*, 411 F.2d at 720). As set forth above, this Court in *California Company* itself described the Commission's reading of Section 717r(a) as "far from self-evident," but this Court nonetheless deferred to the Commission because, in *California Company*, the Commission's approach avoided administrative and judicial problems. *See* C*alifornia Company*, 411 F.2d at 720. Fifty years after *California Company*, FERC's approach no longer avoids administrative and judicial problems, it creates them. As further explained by Judge Millett, the Commission's reading of Section 717r(a), and the circuit precedent giving deference to that reading, has created an "administrative quagmire" that "upends" the "balanced framework" of administrative rehearing and judicial review that Congress set forth in the Natural Gas Act. Concurrence 8-9 (A.397-98).

More importantly, circuit precedent that began with *California Company* denies landowners, like the Homeowners, prompt access to federal court review of the lawfulness of the taking, including the public-use determination, which is part of the protection the Fifth Amendment affords. Concurrence 14 (A.403) (citing *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930)).

Finally, it is important to note that *California Company* was a case that involved disputes over rates and not the lawfulness of a taking. In other words, "this court's acceptance of tolling orders started in a case that involved disputes over money, not property." Concurrence 8 (A.403) (citing *California Co.*, 411 F.2d at 720).

This Court's decisions in *Delaware Riverkeeper* and *Moreau* followed that precedent, but "the same is true of all of the other cases cited in *Delaware Riverkeeper*." *Id.* They were all disputes over money, not property. "Because disputes over monetary payments can be fixed later, the consequences of Commission delay were temporary and remediable." *Id.* "The tolling order just assigned that burden to the party that lost before the agency." *Id.* "But allowing the Commission to take its time while private property is being destroyed is another thing altogether." *Id.*

The United States Constitution and federal common law guarantee property owners a meaningful opportunity to be heard in opposition to a faulty public use

determination ***before*** their property can be permanently taken. *Mathews*, 424 U.S. at 332. Moreover, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) and *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972) (internal quotations omitted)). Therefore, it is of no consequence that FERC has the technical authority to issue tolling orders, or that eminent domain proceedings under the Natural Gas Act may go forward while petitions for review are pending. Due process requires that these practices, procedures, and laws not be combined to deprive citizens of their right to be heard before their property is taken, and it requires that FERC and the courts do what is necessary to ensure that there is actual public need for the taking of private property. The basis for the Homeowners' due-process challenge is that FERC's procedures impermissibly deny property owners that right.

In *Mathews*, the Supreme Court considered the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest, as opposed to a post-taking hearing. 424 U.S. at 333. In *Mathews*, the Court noted that *Goldberg v. Kelly* stood for the proposition that a pre-termination hearing was required in the context of welfare benefits, but that by and large, the Court had spoken sparingly about the requirement of some type of pre-termination hearing as a matter of constitutional right. *Id.* (referencing *Goldberg v. Kelly*, 397

U.S. 254 (1970)). Therefore, in *Mathews*, the Supreme Court explained that determining the constitutional sufficiency of administrative procedures relating to the deprivation of property interests requires analysis of three distinct factors: (1) the private interest that would be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the probable value, if any, of additional or substitute procedural safeguards. *Id.* at 334.

Although the Supreme Court in *Mathews* ultimately determined that a hearing was not required before Social Security disability benefits can be terminated, (because wrongfully terminated benefits are retroactively available), applying the *Mathews* test here yields the opposite result. It makes clear that Homeowners are entitled to a hearing on the accuracy of FERC's public use and necessity determination ***before*** Transco can be allowed to take their property. That review is necessary to ensure that sole authority over federal takings claims under the Natural Gas Act does not begin and end with FERC alone. *City of Cincinnati*, 281 U.S. at 446 ("The question what is a public use is a judicial one.") (internal quotations omitted). Because where, as here, the government takes property based solely upon the application and self-serving demonstration of alleged need set forth by an interested private party, the danger of an erroneous deprivation is substantial.

B. This Court's Decision in *Midcoast* Does Not Undermine Petitioners' Due Process Challenge, it Supports it

In its *per curiam* Opinion denying Homeowners' petition for review, this Court held that circuit precedent foreclosed Homeowners' challenge as to the constitutional sufficiency of FERC's procedures under the Natural Gas Act, and specifically, their right to be heard on whether Transco's taking of their property actually satisfies the public-use requirement of the Fifth Amendment. Opinion 11-12 (A.388-89) (quoting Homeowners' Opening Br. at 47). Citing this Court's decision in *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000), the panel stated, "[w]e have held that, as long as FERC's public-convenience-and-necessity determination is not legally deficient, it necessarily satisfies the Fifth Amendment's public-use requirement." Opinion 12 (A.389). Homeowners respectfully submit that the Court's decision in *Midcoast* is no obstacle to Homeowners' argument that FERC's use of tolling orders violates due process. At the heart of Homeowners' due-process challenge is the argument that FERC's determination of the public convenience and necessity was legally deficient, which is why Homeowners sought judicial review. And though the Homeowners may or may not have succeeded in proving that FERC's determination was legally deficient, the fact that FERC's procedures improperly foreclose their ability to obtain that judicial review plainly violated Homeowners' right to due process and violated the express provisions of the Natural Gas Act.

As set forth by the panel, a due-process claim turns on two essential inquiries: (1) "[I]s there a 'liberty or property interest of which a person has been deprived"?; and (2) "[W]ere the 'procedures followed' by the government in encroaching on those interests 'constitutionally sufficient'"? Opinion at 11 (A.388) (quoting *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011)). In response to part two of this inquiry, the panel suggested that in *Midcoast*, this Court held that FERC's issuance of a certificate of public convenience and necessity satisfies the public-use requirement of the Fifth Amendment so long as it is not legally deficient. Homeowners do not disagree. However, the panel further suggested that the holding in *Midcoast* forecloses Homeowners' claims that their due process rights were violated because they were denied judicial review of the lawfulness of the Certificate Order before their property was taken. Opinion 12. On this point, Homeowners respectfully disagree.

What this Court held in *Midcoast* is that the role of a federal court in reviewing the use of the condemnation power is extremely narrow. *Midcoast*, 198 F.3d at 973. But a narrow role is still a role, and as Judge Millet noted in her Concurrence, the question of whether the public-use requirement has been met is necessarily a judicial one. Concurrence at 14 (A.403) (citing *City of Cincinnati*, 281 U.S. at 446). In other words, the issue here is not what standard this Court should apply in reviewing FERC's public-use determination, which the Court

addressed in *Midcoast*, it is whether Homeowners are entitled to that judicial review. Sections 717r(a) and (b) of the Natural Gas Act, and the Supreme Court's decision in *Mathews*, stand for the proposition that Homeowners are entitled to that review, yet FERC's procedures prevent it. That is an issue separate and apart from the level of scrutiny this Court should give FERC's public convenience and necessity determination when it performs its review.

Therefore, Homeowners respectfully submit that *Midcoast* is no obstacle to their argument here that FERC's manipulation of the certificate rehearing procedure insulates its decisions from pre-taking judicial review and thus violates both the Fifth Amendment and the Natural Gas Act.

C. The All Writs Act Does Not Cure the Due Process Violation

Both FERC and the Intervenor gas companies have argued that FERC's issuance of tolling orders does not violate Homeowners' due process rights because Homeowners can seek relief through the All Writs Act. Intervenor's Opening Br. at 18; Transcript of Dec. 7, 2018 Oral Argument at 30:8-25. That argument is unavailing for several reasons.

First, mandamus is an extraordinary remedy and the suggestion that it is available to ordinary homeowner seeking judicial review of the lawfulness of FERC's decision to take their property is untenable. In order to show entitlement to mandamus, Homeowners would need to demonstrate: "(1) a clear and

indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." *Am. Hospital Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

But as this Court held in *Midcoast*, the Court's role in reviewing FERC's use of the condemnation power is "extremely narrow." *Midcoast*, 198 F.3d at 973. Based upon that standard of review, it would be virtually impossible for a landowner to meet the requisite showing of a "clear and indisputable right to the writ" necessary for relief under the All Writs Act. Therefore, to suggest that an individual homeowner's due process rights are not violated, even though they are denied the right to judicial review set forth in the Natural Gas Act, because the All Writs Act provides an alternate path to review is unfair and incorrect.

Second, though FERC and Intervenors both advance the argument that the All Writs Act is the answer to Homeowners' due-process challenge, both FERC and the Intervenor gas companies ignore the fact that in every instance where a party sought relief from a FERC tolling order through the All Writs Act, FERC (and in two instances, the intervening gas companies) argued against the petition and won. *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 955 (D.C. Cir. 2019) (*citing e.g., In re Appalachian Voices*, No. 18-1006 (D.C. Cir. Feb. 2, 2018) (denying property owners' petition for a stay of pipeline construction under the All Writs Act); *In re Appalachian Voices*, No. 18-1271 (4th Cir. March 21, 2018)

(same); *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. March 15, 2018) (same).

As noted by Judge Millett, neither the Commission nor Transco has ever cited a single instance in which a petitioner opposing pipeline construction has succeeded by invoking the All Writs Act. Concurrence 15. Instead, the Intervenor gas companies relied on *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985); *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 WL 4274884, at *2 (D.Mass. July 15, 2015); and *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 357-58 (D.C.Cir. 1976). However, Intervenors' reliance on *Town of Dedham v. FERC*, is misplaced because that case simply held that the Natural Gas Act provided exclusive jurisdiction to the court of appeals, so the petitioners there were in the wrong court. The Court's statements on the availability of mandamus from the court of appeals were *dicta*. Intervenors' reliance on *Reynolds Metals* is also misplaced because, in *Reynolds Metals*, which was not a Natural Gas Act case, this Court denied the emergency petition for stay under the All Writs Act. *Reynolds Metals*, 777 F.2d at 764. Finally, though this Court did issue a limited injunction under the All Writs Act in *American Public Gas*, it did so because a statutory remedy was actually absent. *See Am. Pub. Gas Ass'n*, 543 F.2d 356 at 357. That is not the case here. Here, the Natural Gas Act provides a clear

statutory remedy (i.e., a path to judicial review in thirty days). FERC's use of tolling impermissibly forecloses it.

Additionally, though this Court held in *Delaware Riverkeeper*, that "any claim of unreasonable or unconstitutional delay — or any other claim designed to preserve the integrity of future judicial review in individual certification proceedings — would lie in a mandamus action filed directly with the court of appeals," that holding does not apply here. 895 F.3d at 113 (D.C. Cir. 2018). In *Delaware Riverkeeper*, this Court was not considering a petition for review under the Natural Gas Act. Instead, this Court considered an appeal from the district court's decision dismissing Riverkeeper's complaint seeking declaratory relief that FERC's use of tolling orders frustrates judicial review in violation of the *Due Process Clause*. *Id.* at 105. This distinction is important because, as this Court recognized, it was not considering "the constitutionality of any particular tolling order." That is not the case here. Moreover, unlike *Delaware Riverkeeper*, Homeowners here were not seeking "to preserve the integrity of future judicial review in individual certification proceedings." *Id.* at 113. Although that may be what Homeowners are left with now, it was not why they sought relief. Homeowners sought judicial review of the lawfulness of FERC's decision that Transco could take ***their property*** because the Atlantic Sunrise Pipeline was

necessary for the public convenience, and their due process rights were violated because they never received it.

Finally, the All Writs Act cannot guarantee Homeowners the right to review of the lawfulness of the taking, which they are entitled to pursuant to the Fifth Amendment, because the court has discretion to deny a petition for a writ of mandamus even if the petitioner demonstrates it satisfies all of the requirements for the writ, including irreparable injury. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

For all of these reasons, the All Writs Act does not absolve, or cure, FERC's violation of Homeowners' due process rights.

D. FERC's Issuance of Tolling Orders Contravenes Important Public Policies

Homeowners are not the only ones caught up in FERC's "Kafkaesque regime." Concurrence 1 (A.390). Any aggrieved party who files a rehearing request is trapped in this "bureaucratic purgatory"—notwithstanding the 30-day deadline for acting on rehearing requests prescribed by Congress. *Id*. at 17. This includes parties who, like the Environmental Associations here, seek to challenge FERC's analysis of a pipeline's environmental consequences. FERC keeps these parties "in seemingly endless administrative limbo" as it authorizes "energy companies [to] plow ahead" with pipeline construction—thereby inflicting the very environmental impacts at issue. *Id*. at 1. This irreparable environmental harm

cannot be undone if FERC later revises or reverses its initial decision, or if a court overturns it on appeal. *See, e.g.*, *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). FERC's misuse of tolling orders thus deprives affected parties of meaningful administrative and judicial review, and deprives the court of meaningful jurisdiction. In short, in addition to being contrary to the plain text of the Natural Gas Act, FERC's unfair practice of keeping the courthouse doors closed indefinitely is inimical to the public interest.

NEPA is the nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). This bedrock environmental law "forces the agency to take a 'hard look' at the environmental consequences of its actions" and "ensures that these environmental consequences, and the agency's consideration of them, are disclosed to the public." *Sierra Club*, 867 F.3d at 1367. Public participation is key. *See, e.g.*, 40 C.F.R. §§ 1500.1(b), 1500.2(d), 1506.6.

FERC's misuse of tolling orders undermines the purpose and spirit of NEPA.[3] After an affected party submits a rehearing request addressing FERC's inadequate environmental review, FERC routinely disregards the statutory deadline

[3] FERC's tolling order practice precludes meaningful judicial review not just under NEPA, but also other procedural statutes designed to protect the public interest and involve the public in agency decision-making, such as the National Historic Preservation Act, 54 U.S.C. §§ 300101 *et seq.*, and Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq*.

to act on that request and instead issues a tolling order. During this indefinite tolling period, FERC is purportedly considering the issues raised on rehearing regarding the pipeline's environmental impacts. Yet during this period (*i.e.*, before FERC issues a "final" decision), FERC authorizes pipeline companies to cut down trees, dig up soil, blast bedrock, displace wildlife, and pollute the air. *See* Concurrence at 13 (A.402). In other words, FERC treats its "non-final" certificate order as sufficiently dispositive to authorize "functionally irreversible construction"—and irreparable environmental harm—to go forward. *Id*. at 5.

This is contrary to NEPA's mandate of fully informed environmental decision-making involving substantial public participation. Allowing construction to proceed while FERC is purportedly still considering information about the pipeline's impacts undermines the requirement "that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). *See also Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) ("The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur.") (emphasis in original). FERC's practice also violates the NEPA directive that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a *final decision*." 40 C.F.R. § 1502.2(f) (emphasis added). *See also id.* at § 1506.1(a).

FERC has defended its practice on the ground that it advises pipeline companies "that they proceed at the risk that the agency may have a change of heart on rehearing." Concurrence 10 (A.399). But this ignores that other parties are injured by the irreparable environmental harm that FERC authorizes to occur while those aggrieved parties are stuck in an administrative limbo of FERC's making.

As in the eminent domain context, FERC "split[s] the atom of finality"—treating its certificate orders as conclusive enough to authorize pipeline construction, "while shielding those same orders from judicial scrutiny as non-final." Concurrence at 9 (A.398). By delaying its decision on a rehearing request until after the environmental harm has occurred, FERC effectively prejudges the rehearing request and deprives parties of a real opportunity for agency or federal court appeal. FERC's practice deprives the court of jurisdiction to even issue a stay as pipeline construction advances; here, in denying the Environmental Associations' first motion for a stay (filed after construction started but before FERC's "final" decision on rehearing), the court cited the jurisdictional issues raised in FERC's and Transco's motions to dismiss, which were based on the tolling order. Doc. No. 1703665.

Misusing tolling orders to allow pipeline construction (and environmental destruction) *before* the court has jurisdiction to hear NEPA claims unfairly blocks the public's access to the courts and undermines the integrity of judicial review.

And this is FERC's practice in virtually every pipeline certification. *See* Petition for an Extraordinary Writ, *In re Appalachian Voices, et al.*, No. 18-1006 at Exhibit G (Jan. 8, 2018) (listing tolling orders issued in 74 out of 75 pipeline certifications between 2009 and 2017); (A.251) (documenting lengthy delay and substantial construction between issuance of certificate orders and final rehearing order in 21 recent pipeline proceedings); Concurrence 7 (A.396) ("FERC has issued a boilerplate tolling order in response to every motion for rehearing of a pipeline certification decision since 2017 too."). Casting aside the statutory time limit to deprive parties of a meaningful appeal of their NEPA claims, and the courts of meaningful jurisdiction, is unquestionably contrary to the public interest.

These issues of irreversible environmental harm and the public interest were not present in *California Company*, "the fountainhead of circuit precedent" upholding FERC's tolling orders. *Id*. at 7. That case involved a rate dispute, and the consequences of FERC's delay were thus "temporary and remediable." *Id*. at 8. And in *California Company*, which was decided before NEPA was signed into law, "no strong reason [was] advanced why Congress would have wished to" not allow the agency more time to issue a final decision. 411 F.2d at 721. That is not the case in pipeline certification cases where FERC authorizes permanent and irreversible environmental harm to occur as NEPA claims languish indefinitely in administrative purgatory. In short, this pre-NEPA case allowing FERC to evade the

plain text of the Natural Gas Act should not have been extended to cases involving irreparable harm. *See also id.* at 722 (noting that FERC's reading of section 717r(a) was "far from self-evident"). This court now has the opportunity to correct that error.

Notably, the *California Company* Court deferred to FERC because it believed its approach "avoid[ed] … administrative and judicial problems." *Id*. A brief look at the procedural history of the instant case shows that FERC's misuse of tolling orders creates rather than avoids such problems. FERC issued the Certificate Order on February 3, 2017, and the Allegheny Petitioners filed a rehearing request and accompanying stay motion on February 10, 2017. Under the plain text of the Natural Gas Act, FERC should have acted on that request by March 13, 2017 (or ignored it, such that it would have been deemed denied on that date), and the Petitioners' NEPA challenge would have been filed in this court immediately thereafter. Instead of this simple process set forth in the Natural Gas Act, FERC's use of tolling orders created a legal quagmire involving numerous petitions for review, motions to dismiss, motions for stay, requests for rehearing on notices to proceed, and so on. And despite the hundreds (if not thousands) of pages of administrative and court pleadings spawned by FERC's unfair process, the pipeline was built and operational by the time this court issued its decision on August 2, 2019.

In sum, FERC uses the same procedural handcuffs that it imposes on landowners to jurisdictionally lock other aggrieved parties out of court. FERC's routine misuse of tolling orders is contrary to the public interest. "A scheme that walls" environmental petitioners "off from timely judicial review" of their NEPA claims while allowing irreparable environmental harm "to go forward, is in substantial tension with the statutory text and runs roughshod over basic principles of" fairness. Concurrence at 5 (A.394).

IV. FERC'S PUBLIC CONVENIENCE AND NECESSITY DETERMINATION FOR THE ATLANTIC SUNRISE PIPELINE WAS ARBITRARY AND CAPRICIOUS

As evidenced by the title of the certificates Congress authorized FERC to issue pursuant to Section 7(c) of the Natural Gas Act — Certificates of Public Convenience and Necessity – FERC's primary task in evaluating applications to build new natural gas pipelines is to determine whether those pipelines are actually ***necessary*** for the ***public*** convenience. Although this fact is beyond question, FERC admits that in making this all-important determination, it relies almost solely upon precedent agreements put forth by the pipeline proponent. *See* Rehearing Order (A.338). That practice can no longer be countenanced because, among other things, it does not account for the fact that natural gas may be exported for purely private gain, and it does not account for the fact that project proponents and shippers have financial incentives to build new pipelines regardless

of whether additional carrying capacity is necessary at all, let alone necessary for the public convenience. As set forth below, Homeowners are not the first to raise this serious issue. The severe problems with FERC's public convenience and necessity determinations have been publicly recognized by current and former FERC commissioners, as well as members of Congress, who have called upon FERC to change this unreasonable procedure. FERC steadfastly refuses to change this procedure.

A. FERC's Own Commissioners and Members of Congress Have Recognized That FERC's Process For Making Public Use Determinations is Flawed

Numerous dissents filed by FERC's own Commissioners and comments from two United States Senators, support the conclusion that FERC's public-use determinations are not above reproach and that Homeowners must not be denied their right to judicial review of the lawfulness of those decisions.

FERC issued the Certificate Order for the Atlantic Sunrise Pipeline, as well as several others, on February 3, 2017, before FERC lost its quorum due to former Commissioner Norman Bay's resignation. That same day, Commissioner Bay issued a separate statement to another certificate order, which FERC issued to National Fuel Gas Supply Corporation. *See National Fuel Gas Supply Corp.*, 158

FERC ¶ 61,145 at 3 (Feb. 3, 2017) (Bay, Comm'r, Separate Statement) (A.501)[4]. In that statement, Commissioner Bay recognized that in 2016 daily gas production in the United States stood at 72.4 billion cubic feet per day ("Bcfd"). *Id.* That same year, FERC granted certificates for an additional 17.6 Bcfd of pipeline capacity, and during the week of February 3, 2017 (when Commissioner Bay was writing and when FERC issued the Certificate Order for the Atlantic Sunrise Pipeline), FERC issued a series of certificate orders authorizing "more than several billion cubic feet of new gas pipeline capacity." *Id.* In his statement, Commissioner Bay noted some of the present and potential future benefits of the new infrastructure, but the primary focus of the statement was cautionary, urging FERC to consider "how the Commission establishes need in doing its certificate reviews under section 7(c) of the Natural Gas Act." *Id.* Commissioner Bay explained that FERC's "certificate policy statement, which was issued in 1999, lists a litany of factors for the Commission to consider in evaluating need. Yet, in practice the Commission has largely relied on the extent to which potential

[4] Petitioners have included in the Appendix certain statements and dissents authored by FERC Commissioners in connection with certificate orders issued in other matters. These documents are germane to the matter before this Court, are properly the subject of judicial notice (*see, e.g.*, *Klamath Water Users Ass'n v. FERC*, 2007 U.S. App. LEXIS 13483, at *1 (D.C. Cir. June 7, 2007) (taking judicial notice of a pleading filed with FERC)), and are included within the Appendix for this Court's convenience.

shippers have signed precedent agreements for capacity on the proposed pipeline." *Id.* By fixating on precedent agreements, Commissioner Bay said FERC "may not take into account a variety of other considerations, including, among others: whether the capacity is needed to ensure deliverability to new or existing natural gas-fired generators; whether there is a significant reliability or resiliency benefit; whether the additional capacity promotes competitive markets; whether the precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize." *Id.* In other words, Commissioner Bay urged FERC to look beyond precedent agreements by pointing out all of the ways they may not evidence public need.

Commissioner Bay was not alone in his concerns. Eight months later, Commissioner Cheryl LaFleur dissented from FERC's certificate order for the Mountain Valley Pipeline in part because she believed that "the needs determinations for these projects highlight another issue worthy of further discussion." (A.643). Commissioner LaFleur noted that the Mountain Valley Pipeline and the Atlantic Coast Pipeline, both approved by FERC, shared similar routes, impact, and timing, and were to be built in the same region with certain segments located in close geographic proximity. (A.643-44). Based on these facts, and the Commission's reliance on precedent agreements, Commissioner LaFleur believed that there was "an important distinction between the needs

determinations for ACP and MVP." (A.645). Commissioner LaFleur explained that "both projects provide evidence of precedent agreements to demonstrate that these pipelines will be fully subscribed." *Id.* However, "ACP also provides specific evidence regarding the end use of the gas to be delivered on its pipeline." *Id.* "In contrast, while Mountain Valley has entered into precedent agreements with two end users…for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets, and thus, is unknown." *Id.* (quoting *Mountain Valley Pipeline, LLC, Equitrans, L.P.*, 161 FERC ¶ 61, 043 at FN 286 (October 13, 2017)). Based on the above, Commissioner LaFleur wrote:

> In my view, it is appropriate for the Commission to consider as a policy matter whether evidence other than precedent agreements should play a larger role in our evaluation regarding the economic need for a proposed pipeline project. I believe that evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination.

Id.

The same concerns expressed by former Commissioners Bay and LaFleur were most recently reiterated by Commissioner Richard Glick in his vehement dissent to FERC's order denying requests for rehearing of the certificate order for the Spire STL Pipeline. *See* Spire STL Pipeline LLC, 169 FERC ¶61,134 (November 21, 2019) (A.685). In the opening sentence of Commissioner Glick's

dissent he wrote, "I dissent from today's order because there is ***nothing in the record to suggest that this interstate natural gas pipeline in needed***." (A.685) (emphasis added). Commissioner Glick further explained, that prior to receiving a certificate pursuant to section 7(c) of the Natural Gas Act, a pipeline developer must demonstrate a need for its proposed project. But according to Commissioner Glick, FERC's order denying requests for rehearing of the Spire STL certificate order "***turns [that] requirement into a meaningless check-the-box exercise.***" (emphasis added). Commissioner Glick went on to write:

> The Commission is supposed to 'consider all relevant factors reflecting on the need for the project' and balance the evidence of need against the project's adverse impacts. ***Today's order***, however, ***falls well short of that standard, failing utterly to provide the type of meaningful assessment of need that Commission precedent and the basic principles of reasoned decisionmaking require.*** The record suggests that this project—***the Spire STL Pipeline Project*** (Spire Pipeline)—***is more likely an effort to enrich the shared corporate parent of the developer,…and its only customer,…than a response to a genuine need for new energy infrastructure***.

(A.685) (emphases added).

The above statements from FERC's own commissioners, both current and former, demonstrate that the process by which FERC makes its public convenience and necessity determinations is seriously flawed. Likewise, in response to a notice of inquiry regarding new interstate natural gas facilities issued by FERC on April 29, 2018, 163 FERC ¶ 61,042, United States Senators Mark R. Warner and Tim

Kaine objected to FERC's process for evaluating public need and strongly suggested that it should be changed.[5]

The above concerns, expressed by FERC's own Commissioners and members of Congress, suggest that despite this Court's long-standing approval of FERC's reliance on precedent agreements, the practice is not reasonable. *See Sierra Club*, 867 F.3d at 1379; *Meyersville*, 783 F.3d at 1311; *Minisink*, 762 F.3d at 111 n.10; (all upholding FERC's reliance on precedent agreements to determine market need). As a result, FERC's public convenience and necessity determinations, both here and in general, are arbitrary, capricious, and otherwise contrary to law. *See City of Oberlin v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019).

B. The Atlantic Sunrise Pipeline Was Not Necessary for the Public Convenience

Leaving aside the fact that the Atlantic Sunrise Pipeline is in the ground and operational, Transco cannot take Homeowners' property by eminent domain based upon an invalid Certificate Order. Therefore, while Homeowners recognize that the Atlantic Sunrise Pipeline may never be removed from their properties, they

[5] The Senators further stated that "FERC should end the practice of issuing 'tolling orders' that freeze litigation over a project but allow construction to continue pending a decision on rehearing." (A.509-510). The Senators directed FERC that it "should decide on rehearing one way or the other so that citizens have a meaningful ability to have their claims heard in court." (A.510).

respectfully submit that this Court should invalidate the Certificate Order because FERC's public use determination was arbitrary and capricious.

While FERC says it "consider[ed] all evidence submitted reflecting on the need for the project," the fact is that FERC relied solely on the fact that Transco secured long-term commitments from other shippers as evidence of demand for the Project, and ignored other evidence that the pipeline was not in fact necessary for the public convenience. Certificate Order 28 (A.91). *See* Glick Dissent (A.685-705). For example, FERC did not appear to consider the fact that gas consumption rapidly increased between 2009 and 2015, but since then growth has completely stopped. *See e.g.* U.S. EIA, Monthly Energy Review 85, 87 (April 2018), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

FERC also ignored the fact that the purpose for the reversal of the Transco longhaul pipeline to the southeast is to allow northern Pennsylvania shale gas to reach Gulf Coast export terminals. Indeed, Transco's parent company, Williams, "has been on a mission to send Marcellus gas south – including to Georgia" such that "Marcellus Shale gas will, via the Transco [pipeline], be at least some of, if not the primary, source for gas exported from the Elba Island facility." *See* Elba Island LNG Update: Non-FTA Exports Approved, Marcellus Drilling News, Dec. 2016, available at http://marcellusdrilling.com/2016/12/elba-island-lng-update-non-fta-exports-approved-dump-truck-city/. And though FERC and Transco have

both argued that the Department of Energy must approve exports of Natural Gas, and that the Department of Energy will not do so if the export is not consistent with the public interest, *see Rover Pipeline, LLC*, 158 FERC ¶ 61, 109, ¶49 n.43 (Feb. 2, 2017) (citing 42 U.S.C. § 7151 (b)), the fact of the matter is that the necessary export approvals were in place prior to building the Atlantic Sunrise Pipeline. For example, by Order No. 3331-A, dated May 7, 2015, the U.S. Department of Energy authorized Dominion Energy Cove Point LNG, LP ("Cove Point") to export up to .77 billion cubic feet of natural gas per day, for a 20 year term, to countries that do not have free-trade agreements with the United States. Importantly, therefore, it stands to reason that if, in May 2015 (*i.e.*, the same time that Transco applied for a certificate order from FERC) the Department of Energy authorized the export of .77 billion cubic feet of natural gas to non-free-trade countries, which it cannot approve unless doing so is consistent with the public interest, then presumably that .77 billion cubic feet of natural gas would not be necessary to serve existing public need. Therefore, by extension, it cannot be the case that the Atlantic Sunrise Pipeline was necessary for the public convenience, solely because Transco had precedent agreements for the pipeline's capacity, if substantial amounts of natural gas could be exported without impinging upon that same public interest.

This information, which was available to FERC, is significant because one of the primary shippers for the Atlantic Sunrise Pipeline, Cabot, who subscribed to approximately half of the capacity for the Project, announced, as early as 2014, that it executed a binding precedent agreement with Transco for the Atlantic Sunrise Pipeline, for which Cabot would also be an equity owner, and that the agreement would pave the way for Cabot's shipment of 350 MMcfd to Cove Point to fulfill a 20-year supply agreement with Pacific Summit Energy, a wholly owned subsidiary of Sumitomo Corp. *See* https://www.ogj.com/general-interest/companies/article/17272709/cabot-secures-transco-natural-gas-pipeline-space-sales-to-wgl.

Therefore, FERC's assumption in the FEIS that the "vast majority of natural gas transported through the firm capacity under the Project would be consumed domestically in markets along the East Coast" does not appear to be accurate. FEIS at 1-10 (R.3913).

Nevertheless, in response to the Homeowners' arguments that FERC's public-use determination was flawed because FERC did not look beyond the precedent agreements, FERC simply reiterated its routine statements that precedent agreements are significant evidence of demand and the Commission "typically does not look behind such agreements to assess shippers' business decisions." Order on Rehearing 12 (A.338). This is simply not a reasonable answer.

Through the Natural Gas Act, Congress gave FERC the authority to extend the sovereign's power of eminent domain to private, for-profit companies like Transco, and allow them to invade and permanently take homeowners' property. Therefore, in order to satisfy the Takings Clause of the Fifth Amendment, FERC must determine that the project is actually necessary for a public use. If that requires FERC to "assess shippers' business decisions," then that is what FERC must do. If that requires FERC to "look behind" precedent agreements, then that is what FERC must do. As set forth by Commissioners Bay, LaFleur, and Glick, and Senators Warner and Kaine, FERC cannot hide behind its own Policy Statement, and ignore contrary evidence that suggests that pipelines are not actually going to serve a public use, which is exactly what FERC did here.

Finally, FERC and Transco have argued that FERC did not rely solely upon the precedent agreements, because they also considered comments submitted by two shippers, and one existing end-use customer on Transco's southeastern system. Those comments do very little to support FERC's public convenience and necessity determination. More importantly, FERC's position as to why those statements are important highlights the problem with FERC's analysis.

As a threshold matter, Washington Gas Light Company was never one of the project shippers and its comment did not say that the capacity of the Atlantic Sunrise Pipeline was necessary to serve its customers. *See* Comments of

Washington Gas Light Company (A.45). In fact, its comment did nothing more than recite the fact that the pipeline would provide 1.7 million dekatherms per day of natural gas transportation capacity. *Id.* Second, the two shippers that submitted comments in support of Transco's application, who had obvious self-interest in the approval of the project, were among the minor subscribers to the pipeline's capacity. Southern Company Services, Inc. subscribed to only 60,000 dekatherms, and Seneca Resources Corporation another 189,405 dekatherms. *See* Certificate Order (A.85); Comment of Seneca Resources (A.43); Comment of Southern Company Services (A.36). In other words, only 249,405 of the Project's 1,700,002 dekatherms per day of capacity, less than fifteen percent of the total. *See* Certificate Order (A.84-85). Only Seneca asserted that it has end-use contracts for the gas to be carried on its contracted capacity, representing just over eleven percent of the Project's capacity. No information was offered, other than precedent agreements, for the vast majority of the pipeline's capacity. Finally, though Transco has recited in briefing and elsewhere that the Project "is designed to supply enough natural gas to meet the daily needs of more than 7 million American Homes," neither Transco nor any of the precedent shippers have ever made forthright statements that the natural gas transported by the Project will serve American Homes. *See* Intervenors' Opp. to Rehearing En Banc at 2. To the contrary, Transco and the shippers are careful to only ever state in general terms,

who the natural gas **could** serve, and the general geographic directions it will flow. Transco's argument is also contrary to evidence that was available to FERC that U.S. demand for natural gas has been flat since 2015, and that some of the Atlantic Sunrise shippers plan to use the capacity they contracted for to facilitate exports,

But most troubling of all is FERC's statement in response to Homeowners' argument that FERC should not accept the shippers' self-serving statements. In its order denying rehearing FERC wrote, "it would seem that as a pipeline project is intended to serve need for transportation services, statements from those entities actually experiencing the need for such services would be precisely the kind of evidence the Commission should look to." Rehearing Order 13 (A.339). FERC is wrong. While a pipeline project may be intended to serve "need for transportation services" it is not the "needs" of shippers that FERC is supposed to be evaluating when it makes its public use determinations. FERC is required to determine whether the project is necessary serve the ***public's*** needs, not the needs, or more aptly, the financial concerns of project shippers. The fact that FERC refuses to recognize the difference is not reasonable.

FERC's refusal to seriously question whether gas transported by the Atlantic Sunrise pipeline is intended primarily for export is a significant issue going to the heart of the public need for the Project. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.") As this

Court recently recognized in *City of Oberlin*, 937 F.3d at 605, FERC must explain why it is lawful to predicate a Section 7 finding of project need on demand for export capacity. This Court explained, "Section 7 states that the Commission may issue a certificate of public convenience and necessity for 'the transportation in *interstate commerce*.'" *Id.* (citing § 717f(c)(2)). And, this Court has, "explicitly refused to 'interpret interstate commerce' within the context of the Act 'so as to include foreign commerce.'" *Id.* (quoting *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948)). By extension, though Transco's precedent agreements for the Atlantic Sunrise Pipeline may not be with foreign parties, it stands to reason that where, as here, there is significant evidence that the demand for the pipeline's capacity is nevertheless demand for export, FERC cannot turn a blind eye to that evidence and rely solely upon precedent agreements. This is precisely what Commissioner Glick objected to in his recent dissent to FERC's order denying rehearing to the petitioners in Spire STL (A.689).

Here, as in *City of Oberlin*, FERC's only response to these challenges by the Homeowners is to re-state its policy that precedent agreements "serve as 'significant evidence of demand for the project' and 'the Commission typically does not look behind such agreement to assess shippers' business decisions.'" Order on Rehearing 12 (A.338). In light of these failings by FERC, the public convenience and necessity determination in the Certificate Order is arbitrary and

capricious and must be set aside. As this Court recognized in *City of Oberlin*, a decision of the Commission must be set aside if it is arbitrary and capricious or otherwise contrary to law. 937 F.3d at 605 (citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 358 (D.C. Cir. 2017)). "Accordingly, where an agency's 'explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy." *Id.* (citing *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016)).

Therefore, Homeowners respectfully submit that this Court should, at long last, put an end to FERC's practice. Review of the administrative record in this case, as well as publicly available information regarding the current and proposed uses for the Atlantic Sunrise Pipeline, highlight the fact that FERC's practice is unreasonable and led to a determination that is not supported by substantial evidence. Accordingly, Homeowners' ask that the Certificate Order be vacated and remanded to FERC.

CONCLUSION AND REQUESTED RELIEF

For the reasons set forth above, Petitioners respectfully submit FERC's issuance of tolling orders is contrary to the Natural Gas Act and violates due process. Additionally, FERC's public convenience and necessity determination for the Atlantic Sunrise Pipeline was not based on substantial evidence, and as a result, the Certificate Order is arbitrary and capricious. Accordingly, Homeowner

Petitioners respectfully request that the Certificate Order be vacated and remanded to FERC.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's Order of December 5, 2019 because this brief contains 12,985 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Office 2016 computed the word count.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, I electronically filed the foregoing Petitioners' Joint Brief on Rehearing *En Banc* with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

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