EN BANC ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020

No. 17-1098, *et al.*

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,

ANADARKO ENERGY SERVICES COMPANY, *et al.*,

Intervenor-Respondents.

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

EN BANC BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENTS

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February 18, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Interstate Natural Gas Association of America submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND *AMICI*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the briefs of Petitioners and Respondent, the Federal Energy Regulatory Commission.

The following parties have filed or moved for leave to file (or are expected to do so), *amicus* briefs in support of respondents: the Edison Electric Institute; the Interstate Natural Gas Association of America; and TC Energy Corporation.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the brief of Respondent the Federal Energy Regulatory Commission.

C. RELATED CASES

Related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C) are listed in the brief of Respondent the Federal Energy Regulatory Commission.

Date: February 18, 2020

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

The Interstate Natural Gas Association of America ("INGAA") is an incorporated, not-for-profit trade association representing the majority of interstate natural gas pipeline companies operating in the United States. INGAA has no parent corporation and no publicly held company has 10% or greater ownership in INGAA.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. On February 18, 2020, *amicus curiae* Interstate Natural Gas Association of America ("INGAA") filed a written representation of that consent pursuant to D.C. Circuit Rule 29(b).*

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* hereby certify that no other non-government *amicus* brief of which they are aware focuses on the subjects addressed herein, i.e., the importance of privately owned and operated interstate natural gas pipeline infrastructure in meeting the nation's energy needs and serving the public interest in a reliable and reasonably priced supply of natural gas; the disruption and harm to the public interest that would follow from causing additional delays in the process for approving and building such infrastructure; and the practical consequences for the Commission's current certificate process of adopting Petitioners' statutory or constitutional arguments. As the leading trade organization for the interstate natural gas pipeline industry nationwide, INGAA is well-suited to provide the Court important context on these subjects that will assist

* Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

it in resolving this case. INGAA has endeavored to coordinate with respondents and other *amici* supporting respondents, to avoid duplication in briefing.

Date: February 18, 2020

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GLOSSARY

As used herein,

the Act or **NGA** means the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*;

FERC or **Commission** means Federal Energy Regulatory Commission;

INGAA means Interstate Natural Gas Association of America;

Landowner Amicus Br. means the Corrected *En Banc* Brief of Affected Landowners as *Amici Curiae* in Support of Petitioners (Doc. 1824958) (Jan. 21, 2020).

P means the internal paragraph number within a FERC order;

the Project means the Atlantic Sunrise Project;

Transco Br. means the Joint Brief of Intervenors on Rehearing En Banc (Doc. 1827701) (Feb. 10, 2020).

STATUTES AND REGULATIONS

Relevant statutes and regulations are appended to Respondent's brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Interstate Natural Gas Association of America ("INGAA") is a national trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America.[1] INGAA represents the majority of interstate natural gas transmission pipeline companies in the United States. Its members transport much of the nation's natural gas through a network of approximately 200,000 miles of pipelines. INGAA's members are regulated by the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (the "Act"). INGAA and its members have a substantial interest in pipeline development, continued investment in energy infrastructure, maintenance of an efficient and timely process for approval and construction of new interstate natural gas pipeline infrastructure, and ensuring predictable, consistent, and rational law and policy affecting natural gas transportation. To advance those interests, INGAA regularly files briefs in cases concerning the industry.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

As the leading trade organization for the interstate natural gas pipeline industry, INGAA has a significant interest in, and can offer a unique perspective on, the issues presented in this case. *See* Fed. R. App. P. 29(a)(3).

SUMMARY OF ARGUMENT

Natural gas is one of the nation's most important primary sources of energy, and the timely addition of new interstate pipeline infrastructure has allowed American businesses and consumers to benefit from the United States' abundance of this crucial resource. The development of the nation's natural gas pipeline grid has provided more reliable access to competitive natural gas supplies and resulted in more affordable—and environmentally friendly—energy and energy-based products. Petitioners and their *amici* advance flawed statutory and constitutional arguments that would, if accepted, have serious practical and legal consequences for the Commission's process of reviewing and approving new gas infrastructure, ultimately harming the public interest.

Petitioners' legal theories would cause significant delays in approving, constructing, and placing in service much-needed public infrastructure, harming not only pipelines and their customers (i.e., shippers of gas), but also ultimate end-users, who depend on this critical resource for such essential tasks as heating, cooking, cooling, industrial uses, and power generation. Prohibiting a certificate holder from exercising eminent domain until the rehearing process is complete could delay even

preliminary access to a property, which may be needed to conduct environmental surveys or gather data to apply for or secure other applicable permits. Delaying construction for even a few months can cause cascading delays in project in-service dates, given the linear and sequential nature of construction activity and the patchwork of seasonal and temporal restrictions on certain construction-related activities. Requiring FERC to grant or deny all rehearing requests on the merits within 30 days—a reading not compelled by the statutory text, and that is contrary to the agency's longstanding interpretation and the views of other circuits—could multiply the number of issues raised on judicial review and make it more difficult for the Commission to defend orders on appeal.

The Act's mandatory rehearing process is predicated on FERC having a meaningful opportunity to consider and respond to claims of error prior to judicial review. Given the complexity of many FERC proceedings, the Commission may receive a dozen or more rehearing requests totaling hundreds or thousands of pages of legal briefing and exhibits, for a single order. The Commission cannot meaningfully respond to all rehearing requests within 30 days, across the multitude of proceedings pending in the numerous programs it administers.

A century of precedent from the Supreme Court, this Court, and its sister circuits confirms that a landowner subject to eminent domain does not have a due process right to a pre-deprivation hearing; rather, the Takings Clause guarantees an

award of just compensation, which can occur after the taking. Regardless, Petitioners were afforded ample process, beginning with administrative proceedings before the Commission, and with judicial review available during rehearing (via mandamus) and after rehearing was denied (via a petition for review). The Court should not employ the canon of constitutional avoidance to interpret the Act as a categorical bar on tolling orders, given that due process issues do not even arise in a substantial number of FERC proceedings, many of which do not confer or involve the exercise of eminent domain or are limited to economic (e.g., tariff or rate) issues.

ARGUMENT

I. Under The Natural Gas Act, Private Industry Builds And Operates Vital Infrastructure Serving The Public Interest

The United States depends on natural gas for almost a third of its overall energy needs, including residential, commercial, and industrial uses, power generation, and export trade.[2] Natural gas is the largest source for utility-scale electricity generation in the United States.[3] A broad range of end-users depend on the reliable and uninterrupted supply of natural gas delivered by the nation's natural

[2] U.S. Energy Info. Admin., *U.S. energy facts explained*, https://bit.ly/2P0AvyO (last visited Feb. 11, 2020).

[3] U.S. Energy Info. Admin., *Frequently Asked Questions: What is U.S. electricity generation by energy source?*, https://bit.ly/2vAkFEm (last updated Oct. 25, 2019).

gas pipeline grid.[4] Over the past fifteen years, the United States has experienced an energy transformation, as new technologies have dramatically increased domestic production of natural gas,[5] decreased the Nation's dependence on geopolitically risky overseas energy sources, fostered economic expansion, saved consumers money through lower commodity prices, and bolstered the Nation's national security. While the benefits of increased natural gas production are widespread, over two-thirds of dry natural gas production comes from just five states.[6] The pipeline grid plays an essential role of connecting producing regions with end-users, ensuring reliable, safe, and cost-effective transportation of natural gas.

A. Congress Created A Comprehensive Federal Framework For The Safe, Reliable, And Cost-Effective Interstate Transportation Of Natural Gas

Over 80 years ago, Congress recognized that the business of transporting and selling natural gas in interstate and foreign commerce is "affected with a public interest," and established a comprehensive scheme of federal regulation governing the same. 15 U.S.C. § 717(a); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). Under that system, private companies bear the cost of planning, financing, constructing, operating, and maintaining the interstate natural gas

[4] U.S. Energy Info. Admin., *Natural gas explained: Use of natural gas*, https://bit.ly/2wmN8hm (last updated Dec. 18, 2019).

[5] U.S. Energy Info. Admin., *Natural gas explained: Where our natural gas comes from*, https://bit.ly/3bJE1aA (last updated Nov. 13, 2019).

[6] *Id.*

transmission pipeline grid. Natural gas companies are subject to FERC's extensive and primary jurisdiction on matters ranging from terms and conditions of service to the siting, construction, operation, and abandonment of pipeline facilities. *See* 15 U.S.C. §§ 717c-717f. FERC-regulated natural gas companies currently own and operate a network of roughly 200,000 miles of interstate natural gas pipelines, delivering to markets throughout the United States.[7]

B. The Certificate Process Implements FERC's Statutory Charge To Ensure Adequate Supplies Of Natural Gas At Reasonable Prices

FERC's certificate process for interstate natural gas pipelines is the heart of Section 7 of the Act, and ensures careful review of proposed pipeline projects to "advance development of a sustainable energy infrastructure that supports economic growth, environmental protection and other social benefits over the life of the projects." *Certification of New Interstate Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,389 (2000); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir 2015) (Act's purpose is to "'encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices'") (quoting *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976)). The certificate process is transparent and open, and invites participation by all interested parties, including landowners. For a single natural gas pipeline project, the certificate

[7] U.S. Energy Info. Admin., *About U.S. Natural Gas Pipelines* 70 (June 2007), https://bit.ly/3bRNqNA.

process can take years.[8] The process reflects a thoughtful balance between competing factors, including the need for careful planning and review of proposed natural gas infrastructure with consideration for affected stakeholders, and the needs of pipeline operators, their customers (i.e., natural gas shippers), and ultimately natural gas end-users for infrastructure to be planned and placed in service in a timely manner.

C. Stakeholders Have Extensive Opportunity To Participate In FERC's Certificate Process

Even before a project is proposed, FERC's pre-filing process is available to project developers, and provides a framework to interact with, provide information to, and receive feedback from affected stakeholders.[9] Once the formal certificate process begins, interested parties can intervene, submit information, review and comment on filings, seek administrative rehearing, and ultimately appeal to federal court. The Commission often issues data requests in response to comments by affected parties, and project developers often undertake additional alternatives analysis and proactively modify a proposal to address those issues. *See, e.g.*,

[8] *See* U.S. Gov't Accountability Off., GAO-13-221, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* 26 (2013), https://bit.ly/2UVrjj7 (average processing time of 1.5 years, with some reviews lasting nearly 2.5 years).

[9] *See* FERC, EIS Pre-Filing Environmental Review Process, https://bit.ly/2P0siuz (last visited Feb. 16, 2020).

PennEast Pipeline Co., 162 FERC ¶ 61,053, P 39 (2018) (applicant held over 200 meetings and 15 informational sessions, and incorporated 70 out of 101 proposed route variations in final proposal). Pipelines seek to minimize effects on landowners and the use of eminent domain, including by locating the route away from structures or preexisting uses of property where possible, acquiring only the necessary easements, with the landowner retaining other property rights, and reaching negotiated resolutions wherever possible. *See* Transco. Br. 9.

Through the certificate process, the Commission seeks to balance the public benefits and need for a project against potential adverse consequences. Evidence of need for natural gas projects proposed to the Commission is typically concrete and overwhelming: customers (i.e., shippers of gas) sign binding long-term (typically, 10-30 year) agreements for firm transportation capacity on a pipeline before the project developer even begins the Commission's review process. Shippers include local distribution companies, power generators, producers, gas marketers, large industrial users, and others. Those shippers—no less than end-users of gas—have a direct interest in new gas transportation infrastructure being timely proposed, approved, built, and placed into service.

II. Adopting Petitioners' Legal Theories Would Delay Project Review, Approval, And Construction, Harming The Public Interest

Petitioners assert that the Commission's issuance of a tolling order in this case violated the Act and landowners' alleged due process rights, because the pipeline

litigated condemnation actions and ultimately started construction while rehearing requests were pending before the Commission. *See* Pet'rs Br. 19-21. Perhaps reflecting the novel and doctrinally unsupported nature of their constitutional claims, Petitioners are vague about precisely what process they believe *would* have satisfied the Act and the Constitution. But any of their theories would constitute a significant change in the Commission's certificate process, depart from decades of precedent, create a statutory and constitutional circuit split, and delay the process of planning, building, and operating natural gas pipeline infrastructure.

A. Petitioners Offer Several Flawed Due Process Theories

Petitioners appear to offer several distinct due process theories. At times, they suggest the Constitution requires that landowners have an opportunity to petition for judicial review under Section 19 of the Act, 15 U.S.C. § 717r(b)—and perhaps to fully litigate such a challenge to final judgment—before a certificate holder may exercise its statutory eminent domain authority, *id.* § 717f(h). *See* Pet'rs Br. 27-28. Elsewhere, Petitioners claim the right to a hearing before being "permanently" deprived of a property interest (without defining permanence). *See id.* at 18, 20, 27-28.

Still elsewhere, Petitioners suggest a hearing is required before a certificate holder may *begin construction*—which may not happen for months or longer after condemnation actions are filed. Petitioners variously suggest that judicial review

must not only be *available* pursuant to 15 U.S.C. § 717r(b), but also that appeals should be fully litigated before construction commences. *See* Pet'rs Br. 21 ("[Petitioners] cannot even seek judicial review of FERC's underlying determinations, much less have it completed before their property is taken.").

These arguments begin from a mistaken premise. As the Supreme Court, this Court, and other circuits have held, in the particular context of the Takings Clause, the Constitution confers no due process right to a pre-deprivation hearing on the question of public use. *See* FERC Br. 37-40; Transco Br. 24-28. Under that well-settled doctrine, landowners are entitled to just compensation, and the condemnation proceeding that awards such compensation is the process due. FERC Br. 42-45; Transco Br. 26-28; *cf.* Landowner Amicus Br. 2-3 (asserting right to a prompt *post*-deprivation hearing). In any event, Petitioners were afforded, and employed, more than adequate procedural protections. *See infra* § IV.

If this Court is nonetheless prepared to depart from that body of precedent, it should carefully consider the consequences for the Commission and regulated industry. *See* Pet'rs Br. 18 (urging this Court to apply due process framework from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which considers "the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").[10]

B. Petitioners' Preferred Process Would Significantly Delay The Approval And Construction Of Natural Gas Infrastructure

Adopting Petitioners' statutory or constitutional theories would impose significant additional delays on an already protracted federal approval process. Such delays would harm not only project developers (by making it more expensive and difficult to plan, finance, and build such projects), but also shippers and end-users of natural gas, who depend on pipeline projects being timely approved, built, and placed into service.

If this Court were to hold that due process guarantees landowners an opportunity not only to file, but also to litigate to completion, a petition for judicial review before a certificate holder can even initiate a condemnation action, pipeline projects could be delayed by months or years, with negative effects on the public

[10] Petitioners' due process theories would have radical consequences for the exercise of eminent domain at the federal, state, and local levels, where governments (or their delegees) use eminent domain to build public infrastructure, including roads, power lines, public buildings, parks, and railroads. Petitioners and their *amici* cite no authority holding that the Due Process Clause subjects those exercises of eminent domain to a *de facto* stay, prohibiting project development from moving forward until judicial review is available or complete. Nor could they. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2173 (2019) ("[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking" (citation omitted)).

interest.[11] No "taking" occurs upon the mere filing of a condemnation action under the Act. Rather, after filing a complaint, the certificate holder generally files a motion seeking preliminary injunctive relief to obtain physical access, and the parties litigate that motion over weeks or months. The condemnation court determines the timing of any such relief, as well as subsequent valuation proceedings, ordering a pipeline to post a bond to ensure funds are available to pay compensation, and ultimate entry of any final order of condemnation. Where landowners oppose a pipeline project, and where state law does not provide a right of survey access for utilities, obtaining preliminary relief under the Act allowing property access can be a necessary first step, which may occur many months before construction. *See* Pet'rs Br. 4; FERC Br. 13. In some cases, a pipeline may have obtained survey access pursuant to state law, and thus may be in a position to begin construction a few months after obtaining relief in a condemnation case. But in other instances, a preliminary order in the condemnation case is necessary for a project developer to access properties for purposes of conducting environmental surveys, such as wetlands delineations, identification of potential habitat for protected species, or cultural or historical resources. Such data may be necessary for a pipeline

[11] Pipelines already seek to minimize the use of eminent domain, but it often cannot be eliminated entirely—due, e.g., to a parcel's ownership status (e.g., probate or clouded title), a landowner preference for eminent domain, irreconcilable disagreement about valuation, or where a landowner opposes a project entirely.

even to *apply for* other applicable federal or state permits. *E.g.*, *In re PennEast Pipeline Co.*, No. 18-cv-1585, 2018 WL 6584893, at *23 & n.54 (D.N.J. Dec. 14, 2018) (in granting preliminary injunction allowing property access, condemnation court explained that state agency "is requiring that [the pipeline] have 100% of the [environmental] surveys completed before the agency will undertake to . . . render decisions on [state water-quality permit applications]," and thus pipeline "cannot attempt to obtain its permits without access" (internal quotation marks omitted)), *vacated on other grounds*, 938 F.3d 96 (3d Cir. 2019). Given that those state and federal permitting processes can take months or years, holding that the Constitution bars a certificate holder from even *initiating* a condemnation action until FERC acts on rehearing—or until a certificate appeal has been adjudicated—would add years to an already extended project development process.

Holding that due process bars FERC from authorizing construction activity while rehearing requests are pending would also disrupt and delay the certificate process. FERC can and often does receive numerous rehearing requests for a single certificate order, in some cases totaling hundreds or even thousands of pages of legal briefing and exhibits. *See* FERC Br. 29 & n.7; *PennEast Pipeline Co.*, FERC Docket No. CP15-558 (31 rehearing requests totaling 2,109 pages; FERC addressed in 85-page rehearing order with 394 footnotes); *Atl. Coast Pipeline, LLC*, FERC Docket No. CP15-554 (12 rehearing requests totaling 1,805 pages; FERC addressed in 153-

page rehearing order with 887 footnotes); *Algonquin Gas Transmission, LLC*, FERC Docket No. CP14-96 (9 rehearing requests totaling 896 pages; FERC addressed in 70-page rehearing order). It is hardly unreasonable that FERC would take several months to consider and respond substantively to such requests, particularly given the large number of matters pending before the Commission on rehearing at a given time.

Delaying construction by even a few months can have cascading effects on project completion and in-service dates. Pipeline construction occurs in a linear, sequential fashion, as certain tasks (e.g., clearing of brush, grading terrain, digging a trench) must occur before others (e.g., laying the pipe and backfilling the trench). Construction is also subject to a patchwork of temporal restrictions, such as time-of-year limitations to avoid disturbing habitat occupied by protected species, state or federal limitations on waterbody crossings, and seasonal limitations on construction activity due to extreme weather. *See, e.g.*, FERC, *Wetland and Waterbody Construction and Mitigation Procedures* 5 (2013), https://bit.ly/2SOctsb (FERC policy incorporated into many certificate orders, allowing in-stream work for waterbody crossings only during June 1 through September 30 for coldwater fisheries); *Rover Pipeline LLC*, 158 FERC ¶ 61,109, P 202 (2017) (to minimize impacts on federally listed bat species, allowing tree-clearing activity only between November 15 and March 31 in West Virginia); *Fla. Se. Connection, LLC*, 154 FERC

¶ 61,080 app. B ¶ 16 (2016) (pipeline must "avoid construction within occupied [Florida] scrub-jay habitat between March 1 and June 30"); *Rockies Express Pipeline, LLC*, 123 FERC ¶ 61,234 app. E ¶¶ 85, 97 (2008) (pipeline must comply with state prohibition on "waterbody crossing[s]" between March 1 and June 30).[12]

Project construction schedules are carefully sequenced to satisfy these overlapping temporal and engineering constraints. The net effect is that delaying project construction even a few months could cause projects to miss key construction windows, pushing certain activities—and project completion—back by a whole season or year. Natural gas pipelines are often built to accommodate anticipated peak demand, which can correspond with seasonal weather variations (e.g., "winter peaking" projects in the Northeast where gas is used for heating; "summer-peaking" projects in warmer regions, where gas is used for cooling or power-generation). Delaying a project by a few months can effectively deny a project's customers service for an entire peak season.

Even if the Court were to bypass the due process questions and hold that the Act requires FERC to grant or deny rehearing requests on the merits within 30 days,

[12] *Cf. Jersey Cent. Power & Light Co.*, 143 FERC ¶ 62,102, P 32 (2013) (for pumped-storage hydropower project under Federal Power Act, noting that "[t]he proposed restrictions to construction activities for the protection of bald eagles and Indiana bats could potentially limit the timing of construction to the month of October").

that holding would still likely disrupt FERC's certificate process and cause costly project delays. If the Commission knows that it will lack adequate time to respond to rehearing requests, it may delay issuing certificate orders, attempting to predict and address preemptively arguments that may be raised on rehearing, but without the benefit of receiving actual rehearing requests, which typically narrow and refine the issues and arguments. Denying the Commission reasonable time to address rehearing requests would also deprive the agency of a chance to correct its own errors, thus increasing the number and complexity of issues to be briefed on appeal, burdening courts and litigants. *Cf. ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (rehearing process facilitates winnowing of issues for judicial review). Making it more difficult for FERC to defend its orders on judicial review would place certificate holders in an untenable situation: either delay construction for years until an appeal is complete (failing to satisfy contractual obligations to customers and end-user demand for gas), or invest hundreds of millions or billions of dollars to construct projects while appeals are pending, assuming the risk that a court may later set aside a certificate required to construct and operate the facilities. Such delays and uncertainty will make it more difficult to plan and finance projects, potentially rendering some projects uneconomic that otherwise would have provided significant public benefits. These concerns underlie FERC's development of the tolling order practice, and likely account for Congress's decision to leave that

process undisturbed, despite enacting other statutes that restrict the Commission's use of tolling orders in other contexts. *See* FERC Br. 33-36.

Some Petitioners here are landowners subject to eminent domain. But other Petitioners and their *amici* are national environmental organizations and states opposed to the end-use of natural gas for political or policy reasons. For those organizations, delay or cancellation of natural gas pipeline projects is the self-professed, desired end. While such organizations can and do participate in the Commission process and seek judicial review of FERC orders, they typically do not have protected property or liberty interests triggering a due process analysis. *See Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 107-110 (D.C. Cir. 2018). For these reasons, those groups' anti-fossil-fuel policy arguments, *see* Pet'rs Br. 36-42, should not be given weight in interpreting the Act.

III. The Act Contemplates A Mandatory And Meaningful Rehearing Process

Reading Section 19(a) as requiring FERC to grant or deny all rehearing requests on the merits within 30 days would be contrary to a longstanding agency interpretation that is entitled to deference and is not compelled by the plain statutory text. *See* FERC Br. 19-27; Transco Br. 29-33. It would also be inconsistent with Congress's expectation, reflected in the Act's text and structure, that the rehearing process will be meaningful and substantive. *Accord* FERC Br. 28-33.

Congress created a specific procedure for seeking review of Commission orders, through which a timely request for rehearing is a jurisdictional prerequisite to judicial review. *See* FERC Br. 7; *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334 (D.C. Cir. 2006). Neither a request for rehearing nor the filing of a petition for judicial review "operate[s] as a stay of the Commission's order," unless FERC or a court grants a stay. 15 U.S.C. § 717r(c). Under the Act, any Section 7 certificate holder may exercise the power of eminent domain, without limitation based on the pendency of a rehearing request. *Id.* § 717f(h).

This mandatory rehearing process is unusual among federal agencies, and reflects Congress's judgment that FERC should have a meaningful opportunity to be presented with, and respond to, claims of error in its orders before they are subject to judicial review. *See ASARCO*, 777 F.2d at 774. Given the length and technical complexity of FERC proceedings—which "often involve multitudinous claims and parties"—it makes sense that Congress would have included a mandatory rehearing process. *Pub. Serv. Co. v. FERC*, 863 F.2d 1021, 1023 (D.C. Cir. 1988) (D.H. Ginsburg, J., concurring in denial of rehearing en banc). The rehearing process encourages opponents to focus and narrow the major issues in controversy, and

allows FERC to address "all the issues and arguments at once and in relation to each other" at the rehearing stage, and prior to judicial intervention. *Id.*[13]

Given the complexity of Section 7 certificate proceedings and the number and length of rehearing requests, imposing a strict 30-day "strait jacket," *Cal. Co. v. Fed. Power Comm'n*, 411 F.2d 720, 721 (D.C. Cir. 1969) (per curiam), on FERC's time period for resolving rehearing requests on the merits could effectively deprive the rehearing process of meaning. *See supra* § II. Nor is it plausible that Congress would *require* parties—on pain of forfeiture—to present arguments to the Commission on rehearing, *see* 15 U.S.C. § 717r(b), if it did not intend for the Commission to give those arguments serious consideration.

The Commission issues orders in a wide range of proceedings, large and small, simple and complex. In some proceedings, 30 days might be enough. But the same statutory rehearing-and-review provisions apply broadly to orders under the Act—and under the Federal Power Act, *see* 16 U.S.C. § 825*l*—no matter how complex the subject matter or legal issues. If Congress intended to mandate an aggressive one-size-fits-all deadline to resolve rehearing requests on the merits in

[13] Congress's express provision that Commission orders are not automatically stayed pending rehearing and judicial review is consistent with the familiar principle that "[a] stay is an intrusion into the ordinary processes of administration and judicial review," and "accordingly is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted).

the full panoply of administrative proceedings under both of those complex regulatory statutes, it would have spoken more clearly.

Petitioners suggest the 30-day period in Section 19(a) was part of a congressional "balance" struck between providing natural-gas companies with federal eminent-domain authority and protecting "constitutional interests involved with the permanent taking of property." Pet'rs Br. 10-11. But Petitioners have their history wrong. Sections 19(a)-(c), including the 30-day period on which Petitioners rely, were part of the original 1938 Act, and have remained largely unchanged since. *See* Natural Gas Act of 1938, Pub. L. No. 75-688, § 19, 52 Stat. 821, 831-32. But Section 7(h), conferring eminent-domain authority, was not enacted until 1947. *See* Act of July 25, 1947, Pub. L. No. 80-245, 61 Stat. 459. Section 19(a) could not have been designed to "balance" the effects of eminent-domain authority that *did not even exist* in 1938, when Section 19(a) was enacted. Rather, Congress addressed landowners' constitutional interests when it added Section 7(h) itself, which requires pipeline companies to bring eminent-domain actions in court, *see* 15 U.S.C. § 717f(h)—assuring "just compensation, as established in a hearing that itself affords due process." *Del. Riverkeeper Network*, 895 F.3d at 110-11.

The use of tolling orders in appropriate cases ensures that the rehearing process serves a meaningful and beneficial role. While it is perhaps unsurprising that the Commission does not frequently change bottom-line decisions reached after

years of careful consideration,[14] the Commission does modify its certificate orders on rehearing in appropriate cases, to clarify or impose new requirements (including environmental conditions), address inadvertent omissions, and in other respects. *See, e.g.*, *Tenn. Gas Pipeline Co.*, 154 FERC ¶ 61,184, P 15 (2016) (in response to electric utility's rehearing request, requiring applicant to charge incremental fuel rates as initial rates for service using the project); *Ruby Pipeline, L.L.C.*, 131 FERC ¶ 61,007, P 2 (2010) (granting rehearing in part on financial issues, including recovery of voluntary greenhouse gas costs); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, PP 103, 105 (2009) (establishing two additional environmental conditions in response to rehearing requests filed by environmental groups and an individual); *see also, e.g.*, *Tenn. Gas Pipeline Co.*, 160 FERC ¶ 61,027, PP 2, 6 (2017); *Tex. E. Transmission, LP*, 131 FERC ¶ 61,164, P 9 (2010). This Court should not interpret Section 19(a) in a manner that would undermine that meaningful and beneficial rehearing process—especially when Petitioners' interpretation is not

[14] By the time a certificate order is issued, "applicants and their expert counsel have worked through changes, adaptations, and amendments," *NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014), developed in a lengthy, interactive process in consultation with both the Commission and affected stakeholders. Such changes often include numerous route variations to accommodate landowner and environmental concerns. *See, e.g.*, *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, P 151 (2017), A141 (132 route variations to address "environmental," "engineering," and "stakeholder concerns"); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, P 65 (2017) (201 route variations, totaling 199 miles).

required by the statutory text, runs contrary to the expert agency's consistent understanding, and is contrary to the holdings of every court of appeals to address the question. *See* FERC Br. 23-28.

IV. Petitioners Were Afforded Adequate Process, And This Court Should Not Color Its Statutory Interpretation Based On Potential Due Process Concerns Not Presented In All Cases

Petitioners argue that the Commission's tolling orders deprive affected landowners of due process. Petitioners' due-process arguments suffer from a fatal, threshold flaw: they rely entirely on "general-purpose due process precedent," FERC Br. 37, ignoring the "century of [Supreme Court] precedent" that "has created a distinct body of due process law" applicable to takings. *Presley v. City of Charlottesville*, 464 F.3d 480, 489 (4th Cir. 2006). That precedent establishes that "there is no right to a pre-deprivation hearing" "in the context of takings." *Del. Riverkeeper Network*, 895 F.3d at 111 (citing *Bailey v. Anderson*, 326 U.S. 203, 205 (1945)); *see Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (per curiam). Other circuits agree. *See* FERC Br. 39-40 (citing cases).[15]

[15] *Knick v. Township of Scott*, 139 S. Ct. 2162, does not teach otherwise. *Knick* was not a due process case, and it confirmed that "governments need not fear that courts will enjoin their activities" "[s]o long as the property owner has some way to obtain compensation after the fact," *id.* at 2168; *accord id.* at 2173, 2176—a holding that cannot be reconciled with the federal constitutional right to a pre-deprivation hearing that Petitioners assert here. *See* Transco Br. 28. To the extent Petitioners take issue with the delay resulting from having to raise their public-use arguments on rehearing

There is no basis for this Court to depart from Supreme Court authority, overrule its own precedent, and create a circuit split by holding otherwise. "[T]aking[s] differ[] from other deprivations" in unique ways that "necessarily affect any procedural due process analysis." *Presley*, 464 F.3d at 489. First, the eminent domain power is particularly "essential to the life of the state." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924); *see* FERC Br. 38. Second, the owner of property taken through eminent domain is constitutionally entitled to "just compensation." U.S. Const. amend. V. Unlike typical deprivations of property—such as fines or forfeitures—eminent domain is not an absolute and uncompensated deprivation, but simply a compelled exchange at a fair price. That unique constitutional guarantee of just compensation fundamentally alters the due-process calculus. *Cf. Mathews*, 424 U.S. at 341 ("degree of potential deprivation" bears on "the validity of any administrative decisionmaking process" for due-process purposes).

Even if this Court were to look beyond the dispositive takings-specific case law and apply the general framework of *Mathews v. Eldridge*, Petitioners were afforded all the "process [that] is due," 424 U.S. at 349. They had the right to

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to the Commission before going to court, *Knick* expressly *reaffirmed* that "Congress . . . is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims"—even claims sounding in the Takings Clause. 139 S. Ct. at 2173.

intervene and raise their arguments in FERC's certificate proceeding, prior to any conceivable deprivation of property. *See* 18 C.F.R. § 385.214. They also had the right to seek administrative rehearing of the certificate order, and to raise all of their properly preserved arguments before an Article III court, by writ of mandamus while rehearing was pending, or through a timely petition for review after rehearing was denied—as they have done. *See* 15 U.S.C. § 717r(a)-(b); *cf. Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 630-32 (4th Cir. 2018) (Act provides for meaningful review of constitutional questions), *cert. denied*, 139 S. Ct. 941 (2019). Condemnation actions provide ample process to adjudicate just compensation. *See Del. Riverkeeper Network*, 895 F.3d at 110-11.

Petitioners and their *amici* suggest that the Due Process Clause is violated not because they were denied a particular element of process, but because the process does not unfold "prompt[ly]" enough. Pet'rs Br. 27; *see* Landowner Amicus Br. 15. But "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips v. Comm'r*, 283 U.S. 589, 596-97 (1931). Numerous mechanisms exist to address concerns about delays or interim harms during administrative and judicial review. Aggrieved parties can seek a stay of a certificate order while FERC evaluates rehearing requests. *See* 15 U.S.C. § 717r(c). They can also raise "a[] claim of unreasonable or unconstitutional

delay" or seek a stay "in a mandamus action filed directly in the court of appeals." *Del. Riverkeeper Network*, 895 F.3d at 113. Finally, once a jurisdictionally proper petition for review is filed, parties can ask the Court for a stay pending review. *See* Fed. R. App. P. 18(a); *see generally Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958) (per curiam). Although the standards for such relief are high, due process does not demand that they be relaxed—any more than it requires abandoning the same standards for interim relief in ordinary federal-court litigation.

Even if there were residual concerns that tolling orders could lead to due-process violations under some factual circumstances, that would not justify invoking the canon of constitutional avoidance to interpret Section 19(a) as a categorical bar on tolling orders. No party suggests that Section 19 could be read one way for cases involving eminent domain, but another way in other contexts. Section 19 applies broadly to all "order[s] issued by the Commission in . . . proceeding[s] under [the Act]," 15 U.S.C. § 717r(a), and the Federal Power Act contains materially identical rehearing provisions, *see* 16 U.S.C. § 825*l*. A large portion of the Commission's orders do not have any conceivable effect on landowners or real property—such as the innumerable tariff and rate matters that constitute a major component of FERC's regulatory responsibilities. *Cf., e.g., N. Va. Elec. Coop., Inc. v. FERC*, 945 F.3d

1201 (D.C. Cir. 2019); *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299 (D.C. Cir. 2010).

Even looking just to the subset of natural-gas infrastructure approvals, not all implicate eminent domain. Some projects, such as export facilities approved under Section 3 of the Act, 15 U.S.C. § 717b, do not involve any statutory grant of eminent-domain authority. *See, e.g.*, *Bradwood Landing LLC*, 124 FERC ¶ 61,257, P 19 (2008) (for Section 3 authorization, project developer "has had to obtain all property rights from willing sellers."), *vacated as moot sub nom. Oregon v. FERC*, 636 F.3d 1203 (9th Cir. 2011). And other projects (or parts of projects) are built without resort to eminent domain—e.g., facilities on land already owned or purchased by the pipeline company. *See, e.g.*, *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061, P 246 (2017) (rejecting alternative site for new natural-gas compressor station because alternative "would require the use of eminent domain to procure the property," whereas "[t]he proposed site results in no such impact as the property has been acquired by [the pipeline]"); *Millennium Pipeline Co.*, 140 FERC ¶ 61,045, P 14 (2012) (developer "acquire[d] all the property necessary for its project through negotiation from a willing seller").

Where eminent domain is used, delays in obtaining other applicable permits may forestall any construction until after FERC acts on rehearing, until petitions for judicial review are filed, or even until appeals are fully adjudicated. *See, e.g.*,

PennEast Pipeline Co., 164 FERC ¶ 61,098, P 31 (2018) (noting, in merits rehearing order, that pipeline was not yet allowed to commence construction due to outstanding state permits); *see also Myersville*, 783 F.3d at 1306 (construction of compressor station was conditioned on receipt of state air permit); Letter filed June 24, 2014, *Myersville*, 783 F.3d 1301 (No. 13-1219) (Doc. 1499235) (air permit issued after parties filed final-form briefs in certificate appeal).

Even if Petitioners' due process arguments presented a colorable concern, such issues are not presented in all or even most proceedings governed by Section 19(a), let alone the materially identical provisions of the Federal Power Act. Section 19(a) permits the Commission to exercise discretion to use tolling orders as a tool for managing its own docket—akin to district courts' discretion over timing-related questions that can affect when a final and appealable decision is issued. *Cf.* Fed. R. Civ. P. 6(b). If, on the facts of a specific case, the Commission's *use* of that discretion were to violate due process, recourse "would lie in a mandamus action filed directly in the court of appeals." *Del. Riverkeeper Network*, 895 F.3d at 113. But the canon of constitutional avoidance—which applies only where a contrary interpretation would raise "serious questions about the[] constitutionality" of the statute itself, *United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019)—does not justify categorically barring tolling orders. To nullify the use of tolling orders as Petitioners seek here, based on due-process concerns applicable (if at all) only to a

subset of potential cases, would "assume[] too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410 (1971). This Court should decline to do so.

CONCLUSION

The petitions for review should be denied.

Date: February 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7), because this brief contains 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on February 18, 2020, I electronically filed the foregoing *En Banc Brief of* Amicus Curiae *Interstate Natural Gas Association of America in Support of Respondents* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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