***EN BANC* ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020**

No. 17-1098 (Consolidated with Nos. 17-1128, 17-1263, and 18-1030)

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

ALLEGHENY DEFENSE PROJECT, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 158 FERC ¶ 61,125 (February 3, 2017) and 161 FERC ¶ 61,250 (December 6, 2017)

CORRECTED *EN BANC* BRIEF OF AFFECTED LANDOWNERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

All parties and intervenors appearing in this Court are listed in the certificate to Petitioners' Joint Brief on Rehearing En Banc ("Petitioners' Brief"), Document No. 1823695. The following have appeared or are expected to appear as *amici curiae*:

1. Affected Landowners William Limpert, Carlos B. Arostegui, Richard G. Averitt III, Sandra S. Averitt, Jill Ann Averitt, Richard G. Averitt IV, Carloyn Fischer, Anne A. Norwood, Kenneth W. Norwood, Hershel Spears, Nancy Kassam-Adams, Shahir Kassam-Adams, Robert C. Day, Darlene Spears, Quinn Robinson, Delwyn A. Dyer, Clifford A. Shaffer, Maury Johnson, the New Jersey Conservation Foundation, Catherine Holleran, Alisa Acosta, Stacey McLaughlin, Craig McLaughlin, William McKinley, Pamela Ordway, Neal C. Brown LLC Family, Toni Woolsey, Ron Schaaf, Deb Evans, the Evans Schaaf Family LLC, and the City of Oberlin (collectively, "Amici Landowners").

2. Alliance For The Shenandoah Valley, Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Cowpasture River Preservation Association, Defenders of Wildlife, Delaware Riverkeeper Network, Food & Water Watch, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Mountain Watershed Association, Natural Resources Defense Council, Public Justice, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Alliance, in support of Petitioners (collectively, "Conservation Amici").

3. The States of Delaware, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan in support of Petitioners (Collectively, "State Amici").

B. Rulings Under Review

The final agency actions under review appear in the certificate to Petitioners' Brief.

C. Related Cases

All related cases appear in the certificate to Petitioners' Brief.

CORPORATE DISCLOSURE AND AUTHORSHIP STATEMENTS

Neal C. Brown LLC Family is organized under the laws of Oregon for the purpose of maintaining the property affected by the Pacific Connector Pipeline located in Douglas County, Parcel #s: R10266; R11298; and R11338, and other properties in Oregon. Neal C. Brown LLC Family has no parent company, and there are no publicly held companies that have a 10 percent or greater ownership interest in Neal C. Brown LLC Family.

The Evans Schaaf Family LLC is organized under the laws of Oregon for the purpose of maintaining the property affected by the Pacific Connector Pipeline located in Klamath County, Parcel Number: R71040; Tract: KH-569.000, as well as other properties in Oregon. Evans Schaaf Family LLC has no parent company, and

there are no publicly held companies that have a 10 percent or greater ownership interest in Evans Schaaf Family LLC.

The New Jersey Conservation Foundation is a nonprofit 501(c)(3) organization that advocates for the protection of New Jersey lands, waters, and the communities that use New Jersey natural resources. New Jersey Conservation Foundation has no parent company, and there are no publicly held companies that have a 10 percent or greater ownership interest in the New Jersey Conservation Foundation.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *Amici* state that no party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than the *Amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), *Amici Landowners* state that they are unaware of any other amicus brief addressing the impacts of the Federal Energy Regulatory Commission's use of tolling orders on affected landowners. Among the other issues addressed, *Amici Landowners* believe that their brief is particularly useful in providing the Court with an additional factual examination of how FERC's tolling orders have played out again and again in various pipelines to landowners' severe detriment, and an examination of the violations of landowners' due process rights to a "prompt" post-deprivation hearing. *Amici Landowners* are aware of two other *amicus curiae* briefs to be filed in support of Petitioners in this case: a brief filed by the Conservation Amici that is limited to the impacts of the Federal Energy Regulatory Commission's tolling practice on conservation and community groups, and a brief filed by the State Amici (entitled under Circuit Rule 29 to a separate brief) that addresses the effects of FERC's tolling practices on states.

Because of the unique perspectives and expertise, and distinct interests and areas of focus of the various *amici*, it is impractical to collaborate in a single brief. Moreover, the Court will benefit from the presentation of a diverse set of additional arguments in support of Petitioners (as well as Respondents).

Amici Landowners have coordinated with the other *amici* to ensure that there would be no substantial overlap in issues between this brief and other *amicus* briefs.

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GLOSSARY

ACP	Atlantic Coast Pipeline
ACP RO	Atlantic Coast Pipeline Rehearing Order, 164 FERC ¶ 61,100 (2018)
Constitution	Constitution Pipeline
Constitution RO	Constitution Pipeline Rehearing Order, *Constitution Pipeline, Co., LLC*, 169 FERC ¶ 61,102 (2019)
Extension Order	FERC Extension Order, *Constitution Pipeline, Co., LLC*, 165 FERC ¶ 61,081 (2018)
FERC	Federal Energy Regulatory Commission
MVP	Mountain Valley Pipeline
MVP RO	Mountain Valley Pipeline Rehearing Order, 163 FERC ¶ 61,197 (2018)
NGA	Natural Gas Act
NJCF	New Jersey Conservation Foundation
Nexus	Nexus Pipeline
Nexus RO	Nexus Pipeline Rehearing Order, 164 FERC ¶ 61,054 (2018)
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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Petitioners' Brief.

STATEMENT OF INTEREST, IDENTITY OF *AMICI CURIAE*, AND INTRODUCTION

Amici curiae are landowners ("Amici Landowners") from across the United States and a municipality who were (or will be) adversely impacted by the Federal Energy Regulatory Commission's ("FERC") use of tolling orders in its approval process of pipeline projects, including: landowners on the Atlantic Coast Pipeline ("ACP Landowners"), William Limpert, Carlos B. Arostegui, Richard G. Averitt III, Sandra S. Averitt, Jill Ann Averitt, Richard G. Averitt IV, Carloyn Fischer, Anne A. Norwood, Kenneth W. Norwood, Hershel Spears, Nancy Kassam-Adams, Shahir Kassam-Adams, Robert C. Day, Darlene Spears, and Quinn Robinson; landowners on the Mountain Valley Pipeline ("MVP Landowners"); Delwyn A. Dyer, Clifford A. Shaffer, and Maury Johnson; a landowner on the PennEast Pipeline (New Jersey Conservation Foundation); a landowner on the Constitution Pipeline (Catherine Holleran); landowners on the Pacific Connector Pipeline ("Pacific Connector Landowners"), Alisa Acosta, Stacey McLaughlin, Craig McLaughlin, William McKinley, Pamela Ordway, Neal C. Brown LLC Family, Toni Woolsey, Ron Schaaf, Deb Evans, and the Evans Schaaf Family LLC; and landowner on the Nexus Pipeline, the City of Oberlin, Ohio ("City of Oberlin"). Amici Landowners have faced (or will

face)[1] the threat of condemnation and destruction of their land while FERC has locked them out of federal court through its use of tolling orders.

Amici Landowners submit this brief (1) to demonstrate that what happened to the Petitioner Landowners is far from an isolated incident—it is standard FERC practice to use tolling orders to block affected landowners from access to timely judicial review—and (2) to provide a more thorough examination of why FERC's interpretation that the Natural Gas Act's ("NGA"), 15 U.S.C. § 717 *et. seq.*, rehearing provisions allow the Commission an unlimited time to decide a request for rehearing must yield, at the very least, to prompt adjudication of Petitioners' constitutional claims in court.[2]

FACTS

Congress may certainly insist that, before seeking judicial review, parties must request rehearing from FERC in order to give the Commission the opportunity to amend its original decision. And it may even be proper to read the Natural Gas Act to allow FERC all the time it wants for rehearing when considering only statutory or regulatory issues that do not impose irreparable injury. But the NGA may not be read

[1] The Pacific Connector Pipeline is still under review by FERC, thus Pacific Connector Landowners have not yet faced condemnation proceedings. FERC is currently scheduled to issue a decision on the application for a Certificate of Public Convenience and Necessity for the Pacific Connector Pipeline on February 13, 2020.

[2] Petitioners demonstrate several ways in which FERC's tolling order process violates the NGA and the Fifth Amendment, and violated Petitioners' due process rights by depriving them of *pre-deprivation* review of constitutional challenges to the Certificate. Amici Landowners do not repeat those arguments.

to allow for such an indefinite process when the result is to deprive affected landowners of their due process rights to a "prompt" post-deprivation hearing and thus inflict the irreparable injury of the taking—and destruction—of their property. What makes this situation all the more absurd is that FERC allows itself to take months and months to rehear *some issues that it concedes it has no authority to decide*. Because FERC has not—and cannot—decide these issues, that leaves only the federal courts to do so, and due process requires that it be done "promptly" after FERC issues a Certificate to build a pipeline. To further illustrate the absurdity of FERC's use of tolling orders and the serious harm and due process violations it inflicts on landowners, summaries of FERC's tolling order process as experienced by Amici Landowners are outlined below:

1. Atlantic Coast Pipeline:

FERC issued the Certificate Order for the Atlantic Coast Pipeline ("ACP") on October 13, 2017. *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042. All ACP Landowners filed timely requests for rehearing and motions to stay the Certificate pending a final rehearing order, challenging the Certificate on numerous grounds, including due process violations. *Shenandoah Valley Network, et al. Request for Rehearing and Motion for Stay*, FERC Accession No. 20171113-5367 (including Amici Landowners William Limpert and Richard Averitt IV); *Friends of Buckingham Request for Rehearing and Motion for Stay*, FERC Accession No. 20171113-5324 (including Amici Landowners Quinn Robinson, Carlos B. Arostegui, and Robert C. Day, Jr.); *Friends of*

Nelson Request for Rehearing, FERC Accession No. 20171113-5275 (including Amici Landowners Richard G. Averitt III, Dr. Sandra S. Averitt, Jill Ann Averitt, Richard G. Averitt IV, Carloyn Fischer, Nancy Kassam-Adams, Shahir Kassam-Adams, Anne A. Norwood, Kenneth W. Norwood, Hershel Spears, and Darlene Spears).

FERC issued its Tolling Order on December 13, 2017, barring all Amici Landowners from access to federal courts for the purpose of challenging the Certificate. *Order Granting Rehearing for Further Consideration*, FERC Accession No. 20171211-3013.

FERC did not issue a Rehearing Order until August 10, 2018. *Atlantic Coast Pipeline*, *LLC*, 164 FERC ¶ 61,100 ("ACP RO"). In other words, over *nine months* elapsed between the Certificate Order allowing confiscation of ACP Landowners' property, and the Rehearing Order allowing them to seek review and obtain the required post-deprivation hearing on the constitutionality of the Certificate and the taking of their property. FERC did not even bother to respond to any of the ACP Landowners' motions to stay the Certificate, and in the Rehearing Order, simply denied all of those motions as moot. *Id.* ¶ 14. Over this nine-month period, ACP Landowners faced actual or imminent condemnation proceedings. For example, ACP filed "quick take" (for immediate possession prior to the determination of just compensation) *and* condemnation proceedings against Amici Landowner Robert C. Day, Jr.'s property on December 8, 2017. *ACP v. 2.64 Acres*, Case No. 6:17-CV-00083 (Dec. 8, 2017 W.D. Va.). Nor was Mr. Day the only victim; the following other

condemnation actions were all filed while a decision on ACP Landowners' rehearing requests was being tolled:[3] *ACP v. 0.18 Acres*, Case No. 2:18-CV-16 (Feb. 5, 2018 N.D.W. Va.); *ACP v. 8.17 Acres*, Case No. 2:18-CV-00025 (Jan. 17, 2018 E.D. Va. 2018); *ACP v. 0.19 Acres*, Case No. 2:18-CV-00027 (Jan. 17, 2018 E.D. Va.); *ACP v. 3.99 Acres*, Case No. 2:18-CV-00029 (Jan. 17, 2018 E.D. Va.); *ACP v. 3.25 Acres*, Case No. 2:18-CV-00034 (Jan. 27, 2018 E.D. Va.); *ACP v. 3.74 Acres*, Case No. 2:18-CV-00171 (Mar. 28, 2018 E.D. Va. 2018).

2. Mountain Valley Pipeline:

FERC issued the Certificate Order for the Mountain Valley Pipeline ("MVP") on October 13, 2017. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043. On November 13, 2017, all MVP Landowners filed timely requests for rehearing and motions to stay the Certificate pending a resolution with a final order on rehearing, challenging FERC's Certificate on numerous fronts. *Carl E. Zipper et al. Request for Rehearing*, FERC Accession No. 20171113-5236 (including Amici Landowners Maury Johnson, Delwyn A. Dyer, and Clifford A. Shaffer).

FERC issued its Tolling Order on December 13, 2017, barring landowners from access to federal courts for the purpose of challenging the Certificate. *Order Granting Rehearing for Further Consideration*, FERC Accession No. 20171213-3061.

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[3] Undersigned counsel only included *some* of the condemnation actions filed during each of the listed pipeline tolling order periods in order to illustrate the issue; *many* additional condemnation actions were filed but have not been listed.

FERC did not issue a Rehearing Order until June 15, 2018. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 ("MVP RO"). In other words, *over eight months* elapsed between the Certificate Order allowing confiscation of MVP Landowners' property, and the Rehearing Order allowing them to seek review in federal court and obtain the constitutionally-mandated post-deprivation hearing of the Certificate and the taking of their property. Up and until the MVP Rehearing Order, FERC remained silent on all of the Amici Landowners' motions to stay the Certificate and, as it did in the ACP Rehearing Order, they simply denied all of the stay motions as moot. *Id.* ¶ 21. Over this eight-month period, MVP Amici Landowners faced actual or imminent condemnation proceedings. On October 24, 2017, MVP filed complaints for condemnation and quick take against MVP Landowners'—and countless others'—properties." *See MVP v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, and Summers, West Virginia et al.*, Case No. 2:17-CV-04214 (Oct. 24, 2017 S.D.W. Va.) (including Amicus Landowner Maury Johnson as defendant); *MVP v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Virginia et al.*, Case No. 7:17-CV-0492 (Oct. 24, 2017 W.D. Va. 2017) (including Amici Landowners Clifford A. Shaffer and Delwyn A. Dyer as defendants and over 400 individual landowner defendants total); *see also MVP v. Sharon Simmons et al.*, Case No.

1:17-CV-00211 (Dec. 8, 2017 N.D.W. Va.) (a subsequent condemnation action including over 30 individual landowner defendants).

3. <u>PennEast Pipeline:</u>

FERC issued the Certificate Order for the PennEast Pipeline ("PennEast") on January 19, 2018. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053. Amicus Landowner New Jersey Conservation Foundation ("NJCF") filed a timely request for rehearing and motion to stay the PennEast Certificate pending a final rehearing order, challenging the Certificate on numerous grounds, including due process violations. *Request for Rehearing and Motion for Stay on Behalf of NJCF and Stony Brook-Millstone Watershed Association*, FERC Accession No. 20180213-5082.

FERC issued its Tolling Order on February 22, 2018, barring NJCF from access to federal courts for the purpose of challenging the Certificate. *Order Granting Rehearing for Further Consideration*, FERC Accession No. 20180222-3037.

FERC did not issue a Rehearing Order until August 10, 2018. *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098 ("PennEast RO"). In other words, over *seven months* elapsed between the Certificate Order allowing confiscation of NJCF's property and the Rehearing Order allowing them to seek review and obtain the required post-deprivation hearing on the constitutionality of the Certificate and the taking of their property. During those seven months, FERC did not even bother to respond to NJCF's motion to stay the Certificate and, once again simply denied the motion as moot. *Id.* ¶ 4. Over this over seven-month time period, NJCF faced actual

or imminent condemnation proceedings. For example, PennEast filed for quick take and condemnation proceedings against NJCF and numerous other landowners. *PennEast Pipeline Company, LLC v. A Permanent Easement for 0.06 Acres et al.*, Case No. 3:18-CV-01851 (Feb. 8, 2018 D.N.J.) (including NJCF and at least[4] 8 other individual defendants); *PennEast v. A Permanent Easement for 1.41 Acres et al.*, Case No. 3:18-CV-01699 (Feb. 7, 2018 D.N.J.) (including NJCF and at least 5 other individual defendants); *PennEast v. A Permanent Easement for 0.73 Acres et al.*, Case No. 3:18-CV-01756 (Feb. 7, 2918 D.N.J.) (including NJCF and at least 6 other individual defendants); *PennEast v. A Permanent Easement for 0.65 Acres et al.*, Case No. 3:18-CV-01798 (Feb. 8, 2018 D.N.J.) (including at least 9 individual defendants); *PennEast v. A Permanent Easement for 1.72 Acres et al.*, Case No. 3:18-CV-02004 (Feb. 12, 2018 D.N.J.) (including at least 7 individual defendants).

4. <u>Nexus Pipeline:</u>

FERC issued the Certificate Order on August 25, 2017 for the Nexus Pipeline ("Nexus"). *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022. On September 25, 2017, Amicus Landowner City of Oberlin filed a timely request for rehearing and request to stay the Certificate pending resolution with a final order on rehearing and judicial review, challenging FERC's Certificate on numerous fronts, including constitutional due process violations. *City of Oberlin Request for Rehearing of Issuance of*

[4] The number of defendants are listed "at least" a certain number, because many of these actions listed "unknown defendants."

Certificate for the Nexus Pipeline and Request for Stay, FERC Accession No. 20170925-5021.

FERC issued its Tolling Order on October 23, 2017, barring the City of Oberlin from access to federal courts. *Order Granting Rehearing for Further Consideration*, FERC Accession No. 20171023-3012.

FERC did not issue a Rehearing Order until July 25, 2018. *Nexus Gas Transmission, LLC*, 164 FERC ¶ 61,054 ("Nexus RO"). In other words, nearly *eleven months* elapsed between the Certificate Order allowing confiscation of the City of Oberlin's property, and the Rehearing Order allowing the City to seek review in federal court and obtain the constitutionally-mandated post-deprivation hearing of the Certificate and the taking of its property. On October 2, 2017, Nexus filed a complaint for condemnation and quick take against the City of Oberlin's—and many others'—properties. *See Nexus v. 2.00 Acres et al.*, Case No. 5:17-CV-2062 (Oct. 2, 2017 N.D. Ohio) (including Amicus Landowner City of Oberlin as defendant and at least 75 individual defendants total); *see also Nexus v. 0.4 Acres et al.*, Case No. 4:17-CV-13220 (Oct. 2, 2017 E.D. Mich.) (a separate condemnation action including 4 individual defendants).

5. **Constitution Pipeline:**

FERC issued the initial Certificate Order for the Constitution Pipeline ("Constitution") on December 2, 2014. *Constitution Pipeline, Co., LLC*, 149 FERC ¶ 61,199. The Constitution Certificate has been extended multiple times. FERC granted

the latest two-year extension of time to complete construction on November 5, 2018 ("Extension Order"). *Constitution Pipeline, Co., LLC*, 165 FERC ¶ 61,081. On December 4, 2018, Amicus Landowner Catherine Holleran filed a timely request for rehearing of the Extension Order. *Holleran Landowners' Petition for Rehearing*, FERC Accession No. 20181204-5027.

FERC issued its Tolling Order on December 21, 2018, barring Holleran from access to federal courts for the purpose of challenging the Certificate. *Order Granting Rehearing for Further Consideration*, FERC Accession No. 20181221-3039.

FERC did not issue a Rehearing Order in response to requests for rehearing of the Extension Order until November 8, 2019. *Constitution Pipeline, Co., LLC*, 169 FERC ¶ 61,102 ("Constitution RO"). In other words, years elapsed between the Certificate Order allowing the pipeline to confiscate the Holleran's property, and the Rehearing Order allowing her to seek review in federal court and obtain the constitutionally-mandated post-deprivation hearing on the Certificate and the taking of her property, and *over ten months* elapsed between Holleran's request for rehearing of the Extension Order and the Rehearing Order being issued.

Less than 30 days after FERC granted the Certificate, Holleran faced condemnation proceedings. On December 28, 2014, Constitution filed a complaint for condemnation and quick take against Holleran's property. *See Constitution v. A Permanent Easement for 1.84 Acres et al.*, Case No. 3:14-CV-02458, ECF Entry Nos. 1, 4, 15 (M.D. Pa. 2014). By March of 2016, despite opposition from Holleran and her

family, over 500 ash and sugar maple trees had been cut down on Holleran's land, and as a result of the preliminary injunction, Holleran had halted nascent maple syrup operations. *See id.*, ECF Entry No. 74 at 8–10, ECF Entry No. 74-1 ¶ 15, ¶ 20 ("Constitution finished the tree clearing within a four-day period. All told, Constitution took down just over 550 trees of significant size, not including countless saplings."), ¶ 25 ("My brother and I determined that the tree species were roughly half ash and half sugar maples. Some of the trees were easily 1.5 to 2 feet in diameter which would make them about 200 years old. These trees are irreplaceable.").

As with the other pipelines, Holleran was far from the only victim of condemnation during the tolling period. *See, e.g.*, *Constitution v. A Permanent Easement for 1.84 Acres et al.*, Case No. 3:14-CV-02458 (Dec. 28, 2014 M.D. Pa.) (at least 8 individual defendants); *Constitution v. A Permanent Easement for 1.92 Acres et al.*, Case No. 3:14-CV-02445 (Dec. 29, 2014 M.D. Pa.) (at least 3 individual defendants); *Constitution v. A Permanent Easement for 0.22 Acres et al.*, Case No. 3:14-CV-02091 (Dec. 22, 2014 N.D.N.Y.) (at least 4 individual defendants); *Constitution v. A Permanent Easement for 0.64 Acres et al.*, Case No. 3:14-CV-02450 (Dec. 29, 2014, M.D. Pa.) (4 individual defendants).

6. <u>Pacific Connector Pipeline:</u>

FERC is currently scheduled to issue a Certificate of Public Convenience and Necessity for the Pacific Connector Pipeline on February 13, 2020. *See Notice of Revised Schedule for the Environmental Review and the Final Order for the Jordan Cove Energy Project*,

FERC Accession No. 20190927-3025 (Sept. 27, 2019). All Pacific Connector Landowners on the pipeline route—Alisa Acosta, Stacey McLaughlin, Craig McLaughlin, William McKinley, Pamela Ordway, Neal C. Brown LLC Family, Toni Woolsey, Ron Schaaf, Deb Evans, and the Evans Schaaf Family LLC—will face imminent, irreparable injury and be barred from a federal court to issue challenges against FERC's Certificate Order by FERC's inevitable use of a tolling order in the Pacific Connector Pipeline case.

ARGUMENT

As highlighted further below, given that FERC has repeatedly stated it cannot provide a pre-deprivation hearing on constitutional due process issues, the post-deprivation hearing *must* be a judicial one. *Infra* at 13–15. Further, FERC lacks the institutional competence to resolve constitutional due process issues, and such challenges should be handled promptly by federal courts. *See infra at* 22–25.

I. THE DUE PROCESS CLAUSE GUARANTEES THAT WHEN PROPERTY IS TAKEN WITHOUT A PRE-DEPRIVATION HEARING, AT A MINIMUM A PROMPT POST-DEPRIVATION HEARING IS REQUIRED.

A. FERC's Rehearing Orders Declined to Adjudicate Numerous Constitutional Issues Concerning the Taking of Amici Landowners' Properties.

FERC has repeatedly said that it is not competent to decide landowners' Due Process claims; indeed, one entire section of a FERC rehearing order is titled,

"Eminent Domain Concerns Are Best Addressed by a Federal Court." *See* MVP RO ¶¶ 73–79.

Many of the issues raised by Petitioners and Amici pose pure questions of constitutional law, which FERC has disclaimed authority to decide in various Orders, including: Does the Takings Clause require the Commission to determine whether a pipeline is able to provide "just compensation" before issuing a Certificate allowing pipeline to expropriate landowners' property?, *see* ACP RO ¶ 88 n.226 (stating "[d]ue process rights are nonetheless preserved because constitutional challenges to agency decisions may be raised in appeals of final agency decisions." (citations omitted)); MVP RO ¶ 76; *see also* PennEast RO ¶ 33 ("The Commission does not have the authority to limit a pipeline company's use of eminent domain once the company has received its certificate of public convenience and necessity. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court."); and does the Commission permitting "quick take" procedures violate the due process clause and separation of powers doctrine?, *see* ACP RO ¶¶ 84, 89 (finding that FERC's "role does not include directing courts how to conduct their own proceedings"); MVP RO ¶¶ 76, 77. FERC has repeatedly disclaimed authority to decide any of these issues. *See* ACP RO at 41–42 (noting it does not have authority to rule on various eminent domain due process issues, including quick take, the violations of the Takings Clause, and just compensation). As a result of both FERC and the courts disclaiming

authority to decide such issues, a nightmare scenario has resulted wherein property is taken and destroyed via quick take, and *years* go by without a penny going to the injured landowners or the pipeline even getting built. The Constitution Pipeline and the Holleran's property serves as an unfortunate example:

> Just weeks after the FERC Certificate issued, Constitution filed eminent domain against dozens and property owners and once awarded possession, forged ahead on the Landowners' property, surveying and staking the right of way and pursuing contempt charges against the Landowners for their alleged obstruction of tree-clearing activity, ultimately securing state police and heavily armed U.S. Marshals outfitted with assault weapons and bulletproof vests to protect Constitution crews as they invaded the property to chop down over 500 ash and sugar maple trees. [...] But there is one activity that Constitution has not accomplished during the past three years and never will: actually building the very pipeline that served as the rationale for the preliminary injunction to begin with.
>
> Exhibit 1, *Constitution v. A permanent Easement for 1.84 Acres et al.*, Case No. 3:14-CV-02458 at 1-2, ECF Entry No. 74 (Mot. to Dissolve Injunction) (M.D. Pa. 2014).

Consequently, only federal appellate courts are left to decide these issues, and due process requires that it be done "promptly" after FERC issues a Certificate.

B. The Due Process Clause Guarantees—at a Minimum—Prompt Post-Deprivation Review.

Because the Certificate of Public Convenience and Necessity gives a pipeline eminent domain authority which it can exercise *immediately*, as Petitioners explain, FERC's impermissible use of tolling orders means that landowners like Petitioners and Amici have been deprived of their due process right to a "pre-deprivation hearing." Petitioners' *En Banc* Br. at 18, 20–21, 27–29. The Supreme Court has been

crystal clear that a pre-deprivation hearing is required even when the interference with the landowners' rights are far less intrusive and destructive than what Petitioners and Amici Landowners have experienced:

> [I]n *Connecticut v. Doehr*, we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds.

United States v. James Daniel Good Real Prop., 510 U.S. 43, 54 (1993) (citations omitted). But it is black-letter law that when property is taken and—for whatever reason—a pre-deprivation hearing is not provided, the only way to satisfy due process is with a "prompt" post-deprivation hearing. *See Barry v. Barchi*, 443 U.S. 55 (1979). Assuming that landowners must settle for a prompt post-deprivation hearing, Amici Landowners note only that allowing seizure of property so that a private corporation can build a natural gas pipeline is hardly comparable to the handful of "extraordinary situations" where the Supreme Court has held that it is warranted. *See Fuentes v. Shevin*, 407 U.S. 67, 90–92 (1972) (noting the "extraordinary situations" that justify postponing an opportunity for a hearing, including the "summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food").

If due process entitles Landowners only to a post-deprivation hearing, the Supreme Court has held that it must come promptly on the heels of the taking. In

Barry v. Barchi, 443 U.S. 55 (1979), the New York State Racing and Wagering Board suspended Barchi's license when a horse he trained tested positive for a banned drug. After holding that the State's "important interest in assuring the integrity of the racing carried on under its auspices" justified suspending Barchi's license without a prior hearing, *id.* at 64, the Court addressed the adequacy of the State's post-suspension hearing procedure.

The New York statute governing this process set no deadline for such a hearing, providing only that the Board would have 30 days after the hearing to give its decision. *Id.* at 61. The Court gave such an open-ended process short shrift:

> Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, it is as likely as not *that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed* . . . . *We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing.*

Id. at 66 (emphasis added). As a result, the Court concluded that due process required "that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay." *Id.* And, in light of the irreparable damage that Landowners' properties will suffer and have suffered as a result of FERC pipeline Certificates, Justice Brennan's concurrence is particularly apt: "To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a

suspension can still be avoided -- *i.e.*, either before or immediately after suspension." *Id.* at 74.

Even when the Supreme Court has found that delay in a post-deprivation hearing does *not* violate due process, its reasoning shows why the delay in the case of FERC's use of tolling orders most certainly does. In *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988), the FDIC suspended Mallen from his role as a bank president and director after his indictment for making false statements to the agency. Since the suspension order "affected a deprivation of this property interest," *id.* at 240, Mallen was entitled to due process. The Court decided that 90 days to hold both a post-deprivation hearing *and* reach a decision did not violate the Due Process Clause because Congress had determined that indicted bank officers must be suspended to preserve banking industry integrity, the delay benefited Mallen because it allowed time for a fair process, and the suspension was incidental to the injury caused by the indictment. *Id.* at 243.

In contrast, no such interests are present here. On the one hand, there can be no possible interest at all in giving FERC *unlimited* time to reconsider landowners' constitutional arguments; as further outlined above, it has already said that it has no authority to decide them. And on the other hand, having their land expropriated does not represent a marginal additional harm to landowners, since that alone is their injury.

Other courts—including this Court—have followed the framework laid down in *Barchi* and *Mallen.* Citing *Barchi*, in *Tri County Indus. v. District of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997), this Court held that due process was violated even if it was possible for the plaintiff to obtain a stay of an order suspending his building permit, because he had "no assurance that any such stay would be issued promptly." In *Horne Bros., Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972), the Defense Department suspended the plaintiff from bidding on government contracts without notice or a hearing. Noting that the suspension "may be continued for eighteen months or more," this Court held that, "[w]hile we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor [to contest the suspension], that cannot be sustained for a protracted suspension." *Id.* at 1270. And in *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 104 (D.D.C. 2012), seven months after plaintiff's car was seized, the Court held that the plaintiff was likely to succeed on his claim he was denied his right to a prompt post-deprivation hearing. *See also Gershenfeld v. Justices of Supreme Court*, 641 F. Supp. 1419, 1428 (E.D. Pa. 1986) (finding that a state bar disciplinary rule violated due process because it allowed for the suspension of an attorney without *any* deadline for a post-suspension hearing).

If *Barchi* and its progeny stand for anything, it is that a post-deprivation hearing must be held "promptly" after the taking, and that processes that provide no deadlines at all for that hearing are *per se* violations of the Due Process Clause.

II. FERC'S POLICY AND PRACTICE OF INDEFINTIELY DELAYING THE REQUIRED PROMPT POST-DEPRIVATION HEARING VIOLATES LANDOWNERS' DUE PROCESS RIGHTS.

As noted previously, these tolling orders are not brief pauses for reflection; in the Amici Landowners' cases, between seven and eleven months passed between when the Certificates were granted and FERC issued rehearing orders denying Amici Landowners' requests. *See supra* at 3–11. As Petitioners and this Court have noted, "between 2009 and 2017, the Commission issued tolling orders in response to 99% of requests for rehearing of pipeline certification decisions." Petitioners' *En Banc* Br. at 24 (citing Concurrence 7 (A.396) (citing *In re Appalachian Voices, et al.*, No. 18-1006 at Exhibit G (Jan. 8, 2018 D.C. Cir.) (cataloging tolling orders issued in 74 out of 75 pipeline certifications between 2009 and 2017)). In other cases, tolling orders have lasted more than 18 months. *See id.*

This Court has previously dealt with the issue of FERC's tolling orders. Although it concluded that the issue was not properly before it, in *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 112–13 (2018) this Court recently noted its previous approval of FERC tolling orders citing, *inter alia*, its decision in *California Co. v. Federal Power Com.*, 411 F.2d 720, 722 (D.C. Cir. 1969). Ironically, *California* explains precisely why tolling orders *in this situation*—where FERC declines to decide constitutional issues put forward by Affected Landowners—violate the Due Process Clause:

> But no strong reason is advanced why Congress would have wished to impose such a rigid strait jacket on the Commission, preventing it from giving careful and mature consideration to the multiple, and often clashing, arguments set out

> in applications for rehearing in complex cases such as this one. Nor is any reason suggested why Congress would wish to put courts in the awkward position *of reviewing a decision which the agency for the best of reasons may be willing to alte r.* . . .
>
> We are reluctant to impute to Congress a purpose to limit the Commission to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts *to review a decision which at that moment would profitably remain under active reconsideration by the agency.*

Id. at 721–22 (emphases added). If the agency has conceded that it has no jurisdiction to decide these issues, then by definition there is no decision which the agency "may be willing to alter," and FERC's non-decision most certainly does not "profitably remain under active consideration by the agency." *Id.*

Riverkeeper also cited to *Kokajko v. Federal Energy Regulatory Com.*, 837 F.2d 524 (1st Cir. 1988), which provided guidance as to the parallel Federal Power Act tolling provision, 16 U.S.C. § 826l(a)). *Kokajko* noted that its jurisdiction was predicated on having a "definitive" agency determination, and that "agreed[d] with the 10th Circuit which has said that it is a requirement of a 'definitive' order that it 'have some substantial effect on the parties which cannot be altered by subsequent administrative actions.'" *Id.* at 525 (citing *Public Service Co. of N.M. v. Federal Power Comm'n.*, 557 F.2d 227, 233 (10th Cir. 1977)). There is nothing about FERC's non-decision as to Petitioners' constitutional claims that can possibly "be altered by subsequent administrative actions."

A. FERC Lacks the Institutional Competence to Decide Constitutional Due Process Claims, and it is Thus Futile for Landowners to Bring Such Claims before FERC.

A useful analogy—the futility exception to the administrative exhaustion requirement—highlights why FERC's tolling order is unconstitutional. "When resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be applied." *Athlone Industries, Inc. v. Consumer Product Safety Comm.*, 707 F.2d 1485, 1489 (D.C. Cir. 1983).

A specific type of futility is when an agency has no jurisdiction or "institutional competence" to decide an issue. Exhaustion is not required when "an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, *such as the constitutionality of a statute*." *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992) (emphasis added), superseded by statute on other grounds as recognized by *Woodford v. Ngo*, 548 U.S. 81 (2006) (noting that agency may lack the "institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 497 n.5 (1977) (plurality) (rejecting requirement of exhaustion where local agency lacked competency to resolve constitutionality of city ordinance limiting occupation of dwellings); *Mathews v. Diaz,* 426 U.S. 67, 76 (1976) (excusing exhaustion where only issue brought to court was a "constitutional issue beyond the Secretary's competence"); *Thomson Consumer*

Electronics, Inc. v. United States, 247 F.3d 1210, 1215 (Fed. Cir. 2001) (excusing exhaustion given that "Customs is powerless to perform any active role in the determination of the constitutionality of the assessment since it cannot rule on the validity of an Act of Congress"); *Howard v. F.A.A.*, 17 F.3d 1213, 1218 (9th Cir. 1994) (observing that "[c]hallenges to the constitutionality of an agency regulation . . . lie outside the cognizance of that agency [and] . . . therefore need not be exhausted"); *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992) ("If the agency lacks authority to resolve the constitutional claims, there is little point to requiring exhaustion.").

As noted *supra*, any of the issues raised by Petitioners and Amici pose pure questions of constitutional law that FERC has no competence in deciding, including such questions as: Does the Takings Clause allow pipelines to exercise eminent domain on the basis of a conditioned certificate that may never authorize the pipeline to actually construct or operate a pipeline? (MVP RO ¶¶ 80–83); (PennEast RO ¶ 28); and Do tolling orders violate landowners due process right to a meaningful hearing? (MVP RO ¶¶ 78, 79). FERC merely repeats the same arguments in every case to justify its own power and orders, without giving special consideration to the unique circumstances of each case, and does not give landowners any meaningful review of their constitutional challenges. *See, e.g.*, PennEast RO ¶ 31 ("The Commission has fully addressed the Fifth Amendment issues raised in other proceedings.") (citing to *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, ¶¶ 30–35 (2017); MVP

RO; ACP RO (citations omitted); and Nexus RO ¶ 46 (stating same; citing to the same FERC decisions).

As this Court has recognized, it is futile to go through the administrative process if the agency does not have jurisdiction over the issues raised: "Resort to the administrative process is *futile* if the agency will almost certainly deny any relief either because it has a preconceived position on, or lacks jurisdiction over, the matter." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986) (emphasis in original). For example, in *Baxter v. Claytor*, 652 F.2d 181 (D.C. Cir. 1981), the Secretary of the Navy argued that Baxter had failed to exhaust his administrative remedies before the Naval Board for Correction of Military Records. The Court held that because the Board had informed Baxter that it had no jurisdiction to provide the relief sought, "Baxter was justified in not filing an additional, formal claim for relief. The requirement that administrative remedies be exhausted does not include the performance of clearly useless acts." *Id.* at 185.

In addition, courts have not required litigants to exhaust administrative procedures that are themselves the object of the legal challenge, for in such a case "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." *McCarthy*, 503 U.S. at 148 (quoting *Barry*, 443 U.S. at 63 n.10 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (excusing exhaustion of administrative remedies before the State Board of Optometry where "the clear purport of appellees' complaint was that the State Board

of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion”))); *Cohen v. U.S.*, 650 F.3d 717, 731–33 (D.C. Cir. 2011) (observing, “it is ‘improper to impose an exhaustion requirement’ when the allegation is that the ‘administrative remedy furnishes no effective remedy at all’” (quoting *McCarthy*, 503 U.S. at 156 (Rehnquist, J., concurring in the judgment (concluding that appellants were not obligated to seek refund from Secretary before challenging “the administrative procedures by which the IRS allows taxpayers to request refunds”))); *Bavido v. Apfel*, 215 F.3d 743, 748 (7th Cir. 2000) (citing principle that exhaustion is not required where the adequacy of the administrative remedy is “for all practical purposes identical with the merits”; excusing exhaustion where use of administrative remedy would, in essence, require plaintiff to concede his case).

And so here it was “clearly useless” for Amici Landowners to have to submit their constitutional claims for rehearing and claims challenging FERC’s due process violations, an exercise that achieved nothing but delays ranging from seven to eleven months in having these claims presented to the constitutionally mandated post-deprivation hearing in federal.

CONCLUSION

For the reasons given herein, and in Petitioners’ Brief, the Court should declare that the delay created by the Commission’s use of tolling order violates landowners’ due process right to a prompt post-deprivation hearing, and vacate the Atlantic

Sunrise Certificate and remand it to the Commission. The Court should further find that a petitioner who will suffer from irreparable injury may deem the Commission to have denied rehearing if the Commission does not take a final agency action (including granting, denying, abrogating or modifying its certificate order without further hearing, 15 U.S.C. § 717r(a); *see* Petitioners' *En Banc* Br. at 12–13) within 30 days of that petitioner's request for rehearing, and the petitioner may then seek judicial review within 60 days from the 30 days after requesting rehearing.

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSTITUTION PIPELINE, Plaintiff v. A PERMANENT EASEMENT FOR 1.84 ACRES AND TEMPORARY EASEMENTS FOR 3.33 ACRES IN NEW MILFORD TOWNSHIP, SUSQUEHANNA COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 127.00-1,603.00,000 Defendants.	CIVIL ACTION NO: 3:14-2458

MOTION TO DISSOLVE INJUNCTION AND SET JURY TRIAL FOR DETERMINATION OF COMPENSATION

OVERVIEW

In the three years since this Court granted Plaintiff Constitution Pipeline LLC's (Constitution) Emergency Motion for Preliminary Injunction for Possession of A Right of Way across property owned by the Defendant Landowners to construct and operate a 30-inch diameter, natural gas pipeline that would transport shale gas through New York and Pennsylvania, Constitution has been busy. Just weeks after the FERC Certificate issued, Constitution filed eminent domain complaints against dozens and property owners and once awarded possession, forged ahead on the Landowners' property, surveying and staking the right of way and pursuing contempt charges against the Landowners for their alleged

obstruction of tree-clearing activity, ultimately securing state police and heavily armed U.S. Marshals outfitted with assault weapons and bulletproof vests to protect Constitution crews as they invaded the property to chop down over 500 ash and sugar maple trees. Simultaneously on the regulatory front, Constitution pursued a Section 401 water quality certification for the pipeline from the state of New York (without which the project cannot be built) and when refused, appealed the denial all the way up through the United States Supreme Court, *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation,* 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018), before unsuccessfully urging the Federal Energy Regulatory Commission (FERC) to find the Section 401 permit requirement waived. *Constitution Pipeline LLC*, CP18-5 (Declaratory Order Denying Waiver), 162 FERC ¶61,014 (2018). But there is one activity that Constitution has not accomplished during the past three years and never will: actually building the very pipeline that served as the rationale for the preliminary injunction to begin with.

"Two years is a long time for a preliminary injunction," observed the Third Circuit in *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3rd Cir. 2003). Here, the injunctive relief that this Court granted Constitution for the purpose of gaining immediate access has lasted over three years and circumstances have changed. With the passage of time, the pipeline that Constitution once insisted would face costly delays in the absence of immediate access to the Landowners' property now faces certain demise as the result of the New York's denial of the Section 401 water quality certificate. These changed circumstances eviscerate the original justification for the injunction and transform this Court's order into an "instrument of wrong" that violates the Landowners' Fifth Amendment rights.

The continued injunction has, and will continue to wreak severe hardship on the Landowners who continue to play involuntary host to a multi-billion company that has not paid a dime of compensation for the occupation and destruction of the Landowners' trees, land and business, or the retaliatory harassment inflicted on them for exercising their First Amendment rights to oppose occupation of their property. Moreover, with each passing day that Constitution holds the property hostage for a project that will never be built, the Landowners suffer a deprivation of their Fifth Amendment rights, which protect against uncompensated takings of property that will not serve a public use.

For all of these reasons, the Landowners ask this Court to expeditiously dissolve the injunction, eject Constitution from the property and restore full possession to the Landowners. This relief should not be difficult because Constitution never compensated the Landowners for their property and therefore never took title to the easement. *See E. Tennessee Nat. Gas Co. v. Sage*, 361 F.2d 808, 825 (4th Cir. 2004) (noting that title does not pass until compensation is paid and that Landowners are due compensation if pipeline is abandoned). Once property ownership is restored, this Court must establish a schedule for a jury trial to determine compensation for the destruction of the Landowners' property and cost of restoration (also known as "cost to cure," business losses, trespass, intentional infliction of emotional distress, attorneys' fees and all other damages. *Id.*, *see also* Rule 71.1(i)(c)(requiring court to hold compensation hearing where case is dissolved or dismissed but partial property interest has been taken). To alleviate the financial burden on Landowners, the Court should also permit the Landowners to draw down on the bond amounts posted by Constitution. *see also Sage*, 361 F.2d at 831 (observing that Landowners may draw down on

pipeline's posted deposit during pendency of compensation hearings).

BACKGROUND

A. Description of Landowners and Property

By way of background, the current Defendants in the above-captioned proceeding, Michael and Maryann Zeffer, Patricia Glover, Catherine Holleran, Dustin Webster ("Landowners"), own the approximately 23-acre-property in New Milford Township, Susquehanna County, Pennsylvania which is the subject of this case. Ex. 1, Holleran Decl., ¶ 1, 3. Ms. Zeffer is a life-tenant of the property and lives in one of the houses located on the parcel. *Id.* at ¶1.

Prior to Constitution's intrusion, the property supported a variety of uses. With two small cottages and abutting a natural spring-fed lake, the property has potential as a vacation or recreational destination as it is currently used by the Landowners. Ex. 1, Holleran Decl. ¶ 4-5. The two open fields on another portion of the parcel had been actively farmed, and the heavily wooded area was used for four-wheelers and walking while serving as a visual buffer to afford privacy from adjacent properties. Ex. 1, Holleran Decl. ¶ 3. The woods were comprised primarily of ash and sugar maple trees, which were tapped by the Hollerans to operate a small maple syrup business. Ex. 1, Holleran Decl. ¶3. Needless to say, once Constitution gained immediate possession of the property through this Court's injunctive powers and razed a swath through the wooded area, the Landowners' ability to use their property for the purposes just described was either substantially damaged or completely destroyed.

B. Constitution's Condemnation Complaint and Rule 65 Motion for Injunctive Relief for Immediate Possession.

1. The FERC Certificate

This proceeding dates back to December 2, 2014 when the Federal Energy Regulatory Commission (FERC) issued a certificate of convenience and necessity to Constitution to construct and operate a 124-mile long, 30-inch diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania to a proposed interconnection in Schoharie County, New York. *See Constitution Pipeline LLC*, Order Issuing Certificate, 149 FERC ¶ 61,199, at P 1 (2014) ("Certificate"). Although the project as approved by FERC originates in Pennsylvania, 80 percent of the pipeline as planned– or approximately 98 miles – would run through New York.

The FERC certificate was not the only authorization required for the project. The pipeline would cross over 250 waterways, Certificate at P 77, necessitating water quality certificates under Section 401 of the Clean Water Act from both Pennsylvania and New York.[1] *See Constitution Pipeline*, 868 F.3d at 90; *see also* 15 U.S.C. §717b(d) (preserving applicability of Section 401 to projects under the Natural Gas Act). Constitution timely initiated the Section 401 process in both states, but New York had not acted on Constitution's application by the time FERC granted the certificate. Thus, the FERC Certificate contained a provision prohibiting Constitution from commencing project construction until it received all other required federal permits. *See* Certificate, App. at P 8. FERC described the conditioned certificate granted to Constitution as an "incipient authorization without current force or

[1] Constitution applied for and obtained a Section 401 water quality certificate from Pennsylvania for the 20-plus-mile segment of pipeline that runs through the state. 44 Pa. Bull. 6287 (Oct. 4, 2014).

effect." *Constitution Pipeline LLC*, Order Denying Rehearing, 154 FERC ¶ 61,046, at P 62 (2016).

2. Constitution's Condemnation Complaint and Motion for Rule 65 Injunctive Relief.

Notwithstanding the incipient nature of the FERC certificate, on December 28, 2014, Constitution filed a condemnation complaint to seize a 1.84 acre right of way and 3.33 acre construction easement across the Landowners' property. Compl., ECF No. 1. The Complaint alleged that Constitution, as a certificate holder, had a right to use eminent domain under Section 7f(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) to acquire a right-of-way across the landowners' property to "construct, install, operate and maintain the pipeline facilities approved in the FERC Order," Compl. ¶18, ECF No. 1.

Although the Natural Gas Act does not confer a right of immediate possession before compensation, Constitution availed itself of a process approved by the Fourth Circuit in *East Tennessee Natural Gas Co. v. Sage*, 361 F.2d 808 (4th Cir. 2004), to gain immediate entry: a motion for partial summary judgment to establish Constitution's substantive right to take the property (Mot. for Partial Summ. J., Jan. 7, 2015, ECF No. 4) and for injunctive relief for immediate possession under FRCP 65. (Mot. for Prelim. Inj., Jan. 16, 2015, ECF No. 15). Constitution filed these motions for *Sage*-style relief on January 7, 2015 and January 16, 2017 respectively.

In its motion for summary judgment, Constitution argued that FERC's award of a certificate conferred a substantive right to eminent domain under Section 717f(h) of the Natural Gas Act that could be enforced by the court through the issuance of a preliminary

injunction granting immediate possession. Mot. for Partial Summ. J., Jan. 7, 2015, ECF No. 4. Constitution next argued that injunctive relief was warranted because it satisfied the Third Circuit's four factor test for a preliminary injunction: likelihood of success on the merits, irreparable harm to the movant and lack of harm to the non-moving party, and that injunctive relief is in the public interest. Br. in Supp. 10, Jan. 16, 2015, ECF No. 16, *citing Columbia Gas Transmission LLC v. 1.01 Acres,* 768 F.3d 300, 315 (3d Cir. 2014). As to the first factor, Constitution asserted that there was a high likelihood of success on the merits because as holder of a certificate, it had a substantive right to use eminent domain to take property necessary for the project under 15 U.S.C. 717f(h) of the Natural Gas Act. Br. in Supp. 12-13, Jan. 16, 2015, ECF No. 16.

Next, Constitution urged that it would suffer irreparable harm if denied immediate access, explaining that the resulting delay would interfere with timely completion of the project by the certificate deadline of December 2, 2016 and give rise to lost revenue of $358,000 a day, and work suspension and remobilization charges of $720,000 per day. Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 34-36, Jan. 16, 2015, ECF No. 15-3. Constitution presented testimony from Project Manager Matthew Swift detailing the scope of work that Constitution needed to accomplish urgently and within a short time-frame, including performing cultural resource surveys, developing and implementing best practices and accessing and constructing in sensitive fish and wildlife habitat within state-mandated deadlines. Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 15-28, Jan. 16, 2015, ECF No. 15-3. Swift also explained that Constitution could only carry out many of these tasks during certain months to avoid harming certain wildlife and that missing these narrow

timeframes would force Constitution to wait a full season until the construction window reopened. At least half of the restricted and time-constrained activities described by Swift pertained to the New York segment of the pipeline. *See generally* Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 11-28, Jan. 16, 2015, ECF No. 15-3.

Constitution assured that Landowners would suffer no harm. Constitution explained that Landowners would eventually be compensated for the property taken and that Columbia would also post bond as security for future payment. Br. in Supp. 20, Jan. 16, 2015, ECF No. 16; Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶ 32, Jan. 16, 2015, ECF No. 15-3. Constitution concluded that injunctive relief would serve the public interest because it would enable Constitution to timely comply with the terms of the FERC certificate and provide the public with access to natural gas supply. Br. in Supp. 2-22, Jan. 16, 2015, ECF No. 16.

On March 17, 2015, this Court granted Constitution's motion for summary judgment and injunctive relief. Balancing the equities, this Court agreed that Constitution would suffer irreparable harm if not granted immediate access and that injunctive relief would serve the public interest by providing additional natural gas capacity. Order, ECF No. 44.

C. Tree Clearing Activity on the Landowners Property Begins

After the court's injunction issued in March 2015, Constitution began staking and surveying activities but did not immediately begin ground-breaking activities with permanent impacts such as tree-clearing or trenching on the Landowners' property. Nevertheless, based on Constitution's earlier representations regarding its need to move quickly to meet its in-service deadline, the Landowners reasonably expected that pipeline construction might begin at any moment. For that reason, once the Court awarded possession the Landowners'

saw no point in continuing maple syrup operations or making improvements to their property that would only be destroyed once the pipeline came through.

In January 2016, Constitution asked FERC for authorization to proceed with tree removal for the pipeline. Request for Partial Notice to Proceed (Jan. 8, 2015 [sic]), CP13-499, FERC eLibrary Accession No. 20160108-5125. Constitution limited its request for tree-clearing to Pennsylvania because New York had still not acted on Constitution's Section 401 application and the certificate prohibited commencement of construction without it. FERC granted Constitution's request on January 29, 2016. Letter Order (Jan. 29, 2016), CP13-499, FERC eLibrary Accession No. 20160129-3019.

Two weeks after receiving approval to start tree-clearing, Constitution returned to this Court with an Emergency Motion to Enforce the Injunction Order, inaccurately representing that the Landowners planned to interfere with tree clearing and should be subject to contempt findings. Mot. to Enforce Order, Feb. 12, 2016, ECF No. 46. In support of the Enforcement Motion, Matthew Swift offered a second declaration, reaffirming the urgent need to access the property and commence tree-clearing to complete work within an agency-approved window and reiterating the accumulation of damages resulting from delays. Mot. to Enforce Order, Feb. 12, 2016, ECF No. 46-1, ¶¶ 24-26. Following a brief hearing, this Court found that the Landowners were not in contempt, but nevertheless entered an order to enforce the Injunction Order and allow the tree-clearing to proceed. Order, Feb. 22, 2016, ECF No. 67.

On March 1, 2016, Constitution workers, accompanied by gun-toting security guards and U.S.marshalls entered the Landowners' property with chainsaws and cut 558 trees (a combination of ash and sugar maple) to clear the right-of-way. Ex. 1, Holleran Decl. at ¶¶

19, 25. A little over a month later, on April 22, 2016, the New York Department of the Environment denied Constitution's application for a Section 401 water quality certificate. *See Constitution Pipeline*, 868 F.3d at 88. Around that time, further activity on the Landowners' property ceased, though Constitution left the felled trees on the property for months. Ex. 1, Holleran Decl. at ¶¶ 22-23, 27-28. In the spring of 2017, Constitution crews returned to remove the trees, but the stumps and roots remain. Ex. 1, Holleran Decl. at ¶¶ 27-28.

D. The Pipeline Reaches the End of the Line

Since removing the trees felled over two years ago, Constitution has not taken any further steps to construct the project in either Pennsylvania nor New York. Nor can it. On April 22, 2016, the New York DEC denied Constitution's application for a Section 401 water quality certificate, which was affirmed by the Second Circuit in *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018). Under the Clean Water Act, "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator . . ." 33 U.S.C. §1341(a), thus rendering the license invalid.

After losing its appeal of the NYDEC's denial of the Section 401 certificate, Constitution petitioned the Commission to waive the water quality certificate, arguing that the New York DEC failed to act within a year of receiving Constitution's application as required by Section 401. FERC denied Constitution's waiver request on January 11, 2018. *See Constitution Pipeline*, Order for Petition on Declaratory Order For Waiver, 162 FERC ¶ 61,014 (2018). Constitution sought rehearing of the FERC's waiver denial, but its chances of success are dim as the Landowners cannot identify a single case where FERC has reversed

itself on rehearing in a natural gas pipeline case under Section 7 of the Natural Gas Act. Moreover, Constitution's rehearing request for a waiver of the Section 401 requirement does not change the fact that New York's denial of the Section 401 certificate remains intact and bars construction of the pipeline under the terms of the FERC Certificate and the Clean Water Act.

Having exhausted its remedies, Constitution's pipeline has reached the end of the line. Because FERC certificate conditions commencement of project construction on receipt of all federal permits, Constitution's inability to obtain the Section 401 water quality certificate dooms the project by preventing Constitution from constructing the 80 percent of the pipeline located in New York. And although FERC also extended the original December 2016 in-service deadline for the pipeline to December 2, 2018,[2] all the time in the world will not save Constitution's pipeline because without the Section 401 permit, Constitution cannot build the project.

ARGUMENT

I. THE INJUNCTION MUST BE DISSOLVED BECAUSE THE CIRCUMSTANCES JUSTIFYING A GRANT OF IMMEDIATE POSSESSION TO CONSTITUTION HAVE DRASTICALLY CHANGED AND CONVERTED THE INJUNCTION INTO AN "INSTRUMENT OF WRONG"

A. Changed Circumstances Justify Vacating a Preliminary Injunction

A court may dissolve a preliminary injunction that it has previously issued. *Sprint v. Commc'ns Co. L.P. v. CAT Commc'ns Int'l*, 335 F.3d 235, 241 (3d Cir. 2003); *see also Twp. of Franklin Sewerage Auth. v. Middlesex Cty. Utils. Auth.*, 787 F.2d 117, 121 (3d Cir. 1986). Vacating a preliminary injunction is appropriate where "change of circumstances between

[2] Letter Order (July 26, 2016) CP13-499, FERC eLibrary Accession No. 20160726-3006.

entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable," *Favia v. Indiana Univ.*, 7 F.3d 332, 337 (3d Cir. 1993), or transform the original mandate into "an instrument of wrong." *United States v. Swift & Co.,* 286 U.S. 106, 115 (1932). The changed circumstances standard prevents an enjoined party from constantly challenging the imposition of a preliminary injunction and relitigating arguments on motions to dissolve that have already been considered by the district court in its initial decision. *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3rd Cir. 2003).

To demonstrate changed circumstances to dissolve an injunction, a movant must show (1) the emergence of new evidence; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or prevent manifest injustice. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995); *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Applying this standard, a federal district court examined whether continuation of an injunction preventing a shipping company from using a particular software remained justified in light of changed circumstances. *Air Express Int'l v. Log-Net, Inc.*, 2014 U.S. Dist. LEXIS 89471, at *14-15 (D.N.J. June 30, 2014). There, the court found that the shipping company's *raison d'etre* for the injunction – that its operations would "come to a grinding halt" without access to the software – had evaporated after new evidence was presented that the shipping company's customers had been migrated to another provider. Similarly, in *Harper v. Global Geophysical Servs.*, 2011 U.S. Dist. LEXIS 2439, at *14, the court dissolved an order enjoining a survey company from accessing a property to conduct seismic testing after learning that the company had ceased testing, thus obviating the

need to prohibit the company from entering the property to conduct tests.

In *DUSA Pharms., Inc. v. River's Edge Pharms.*, 2007 U.S. Dist. LEXIS 16005, *10 (D.N.J. March 6, 2007), a change in an intervening administrative action enabled a defendant pharmaceutical company to dissolve an injunction restraining it from manufacturing, selling or importing an allegedly infringing product. After the preliminary injunction was issued, the US Patent and Trademark Office granted the defendant's request to reexamine the patent and rejected the claims of obviousness which had been the grounds for the infringement action. *Id.* As a result of the PTO's ruling, the court found that plaintiff was no longer likely to succeed on the merits and the injunction was no longer justified. *Id.*

B. The "Changed Circumstances" Standard Applies to Sage-Style Injunctive Relief

The Third Circuit's "changed circumstances" standard applies with equal force to injunctive relief under FRCP 65 awarding a gas company with a FERC certificate immediate possession in accordance with *Sage*. In *Tenn. Gas Pipeline, L.L.C. v. 1,693 Acres*, the district court, relying on *Sage*, granted Tennessee Gas immediate possession of a purportedly private road to transport workers to the site to construct project upgrades approved by a FERC certificate. *Tenn. Gas Pipeline, L.L.C. v. 1,693 Acres of land in the Twp. of Mahwah*, 2015 U.S. Dist. LEXIS 57995 (D.N.J. May 4, 2015). Tennessee Gas had argued that it would suffer irreparable harm without immediate possession because it would be unable to meet the project in-service dates specified by contract, thus triggering financial penalties. *Id* at *4. Two years later after the project was nearly completed, the court determined that the private road to which Tennessee Gas had been awarded access was actually classified under state law as by-road open to the public. As a result, the court found that "Tennessee Gas can access its

pipeline facilities without a preliminary injunction. Consequently, Tennessee Gas will not suffer irreparable harm absent the injunction and dissolution of the injunction is appropriate." *Id.* at *38-39.

C. The NYDEC Denial of the Section 401 Certificate Is A Changed Circumstances That Eviscerates the Original Justification for the Injunction.

With the passage of time and intervening events, this Court's *Sage*-style grant of injunctive relief to Constitution has transformed from what has been characterized as "an approach of practical necessity"[3] into an "instrument of wrong." The drop-dead December 2016 in-service deadline that Constitution used to justify the urgent need for immediate possession has come and gone. With New York's denial of a Section 401 water quality permit, the FERC certificate that Constitution once invoked to prop up its claim of a substantive entitlement to use of eminent domain no longer authorizes project construction and cannot serve as a basis for condemnation under Section 717f(h) of the Natural Gas Act. Meanwhile, the court order -- though appropriate at its inception based on information presented at the time -- now functions only to compel Landowners to continue playing involuntary host to a private gas company for a project that will never be built, without a dime of compensation for Constitution's three-year occupation of their land, destruction of their property and business, and infliction of emotional distress. All of these factors constitute the type of changed circumstances that eviscerate Constitution's grounds for the underlying injunction under the familiar four-factor test and require immediate dissolution of the injunction. Additional discussion follows.

[3] *See* J. Behnke and H. Dondis, *The Sage Approach to Immediate Entry*, 27 Energy L.J. 499 at 544 (2006).

1. Constitution Does Not Have a Likelihood of Succeed on the Merits Because New York's Denial of a Section 401 Permit Stripped Constitution of Its Substantive Right to Condemn the Property.

With the New York's denial of the Section 401 water quality certificate, Constitution's likelihood of success on the merits of retaining the power of eminent domain is diminished because Constitution no longer has a substantive entitlement to eminent domain. In this regard, this case resembles *DUSA Pharms.*, where an intervening event – the Patent Office's decision to reexamine the patent and reject of claims of obviousness – pulled the rug out from under the court's initial finding that an injunction was justified because the plaintiff was likely to succeed on the merits of its patent infringement argument. *DUSA Pharms., Inc. v. River's Edge Pharms.*, 2007 U.S. Dist. LEXIS 16005, *10 (D.N.J. March 6, 2007). Likewise, New York's intervening denial of the Section 401 permit invalidates this Court's earlier findings related to Constitution's likelihood of success on its eminent domain claims.

Recall, that during the initial proceeding for injunctive relief before this Court, Constitution argued that as the holder of a valid FERC certificate, it had the right to invoke eminent domain under Section 717f(h) of the NGA to construct and operate the project. *See* Mot. for Partial Summ. J. 3, Jan. 7, 2015, ECF No. 4. But New York's denial of the water quality permit invalidates the FERC Certificate under the Clean Water Act, which expressly prohibits a federal agency from granting a license if Section 401 certification has been denied by the State. 33 U.S.C. §1341(a) ("No [federal] license or permit shall be granted if certification has been denied…"); *see also Alabama Rivers Alliance v FERC*, 325 F.3d 290, 300 (D.C. Cir. 2003) ("Because the Commission issued the license amendment to Alabama Power without having such [401] certification, we . . . vacate the Commission's orders.").

Without a valid FERC certificate, Constitution's power to invoke eminent domain under Section 7f(h) of the Natural Gas Act evaporates because the statute limits condemnation authority to "certificate holders."

Even if the FERC certificate remains intact without New York's Section 401 certificate,[4] New York's denial still strips Constitution of a substantive entitlement to eminent domain under the terms of the Certificate itself. The certificate conditioned commencement of construction on Constitution's receipt of all required permits. Certificate, App. at P 8. As Without receipt of the required federal permits, the certificate order -- in FERC's own words -- is nothing but an 'incipient authorization without current force or effect' because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied." *Constitution Pipeline LLC*, Order Denying Rehearing, 154 FERC ¶ 61,046, at P 62 (2016). New York's denial of the Section 401 permit kills any chance of Constitution satisfying the FERC Certificate's environmental conditions and as a result, the certificate will forever remain an incipient authorization that is inadequate to support Constitution's claim of a substantive entitlement to eminent domain.

Finally, Constitution no longer entitled to use the power of eminent domain under the Natural Gas Act. Section 717f(h) confers certificate holders with the power of eminent domain only for the specific purpose of acquiring "the necessary right-of-way to **construct, operate and maintain a pipeline** . . . for the transportation of natural gas . . ." 15 U.S.C. §

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[4] On June 27, 2018, the Landowners asked FERC to vacate or rescind the certificate because the "construction and operation" authorized by the certificate can never take place now that New York has denied the Section 401 permit. But this Court need not wait for FERC to act, because the Landowners still satisfy the standard for dissolution of the injunction.

717f(h) (emphasis added). But Constitution cannot construct, operate or maintain the pipeline without the Section 401 permit and therefore, does not qualify for condemnation under Section 717f(h) of the Natural Gas Act.

2. Constitution No Longer Faces Irreparable Harm From Delay For a Project That Will Not Be Built, While the Harm to the Landowners Is Substantial

When Constitution sought injunctive relief for immediate possession, it argued that its inability to access the properties and clear all trees would prevent the project from meeting its December 2, 2016 in-service deadline and cause massive financial losses for this multi-billion dollar company. *See* Br. in Supp. 15, 17, Jan. 16, 2015, ECF No. 16, discussion *supra* at Background B.2. Constitution's witness Matthew Swift outlined the tasks that Constitution would need to complete to meet the 2016 service date - over half of which related to the New York segment of the project. Swift also explained that much of this work could only be performed during narrow seasonal windows that if missed, would require Constitution to wait months for its next opportunity to continue construction. *Id*.

Based on Constitution's claims of urgency, this Court found that injunctive relief in the form of immediate possession was necessary to prevent irreparable harm to Constitution. But the dire circumstances described by Constitution no longer exist. The December 2, 2016 deadline that Constitution cited as the basis for moving full speed ahead has come and gone. The lengthy to-do list of pre-construction tasks enumerated in Mr. Swift's declaration have already been largely completed on the Pennsylvania side of the pipeline, and no longer matter on the New York side with the denial of the Section 401 permit. At this point, Constitution has nothing left to do.

That FERC extended the in-service deadline to December 2, 2018 -- now five months away -- does not change anything. No amount of extra time will enable Constitution to get the pipeline in the ground when the lack of a Section 401 permit prohibits construction of the pipeline to begin with.

Importantly, the Landowners do not here question this Court's original order granting injunctive relief. As the saying goes, hindsight is 20-20. Back in 2015, this Court's findings that Constitution would suffer irreparable harm due to delay if denied injunctive relief were reasonable based on the facts presented -- but not so today. Denied a Section 401 permit, Constitution simply cannot build the pipeline authorized by the Certificate and will not be irreparably by a dissolution of the original injunction granting possession. *See also Tennessee Gas*, 2015 U.S. Dist. LEXIS 57995 (finding no irreparable harm to company in dissolving *Sage*-style order granting immediate possession of private roadway after determining that the road is open to the public and company no longer needs court-ordered access); *Harper*, 2011 U.S. Dist. LEXIS 2439 (dissolving injunction barring survey company from conducting seismic tests on property when testing is completed and property owner no longer has need for a court order prohibiting entry).

Meanwhile, the continuation of the injunctive inflicts substantial harm on the Landowners. For starters, even though Constitution has occupied the Landowners' property for three years and change, Constitution has not paid the Landowners a dime by Constitution for the occupation and destruction of their property, in violation of their property rights under the Fifth Amendment. The existence of a continuing constitutional violation constitutes proof of irreparable harm. *Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978). The

Landowners suffer other hardship from the continued occupation of their property. The court order also prohibits the Landowners from replanting the trees or putting any permanent structures in the easement. *See* Order, March 17, 2015, ECF No. 44; Order, Feb. 22, 2016, ECF No. 67. And Constitution can continue to access the property without the Landowners' consent. These continued encroachments on the Landowners for a project that cannot be constructed and for which Constitution has no right of eminent domain justify dissolution of the injunction.

3. The Injunction No Longer Serves the Public Interest

This Court found that the injunction would serve the public interest by providing access to additional natural gas capacity. Order 3, March 17, 2015, ECF No. 44. With the denial of the Section 401 permit, this project will no longer carry gas and does not serve the public interest. In fact, light of the changed circumstances described throughout this motion, the continued injunction now runs counter to the public interest by taking the Landowners' property without just compensation in violation of their Fifth Amendment Consitutional rights. Whereas once the injunction might arguably have been justified as a practical solution to enable Constitution to move forward with its pipeline, now the injunction operates as an instrument of wrong – a taking of private property by a private company for a project that will not be built.

III. THE LANDOWNERS ARE ENTITLED TO RETURN OF FULL POSSESSION OF THE PROPERTY AND SUBSTANTIAL DAMAGES

A. Both *Sage* and Rule 65 Contemplate Damages for an Unlawful Injunction

In granting immediate possession, the *Sage* court nevertheless contemplated the

possibility that a regulatory approval might be reversed or that a pipeline might abandon a project midway through, leaving the Landowners with no recourse because they had not been compensated in advance. Thus, *Sage* put in place two safeguards that would protect Landowners from holding the bag if a project went south for whatever reason.

First, under *Sage*, "title does not pass until just compensation has been ascertained and paid." 361 F.2d at 826. By retaining title, Landowners can easily reclaim full possession and ownership of easement rights without the need to reconvey title. Second, *Sage* requires gas companies to post a bond pending compensation to ensure that Landowners will be paid for damages if the company walks away from a project:

> Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any "damages resulting to the [land] and to fixtures and improvements, or for the cost of restoration." 4 J. Sackman, Nichols on Eminent Domain § 12E.01 [07] (rev.3d ed).

Sage, 361 F.3d at 826. *Sage* also held that damages for trespass might be appropriate in circumstances where the company continued to occupy the property without payment. *Id*.

Sage is consistent with Federal Rules of Civil Procedure 65 and 71.1, which provide a similar result. FRCP 65 governing injunctive relief anticipates that if "any party is found to have been wrongfully enjoined or restrained," recovery may be had from the bond posted as security. Rule 71.1 also prevents a company that has taken an interest in a property from dismissing an action so as to avoid payment of compensation. *See* FRCP 71.1 Both *Sage* and FRCP 71.1 leave no doubt that this Court has jurisdiction to remedy the harm suffered by the Landowners.

B. Damages

The damages suffered by the Landowners in this matter are extensive and complex. As detailed in Landowner Catherine Holleran's declaration, the Landowners lost 558 trees, many of which were at least 200 years old and therefore irreplaceable and priceless. Ex. 1, Holleran Decl. ¶ 25. Moreover, the loss of trees gave rise to other permanent damage to the property itself. The wide swath of trees removed from the property along the border reduces that privacy that the fully wooded area provided. And 558 stumps now remain in the easement effectively rendering the area useless for building, replanting or other purposes. Ex. 1, Holleran Decl. ¶ 28. In addition, without the tree canopy, the easement is full of weeds and invasive plants, in contrast to the leafy forest floor that once existed. Ex. 1, Holleran Decl. ¶ 29. The slope of the property has also been permanently altered as a result of Constitution clearing a slope for road construction. Ex. 1, Holleran Decl. ¶ 29.

Constitution also put an end to the Landowners' nascent syrup business. Ex. 1, Holleran Decl. ¶ 26. The threat of pipeline construction in 2015 caused the Landowners to miss one year of tapping of the impacted property and thereafter, trees were taken down and could not be tapped. Ex. 1, Holleran Decl. ¶ 26. Constitution's actions also destroyed the gravity feed of the sap down the tubing. Ex. 1, Holleran Decl. ¶ 26. Constitution must compensate the Landowners for these significant business losses.

Meanwhile, Constitution has occupied the property for over three years now without any rental payment. And during much of that period, the Landowners were forced to live with felled, rotting trees that Constitution did not remove until the fall of 2017. The lengthy occupation without construction kept the Landowners in limbo, unable to make decisions

about future use of their property without knowing whether the pipeline would come through.

The Landowners have also been subjected to emotional stress through court hearings and the presence of armed guards on their property followed by the despair of realizing that the damage was entirely avoidable – since Constitution sent its crews home just a few weeks after having removed the trees. Ex. 1, Holleran Decl. ¶¶ 19-30..

The Landowners request a trial before a jury to determine the full extent of their damages. But pending trial, the Landowners ask the Court to release to the Landowners an initial payment of $50,000 to cover the cost of expert witnesses to assist in evaluating the full scope of the damage and to enable them to begin to replace some of their lost business income and to begin to address some of the damages to their property.

REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the Landowners respectfully request that this Court (1) dissolve the injunction, divest Constitution of any possessory interests in the Landowner's property and restore full ownership of the easements to the Landowners; (2) immediately release $50,000 to the Landowners from the bond consistent with *Sage* to enable them to address the most serious damage to their property and (3) award damages to fully compensate the Landowners for the full restoration of their property, lost business, trespass, infliction of emotional distress and attorneys fees in an amount to be set by jury trial and full amount of compensation for restoration of the property to the condition it was in prior to the taking damages for lost business, infliction of emotional distress and attorneys fees for a jury trial and (4) grant any other relief that this Court deems just.

Respectfully submitted,

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July 9, 2018

CERTIFICATE OF SERVICE

I certify that on July 12, 2018, a copy of the above-motion was served on the parties through this Court's ECF System.

Respectfully submitted,

/s/Carolyn Elefant

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(a)(5) that the attached *En Banc* Brief of Affected Landowners as *Amici Curiae* in Support of Petitioners is proportionately spaced, has a typeface of 14 points, and contains 6,230 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

DATED: January 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted,

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