ORAL ARGUMENT SCHEDULED
TUESDAY, MARCH 31, 2020

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

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

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

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

PETITIONERS' JOINT REPLY BRIEF ON REHEARING *EN BANC*

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GLOSSARY

Certificate Order	Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC, 158 FERC ¶ 61, 125 Feb. 3, 2017)*
FERC or the Commission	Federal Energy Regulatory Commission
Homeowner Petitioners or Homeowners	Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, and Stephen D. Hoffman
NEPA	National Environmental Policy Act
Petitioners	Allegheny Petitioners and Homeowner Petitioners
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (July 28, 2000)
Project	Atlantic Sunrise Pipeline Project
Rehearing Order	Order on Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017)
Rehearing Request	Allegheny Petitioners' request for rehearing and motion for stay of the Certificate Order (Feb. 10, 2017)
Transco	Transcontinental Pipe Line Company, LLC

SUMMARY OF ARGUMENT

Due Process: Contrary to FERC and Intervenors' position that landowners only have a right to a post-deprivation hearing on compensation, due process requires a pre-deprivation hearing as to whether a taking of their property is constitutional. FERC's public notice and comment process does not satisfy this requirement. Moreover, FERC's practice of issuing tolling orders deprives landowners of the timely post-deprivation rehearing and judicial review that Congress unambiguously set forth in the Natural Gas Act.

Public Use: FERC's public convenience and necessity determination was not supported by substantial evidence because it was based solely on precedent agreements put forth by the pipeline proponent. Homeowners properly pursued their challenge to FERC's public use determination in this *en banc* proceeding and vacatur is the proper remedy.

The Natural Gas Act: Section 19(a) of the Natural Gas Act does not confer discretionary authority on FERC to deem--or not deem--that a rehearing request has been denied. In addition, amendments to the Federal Power Act do not support FERC's position on tolling orders or its interpretation of the Natural Gas Act. And FERC's interpretation of Section 19(a) is not entitled to deference because that section bears directly on the scope of the Court's jurisdiction. Finally, contrary to

FERC's claims, requiring compliance with the plain language of Section 19(a) would not create insurmountable administrative problems.

ARGUMENT

I. DUE PROCESS REQUIRES MORE THAN A POST-DEPRIVATION HEARING ON COMPENSATION

At the heart of FERC's and Intervenors' position on tolling orders is their flawed belief that the Fifth Amendment confers no right to be heard as to whether a taking is constitutional. According to FERC and Intervenors, the Fifth Amendment confers only the right to post-deprivation compensation.

As set forth in Petitioners' Opening Brief, and below, FERC and Intervenors' belief is incorrect for many reasons, the greatest of which is this:

If the position of FERC and Intervenors were correct, condemnees would have no constitutional right to challenge, undo, or even be compensated for an erroneous taking pursuant to a Certificate Order. Ever. If FERC and Intervenors were correct, landowners would only have the right to be heard at a post-deprivation compensation hearing, where substantive challenges to FERC's decisions are prohibited. As a result, condemnees could never avoid or undo an erroneous taking decision, nor could they be monetarily compensated for it, because evidence of FERC's substantive error could not be raised at the compensation proceeding. That result cannot be reconciled with due process

requirements, and cannot be correct, nor can any of the other arguments that FERC and Intervenors base upon that faulty premise.

A. Homeowners Have a Constitutional Right to a Pre-Deprivation Hearing

Try as they may to criticize Homeowners for their reliance on "general-purpose due process precedent," FERC, Intervenors, and their amici, cannot escape the fact that the Supreme Court's decisions in *Cincinnati v. Vester*, *Goldberg v. Kelly*, and *Mathews v. Eldridge* are the backbone of this country's due process jurisprudence. More importantly, and unlike many of the eminent domain decisions relied upon by FERC and Intervenors, those Supreme Court decisions are binding—and they demonstrate that Homeowners have a constitutional right to be heard, prior to suffering an irreversible loss. Finally, these cases make clear that FERC's public notice-and-comment process did not, and cannot, in and of itself, satisfy a landowner's right to be heard prior to a final taking.

As set forth in *Mathews v. Eldridge*, "some form of hearing is required before an individual is deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). And though it is true that "something less than an evidentiary hearing is sufficient prior to adverse administrative action," that principle only applies where there is also a hearing *post* deprivation, and the ability to remedy an erroneous deprivation. *Id*. at 343.

The Supreme Court held in *Mathews* that the administrative procedures under review there were constitutionally sufficient because they included: (first) a pre-deprivation claim process; (second) a post-deprivation evidentiary hearing; and (third) the opportunity for judicial review. *Id*. at 349. The Supreme Court also made clear that something less than a pre-deprivation evidentiary hearing is only appropriate where, as in *Mathews*, an erroneous taking could be remedied post deprivation. *Id.* at 340-41 (comparing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), where a pre-deprivation evidentiary hearing was required because the taking was potentially life threatening and irreparable).

It is not the case that a pre-deprivation hearing is never required before a deprivation of property. The Supreme Court held in *Goldberg v. Kelly* that due to the serious and potentially irreparable nature of the taking of welfare benefits, a post-deprivation hearing was not sufficient and a pre-deprivation hearing was required. Here, as in *Goldberg*, the nature of the taking had serious and irreversible consequences. Though Intervenors do their best to belittle the harm landowners have suffered --describing it as purely monetary, the fact of the matter is that their homes are now in the high-impact-radius of a 42 inch natural gas pipeline and their privacy and quiet enjoyment of their homes has been damaged

forever.[1] These are not monetary deprivations, nor will Homeowners ever be compensated for those losses, because the eminent domain code does not provide for recovery of that type.

Nonetheless, both FERC and Intervenors take the position that Homeowners have no due process right to a pre-deprivation hearing of any kind. *See* FERC Br. 37-40; Intervenor Br. 26-29. In support of their argument, FERC and Intervenors recite the general "rule" that a landowner has no right to a hearing in advance of a governmental body's determination that a taking is necessary. Intervenor Br. at 26 (citing *Gov't of V.I. v. 19.623 Acres of Land*, 536 F.2d 566, 570 (3d Cir. 1976) and *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 430 (D.R.I. 1990)). Homeowners do not necessarily disagree with that general "rule," and as set forth above, Homeowners have never argued that they were entitled to an evidentiary hearing or judicial review before FERC determined, in the Certificate Order, that taking their property was "necessary." All that Homeowners have ever argued is that they were entitled to a hearing and judicial review before their property was actually, permanently, and irrevocably—taken.

[1] *Cf. Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988) (upholding tolling order in a case involving monetary payments that were presumptively not irreparable, and explaining that due process concerns could arise when there was a risk of "irreparable injury" or harm to "human health and welfare").

More importantly, the "rule" relied on by Intervenors, and the cases cited by both FERC and Intervenors, do not support the argument that Homeowners have no right to a pre-deprivation hearing.

First, the cases cited by FERC and Intervenors deal primarily with notice and possession, and do not involve substantive challenges to the taking. For example, *Gov't of V.I.*, 536 F.2d at 571 and *Tennessee Gas*, 749 F. Supp. at 430, addressed whether personal notice was required prior to a determination that a taking was necessary, which is different than whether Homeowners' had a right to be heard before their property was actually taken.

Bailey v. Anderson, 326 U.S. 203, 204-205 (1945) and *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 729 (3d Cir. 2018) both considered whether the condemnor could take possession of the property prior to a hearing on compensation, which has no bearing on whether Homeowners have a constitutional right to be heard pre-deprivation. Likewise, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2176 (2019), *Presley v. City of Charlottesville*, 464 F.3d 480, 489-490 (4th Cir. 2006) and *Collier v. City of Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984) all addressed *de facto* takings and the remedies available through inverse condemnation proceedings, which are also irrelevant here.

More importantly, the majority of cases FERC and Intervenors rely upon are cases in which the government itself was the condemnor and the public use determination was uncontested. *See Knick*, 139 S. Ct. at 2176 (public cemetery); *Bailey*, 326 U.S. at 204 (public highway); *Gov't of V.I.*, 536 F.2d at 571 (public highway); *Presley*, 464 F.3d at 482 (public trail); and *Collier*, 733 F.2d at 1314 (public sewer). FERC and Intervenors cannot ignore this distinction.

As set forth in Judge Bye's concurrence in *Rex Realty Co. v. City of Cedar Rapids*, which FERC and Intervenors rely on, when a governmental entity condemns property, there is generally "little risk" that it lacks a legitimate public purpose for doing so. 322 F.3d 526, 531 (8th Cir. 2003) (Bye, J., concurring). Therefore, when applying the *Mathews* factors to a party's challenge to the public nature of a taking, ***by the government,*** the balance weighs against requiring a pre-deprivation hearing "in every case" because in most cases the only issue will be the amount of compensation due. *Id.* That is not the case here.

Here, the government's power of eminent domain is extended with a purportedly public purpose in mind, but it is extended to ***private parties*** who have strong private interests that may be contrary to the public interest. The likelihood of error is made worse by the fact that FERC's public use determination is based solely upon information from those interested private parties. Here, the risk of an erroneous deprivation is much larger than a straight forward taking by a public

entity, and balancing the *Mathews* factors requires that Homeowners be afforded a pre-deprivation hearing.

Congress recognized this difference with the procedures it built into the Natural Gas Act. This Court has recognized that those procedural safeguards are the reason that the process set forth in the Natural Gas Act is constitutionally sufficient. For example, in both *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015) and *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014), this Court held that petitioners were afforded due process because they were able to meaningfully participate in the ***rehearing*** process. *See Myersville*, 783 F.3d at 1307; *Minisink*, 762 F.3d at 115. This Court did not hold that due process was satisfied by the public notice-and-comment process, nor did it hold that the Fifth Amendment guarantees only compensation. Likewise, in this case, Judge Millett stated that judicial review of the lawfulness of the taking is part of the protection the Fifth Amendment affords Homeowners. Concurrence 14 (A.403).

Finally, FERC and Intervenors rely on this Court's unpublished decision in *Appalachian Voices v. FERC*, Nos. 17-1271, 2019 U.S. App. LEXIS 4803 (D.C. Cir. Feb. 19, 2019). Though that case did include a public use argument, it relied on *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018), which is among the circuit precedent Petitioners ask the *en banc* Court to consider

and overturn here. *Id*. at *18. *See* Petitioners' Opening Brief at 22-29. *See also* D.C. Circuit Rule 36(e)(2) ("a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition").

Therefore, the "general rule" that a landowner has no right to a hearing in advance of a governmental body's determination that a taking is necessary, is not applicable here. In takings cases pursuant to the Natural Gas Act, it will often be that compensation is ***not*** the only issue to be determined. As demonstrated by the vigorous dissents of FERC's own commissioners, and this Court's recent decision in *City of Oberlin v. FERC*, 937 F.3d 599, 607 (D.C. Cir. 2019) there is also a very real risk that FERC's current procedure for evaluating the public necessity of natural gas pipelines can lead to erroneous takings. *See* Petitioners' Opening Br. at 42-56. Therefore, due process requires that Homeowners and other similarly situated landowners receive more than a post-deprivation hearing on compensation.

B. FERC's Public Notice-and-Comment Process is Not a Constitutionally Sufficient Pre-Deprivation Hearing

FERC and Intervenors argue in the alternative that any pre-deprivation hearing Homeowners were due was satisfied by FERC's public notice-and-comment process. This argument also fails.

A public notice-and-comment process with hundreds, if not thousands, of participants is not the same as a pre-deprivation administrative hearing. As set

forth by Intervenors, FERC's public notice-and-comment process for the Project included 1,185 written comments, 296 oral comments, and more than 900 letters. Intervenor Br. 19. Homeowners were responsible for 9 of those written comments. In other words, less than half of one percent of the total alleged "hearing" process.

Additionally, though the application and approval process for the Atlantic Sunrise Pipeline may have spanned years, for much of that time, Homeowners did not know that their property would be taken. Homeowners were not notified that their property would be taken until January 9, 2017 (A.110). FERC issued the Certificate order on February 3, 2017 (A.80). Moreover, at the time of the public comment process, Homeowners had no knowledge of the Natural Gas Act, takings by eminent domain, the public use requirement of the Fifth Amendment, or the fact that the public notice-and-comment period would be their only chance to defend against the taking of their property. They were also not privy to much of the information that Transco submitted to FERC in support of its application and had no meaningful ability to challenge the propriety of the taking.

Despite the above, FERC and Intervenors argue that Homeowners unfairly diminish the "multi-year" process leading up to FERC's issuance of the Certificate Order, and allege that Homeowners failed to cite any authority for their argument that FERC's public notice-and-comment period was not sufficient to satisfy their right to be heard. Intervenor Br. 20; FERC Br. 45. The opposite is true.

The majority of Petitioners' Opening Brief is devoted to arguments regarding the constitutional insufficiency of the process Homeowners' received, including a detailed recitation of *Mathews* and the reasons that the process here differed from the process there, and is constitutionally inadequate as a result. *See* Petitioners' Opening Br. 17-21.

Here, FERC's use of tolling orders deprives landowners of the important post-taking safeguards identified in *Mathews* and it deprives landowners of any opportunity to avoid, undo, or be adequately compensated for an erroneous taking. FERC's use of tolling orders takes away the timely post-deprivation rehearing and judicial review process set forth in the Natural Gas Act, which are essential to the constitutionality of the overall process. Without them, FERC's public notice-and-comment process is not a constitutionally sufficient pre-deprivation hearing, and the argument that Homeowners are entitled to nothing more, before suffering an irreparable taking, must fail.

Despite arguments to the contrary asserted by FERC and Intervenors, condemnees are not permitted to raise any substantive challenges to the Certificate Order through the post-deprivation compensation hearing. As a result, there is no opportunity to identify or be compensated for an erroneous taking through the condemnation hearing. The amount of compensation condemnees are allowed to recover presumes that the taking is constitutional and "collateral attacks" on the

Certificate Order are prohibited. Therefore, the fact that landowners receive a post-deprivation compensation hearing does not render the pre-taking notice-and-comment procedure constitutionally sufficient.

C. Petitioners Do Not Ask this Court to Read a Stay or Injunctive Relief into the Natural Gas Act

Intervenors and FERC argue that the Fifth Amendment does not entitle Homeowners to "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." Intervenor Br. 3. Petitioners do not disagree, so long as the Congressionally-authorized process is followed. But FERC's issuance of tolling orders does not follow that process.

Intervenors and FERC further argue that Petitioners are asking this Court to read a stay requirement into Section 19(a) of the Natural Gas Act. Specifically, FERC and Intervenors suggest that requiring compliance with the thirty-day time limit set forth in Section 717r(a) of the Natural Gas Act is somehow contrary to the provision in Section 717r(c), that neither a rehearing request nor a petition for review automatically stays the effectiveness of the Certificate Order. It is not. Petitioners never argued that the Fifth Amendment requires a judicial hearing prior to the issuance of the Certificate Order, nor did Petitioners argue that filing a rehearing request or petition for review should result in an automatic stay. To the contrary, Petitioners have only ever argued that FERC must comply with the thirty-

day time limit, which would provide Petitioners with timely, meaningful judicial review as Congress intended. Petitioners' Opening Br. 12.

Moreover, in arguing that Section 717r(c) somehow negates Petitioners' arguments, FERC conveniently omits that the Act's "directive" to "keep its orders in force" during rehearing assumes that rehearing requests will be disposed of within thirty days. FERC Br. 41. And, as FERC and Intervenors acknowledge, greenfield pipeline construction generally does not begin during the thirty-day period following a rehearing request. *Id.* at 10; Intervenor Br. 15.

Petitioners fully recognize that absent an order from FERC or the reviewing Court of Appeals, neither the filing of a request for rehearing nor a petition for review stays the effect of FERC's Certificate Orders. Rather, Petitioners argue that judicial review must happen at a meaningful time (as required by the plain language of the statute), and meaningful cannot be after the harm is irreversible.[2]

[2] FERC's approach also renders "any new NEPA analysis merely perfunctory and not actually informative of any agency decision." *WildEarth Guardians v. Bernhardt*, No. 19-CV-001920-RBJ, 2019 WL 5853870, at *14 (D. Colo. Nov. 8, 2019). Petitioners are puzzled by FERC's claim that it is not "irrevocably committing any resources to a project while analyzing rehearing applications." FERC Br. 41. Pipeline construction has adverse environmental impacts and limits the choice of reasonable alternatives. 40 C.F.R. § 1506.1. This is particularly concerning in light of FERC's decision to "double down[] on approaches that the D.C. Circuit has already rejected" and its "refus[al] to heed the court's unambiguous directives" with regard to indirect effects. *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61045 (Jan. 23, 2020) (Comm'r Glick, dissenting in part).

Homeowners recognize that energy infrastructure is necessary and that takings for the public use are part of the price of citizenship. Homeowners also understand that energy infrastructure projects cannot be unnecessarily delayed or even halted by individual challenges. Homeowners acknowledge that the process must be balanced, and they have never argued that absent tolling orders, the procedure set forth in the Natural Gas Act—denies due process. But FERC must not be allowed to use tolling orders to continue to deprive landowners of any and all ability to ever challenge an erroneous takings decision while it might still be avoided or remedied.

If, however, FERC was forced to follow the process in the Natural Gas Act, landowners would at least have an opportunity to avoid that result—and that is what Petitioners seek. Though condemnation proceedings would still go forward based on the Certificate Order, landowners would nevertheless receive a timely rehearing decision[3], and, if necessary, start the judicial review process. Landowners would have the ability to petition for judicial review before the condemnation proceeding is completed, and in appropriate circumstances, seek a court-ordered stay of a faulty certificate order.

[3] FERC ignores its own rule prohibiting the Secretary's issuance of a tolling order where the rehearing request is paired with a stay motion. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

II. NOTHING WITHIN THE NATURAL GAS ACT, THE FEDERAL POWER ACT, OR ANY OTHER INDICATOR OF CONGRESSIONAL INTENT COMPORTS WITH FERC'S POSITION THAT TOLLING ORDERS ARE "ACTS"

FERC argues that by issuing tolling orders, the Commission "acts" upon a request for rehearing within the context of Section 19(a) of the Natural Gas Act. As set forth in Petitioners' Opening Brief, FERC's interpretation of Section 19(a) does not comport with principles of statutory construction, and the circuit precedent that supports it should be overturned.[4] FERC's interpretation of the word "may" in Section 19(a) is also incorrect and there is nothing in the amendments to the Federal Power Act that supports FERC's use of tolling orders. Finally, FERC's interpretation of Section 19(a) is due no deference.

A. Section 19(a) of the Natural Gas Act does not Bestow Any Discretionary Authority on FERC

FERC contends that use of the word "may" in Section 19(a) of the Natural Gas Act "vests the Commission with a discretionary tool to manage its docket," and therefore to issue tolling orders. FERC Br. 26. This is wrong for at least two reasons. First, when read in the context of the rest of Section 19(a), the "may be deemed to have been denied" language in the statute is directed to an aggrieved party or a court, not FERC. The "may be deemed" language relates to the fact that

[4] *See also* Concurrence at 8 (A.397) (explaining that all of the cases cited in *Delaware Riverkeeper*, 857 F.3d 388 involved disputes over monetary payments).

until a petition for judicial review of a FERC order is submitted, and the FERC record is "filed in a court of appeals," FERC may at any time, with reasonable notice, "modify or set aside" any finding or order it has made. 15 U.S.C. § 717r(a). Use of the word "may" in Section 19(a) does not confer discretionary authority on ***FERC*** to deem (or not deem) rehearing requests denied. If the word "may" meant that it was FERC who had the discretion to deem (or not deem) requests denied due to FERC's own inaction, there would be no need for FERC to issue tolling orders.

Second, FERC itself interprets Section 19(a) of the Natural Gas Act as being non-discretionary. FERC regulations state that "Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, **the request is denied**." 18 C.F.R. § 385.713(f)(emphasis added); *see also Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1031 (9th Cir. 2007) ("FERC's regulations make this denial automatic"). FERC and Petitioners' disagreement over the meaning of the phrase "acts upon" does not provide FERC an opening to redefine the phrase "may be deemed to have been denied" contrary to the meaning enshrined in its regulations.

B. None of the Amendments to the Federal Power Act Undermine Petitioners' Reading of the Natural Gas Act

FERC claims that the 2005 amendments to the Federal Power Act also support its view that "acts upon the application" in Natural Gas Act Section 19(a)

does not require the Commission to take one of the actions specifically authorized in that section. FERC Br. 35. Notwithstanding the U.S. Supreme Court's warning that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980)[5], FERC's argument fails. As amended, the Federal Power Act directs the Commission to "grant or deny" certain applications within 180 days, and provides that "[i]f the Commission does not act within 180 days, such application shall be deemed granted unless the Commission . . . *issues an order tolling the time for acting* on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application" 16 U.S.C. § 824b (emphasis added). By making reference to tolling orders, but explicitly stating that such orders merely "toll[ ] the time for acting," Congress specifically defined tolling orders as something other than an act upon the application and, by extension, defined "act" to mean an "act on the merits."

Additionally, the Natural Gas Act contains no reference to tolling orders. Therefore, to the extent Congress was previously aware of FERC's use of tolling orders under the Natural Gas Act, and intended to allow that process to

[5] *See also U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 878 (D.C. Cir.), supplemented, 173 F.3d 890 (D.C. Cir. 1999) (explaining that "Courts sensibly accord such postenactment legislative history, arguably an outright contradiction in terms, only marginal, if any, value" (internal citation and quotations omitted)).

continue, by FERC's own rationale, Congress would have amended the Natural Gas Act to allow FERC to toll the time for acting on a petition for rehearing. The amendment thus supports Petitioners' statutory construction, not FERC's.

FERC further claims that the 2018 amendment to the Federal Power Act supports its interpretation of the Natural Gas Act. This argument is likewise unavailing. The 2018 amendment permits judicial review of tariff filings in the event FERC fails "to act on the merits of the rehearing request" within 30 days. This phrasing does not – as FERC suggests– evidence that the more general phrase "acts upon the application" in the Natural Gas Act Section 19(a) should be read to permit tolling orders. FERC Br. at 34. The amendment instead recognizes that while the Federal Power Act permits FERC to "issue[ ] an order tolling the time for acting" in certain circumstances (*see* 16 U.S.C. § 824b), the same is not true with respect to requests for rehearing. The amendment thus clarifies that FERC may not issue tolling orders in response to rehearing requests.

Finally, recent action by the House Subcommittee on Civil Rights and Civil Liberties suggests that FERC's assertions regarding Congress's knowledge and acceptance of tolling orders under the Natural Gas Act are incorrect. On February 18, 2020, the Subcommittee sent a four-page letter to FERC expressing extreme concern over FERC's use of tolling orders under the Natural Gas Act and

requesting extensive information (by March 3, 2020) regarding the extent to which FERC has used tolling orders in the past.[6]

C. FERC's Interpretation of Section 19(a) Is Due No Deference

FERC argues that its interpretation of Section 19(a) is entitled to deference because Section 19(a) confers jurisdiction only on FERC. FERC Br. 21-22. FERC's argument fails because Sections 19(a) and 19(b) act in concert to define the Court's jurisdiction. That is, 19(b) provides the express grant of jurisdiction to hear challenges to FERC's orders, but the language of 19(a) largely determines whether an order is subject to such challenge. Indeed, the proscription that "[n]o proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing" is found in 19(a), not 19(b). The Court thus cannot determine the scope of its jurisdiction in any particular case by reference to 19(b) alone, but must also interpret 19(a) to determine whether and when judicial review is appropriate. FERC's interpretation of 19(a) thus bears directly on the scope of the Court's jurisdiction and is due no deference.

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[6] The Court may take judicial notice of the Subcommittee's letter, which is publicly available on the House Committee on Oversight and Reform website (https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-02.18.JR%20to%20Chatterjee-FERC%20re%20Eminent%20Domain1.pdf). *See Citizens for Responsibility & Ethics in Wash. v. Trump*, 924 F.3d 602, 607 (D.C. Cir. 2019).

Such was the case in *Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473 (D.C. Cir. 2001). There, as here, the explicit grant of jurisdiction appeared in a different subsection from the one containing the phrase that required interpretation to determine the scope of jurisdiction. *Id*. at 476 (explaining that the court had to interpret the term "administrative proceeding" in 30 U.S.C. § 1724(h)(1) in order to determine whether judicial review was available under separate subsection 1724(h)(2)(B)). In concluding that deference was inappropriate because the provisions at issue affected "the scope of the judicial power vested by the statute," the Court found it of no moment that the specific grant of jurisdiction appeared in a different subparagraph from the term requiring interpretation. *Id*. at 479.

D. Interpreting Section 19(a) According to Its Plain Language Would Not Create Unworkable Administrative Problems

FERC argues at length that without tolling orders it could not adequately consider issues raised in rehearing requests. FERC Br. 28-33. But, as explained by Environmental Amici, FERC's real-world practice fails to demonstrate any need for a lengthy time period to "giv[e] careful and mature consideration to the multiple, and often clashing, arguments" raised on rehearing. Envtl. Am. Br. 17-19. Rather, FERC indiscriminately issues tolling orders regardless of the number of parties or complexity of issues involved and refuses to consider any issue on rehearing that it did not entertain in the original certificate proceeding. As a result,

FERC denied or dismissed all but two rehearing requests from 2009-2019, and made only minor modifications in the two that it granted. *Id.* FERC does not cite a single concrete example of its tolling order practice facilitating a measured reconsideration of any aspect of one of its certificate orders so as to avoid the need for judicial review.

Further, as a practical matter, FERC is not limited to thirty days to "resolve disputes or bring its expertise to bear on complex, technical matters before they are presented to the courts." FERC Br. 28. That is because, although Section 19(a) deems rehearing requests to be denied if FERC fails to act within thirty days, FERC nonetheless retains the authority to "modify or set aside" its orders "in whole or in part" until it files the record of the proceeding with the court of appeals. 15 U.S.C. § 717r(a). If FERC truly believed that its consideration of issues raised in a rehearing request could obviate or limit the need for judicial review, but would require more than thirty days, it could move the court to defer filing of the record, as it did in this case. Doc. No. 1696987. But if FERC is carefully considering the arguments presented in the rehearing requests, *see* FERC Br. 15, 27-28, and may alter its decision, then activities inflicting irreparable damage should not go forward until a final decision is made.

III. PRECEDENT AGREEMENTS ARE INSUFFICIENT EVIDENCE FOR A PUBLIC NEED DETERMINATION

A. Homeowners' Challenge to FERC's Public Use Determination Remains a Viable Issue for This Court's Consideration

FERC argues that it was improper for Homeowners to continue to assert that FERC's public use determination was arbitrary and capricious. According to FERC, the Court's *en banc* grant was limited to the due process issues raised by Homeowners. FERC Br. 52. The argument is based on the Court's direction, in the December 5, 2019 Order, that Petitioners' briefing address the due process concerns raised by the panel and Judge Millett in her Concurrence. FERC is incorrect that Petitioners were limited to only the due process issues in their *en banc* briefing. Although the Court directed Petitioners to address the due process issues raised by the panel and Judge Millett, the Court's Order vacated the entirety of its August 2, 2019 decision. Therefore, Petitioners must re-raise any issue on which they still desire a decision, because the Court's prior decision was vacated. Petitioners are still entitled to a decision from the Court as to whether FERC's public use determination was arbitrary and capricious. Petitioners were thus required to submit those arguments to the *en banc* Court. Moreover, the Court's *en banc* grant in no way indicated that such briefing was prohibited. *See, e.g.*, *In re Sealed Case*, 181 F.3d 128, 131 (D.C. Cir. 1999) (limiting the question

at issue before the *en banc* court to only that portion of the panel's opinion which had been vacated).

Therefore, Petitioners respectfully assert that their challenges to the sufficiency of FERC's public use determination in the Certificate Order remain before this Court.

B. FERC's Public Use Determination for the Atlantic Sunrise Pipeline was not Based on any Evidence of Public Need

Despite statements to the contrary in FERC's Brief, FERC's public use determination was not "reinforced" by the study performed by the Institute for Energy Economics and Financial Analysis, which was submitted to FERC by Petitioner Clean Air Council. FERC Br. 9. That study, entitled, *Risks Associated With Natural Gas Pipeline Expansion in Appalachia*, specifically found:

- Pipelines out of the Marcellus and Utica region are being overbuilt;
- Overbuilding puts . . . landowners at risk of sacrificing property to unnecessary projects;
- [FERC] facilitates overbuilding;
- FERC's approach to assessing the need for projects is insufficient; and
- Industry leaders recognize and acknowledge that current expansion plans will likely result in overbuilding.

R.3554 available at http://ieefa.org/wp-content/uploads/2016/04/Risks-Associated-With-Natural-Gas-Pipeline-Expansion-in-Appalachia-_April-2016.pdf

The above conclusions do not reinforce FERC's public use determination, they undermine it. And despite FERC's contrary statements in the Certificate Order, the IEEFA Study does not "improperly" rely on a U.S. Department of Energy study for the proposition that natural gas infrastructure is currently being overbuilt. *Id*.

As FERC noted in the Certificate Order, the DOE Study, issued in February 2015, projected that between 2015 and 2020, the amount of new interstate natural gas pipeline needed would be between 2.2 and 2.7 Bcf/d annually as opposed to the 8.8 Bcf/d that was added annually between 2009 and 2013. A.93. The IEEFA Study, issued in April 2016, concluded that pipelines out of the Marcellus and Utica region are being overbuilt. Between the Atlantic Sunrise Pipeline (1.7 Bcf/d); and the Atlantic Coast and Mountain Valley Pipelines (3.44 Bcf/d), all of which were approved in 2017, FERC issued certificate orders for 5.14 Bcf/d of new pipeline capacity. The DOE Study projected that 2.2 to 2.7 Bcf/d of new capacity would be needed annually between 2015 and 2020. Therefore, the projections in the DOE Study support the contention in the IEEFA Study that pipelines out of the Marcellus and Utica region are being over built.

FERC's rejection of this information in favor of wholesale reliance on precedent agreements was not reasonable. It is also noteworthy that two of the precedent agreement shippers for the Atlantic Sunrise Pipeline are among the

Intervenors here, but neither has ever offered any evidence regarding ***need***. Instead, Intervenors put forth carefully worded statements such as: "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." Intervenor Br. 7. Conspicuously absent from this general statement is to whom the Project is providing those benefits. Intervenors never allege, much less offer any evidence, they are being conferred on the public.

Both FERC and Intervenors criticize Homeowners for arguments like the one above, which they say are (a) not compelling, and (b) policy arguments more appropriately directed to Congress. These are not policy arguments. They are arguments that the Project was not necessary for the public convenience, which are based on the only evidence available to Homeowners, who have never been allowed to discover or access other information to prove the Project does not serve a public use. Instead, they are based on the common sense argument that in a global economy, where the United States is the largest producer of natural gas in the world (and exports more natural gas than it uses), marketability is not an adequate proxy for public need. Therefore, because the Certificate Order was based solely on Intervenors' claims of market demand, FERC's public use

determination was not based on substantial evidence, and it should be vacated and remanded.

IV. TRANSCO AND ITS CUSTOMERS KNOWINGLY BORE THE RISK THAT REHEARING AND JUDICIAL REVIEW COULD RESULT IN VACATUR

Petitioners seek vacatur and remand of FERC's Certificate Order due to FERC's constitutionally deficient process and its legally defective public use determination. In response, Intervenors largely argue that vacatur is inappropriate because "[n]ot 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] . . .) would not have access to the capacity to which they have subscribed." Intervenor Br. 39-40. However, Intervenors' profit-driven concerns should no longer be permitted to take precedence over Homeowners' due process rights. To the extent any party is forced to bear the risk associated with the due process violations at issue here, it should be Intervenors – not Homeowners.

FERC claims that "to the extent the pipeline begins construction" while rehearing is underway, "it is subject to the risk that the Commission or the courts will revise or reverse the Certificate Order." FERC Br. 41.[7] Transco echoed these

[7] FERC is on record flip-flopping this argument after this Court vacated a certificate order in a recent NEPA case. *Compare Fla. Se. Connection, LLC*, 154 FERC ¶ 61,264, at P9 (Mar. 30, 2016) ("To the extent that the company elects to

arguments in the District Court condemnation case in response to Homeowners' arguments that the taking should not be completed before Homeowners had a chance to be heard. Now, however, Intervenors argue that vacatur is inappropriate "because the Project has been operational for more than sixteen months." Intervenor Br. 39.

In other words, FERC and pipeline companies insist that seeking a court-ordered stay during the indefinite tolling period is prohibited because any such court challenge is "incurably premature." FERC and pipeline companies support that argument by asserting that pipeline companies bear the risk of FERC's decision being overturned as a result of rehearing or judicial review. As a result, condemnation and pipeline construction proceeds while petitioners are held in limbo. Once FERC finally issues a rehearing order denying petitioners' rehearing request, however, FERC and the project proponents argue that stopping ongoing construction would be too costly. *See* Transco Opposition to Motion for Stay (Doc. No. 1715006) at 20 (asserting that a stay would cost Transco approximately $8-10 million per day "in stand by and other charges to the contractors who have been mobilized to work on the Project at this time").

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proceed with construction, it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal.") *to* Petition for Panel Rehearing, Docket No. 16-1329, Doc. No. 1697613, at 14 (Oct. 6, 2017) (arguing that the "court should not vacate because "[h]undreds of miles of the pipeline … are now operational and in-service").

Then, where petitioners prevail in a challenge to the substance of Certificate Order, the pipeline is inevitably already built, and FERC and the pipeline companies vigorously oppose vacatur based on the argument that petitioners cannot overcome the disruption element of the *Allied-Signal* test. *See* Intervenor Br. 39. The successful petitioner is thus deprived of meaningful relief. Therefore, while Petitioners recognize that vacatur would likely cause a disruption in Intervenors' ability to continue performing pursuant to their shipping contracts, that is a risk that Transco and its shippers knowingly bore and it cannot abrogate Homeowners' Fifth Amendment rights. Petitioners therefore respectfully submit that vacatur and remand is the appropriate remedy.

V. CONCLUSION

For all of the reasons set forth above and in Petitioners' Opening Brief, Petitioners respectfully submit FERC's issuance of tolling orders is contrary to the Natural Gas Act and violates due process. Additionally, FERC's public convenience and necessity determination for the Project was not based on substantial evidence, and as a result, the Certificate Order is arbitrary and capricious. Accordingly, Petitioners respectfully request that the Certificate Order be vacated and remanded to FERC.

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Dated: March 2, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's Order of December 5, 2019 because this brief contains 6,488 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Office 2016 computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman) in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the foregoing Petitioners' Joint Reply Brief on Rehearing *En Banc* with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

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