ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020

United States Court of Appeals
for the District of Columbia Circuit

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

ALLEGHENY DEFENSE PROJECT, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

JOINT BRIEF OF INTERVENORS ON REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenors Transcontinental Gas Pipe Line Company, LLC, Chief Oil & Gas LLC, and Southern Company Services, Inc. state the following:

A. Parties and Amici.

All Petitioners and the Respondent are identified in the Rule 28(a)(1) certificate in Petitioners' Joint Brief on Rehearing En Banc.

Intervenors in this action, all of whom join in this Brief, include: Transcontinental Gas Pipe Line Company, LLC, Chief Oil & Gas LLC, and Southern Company Services, Inc.[1] Intervenors make the disclosures required by Circuit Rule 26.1 in a Corporate Disclosure Statement immediately following this Certificate.

In addition, the following have submitted briefs as amicus curiae in support of Petitioners: Alliance for The Shenendoah 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

[1] Due to changes in its interests subsequent to the filing of the Intervenors' Brief in support of Respondent on May 24, 2018, Anadarko Energy Services Company is not participating in this Brief.

Defense Council, Public Justice, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Alliance; 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; and States of Maryland, Delaware, Illinois, 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.

Intervenors anticipate that the Interstate Natural Gas Association of America will submit a brief as amicus curiae in support of Respondent.

B. Rulings Under Review.

References to the rulings at issue appear in the Rule 28(a)(1) certificate in Petitioners' Joint Brief on Rehearing En Banc.

C. Related Cases.

This case was previously before this Court in the consolidated proceeding captioned *Allegheny Defense Project, et al. v. FERC*, Nos. 17-1098, 17-1128, 17-1263, 18-1030. The panel's opinion in that proceeding is published at *Allegheny Defense Project v. FERC*, 932 F.3d 940 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019). Undersigned counsel is not aware of any related cases currently pending within the meaning of Circuit Rule 28(a)(1)(C).

Dated: February 10, 2020

/s/ John F. Stoviak
John F. Stoviak
Counsel for Intervenor
Transcontinental Gas Pipe Line Company, LLC

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of the Rules of this Court, Intervenors Transcontinental Gas Pipe Line Company, LLC, Chief Oil & Gas LLC, and Southern Company Services, Inc. make the following disclosures:

Transcontinental Gas Pipe Line Company, LLC ("Transco") is a natural gas pipeline company engaged in the transportation of natural gas in interstate commerce, which owns and operates an interstate natural gas transmission system that extends from Texas, Louisiana and the offshore Gulf of Mexico area to a terminus in the New York City metropolitan area. Its parent company is Williams Partners Operating LLC, which is a wholly-owned subsidiary of The Williams Companies, Inc. (NYSE: WMB). We have no knowledge of any other entity owning 10% or more of Transco or Williams Partners Operating LLC.

Chief Oil & Gas LLC ("Chief") is a private company engaged in exploration, production and marketing of natural gas in the Appalachian Basin, with its principal place of business in Dallas, Texas. No publicly held company has a ten percent or greater ownership interest in Chief.

Southern Company Services, Inc.: Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Mississippi Power Company, and Southern Power Company (collectively, "Southern Companies")

are each a wholly-owned subsidiary of The Southern Company, which is a publicly-held corporation.[2] Other than Southern Company, no publicly-held company owns 10% or more of Southern Companies' stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include three vertically integrated electric utilities – Alabama Power Company, Georgia Power Company, and Mississippi Power Company – and a wholesale energy provider – Southern Power Company. These subsidiaries, each an Intervenor here through their agent Southern Company Services, Inc., own and operate electric transmission facilities and are engaged in the manufacture, generation, transmission, and sale of electricity and serve both retail and wholesale customers within specified franchised electric service territories in portions of Alabama, Georgia, and Mississippi. Southern Company Services, Inc. is the services

[2] Gulf Power Company ("Gulf") is no longer a wholly-owned subsidiary of The Southern Company, as the stock purchase agreement between The Southern Company and NextEra Energy, Inc., whereby all outstanding common shares in Gulf were sold and transferred by The Southern Company to NextEra Energy, Inc., closed on January 1, 2019. At this time, Southern Company Services continues to serve as agent for Gulf on the Atlantic Sunrise Project.

company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for those operating subsidiaries.

Dated: February 10, 2020

/s/ John F. Stoviak
John F. Stoviak
Counsel for Intervenor Transcontinental Gas Pipe Line Company, LLC

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TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Constitution, Statutes, and Rules

Other Authorities

GLOSSARY

A.	Citation to Petitioners' Joint Appendix on Rehearing En Banc
Certificate Order	Order Issuing Certificate, *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (Feb. 3, 2017)
FERC	Federal Energy Regulatory Commission
Landowner-Petitioners	Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman
Petitioners	Landowner-Petitioners and Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.
Project	Transcontinental Gas Pipe Line Company, LLC's Atlantic Sunrise Project
R.	Record citation
Transco	Intervenor Transcontinental Gas Pipe Line Company, LLC

INTRODUCTION

Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman's (collectively, "Landowner-Petitioners") arguments fail because they ask this Court to overturn and/or ignore compelling precedents of this Court, the Supreme Court, and the United States Court of Appeals for the Third Circuit. Landowner-Petitioners made similar arguments to the Third Circuit regarding the same properties and same pipeline project at issue here, asserting that the eminent domain process prescribed by the Natural Gas Act as followed by the United States District Court for the Eastern District of Pennsylvania "deprived them of any meaningful opportunity to challenge FERC's public use determination." *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 740 (3d Cir. 2018), *cert. denied sub nom. Like v. Transcon. Gas Pipe Line Co.*, 139 S. Ct. 2639 (2019). The Third Circuit rejected their argument, stating: "*This argument also fails. First, and most importantly, the Hilltop/Hoffman Landowners do not dispute that they had the opportunity to raise their concerns with FERC and did in fact do so; sought stays of construction, which were denied; and sought rehearing. . . .*" *Id.* (emphasis added) (footnotes omitted).

Landowner-Petitioners' procedural due process and public use arguments also fail because:

1. Landowner-Petitioners were provided ample due process as part of the Federal Energy Regulatory Commission's ("FERC") notice-and-comment process before any condemnation of a portion of their property occurred. In the closely-related case brought by these same Landowner-Petitioners, the Third Circuit declared that the "administrative review leading up to the certificate of public convenience and necessity lasted almost three years and, as is evident from the record, included extensive outreach and many avenues of public participation." *Id.* at 729.

2. Landowner-Petitioners fully participated in the process before FERC, submitting nine comments which raised their concerns about the routing of the natural gas pipeline, a topic particularly within the expertise and province of FERC as acknowledged by the Natural Gas Act.

3. There is no right to a pre-deprivation judicial hearing in this context, as this Court already ruled in *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 111 (D.C. Cir. 2018). Indeed, Landowner-Petitioners fail to cite any case supporting their argument that they have a constitutional right to a pre-deprivation judicial hearing after the comprehensive FERC notice-and-comment process.

4. The process followed here, as dictated by the provisions of the Natural Gas Act, fully satisfies the test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by providing robust administrative due process with the opportunity for subsequent judicial review, especially where, as here, the risk of an erroneous deprivation is incredibly low.

5. The Fifth Amendment guarantees Landowner-Petitioners the right to receive just compensation for a taking of a portion of their property. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). It does not guarantee them the right to a pre-deprivation judicial hearing, nor does it entitle them to obtain an injunction to stop a taking of property pursuant to a Congressionally-authorized process that includes robust notice and comment and FERC's determination of public use.

6. Landowner-Petitioners' arguments regarding FERC's determination of public use also fail. FERC fully evaluated and properly determined that the Atlantic Sunrise Project (the "Project") meets the public use, in accordance with its broad Congressional mandate. FERC not only relied on the fully-subscribed precedent agreements providing enough gas to heat more than seven million homes in the Southeast and Mid-Atlantic United States, which was sufficient and substantial evidence of the public use, but FERC also considered comments regarding the need for this Project, including a report submitted by Petitioner Clean

Air Council. The ruling of this Court's panel affirming FERC's determination of public use is unremarkable and consistent with this Court's precedents.

STATEMENT OF ISSUES

1. Are Landowner-Petitioners' arguments that they did not receive constitutionally-required procedural due process foreclosed by FERC's comprehensive, three-year-long notice-and-comment proceeding which already provided them ample due process prior to their rehearing requests and FERC's issuance of a tolling order?

2. Should this Court adhere to its 2018 ruling in *Delaware Riverkeeper Network v. FERC*, where it stated that "[d]ue process requires no more in the context of takings . . . [than the process prescribed by the Natural Gas Act because] there is no right to a pre-deprivation hearing"? 895 F.3d at 111.

3. Should this Court ignore the clear Congressional directives of the Natural Gas Act which (a) specifically allow the use of eminent domain upon issuance of a certificate of public convenience and necessity establishing public use and (b) explicitly state that the filing of a request for rehearing or petition for review of FERC's orders does not automatically stay those orders?

4. Whether substantial evidence supports FERC's determination that there was a need for the Project where FERC considered and relied not only upon binding precedent agreements for 100% of the Project's capacity, but also

comments from shippers and an end-user and a study submitted by Petitioner Clean Air Council?

STATUTES AND REGULATIONS

Except for 28 U.S.C. § 1651(a) and 15 U.S.C. § 717r(c), all applicable statutes and regulations are contained in Petitioners' Brief. 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 15 U.S.C. § 717r(c) provides:

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

STATEMENT OF THE CASE

I. Landowner-Petitioners Actively Participated Throughout FERC's Extensive Review and Approval of the Project.

Following an extensive pre-filing period starting in 2014, Transcontinental Gas Pipe Line Company, LLC ("Transco") filed an application with FERC on March 31, 2015 under section 7(c) of the Natural Gas Act for authorization to construct and operate the Project in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. R. 1585-87. FERC issued its Draft Environmental Impact Statement in May 2016, R. 3954, *Transcon. Gas Pipe Line Co.*, 158 FERC

¶ 61,125, P 72 (Feb. 3, 2017), A. 109-10 ("Certificate Order"), its Final Environmental Impact Statement in December 2016, *id.* P 75, A. 110-11, and a Certificate of Public Convenience and Necessity to Transco approving the Project on February 3, 2017, determining that "*the public convenience and necessity requires approval of Transco's proposal*." *Id.*, P 33, A. 94 (emphasis added); *see also id.* PP 1-2, 68, A. 80, A. 108.

Thousands of written and oral comments and over 900 letters, including *thirty-seven comments submitted by Petitioners (nine of which were submitted by Landowner-Petitioners),*[1] were submitted to FERC during the three-year-long administrative review process for the Project. *See id.* PP 69, 72, 73, A. 108-10.

Petitioners also sought to stay construction of the Project, both before this Court and FERC, but their stay requests were denied. *See* R. 4139, Order Denying Stay, *Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042 (Aug. 31, 2017), A. 306-14; Docket No. 17-1098, Order (D.C. Cir. Nov. 8, 2017); Docket No. 17-1098, Order (D.C. Cir. Feb. 16, 2018).

[1] *See* R. 1265; R. 1269; R. 1822; R. 2297; R. 2485; R. 2577; R. 2623; R. 2662; R. 2670; R. 2724; R. 2759; R. 2760; R. 2908; R. 2930; R. 3187; R. 3386; R. 3554; R. 3567; R. 3570; R. 3636; R. 3640; R. 3648; R. 3667; R. 3743; R. 3789; R. 3807; R. 3810; R. 3857; R. 3876; R. 3880; R. 3940; R. 3944; R. 3945; R. 3946; R. 3984; R. 4105; R. 4135. This list includes comments submitted by Gary and Michelle Erb, the principals of Petitioner Hilltop Hollow Limited Partnership.

II. Need for the Project.

The Project is *fully subscribed*, and *Transco has executed binding precedent agreements with nine shippers for 100% of the incremental firm transportation capacity created by the Project*, demonstrating the immediate and compelling need for the capacity of the Project, which has been in full service for more than sixteen months. *See* Certificate Order PP 11, 28-33, A. 84-85, A. 91-94. The Project's new pipeline infrastructure enables producers with production in Northern Pennsylvania to ship gas to downstream markets in the Mid-Atlantic and Southeast United States, thereby relieving capacity constraints, supporting future economic development, increasing service reliability, and providing competitively priced supplies. *See, e.g.*, R. 1648, Motion to Intervene and Comments in Support of Chief Oil & Gas LLC (Apr. 23, 2015), A. 19-23; R. 2651, Letter from Anadarko Energy Services Company to FERC (Feb. 3, 2016), A. 39; R. 2652, Letter from Southern Companies to FERC (Feb. 3, 2016), A. 36-38; R. 2657, Letter from Chief Oil & Gas LLC to FERC (Feb. 4, 2016), A. 40-42.

FERC also evaluated and addressed various comments and a study submitted by Petitioner Clean Air Council which argued that interstate pipeline infrastructure to ship natural gas from the Marcellus and Utica region was overbuilt. *See* Certificate Order P 26, A. 90. FERC ultimately rejected this argument. *See id.* P 28, A. 91-92.

III. The Eminent Domain Proceedings.

After unsuccessful attempts to negotiate access to essential rights-of-way along the FERC-approved route for the Project, Transco initiated eminent domain proceedings against Landowner-Petitioners on February 15, 2017 in the Eastern District of Pennsylvania. *See* Verified Complaints in Condemnation of Property Pursuant to Fed. R. Civ. P. 71.1, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. Feb. 15, 2017), A. 708, A. 718.[2] Transco's condemnation complaints were filed in accordance with Federal Rule of Civil Procedure 71.1, which is the standard procedural mechanism for federal condemnations. *See id.*

Several opportunities to be heard were provided to Landowner-Petitioners both before and after possession of the pipeline rights-of-way were granted to Transco:

(a) Landowner-Petitioners answered Transco's complaint on March 13, 2017 and had the opportunity to assert affirmative defenses thereto. *See* A. 710, A. 720.

(b) On June 28, 2017, Transco filed an Omnibus Motion for Possession of the Rights of Way so that Transco could proceed with construction on Landowner-

[2] The eminent domain proceedings are matters of public record that are subject to judicial notice under Fed. R. Evid. 201.

Petitioners' properties, and Landowner-Petitioners filed opposition briefing on July 14, 2017. *See* A. 712, A. 713, A. 722.

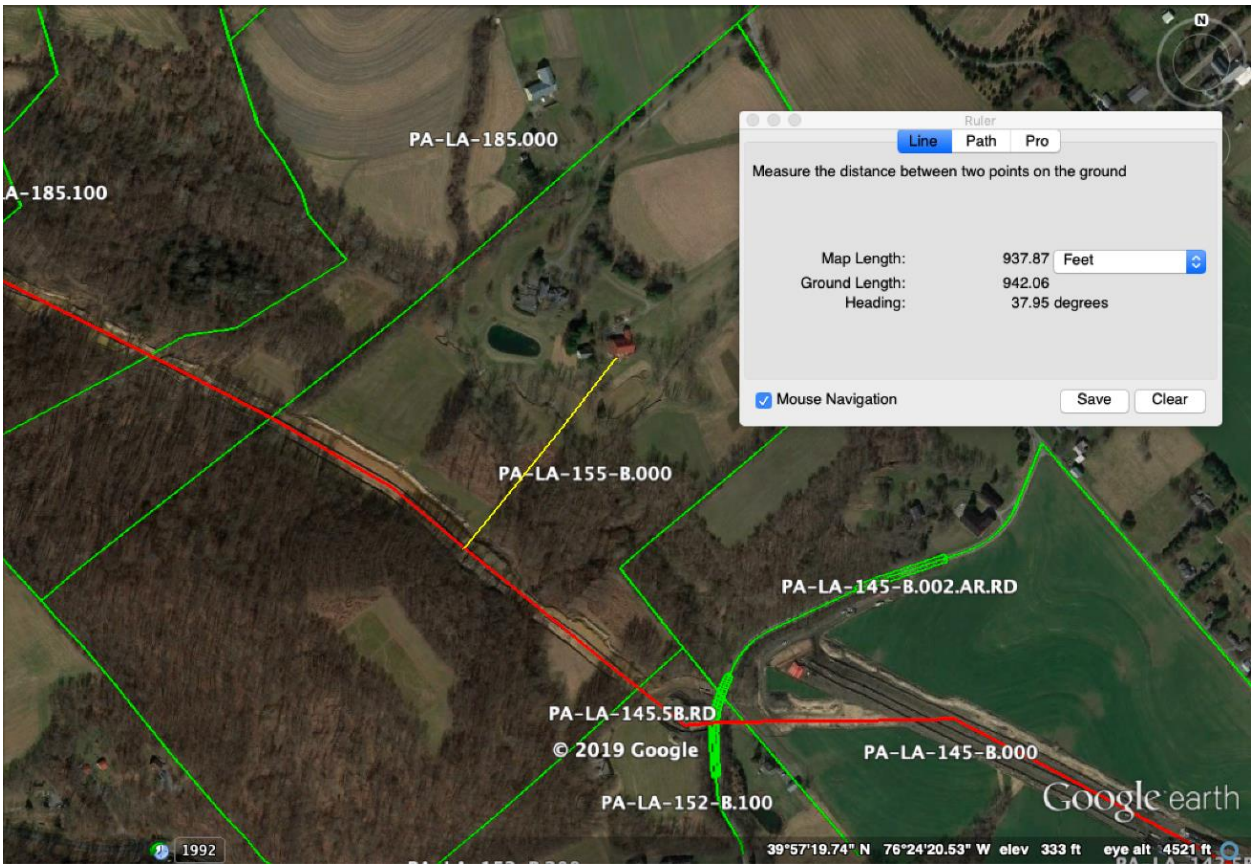
(c) The district court held an evidentiary hearing on the Omnibus Motion on July 17 and July 20, 2017, during which Landowner-Petitioners were heard. Their counsel argued, *inter alia*, that violations of due process had occurred and that the Project did not serve a public purpose. *See, e.g.*, Transcript of Evidentiary Hearing held on July 20, 2017 at 142-50, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. Oct. 19, 2017).

(d) Landowner-Petitioners gave testimony in which they each admitted that they received notice of the FERC proceedings and had the opportunity to participate and submit comments to FERC before the Certificate Order issued. *See id.* at 48-49, 64-65.

Landowner-Petitioners have created a misimpression that their actual homes are being taken by the pipeline when, in fact, Landowner-Petitioners own large tracts of land (Hoffman approximately 114.8 acres and Hilltop approximately 71 acres) and the centerline of the pipeline right-of-way on Landowner-Petitioner Hoffman's property is over 900 feet (the length of three football fields) away from their home. Similarly, the condemned centerline of the pipeline right-of-way on Landowner-Petitioner Hilltop's property is over 600 feet (the length of two football fields) away from their home. Below are aerial photographs of the two properties.

The Court may take judicial notice of the aerial photographs, which were generated using Google Earth and are based on publicly-available information and information of record in the eminent domain proceedings. *See United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1109-10 (9th Cir. 2015) (taking judicial notice of satellite imaging generated by Google Earth); *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (explaining that many courts take judicial notice of geographical facts and distances from sources such as Google). The green lines represent property boundary lines, the red lines represent the centerline of the right-of-way for the pipeline, and the yellow lines represent the *shortest* distance between the Landowner-Petitioners' homes and the centerline of the right-of-way:

Hoffman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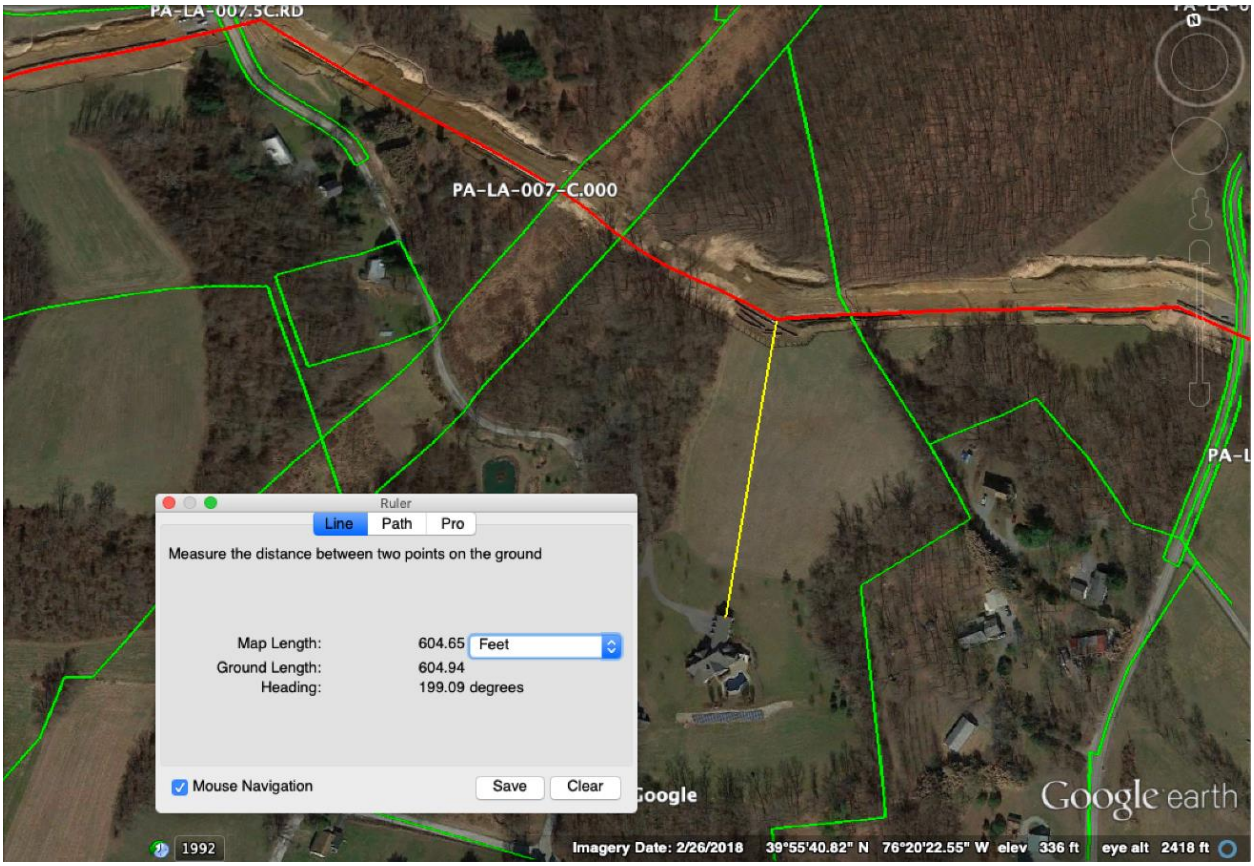
Hilltop



The district court granted the motion for possession on August 23, 2017. *See Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, Nos. CV 17-715, 17-723, 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017), A. 713, A. 723.

On or about September 21, 2017, Landowner-Petitioners appealed the district court's orders granting the Omnibus Motion to the United States Court of Appeals for the Third Circuit. *See Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, Nos. 17-3075, 17-3076 (3d Cir. 2017), A. 714, A. 723. The Third Circuit rejected Landowner-Petitioners' constitutional challenges and affirmed the district court's orders. *See Transcon. Gas Pipe Line Co. v. Permanent*

Easements for 2.14 Acres, 907 F.3d 725, 741 (3d Cir. 2018), *cert. denied sub nom. Like v. Transcon. Gas Pipe Line Co.*, 139 S. Ct. 2639 (2019).

The Third Circuit also rejected Landowner-Petitioners' argument – echoed throughout the amicus brief of the "Affected Landowners" – that the condemnations constituted an unauthorized use of "quick take" procedures, *see id.* at 733-36, noting that Transco "followed standard condemnation procedure," including "different procedures and opportunities for participation" that distinguish it "from an exercise of 'quick take' power." *Id.* at 734-35.

SUMMARY OF ARGUMENT

Landowner-Petitioners challenge FERC's use of tolling orders to allow itself more than thirty days to consider the multitude of complex issues presented in requests for rehearing of its orders, but whether the Natural Gas Act permits FERC's use of tolling orders has no bearing on the due process inquiry because sufficient pre-deprivation process is provided during the notice-and-comment proceeding *prior to* FERC's issuance of a certificate of public convenience and necessity – and by extension, prior to any requests for rehearing or tolling orders on those requests. Landowner-Petitioners receive additional process through rehearing requests and the opportunity to obtain appellate review of FERC's orders, but they receive constitutionally-sufficient pre-deprivation process

consistent with *Mathews* and its progeny *before* FERC even issues a certificate order.

Landowner-Petitioners fail to cite a single case holding that they are entitled to a pre-deprivation *judicial* hearing on FERC's public use determination. None of the relevant cases support their argument that a pre-deprivation judicial hearing is required as a matter of due process. The absence of any such cases reflects the reality that administrative agencies could not function effectively if, as a matter of due process, their decisions – reached after providing their own administrative hearings – were subject to judicial review before taking effect.

Due process aside, FERC's use of tolling orders to fully consider the panoply of complex issues so often raised on rehearing in large infrastructure projects comports with the *Natural Gas Act's express allowance for condemnations and construction to begin prior to appellate review of FERC's orders*. The Natural Gas Act specifically allows the use of eminent domain upon issuance of a certificate of public convenience and necessity establishing public use and explicitly states that the filing of a request for rehearing or petition for review of FERC's orders does not automatically stay those orders. *See* 15 U.S.C. §§ 717f(h), 717r(c). The Natural Gas Act permits a stay of FERC's orders only in those situations which are so extraordinary that such a stay is required, but absent

such a stay, Congress has chosen for these projects to proceed despite an appeal of the issuance of a FERC certificate.

As Congress recognized in the Natural Gas Act, eminent domain is a necessary tool to ensure that these public interest projects can promptly proceed after completion of FERC's comprehensive, multi-year review. Eminent domain possession orders do not necessarily lead to immediate construction of a project since construction begins only after the certificate holder has obtained a Notice to Proceed from FERC. FERC cannot issue a Notice to Proceed until a certificate holder has met all pre-construction conditions in the certificate and has obtained all required federal permits. The pre-construction conditions and the federal permits in most, if not all, cases require both civil and environmental surveys. Therefore, if a landowner denies access to a property, then even the most basic surveys may not be able to be completed, leading to a "chicken and the egg" problem without the tool of eminent domain. Eminent domain must follow issuance of the certificate and not be delayed until the issuance of permits or resolution of all pending permit appeals. Otherwise, a *single landowner* can effectively delay a FERC-approved public use project for years by denying survey access.

Affected landowners have judicial recourse during the pendency of their appeals of the FERC certificate, and, here, the Landowner-Petitioners had judicial proceedings before the Eastern District of Pennsylvania and the Third Circuit.

Their arguments that they were deprived due process in the eminent domain proceedings were expressly rejected. *See Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 737 (3d Cir. 2018), *cert. denied sub nom. Like v. Transcon. Gas Pipe Line Co.*, 139 S. Ct. 2639 (2019).

Landowners also may seek rehearing and stay of the Notice to Proceed once issued by FERC. Interim judicial recourse also is available in a mandamus action or under the All Writs Act in appropriate circumstances, as this Court observed in *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018).

Landowner-Petitioners' challenge to FERC's unremarkable determination that the Project – a fully-subscribed and in-service interstate natural gas pipeline designed to meet growing demand for natural gas in mid-Atlantic and southeastern markets – serves a market need and public use also fail. The Project has been in full service for more than one year, providing a critical outlet for abundant Marcellus natural gas supplies, enhancing service reliability on Transco's pipeline system, and providing markets with new, competitively priced natural gas supplies.

Although Petitioners have failed to demonstrate any entitlement to relief, even if they had done so, vacatur of the Certificate Order would not be appropriate under this Court's precedent in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

ARGUMENT

I. Standards of Review.

A. Standards of Review for Due Process Claims.

The determination of how much process is due requires a balancing of three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation and the probable value, if any, of additional safeguards; and (3) the Government's interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Fifth Amendment imposes two limitations on the right to exercise eminent domain: (1) the taking must be for a public use; and (2) the owner must receive just compensation. *See* U.S. Const. amend. V. While there is a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, that role is extremely narrow. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 127-29, 135 (2d Cir. 2005). The Supreme Court has defined the concept of public use broadly, reflecting its longstanding policy of deference to legislative judgments in this field. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). Accordingly, "the role of the courts in enforcing the constitutional limitations on eminent domain is one of patrolling the borders." *Brody*, 434 F.3d at 135.

B. Standard of Review for FERC's Public Convenience and Necessity Determination.

Congress determined in its passage of the Natural Gas Act that FERC's finding as to whether the Project is required by the public convenience and

necessity – the standard set by Congress in the Natural Gas Act – is "conclusive" and must be upheld "if supported by substantial evidence." 15 U.S.C. § 717r(b); *see also id.* § 717f. Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). The possibility that different conclusions may be drawn from the same evidence does not mean FERC's findings are not supported by substantial evidence. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) ("[T]he question . . . is not whether record evidence supports [petitioners'] version of events, but whether it supports FERC's." (alterations in original) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003))).

II. Landowner-Petitioners' Request to Limit FERC's Use of Tolling Orders So Landowners Can Get a Judicial Ruling Regarding FERC's Public Use Determination Before Eminent Domain Occurs Contradicts Congress's Directives in the Natural Gas Act and Well-Established Case Law and Ignores the Extensive Due Process Provided During FERC's Notice-and-Comment Period.

A. Landowner-Petitioners' Opportunity to Participate in the Notice-and-Comment Proceedings Before FERC Satisfies Constitutional Due Process Requirements.

The due process arguments of Landowner-Petitioners and their amici unfairly diminish the multi-year process leading up to FERC's issuance of the Certificate Order in which Landowner-Petitioners actively participated. During the

course of FERC's consideration of Transco's application for a certificate authorizing the Project, the public, and all landowners affected by the Project, had an opportunity to intervene in FERC's proceeding and comment on Transco's application and the Project. During the three-year-long administrative review process, multiple notice-and-comment periods and public meetings followed, and ***1,185 written comments, 296 oral comments, and more than 900 letters*** were submitted to FERC addressing various issues regarding the Project, Certificate Order PP 69, 72, 73, A. 108-110, including ***thirty-seven comments submitted by Petitioners.***[3] ***Landowner-Petitioners not only intervened in the FERC proceeding, they also submitted nine of these comments to FERC, though their comments were focused almost exclusively on the routing of the Project, rather than its purpose.***[4]

The Certificate Order addressed concerns raised during the FERC proceeding. *See generally id.* Landowner-Petitioners had further opportunity to be heard after the Certificate Order issued by participating in the rehearing process, 15 U.S.C. § 717r(a), and submitting their Requests for Rehearing, which FERC

[3] *See supra* note 1.

[4] R. 2485; R. 2577; R. 2623; R. 3187; R. 3807; R. 3810; R. 3857; R. 3880; R. 3940. This list includes comments submitted by Gary and Michelle Erb, the principals of Petitioner Hilltop Hollow Limited Partnership, who were granted late intervention in the FERC proceeding. *See* R. 3954, Certificate Order P 13, A. 85-86; *id.* App'x B, A. 158-59.

responded to at length in its Order on Rehearing. *See* R. 4203, Order on Rehearing, *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250, PP 25-39, 42-61, 68-71 (Dec. 6, 2017), A. 337-46, A. 348-55, A. 357-59.

Ignoring the FERC proceedings altogether, the "Affected Landowners" amici argue that due process requires a "prompt" judicial hearing when no pre-deprivation hearing has been provided. *See* Br. at 14-20. Their argument wrongly presupposes that Landowner-Petitioners had no pre-deprivation hearing before FERC.

Landowner-Petitioners argue, *without citing a single case*, "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." Petitioners' Br. at 20-21. This Court's precedents say otherwise. *See, e.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1327 (D.C. Cir. 2015) ("[A] commenter before [FERC] who has ample time to comment on evidence before the deadline for rehearing is not deprived of a meaningful opportunity to challenge the evidence."); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014) ("Petitioners had the chance to make meaningful use of this information in connection with their petitions for rehearing. Under our precedent, this fact neutralizes any constitutional claim under the Due Process Clause."); *Blumenthal v. FERC*, 613 F.3d 1142, 1146 (D.C. Cir.

2010) (claim of denial of due process because no opportunity to respond before FERC issued initial decision failed because party "had such an opportunity and took advantage of it when filing its petition for rehearing, which FERC in turn thoroughly considered"); *see also Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres*, No. 4:17-CV-00289, 2017 WL 1105237, at *7 (M.D. Pa. Mar. 24, 2017) (finding no violation of landowner's Fifth Amendment due process rights where landowner "had notice and opportunity to be heard before FERC and will have further notice and opportunity to be heard before this Court as to the amount of compensation to be determined"), *aff'd*, 709 F. App'x 109 (3d Cir. 2017), *subsequent mandamus proceeding*, 711 F. App'x 117 (3d Cir. 2018).

All of this process satisfies constitutional due process requirements in accord with *Mathews*. "[T]he ordinary principle, established by [the Supreme Court's] decisions, [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). In *Mathews*, where the deprivation of disability benefits was at issue, and where "the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year," *id.* at 342, the Court held "that an evidentiary hearing is not required prior to the termination of disability benefits." *Id.* at 349. The administrative procedures providing a claimant with a "process for asserting [a] claim prior to any administrative action," with a subsequent "right to an

evidentiary hearing, as well as to subsequent judicial review, . . . fully comport[ed] with due process." *Id.*

So, too, here. "A balancing of the *Mathews v. Eldridge* factors, as applied to a party's challenge to the public nature of a taking, weighs against the necessity for a pre-deprivation hearing . . . given the slight chance a governmental entity will impermissibly take property for a private purpose." *Rex Realty Co. v. City of Cedar Rapids*, 322 F.3d 526, 531 (8th Cir. 2003) (Bye, J., concurring). There also is a strong government interest in completing the Project – which FERC determined to be required by the national public interest – in a timely manner. *See* Certificate Order P 33, A. 94.

The *Mathews* Court observed that "[i]n only one case, *Goldberg v. Kelly*, . . . has the Court held that a [pre-deprivation] hearing closely approximating a judicial trial is necessary." *Mathews*, 424 U.S. at 333 (citing *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970)). The Court reached that holding in *Goldberg* because the deprivation concerned welfare benefits "given to persons on the very margin of subsistence." *Id.* at 340. The Court noted that the "crucial factor" in *Goldberg*, "a factor not present in the case of . . . virtually anyone else[,] . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* (first alteration in original) (quoting *Goldberg*, 397 U.S. at 264).

The amicus brief of the "Affected Landowners" argues that it is futile for landowners to bring constitutional due process issues to FERC because FERC purportedly lacks institutional competence to decide such claims – an argument Landowner-Petitioners echo with respect to the issue of public use. These arguments are misguided and meritless. It is absolutely within FERC's competence to decide the only merits question raised here: whether the Project serves a public use. Congress entrusted this responsibility to FERC in the Natural Gas Act, *see* 15 U.S.C. § 717f, though the Courts of Appeals have jurisdiction to review FERC's determination if that issue is preserved on rehearing, *see id.* §§ 717r(a)-(b), consistent with *City of Cincinnati v. Vester*, 281 U.S. 439, 446-49 (1930). True, FERC acknowledged in an order for a different pipeline project that "issues regarding the timing of acquisition and just compensation are matters for the applicable state or federal court," *Mountain Valley Pipeline, LLC, Equitrans, L.P.*, 163 FERC ¶ 61,197, P 76 (2018), but that is another matter entirely. Furthermore, as the Third Circuit explained in rejecting a challenge to the Project under the Religious Freedom Restoration Act, "FERC may hear any claim raised before it—even potential violations of federal law." *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 197 (3d Cir. 2018), *cert. denied sub nom. Adorers of the Blood of Christ, U.S. Province v. FERC*, 139 S. Ct. 1169 (2019). "There is no inherent inhibition to FERC hearing a potential claim in the first instance because

it is statutorily granted the authority to hear any claim from an affected party when raised timely." *Id.* "If an affected party disagrees with [FERC's] adjudication of her claim, she has the opportunity for direct appeal before a federal court of appeals." *Id.*

B. Landowner-Petitioners Do Not Have a Due Process Right to a Judicial Hearing on Whether the Project Serves a Public Use Prior to the Use of Eminent Domain.

Landowner-Petitioners do not cite a single case holding that they have a due process right to a pre-deprivation judicial hearing in addition to the hearing and extensive process they received before FERC. Landowner-Petitioners primarily rely on *City of Cincinnati v. Vester*, 281 U.S. 439 (1930), but their reliance is misplaced: the Supreme Court made no ruling as to the timing for judicial review of a public use challenge. *See id.* at 440 (noting that the public use issue was raised in accordance with state law).

Landowner-Petitioners cite *Kelo v. City of New London*, 545 U.S. 469 (2005), but that decision does not help their cause either. *Kelo* explained that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Id.* at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242-43 (1984)); *see also id.* at 480 ("Without exception, our cases have defined th[e] concept [of public use] broadly, reflecting our

longstanding policy of deference to legislative judgments in this field."). In upholding the public use of the community redevelopment plan in *Kelo*, the Supreme Court noted that "[a] constitutional rule that required postponement of the judicial approval of every condemnation . . . would unquestionably impose a significant impediment to the successful consummation of many such plans." *Id.* at 488. The same is true for interstate natural gas pipelines, which simply could not be built if a single landowner could stall an entire project while it seeks appellate review of FERC's public convenience and necessity determination.

Nor does *Phillips v. Commissioner*, 283 U.S. 589 (1931), require a judicial hearing prior to deprivation of a property interest. In fact, *Phillips* held "that no judicial hearing [i]s required prior to the seizure of property" when, as here, there are "preseizure administrative procedures." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 60 (1993) (citing *Phillips*, 283 U.S. at 597-99). *Phillips* specifically rejected the argument that federal appellate review "is constitutionally inadequate" where "collection will not be stayed while the case is pending before the Circuit Court of Appeals." *Phillips*, 283 U.S. at 599.

Landowner-Petitioners' suggestion that more process is due when Congress delegates eminent domain powers to private actors also is meritless. FERC determines whether a project is required by the public convenience and necessity – not the project proponent. And "[t]here is no novelty in the proposition that

Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility." *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950); *see also Berman v. Parker*, 348 U.S. 26, 33-34 (1954) ("The public end may be as well or better served through an agency of private enterprise than through a department of government.").

C. The Fifth Amendment Provides Landowners a Right to Just Compensation, Not a Pre-Deprivation Hearing.

"It has long been the rule that ***the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary.***" *Gov't of V.I. v. 19.623 Acres*, 536 F.2d 566, 570 (3d Cir. 1976) (emphasis added); *see also Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 430 (D.R.I. 1990) (noting "a long line of decisions holding that landowners have ***no due process right to notice and a hearing in agency proceedings to determine the need for condemnation***" (emphasis added) (citing, *inter alia*, *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 677 (1923))).

Indeed, "due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be

heard and to offer evidence as to the value of the land taken." *Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *see also Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 737 (3d Cir. 2018) (same), *cert. denied sub nom. Like v. Transcon. Gas Pipe Line Co.*, 139 S. Ct. 2639 (2019); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (explaining that pipeline company's use of eminent domain powers is "consistent with the Fifth Amendment due process clause" because "'the landowner will be entitled to just compensation, as established in a hearing that itself affords due process,' and '[d]ue process requires no more in the context of takings where . . . there is no right to a pre-deprivation hearing'" (quoting *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110-11 (D.C. Cir. 2018))); *Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006) ("[W]hen the alleged deprivation is effectively a physical taking, procedural due process is satisfied so long as private property owners may pursue meaningful postdeprivation procedures to recover just compensation."); *id.* (collecting "a century of precedent" for the proposition that a "physical taking" does not require a hearing or notice prior to the taking); *Collier v. City of Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984) (explaining that "it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the [C]onstitution without

providing prior notice, hearing or compensation so long as there exists an adequate mechanism for obtaining compensation" and collecting cases).

In the Supreme Court's most recent pronouncement on eminent domain, Chief Justice Roberts, writing for the majority, made clear that landowners are entitled only to just compensation under the Fifth Amendment. "That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: ***So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities.***" *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167-68 (2019) (emphasis added).

Knick overruled precedent that foreclosed takings plaintiffs from *ever* having their claims heard in federal court. *See id.* at 2167. Takings plaintiffs were required to bring their claims in state court first – but state court judgments were later determined to have "preclusive effect in any subsequent federal suit." *Id.* at 2179. In that very literal sense, "takings plaintiffs never ha[d] the opportunity to litigate in a federal forum." *Id.* Petitioners' amici argue that the same is true here, but plainly it is not: landowners are being heard as to compensation in eminent domain proceedings in federal district court, and their public use challenge is being heard before this Court here, where FERC's determinations (unlike those of the state courts in *Knick*) are not given preclusive effect.

Landowner-Petitioners incorrectly claim that FERC's and Intervenors' "answer" to their due process challenge is the All Writs Act, but that is a straw man. Petitioners' Br. at 32-33. Constitutionally-sufficient pre-deprivation process is provided in the notice-and-comment proceedings before FERC. *See* Section II.A., above. *In addition to that process*, interim judicial recourse is available in appropriate circumstances under the All Writs Act if, in fact, the statutory remedies are inadequate. *See* 28 U.S.C. § 1651(a) (empowering federal courts to issue writs as necessary to protect their prospective jurisdiction); *Del. Riverkeeper Network*, 895 F.3d at 113; *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, *2 n.1 (D. Mass. July 15, 2015); *see also, e.g., Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 357-59 (D.C. Cir. 1976) (exercising jurisdiction under the All Writs Act and issuing injunctive relief).

D. FERC's Use of Tolling Orders Does Not Deny Petitioners Due Process or Violate the Natural Gas Act.

Landowner-Petitioners argue that the purported "30-day time limit on FERC's rehearing decision" is necessary "to protect against 'the risk of an erroneous deprivation,'" Petitioners' Br. at 25 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), but their argument ignores that the FERC proceedings (in which they were active participants) protects against that very risk – just like the administrative procedures upheld in *Mathews*.

Petitioners are asking this Court to read into the Natural Gas Act a stay requirement that flatly contradicts Congress's determinations reflected in the plain language of the Natural Gas Act. The Natural Gas Act expressly provides that the filing of a request for rehearing shall not, unless specifically ordered by FERC, operate as a stay of the certificate order, and that the filing of a petition for review with a federal court of appeals, unless specifically ordered by the court, likewise shall not operate as a stay of FERC's order. 15 U.S.C. § 717r(c); *see also Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) (explaining that the Natural Gas Act "does not require a final decision within 30 days; it requires FERC to take *some kind of action* within 30 days for the petition not to be deemed denied by operation of law," and that this "conclusion is not changed simply because the pipeline construction may continue while a rehearing petition is pending. We know this because Congress contemplated construction would be allowed to continue while FERC reviews a petition for rehearing" (citing 15 U.S.C. § 717r(c))), *cert. denied sub nom. Berkley v. FERC*, 139 S. Ct. 941 (2019). Landowner-Petitioners' claims that construction causes irreparable harm completely ignores FERC's conclusion that the Project's "impacts will be reduced to less-than-significant levels with the implementation of the mandatory mitigation measures." Certificate Order P 79, A. 112.

Furthermore, there are good reasons to allow FERC to consider requests for rehearing beyond thirty days. As this Court recognized in *California Co. v. Federal Power Commission*, there is "no strong reason . . . 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." 411 F.2d 720, 721 (D.C. Cir. 1969). "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 alter." *Id.*

Landowner-Petitioners contend that *California Co.* and its progeny should not apply here because the use of tolling orders in this case threatens the "privacy of the home and those who take shelter within it" and involves "'physical invasion' of a family's home," constituting "government intrusion of an unusually serious character." Petitioners' Br. at 25 (quoting *Allegheny Def. Project v. FERC*, 932 F.3d 940, 954 (D.C. Cir. 2019) (Millett, J., concurring), A. 403 (quoting first *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); and then *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982))). In fact, though, this case is not about physical invasion of the Landowner-Petitioners' homes – it involves operating a pipeline in areas several football-field lengths

away from the structures on Landowner-Petitioners' properties, as depicted in the foregoing aerial photographs.

As the aerial photographs make clear beyond any doubt, there has been no seizure of the Landowner-Petitioners' homes. Thus, *James Daniel* – which involved forfeiture and seizure of a home – is plainly inapposite. *See* 510 U.S. at 49. So, too, is *Loretto*, which simply held that a "permanent physical occupation of" an apartment building constitutes a taking – a proposition no one disputes. *See* 458 U.S. at 421, 443. And unlike *James Daniel* and *Loretto*, *California Co.* involved disputes over money; the same can be said here since the Fifth Amendment provides only a right to payment of just compensation and an opportunity to be heard in compensation proceedings. *See* U.S. Const. Amend. V; *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167-68 (2019); *Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Bragg v. Weaver*, 251 U.S. 57, 59 (1919).

Granting the petitions for review to depart from precedent and adopt a new rule would require this Court to find that "FERC's statutorily authorized practice of taking more than 30 days to finally dispose of a rehearing petition violates due process in each and every instance, no matter the reasons for taking more time, the complexity of the application, or the amount of development allowed or blocked in the interim." *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir.

2018). "The Constitution imposes no such categorical rule," *id.*, and this Court should not either.

III. Landowner-Petitioners Fail to Provide Any Persuasive Basis to Overturn This Court's Precedent Upholding the Use of Precedent Agreements to Establish Market Need and Public Use.

FERC's unremarkable and well-supported public convenience and necessity determination fully complied with Circuit precedent. *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 947 (D.C. Cir. 2019). "[A]s long as FERC's public-convenience-and-necessity determination is not legally deficient, it necessarily satisfies the Fifth Amendment's public-use requirement." *Id.* at 948 (citing *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000)); *see also Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) ("FERC's rational public convenience and necessity determination satisfies the Fifth Amendment's 'public use' requirement.").

Landowner-Petitioners ask this Court to overrule its precedent establishing that precedent agreements suffice to demonstrate market need as a precondition to issuance of a certificate of public convenience and necessity. *See Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014); *see also Appalachian Voices*,

2019 WL 847199, at *1. They offer no persuasive reason to do so, choosing instead to make a policy-based argument that should be directed to Congress. Indeed, Landowner-Petitioners support their arguments by citing a few outside-the-record statements by Members of Congress and former FERC Commissioners (some of which were made after FERC issued the Certificate Order), further demonstrating that their argument is a political position not appropriately before this Court. *See* Petitioners' Br. at 43-48.

Landowner-Petitioners are wrong that precedent agreements do not provide meaningful evidence of need. "Investors are highly unlikely to put capital at risk for projects that lack a genuine market . . . . Pipelines have no incentive to enter into sham precedent agreements with affiliates for the same reason. If there is no throughput, the pipeline will not recover the cost of service." Robert Christin, Paul Korman, & Michael Pincus, *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 Energy L.J. 115, 128 (2017); *see also Appalachian Voices*, 2019 WL 847199, at *1.

Notwithstanding Landowner-Petitioners' statements to the contrary, FERC's determination of market need did not rest on precedent agreements alone. As the panel correctly explained, FERC "did not stop" with the precedent agreements for 100% of the Project's capacity, "[i]t also relied on comments by two shippers and one end-user, as well as a study submitted by one of the Environmental

Associations, all of which reinforced the demand for the natural gas shipments." *Allegheny Def. Project*, 932 F.3d at 947. Thus, even if the Court were to overrule its precedent and hold that FERC cannot rely solely on precedent agreements to establish market need and public use, that ruling would not disturb FERC's finding here.

Landowner-Petitioners' speculative argument that some amount of gas transported through the Project facilities could ultimately be destined for export does not undermine FERC's public use determination. *See, e.g.*, Petitioners' Br. at 49-50. FERC fully considered the record materials relating to the possibility of export and provided a reasoned discussion of those materials and why the Project serves a public use. *See, e.g.*, R. 4203, Order on Rehearing, *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250 (Dec. 6, 2017), at PP 29, 29 nn.60-61, 30 n.62, 34, 80, A. 340-41, A. 343, A. 363; Certificate Order PP 26-31, A. 90-93; R. 3913, Final Environmental Impact Statement at 1-10 to 1-11. The record also demonstrates that the Project's objective is to meet growing demand for natural gas ***in mid-Atlantic and southeastern markets***. *See, e.g.*, R. 3954, Certificate Order, at PP 23, 29-30, A. 89, A. 92-93; R. 4203, Order on Rehearing, P 29, A. 340; R. 2666, Seneca Resources Corp. Comment at 1-2, A. 43-44; R. 1877, Southern Co. Servs. Intervention Motion at 1-4, A. 24-27; R. 1795, Washington Gas Light Co. Intervention Motion at 1-2; R. 2678, Washington Gas Light Co. Comment at 1,

A. 45; R. 3232, Comments of Rick Hamilton regarding the Atlantic Sunrise Project, A. 57.

Landowner-Petitioners' efforts to compare this case to *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), are unpersuasive. Petitioners concede that the record here is unlike the record in *City of Oberlin*, where only 59% of that project's capacity was subscribed under long-term precedent agreements, and two of those agreements were with foreign companies serving foreign customers. *See id.* at 603; Petitioners' Br. at 55.

There simply is no basis on this record to second-guess FERC's finding of market need and public use. The record overwhelmingly supports FERC's findings and far surpasses what is required to demonstrate substantial evidence.

IV. Petitioners Have Failed to Demonstrate That They Are Entitled to Relief, But Even if They Had Done So, Vacatur Would Not Be an Appropriate Remedy Here Under This Court's Precedent.

The petitions for review should be denied because Petitioners' only challenge to the merits of the Certificate Order (to FERC's straightforward and well-documented public convenience and necessity determination) is baseless, as determined by the panel. But even if the Court were to find merit in Petitioners' challenge to FERC's public convenience and necessity determination, the relief they seek – vacatur and remand of the Certificate Order – is not the appropriate remedy. Under this Court's decision in *Allied-Signal, Inc. v. U.S. Nuclear*

Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993), the appropriate remedy if Petitioners were to succeed on their public use claim would be a remand to FERC without vacatur.

A. A Showing on Either *Allied-Signal* Factor Is Sufficient to Decline Vacatur.

In *Allied-Signal*, this Court established a two-part inquiry for assessing whether vacatur is an appropriate remedy: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)"; and (2) "the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (quoting *Int'l Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The Court must determine whether there is "at least a serious possibility that the [agency] will be able to substantiate its decision on remand," and whether vacatur will lead to impermissibly disruptive consequences in the interim. *See id.* at 151; *see also Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an adequate explanation for its actions").

This Court does not require the opponent of vacatur to prevail on both factors. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002), *opinion modified in other respects on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *U.S. Telecom Ass'n v. FBI*, 276 F.3d 620, 626-27 (D.C. Cir. 2002).

"When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009); *see also, e.g.*, *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009); *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995).

Even when there are serious deficiencies in an agency's action, this Court has declined to vacate when the disruptive consequences of vacatur would be significant. *See, e.g.*, *North Carolina*, 550 F.3d at 1177-78; *see also Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270-71 (D.D.C. 2015).

B. Neither of the *Allied-Signal* Factors Would Support Vacatur in This Case.

Petitioners do not even attempt to justify their request for vacatur of the Certificate Order. Nevertheless, the record shows that FERC conducted a thorough and lawful public convenience and necessity analysis under the Natural Gas Act in full compliance with Circuit precedent. Even if Petitioners had identified some deficiencies in FERC's finding of public use to the extent FERC was required to focus more of its analysis on factors beyond the precedent agreements, comments of shippers and an end-user, and the study submitted by Petitioner Clean Air Council (which FERC was not required to do), that would be a far cry from

demonstrating that FERC's analysis was "so crippled as to be unlawful." *See Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999).

Turning to the second *Allied-Signal* factor, this Circuit routinely considers disruption to pipelines and their customers when, as here, a project is already in service. Thus, although this Court vacated a certificate of public convenience and necessity in *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017), when it remanded to FERC for further environmental review, the Court granted FERC's motion to stay the issuance of the mandate to avoid immediate vacatur, which, if not stayed, would have required the pipelines to cease operations. *Sierra Club v. FERC*, Docket No. 16-1329, Order (D.C. Cir. Mar. 7, 2018). This Court also recently declined to vacate FERC's orders where vacatur "would be quite disruptive, as the . . . pipeline [at issue] is currently operational." *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019). Vacatur in this case would present similarly severe and disruptive consequences as those present in *Sierra Club* and *City of Oberlin* because the Project has been fully operational for more than sixteen months.

Vacating the Certificate Order here would have several highly disruptive and significant consequences. Not only would Transco be unable to fulfill its transportation contracts and receive a return on its multi-billion dollar investment, but also Transco's customers (including Intervenors Chief Oil & Gas LLC and

Southern Company Services, Inc.) would not have access to the capacity to which they have subscribed, and would be unable to use the capacity to meet their customers' demand for the economical, clean-burning natural gas. *See, e.g.*, R. 1648, Motion to Intervene and Comments in Support of Chief Oil & Gas LLC (Apr. 23, 2015), A. 19-23; R. 2657, Letter from Chief Oil & Gas LLC to FERC (Feb. 4, 2016), A. 40-42; R. 2652, Letter from Southern Companies to FERC (Feb. 3, 2016), A. 36-38. Transco's customers under the Project (and *their* customers) have been using gas shipped through the Project facilities for more than a year, which has enabled them to provide downstream markets with new, competitively priced natural gas supplies, enhanced service reliability on Transco's pipeline system, and created a critical outlet for abundant Marcellus natural gas supplies. *See id.*

Additionally, keeping the Project facilities in service is necessary to provide natural gas transportation service to Transco's existing customers located along the Transco pipeline system. Many of the Project facilities are integrated with Transco's existing mainline system, and, therefore, cannot be shut down without also shutting down Transco's existing mainline facilities. Thus, both Project customers and the many existing customers on Transco's mainline pipeline system would be deprived of critical transportation services in the event of vacatur.

Moreover, Transco would sustain substantial lost revenues associated with those services.

In sum, under *Allied-Signal*, vacatur is inappropriate in this case.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced, 14-point typeface (Times New Roman) and is set in a plain, roman style, using italics for emphasis and citation only.

2. This brief complies with the type-volume limitations in Circuit Rule 32(e)(2)(B)(i) because it contains 8,817 words, excluding the parts of the brief exempted by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

Dated: February 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that thirty paper copies of this filing were delivered this day to the Clerk of the Court.

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