

N.J. to justices: Hold off on pipeline eminent domain fight

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New Jersey officials have urged the Supreme Court to hold off from considering an eminent domain case tied to PennEast Pipeline Co.'s bid to seize 42 parcels of state-owned land for a gas project. Francis Chung/E&E News

The Supreme Court should wait for more lawsuits before considering whether a private company has the authority to seize state land to build a federally approved project, the state of New Jersey told justices this week.

The Garden State is opposing a bid by PennEast Pipeline Co. to allow it to use eminent domain for the seizure of 42 parcels of state-controlled land to construct a 116-mile natural gas pipeline from Pennsylvania to New Jersey. State officials, led by Attorney General Gurbir Grewal, warn that such an action violates New Jersey's constitutionally protected "sovereign immunity" under the 11th Amendment.

Much of the land in the pipeline's proposed path had been preserved for conservation, recreation and agriculture, according to the state.

New Jersey said bringing the case before the high court would be premature. The Supreme Court only accepts about 1% of requests to consider cases, called petitions for writ of certiorari.

"None of the traditional criteria support certiorari," the state wrote in a **brief** filed Tuesday. "Most notably, there is no split for this court to resolve — and no disagreement between any federal appellate judges on the questions presented."

PennEast is seeking to overturn a unanimous three-judge panel decision from the 3rd U.S. Circuit Court of Appeals finding that the company could not bring the state to federal court (*Energywire*, Sept. 12, 2019).

PennEast had argued that the Natural Gas Act delegated federal authority to the private company to act once the Federal Energy Regulatory Commission greenlighted the project. FERC also took the unusual step of publicly backing the company's interpretation.

The 3rd Circuit later declined PennEast's request to rehear the decision before a full panel of active judges.

Even when PennEast unsuccessfully raised the possibility of an en banc hearing, none of the other active judges at the court had voiced any dissent over the original panel's decision, the state added. Similarly, there were no circuit court rulings offering a different interpretation of delegated authority under the Natural Gas Act.

"The lack of any split or inter-circuit tension provides an especially compelling reason to deny certiorari in this case because this Court will have other opportunities to address the same issues in the future, with the benefit of additional consideration by the federal courts of appeals," the state wrote.

The high court already has another case to keep an eye on. The 4th Circuit U.S. Court of Appeals is hearing a similar appeal from Columbia Gas Transmission LLC. The pipeline developer, which is owned by TC Energy Corp., is asking the court to act after the Maryland Board of Public Works declined to allow its natural gas project to cross a state-owned rail trail.

"To the degree that the Fourth Circuit agrees with the decision below, that will provide additional evidence that the panel's unanimous decision is the right one; to the degree that it disagrees, its opinion would help to crystallize the issues for review," New Jersey said.