UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Gas Facilities
Docket No. PL18-1-000

THE NISKANEN CENTER AND AFFECTED LANDOWNERS' MOTION TO INTERVENE AND JOINT COMMENTS ON THE COMMISSION'S RENEWED NOTICE OF INQUIRY ON THE CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES 174 FERC ¶ 61,125 (Feb. 18, 2021)

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May 26, 2021

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INTRODUCTION

The Niskanen Center ("Niskanen"), Hopewell Township, Horizons Village Property Owners Association, Inc., and affected landowners[1] Catherine Holleran, Megan Holleran, Carolyn Fischer, Wisteria Johnson, Richard Averitt, Jill Averitt, Stacey McLaughlin, Craig McLaughlin, Deb Evans, Ron Schaaf, Evans Schaaf Family LLC, Bill Gow, Sharon Gow, Wendy McKinley, Pamela Ordway, Clarence Adams, Linda Christman, Roy Christman, Lorraine Mineo, William Limpert, Louis Ravina, Yvette Ravina, Victor Baum, Lora Baum, Melissa Barr, William Barr, Bridget K. Hamre, and Demian K. Jackson, collectively, "Landowners"), respond to the Federal Energy Regulatory Commission's (the "Commission", or "FERC") February 18, 2021 Notice of Inquiry (NOI)[2] seeking information and perspectives to help the Commission's consideration of revision of its policy statement[3] on the certification of new interstate natural gas facilities ("Policy Statement", or "CPS")[4], and respectfully move for intervention in the above-referenced proceeding.

Niskanen is a 501(c)(3) advocacy organization that represents landowners affected by pipelines throughout the country in court and administrative proceedings, including before FERC. Niskanen has a strong interest in free markets and in protecting Americans' property rights. It is a fundamental matter of justice that government should forcibly take private property only as a measure of last resort, when truly for public use, and must compensate the property owners

[1] As defined in 18 CFR 157.6(d)(2).

[2] *Certificate of New Interstate Natural Gas Facilities* 174 FERC ¶ 61,125 (Feb. 18, 2021) ("2021 NOI").

[3] As outlined below, FERC routinely disregards provisions within its current policy statement (*infra* at 6-13). FERC must enact any revisions to the current policy statement *via a binding order* to ensure that 1. future Commissions will not be emboldened to simply ignore the critical provisions within FERC's policy statement, and 2. the development of a more robust record and thorough analysis of proposed projects.

[4] Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified,* 92 FERC ¶ 61,094 (2000).

sufficient to render them indifferent to the taking.[5] Affected Landowners own property along the proposed Atlantic Coast, Constitution, Pacific Connector, and PennEast pipeline routes. Horizons Village Property Owners Association, Inc. is a neighborhood that has legally binding covenants to protect and conserve the area's environment.

Niskanen and Landowners commend the Commission for its renewal of the NOI on FERC's Policy Statement, as it is well known—especially by affected landowners—that the Policy Statement is archaic and in dire need of revision.

I. FERC SHOULD REVISE ITS NEED DETERMINATION POLICY.

A. The U.S. Natural Gas Market is Now Oversupplied.

Before reviewing the history of the Certificate Policy Statement and how the Commission should address two of its most significant problems, it is critically important to understand the underlying issues of U.S. natural gas supply and demand.

When FERC issued the current CPS in 1999-2000, U.S. natural gas consumption (22.4 tcf) exceeded the marketed production volume of U.S. natural gas withdrawals (19.8 tcf), as it had for decades.[6] That remained the case until 2014, when the marketed production volume (27.5 tcf) surpassed consumption (26.6 tcf), starting a trend that has extended over the last seven years, and becoming more pronounced each year. For example, in 2019, marketed production (36.5 tcf) exceeded domestic consumption (31.1 tcf) by more than 5 tcf, and in 2020 this excess increased to

[5] Niskanen notes in passing that the Commission's Policy Statement appears to acknowledge that court-determined "just compensation" is insufficient to make landowners indifferent to the taking of their property: "Even though the compensation received in such a proceeding is deemed legally adequate, the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits." 90 FERC ¶ 61,128, p. 19.

[6] All production and consumption data in this section is from https://www.eia.gov/dnav/ng/hist/n9050us2a.htm (production)(last visited May 25, 2021), and https://www.eia.gov/dnav/ng/hist/n9140us2A.htm (consumption))(last visited May 25, 2021). The comparable figures for 2000 when FERC revised the CPS were 23.3 and 20.2 mcf, respectively.

almost 6 tcf. Moreover, according to the Energy Information Administration, this will remain the case for decades to come.[7]

In short, for now and the foreseeable future, the U.S. is drowning in natural gas, a situation reflected in the price. In 1999, the Henry Hub price was $2.27; in 2020, it was $2.03.[8] In real dollar terms, the price of natural gas has plummeted during that time by almost 42%.[9]

Back in 1999-2000 the Commission was concerned with this shortfall in domestic production coupled with increasing demand for natural gas; in fact, "the Commission is issuing this policy statement to provide the industry with guidance as to how the Commission will evaluate proposals for certificating new construction. This should provide more certainty about how the Commission will evaluate new construction projects that are proposed to meet growth in the demand for natural gas . . ." CPS p. 2.

The Commission was wrong, of course, about increasing demand; in 1999, consumption was 22.9 mcf, which is exactly what it was ten years later in 2009. (It was not until the surge in shale gas production and accompanying drop in prices after 2009 that consumption began to rise as well.) The entire CPS was thus predicated on an incorrect assumption about demand, and the important lesson the Commission should heed is to be very careful about assuming significant increases in future domestic demand for gas.[10] EIA's 2021 Annual Energy Outlook reference case predicts domestic consumption to increase just 5 tcf to 35 tcf over the next 30 years, while dry gas production will increase to over 42 tcf.[11]

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[7] *Annual Energy Outlook 2021*, https://www.eia.gov/outlooks/aeo/pdf/AEO_Narrative_2021.pdf, p. 22.

[8] https://www.eia.gov/dnav/ng/hist/rngwhhdA.htm.

[9] According to the Fed, 1999 $2.27 = $3.53 in 2020 per https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator.

[10] As discussed below (pp. 19-22), demand for exported gas is not a valid consideration under the Natural Gas Act and has no place in a Section 7 determination of project need.

[11] See note 7, *supra*.

Thus the Commission should anticipate modest, if any, demand growth in domestic consumption of natural gas, continued expansion of domestic production, and no significant change in price.

B. Determining "Need" for Pipelines Under Section 7.

1. FERC's pre-1999 policy.

Before FERC undertook its 1999-2000 CPS revisions, FERC's policy was to "give[] equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties and does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand" (CPS, p. 15) and "use[] the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project." *Id.* p. 16.

However, the Commission recognized that this approach was problematic:

> The amount of capacity under contract also is not a sufficient indicator by itself of the need for a project, because the industry has been moving to a practice of relying on short-term contracts, and pipeline capacity is often managed by an entity that is not the actual purchaser of the gas. Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates. Thus, the test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry's structure and presents difficult issues. *Id.*

The Commission aptly noted that, "by relying almost exclusively on contract standards to establish the market need for a new project, the current policy makes it difficult to articulate to landowners and community interests why their land must be used for a new pipeline project", before concluding that, "All of these concerns raise difficult questions of establishing the public need for the project." *Id.* p. 17. The result of these concerns was the current Certificate Policy Statement.

2. The 1999 Certificate Policy Statement.

The 1999 CPS stated that its new method of determining need would be first, deciding "whether the project can proceed without subsidies from their existing customers." *Id.* p. 18. If it could do so, then the Commission would determine what "adverse effects the project might have on

the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *Id.* Then:

> If residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered.

Id. p. 19. And, "[i]f the result of the balancing is a conclusion that the public benefits outweigh the adverse effects then the next steps would be the same as for a project that had no adverse effects." *Id.*

Or so the theory went. In practice, the revised CPS changed absolutely nothing from FERC's previous policy of using "the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project", "giv[ing] equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties", and "not look[ing] behind the contracts to determine whether the customer commitments represent genuine growth in market demand" (CPS, p. 15). As described below (pp. 6-19), these factors remain the Commission's exclusive decision-making measures to this day.

The second major problem with the Commission's needs determination is it has not implemented (or even articulated) any coherent "economic test" to balance "the evidence of public benefits to be achieved against the residual adverse effects". Instead the Commission has employed the misleading surrogate metric of "adverse impacts avoided" in lieu of "residual adverse effects", and (without quantifying either side of that equation) it uniformly weighs those against project benefits via a 1-sentence conclusion that under any normal or professional standard could not be considered an "economic test".

C. The Problems with the Commission's Current Section 7 Analysis.

1. FERC's Standard Use and Reliance on Precedent agreements to Demonstrate 'Need'.

Notwithstanding the Policy Statement, it is the Commission's standard practice: (1) to accept at face value precedent agreements as the sole evidence of market need; (2) to give affiliate precedent agreements equal weight as precedent agreements with third parties; and (3) regardless of circumstances, to refuse to look behind any precedent agreements, affiliate or not, to see whether these established "genuine growth in market demand". As Commissioner LaFleur conceded, "[w]hile the Certificate Policy Statement sets forth a variety of factors that can be utilized to demonstrate economic need, in practice, the Commission's need determination has focused narrowly on whether a pipeline demonstrates evidence of precedent agreements." *Mountain Valley Pipeline, LLC, Order on Rehearing,* 163 FERC ¶ 61,197 (June 15, 2018) (MVP RO), LaFleur Dissent, p. 2.

In the MVP Rehearing Order, then-Commissioner Glick acknowledged that under the Certificate Policy Statement FERC is "not required to look beyond precedent agreements," but that does "not excuse the Commission from failing to recognize that affiliate precedent agreements may not demonstrate need." (*Id.,* Glick's Dissent, p. 3). FERC's policy meant that this "incentive to secure precedent agreements in order to make this showing [of market need] is, at least potentially, sufficient for a pipeline developer's corporate parent to cause one of its affiliates to enter into a precedent agreement with the developer", and therefore, the "Commission's disregard of this incentive means that its exclusive reliance on precedent agreements cannot be the product of reasoned decisionmaking." *Id.*, Glick Dissent p. 4.

Niskanen uses the Atlantic Coast Pipeline certificate as an apt example of the problems with this policy; after 7 years, ACP was cancelled because, as commenters had argued, *inter alia*, that the Commission's certificate order "(1) inappropriately relied on precedent agreements between Atlantic

and its corporate affiliates to establish need; and (2) failed to consider market studies showing that there is sufficient infrastructure to meet current demand." ACP RO, P 39. But to no avail; the Commission had dismissed that evidence as irrelevant in favor of the need conclusively established by ACP's affiliate precedent agreements.

Those objections raised specific issues that the CPS allegedly addressed. (The Commission not only summarily rejected each, it rejected the relevance of the CPS itself because it did not impose any binding requirements.)[12]

First, commenters argued that the Commission was placing inappropriate reliance on affiliate precedent agreements to establish need. But, "[e]ven though all but one of the ACP Project's shippers are affiliated with Atlantic, the Commission is not required to look behind precedent agreements to evaluate project need." In fact, "it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers. . . . [and] nothing in the Certificate Policy Statement nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers." *Id.* P 41. This is the Commission's standard practice.[13]

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[12] Niskanen and Landowners are extremely skeptical that, no matter what changes it may formally make to the CPS, the Commission will continue its well-established practice of referring to it when convenient to justify its decisions, and ignoring it when it is not. As noted in part above (*supra* n.3), FERC should enact a binding order to ensure these policy changes are implemented.

[13] *See, e.g. Mountain Valley Pipeline, LLC*, Order on Rehearing, 163 FERC ¶ 61,197 (June 15, 2018) ("MVP RO"), P 37: "the Commission is not required to look behind precedent agreements to evaluate project need . . . Moreover, it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers." In fact, "Looking behind the precedent agreements entered into by state-regulated utilities, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate", and "[f]or those shippers that are not state-regulated utilities, such as producers or marketers, the Commission has chosen not to look behind the precedent agreements as these parties are fully at-risk for the cost of the capacity and would not have entered into the agreements had they not determined there was a need for the capacity to move their product to market." MVP RO P 40. In other words, if there is a buyer—and even if it is an affiliated buyer—that's all the Commission needs to know; *PennEast Pipeline Co., LLC,* Order on Rehearing, 164 FERC ¶ 61,098 (August 10, 2018)("PennEast RO"), P 16: "We affirm the Certificate Order's finding that the Commission is not

The Commission's rationale was that the CPS does not *require* the Commission to look behind precedent agreements, because the CPS "established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of the proposed capacity be subscribed under long term precedent or service agreements." ACP RO, P 41. In other words, because the CPS expanded the evidence an applicant could use to show a market need beyond just precedent agreements, these other factors obviated the need for the Commission to look behind those agreements. But when an applicant nevertheless relies *solely* on precedent agreements (as is industry practice), the CPS effectively left the pre-CPS situation—and its acknowledged problems with this practice—undisturbed, where it remains the status quo to this day.

As for those other factors that an applicant may use to show need, they include (*id.*):

> but are not limited to, precedent agreements, demand projections, potential cost savings to customers, or a comparison of projected demand with the amount of capacity currently serving the market. The Commission stated that it would consider all such evidence submitted by the applicant regarding project need.

In other words, FERC would consider "all such evidence *submitted by the applicant*", which leaves it entirely free to disregard, as it did here in ACP and does routinely in all other cases, that same information when presented by anyone else. When ACP commenters presented evidence that there was sufficient infrastructure to satisfy market demand because there was not going to be increased demand for gas, the Commission countered with—once again—affiliate precedent agreements*:*

> Given the uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements, which represent actual, rather than theoretical evidence regarding demand, to be

required to look behind precedent agreements to evaluate project need, regardless of the affiliate status of some of the project shippers. . . . Moreover, it is current Commission policy not to look behind precedent or service agreements to make affiliates or independent marketers in establishing the market need for a proposed project."

> the better evidence of demand. . . . Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service and subsequently executed those service contracts, the Commission places substantial reliance on those agreements to find that the project is needed.

Id. P 54. This too is the Commission's de facto policy.[14]

Since the Commission stated earlier in that same document that two of the four examples of evidence an applicant could use to show need in lieu of exclusive reliance on precedent agreements were, "demand projections" and "comparison of projected demand with the amount of capacity currently serving the market" (ACP RO, P 41) apparently those projections are only valid when they establish need, but not when they demonstrate a lack of it.

The Jordan Cove/Pacific Connector project is a prime example of FERC's affiliate agreement fixation. In approving the Section 7 certificate for the Pacific Connector pipeline, FERC relied solely on the precedent agreements between the pipeline and its sister company Jordan Cove LNG Terminal to justify its conclusion that there is a market need for the gas. *Jordan Cove Energy Project L.P.,* Order on Rehearing and Stay, 171 FERC ¶ 61,136 (May 22, 2020)("JCEP RO") P 25.

The problem is that the Jordan Cove LNG Terminal is a dead end; after years of effort, it had not signed a single export contract for its LNG. When DOE granted the Terminal permission to export LNG, DOE required biannual reports, including on, "the status of the long term contracts associated with the long-term export of LNG and any long-term supply contracts." DOE/FE Order No. 3413, at 156 (Mar. 24, 2014). For twice a year since 2014, the Terminal failed to report *any* such

[14] *See, e.g.,* PennEast RO P 20: "Given the uncertainty associated with long-term forecasts, such as those presented in this proceeding, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand"; MVP RO P 46: After reciting all of the record evidence as to the lack of need for MVP's gas, the Commission ignored it because, "given the uncertainty associated with long-term demand projections . . . where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements, which represent actual, rather than theoretical evidence regarding demand, to be the better evidence of demand."

export contracts, even though throughout that entire period it has, "continued its negotiations with prospective customers for liquefaction services."[15]

Even though the Terminal had found no customers after six years of prospecting, FERC's response was to literally turn a blind eye to the fact that the pipeline's precedent agreements were with a sister company *that had no conceivable use for the gas*:

> We affirm the Commission's finding in the Authorization Order that precedent agreements are significant evidence of demand for a project. As the court stated in *Minisink Residents for Environmental Preservation & Safety v. FERC*, and again in *Myersville Citizens for a Rural Community, Inc. v. FERC*, nothing in the Certificate Policy Statement or in any precedent construing it suggests that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers.

JCEP RO P 30 (footnotes omitted).

To put it mildly, the fact that the LNG Terminal had not been able to find any customers after years of fruitless effort called its ability to use gas and the necessity of the project into question. In the normal course, precedent agreements with entities that are in the daily business of producing, transporting, and selling natural gas, means that, at a minimum, the gas will have somewhere to go. Here, it did not. FERC saying that it would not "look behind" these agreements was damaging and incentivizes pipelines to procure agreements with virtually any entity to demonstrate 'market need' to FERC. If Bob's Auto Shop or Alice's Aquarium Supplies had signed those agreements with the Pacific Connector Pipeline, one would imagine (or at least taxpayers would hope they could imagine) that the Commission would look behind those agreements and conclude that they were a sham because neither Bob nor Alice would have any way to use or dispose of that gas.

That was (and remains) the situation for the LNG Terminal—as far as those agreements went, the Terminal had no real market for the gas. Niskanen is unaware of *any* other Section 7

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[15] Letter re JCEP DOE/FE Semi-Annual Report (Apr. 1, 2021); *available at* https://www.energy.gov/sites/default/files/2021-04/JCEP%20DOE%20SAR%20April%201%202021.pdf (Last accessed May 25, 2021).

certificate decision with a market need determination based on precedent agreements with entities that – literally – have no possible need or use for the gas.[16]

Nor was the lack of customers the only red flag; the application raised numerous red flags that the Policy Statement cautioned about. First, the Terminal and Pacific Connector entered their affiliate agreement *only after the Commission rejected their previous iteration of the exact same project because they had failed to show any market demand. Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP*, 154 FERC ¶ 61,190 (2016), P 5.

Second, the CPS recognizes that contracts with multiple customers are a stronger indicator of need than a contract with a single customer, especially when that customer is an affiliate. 88 FERC ¶ 61227, 61748, 61749. Third, the CPS recognizes that "a project built on speculation" requires additional scrutiny and justification. 88 FERC ¶ 61227, 61749. Here, the Terminal's customer search, and thus use the gas is has agreed to buy from Pacific Connector, made it entirely speculative.

Thus, even though the Jordan Cover project presented numerous red flags that the CPS specifically warned about, FERC ignored these in favor of its talismanic belief in affiliate agreements, an unfortunate example of the Commission ignoring the CPS whenever it is convenient. To this day, FERC has never provided any explanation as to how, if the LNG Terminal were unable to find customers, the Pacific Connector Pipeline would be used or provide any public benefits. And, ironically, on April 22, 2021, Jordan Cove requested an abeyance in the D.C. Circuit challenge

[16] In *Myersville,* the precedent agreements were with Baltimore Gas & Electric ("a local natural gas distribution company"), and Washington Gas Company ("a public utility . . . engaged primarily in the retail sale and delivery of natural gas"). The buyers were in the business of transporting, storing, selling, or using natural gas; in other words, come what may, those buyers would be able to use the gas. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, dealt with this issue in a footnote, 762 F.3d 97, 111 n.10, but neither the decision nor FERC's Certificate Order (*Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61045 (July 17, 2012)) say who the parties to the precedent agreements were.

to its Certificate, on the grounds that they may finally be throwing in the towel on the whole project. *Evans v. FERC*, D.C. Cir. No. 20-1161, Motion of Respondent-Intervenors to Suspend Merits Briefing Schedule and Hold Cases in Abeyance, ECF No. #1895613, pp. 1-2.

In his dissent, then-Commissioner Glick pointedly criticized the Jordan Cove decision. Because the Commission had previously found "a complete absence of evidence indicating need" coupled with the "1999 Policy Statement's contemplation that the Commission would consider all relevant evidence bearing on need for a pipeline, reasoned decisionmaking requires the Commission to do more than simply point to the agreement among affiliates and call it a day." Dissent P 15. Relying solely on a single precedent agreement was improper as the Certificate Policy Statement "contemplates more holistic inquiry that weighs the extent of the need for a project against its adverse impacts" *(id.* P17) and thus the Jordan Cove order "makes no effort to discuss the considerable uncertainty clouding the need for the Project or how that uncertainty factors into its weighing of the adverse impacts, including the exercise of eminent domain and the effects on environmental and cultural resources that lie along the pipeline's 229-mile path." *Id.* P 17.

Although the Commission says that the Policy Statement eliminated the need to look behind the contracts because the applicant could show need via other factors, in every Section 7 proceeding the Commission insists both that (1) it does not need to look behind the contracts even when they still are the *only* evidence of need, and (2) those contracts trump all other need factors when they indicate that there *isn't* any need. In short, the same problem the Commission articulated in 1999 remains, that "by [FERC] relying almost exclusively on contract standards to establish the market need for a new project, the current policy makes it difficult to articulate to landowners and community interests why their land must be used for a new pipeline project." As Chairman Glick said only two days ago:

> We are required under statute to determine whether a pipeline is necessary or not. FERC has been completely relying on the existence of precedent agreements between shippers and

> pipeline developers to determine whether there's a need. In some cases, that might make sense, but it doesn't make sense when the precedent agreements are between affiliates.

Glick on FERC cyber rules, climate and 'common decency', Energy Wire, May 24, 2021. Plus ça change.

2. Balancing a pipeline's benefits against its "residual adverse effects".

As shown above, the Commission treats affiliate agreements as conclusive proof of project need. That said, how does the Commission then balance that need against the harms ("residual adverse impacts"; CPS, p. 19) to communities and landowners? Turning to ACP, where commenters argued that the Commission "did not balance the public need for the project with the harm to landowners and communities" (ACP RO P 39), the Commission explained that the Policy Statement established a sliding scale to address this:

> [T]he Certificate Policy Statement specifically contemplated a scenario where, if a company might not be able to acquire a perhaps significant amount of property rights through negotiation, the Commission might deny the application if there has not been a sufficient demonstration of need. However, here, as discussed above, Atlantic has demonstrated public benefits for the proposed project. Approximately 96 percent of the ACP Project is subscribed under long-term firm transportation precedent agreements, a strong showing of need.

Atlantic Coast Pipeline, LLC, Order Issuing Certificates, 161 FERC ¶ 61,042 (October 13, 2017) ("ACP CO") P 68.

a. FERC's Complete Failure to Examine "Residual adverse impacts".

On one side of the scale, the Commission relies on those precedent agreements. The 'residual adverse effects' on landowners are supposed to be on the other side of the scale (starting with being forced to sell their property against their will). But the Commission does not actually consider the adverse effects on landowners; instead, it has *sub silento*, abandoned that metric in favor of a completely different one, "avoided adverse effects", where FERC solely focuses on a proposed pipeline's alleged adverse impact *mitigation* efforts and fails to actually analyze the adverse impacts themselves. FERC cannot properly conduct a balancing test that involves adverse impacts without even accounting for those adverse impacts. FERC's current approach must be remedied via the

revised Policy Statement followed by a change in FERC's behavior. By way of example, in Jordan Cove, landowners pointed out several gross inaccuracies in FERC's adverse impact assessment, including among other things that:

1. FERC used incorrect easement data in its Certificate Order with regards to the amount of privately-owned land the pipeline would have to acquire either though easement or eminent domain; therefore, FERC could not have accurately weighed the adverse effects on landowners as it did not have accurate information as to which landowners were affected;

2. FERC failed to address the detrimental impacts to landowners' water sources, agricultural drainage, and irrigation;

3. There were significant flaws in the pipeline's groundwater supply and monitoring and mitigation program; and

4. FERC failed to evaluate the negative impact on valuation of land.

In its rehearing order, FERC simply dismissed every single one of these adverse impacts[17] without any real analysis, economic or not. In response to the fact that FERC failed to use the correct easement data in its Certificate Order, instead of even attempting to examine the correct easement data—or providing any data whatsoever on the number of private properties impacted—FERC dismissed its obligation to do so, and cited to the pipeline's general mitigation efforts. *See* JCEP RO P 182 ("As an initial matter, we note that [FERC's] assessment of impacts to landowners is entirely independent of the status of easement negotiations. [...] Further, newly affected parcels are subject to Pacific Connector's and the Commission's Plan and Procedures designed to avoid, reduce, and mitigate landowner impacts."). In response to the pipeline and FERC's complete failure to take into account the detrimental impact (or complete destruction) of landowners' water sources—in southern Oregon where most landowners rely on wells drilled for all of their household and irrigation needs—FERC patted the pipeline on the back for discussing a mere 7 wells out of hundreds and again cited to a vague 'mitigation measure' that the pipeline would develop sometime

[17] All of which were backed up by data and reports.

in the future to protect these water sources, presumably as evidence that the impact 'just wouldn't be that bad.' And so on. *See JCEP RO* P 185 ("the event a groundwater supply is impacted, Pacific Connector would work with the landowner to develop mitigation measures that would satisfy the needs of the individual landowner."); *Id.* P 187. In the Atlantic Coast Pipeline, FERC noted with regards to adverse impacts to landowners and communities along the pipeline route:

> Atlantic participated in the Commission's pre-filing process and has been working to address landowner and community concerns and input. Specifically, Atlantic incorporated 201 route variations, totaling 199 miles, into its proposed route for various reasons, including landowner requests, avoidance of sensitive resources, or engineering considerations. Additionally, Atlantic has stated that it will make good faith efforts to negotiate with landowners for any needed rights, and will resort only when necessary to the use of the eminent domain. Accordingly, while we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Atlantic has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.

ACP CO P65. And so, "We find that the benefits that the ACP Project will provide to the market outweigh any adverse economic effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities." ACP CO P70.

It is flatly impossible to discern what decision-making principle the Commission was applying in determining the extent of the adverse impacts and how it weighed those against the alleged benefits. FERC emphasized the pipeline's mitigation efforts, including the number of route variations and the mileage they cover (a previously-unknown metric), but other seemingly very important metrics—such as the number of landowners subject to eminent domain (including those who felt forced to sell easements under threat of eminent domain), the amount of their property to be confiscated, how much of ACP would be built on such property, reports on the devaluation of land, how many landowners' water sources will be affected, etc.---were not considered. As ACP disclosed only after it decided to abandon the project, there are more than 3,000 landowners whose

property lay in ACP's path,[18] yet even this obviously important figure is nowhere to be found in the Commission's analysis or "balancing test".

Even taking the Commission's supposed rationale in citing to the pipeline's vague mitigation efforts at face value raises more questions than it answers. To begin with, *sub silento* it substitutes "adverse impacts avoided" for "adverse impacts" in its equation, with absolutely no explanation.[19] And even as to these avoided impacts, how many of those 201 route alterations (and their associated mileage) which "include[ed] landowner requests" were actually landowner requests? According to the Final EIS, only 23 of these 201 changes describe the rationale as "landowner request", for a total of 17.4 miles.[20] Atlantic Coast Pipeline and Supply Header Project, *Final Environmental Impact Statement,* Volume I, pp. 3-52 – 3-57. And while we know that (at most) 36 landowner requests were granted, how many landowner requests did **not** result in route changes? And how many of the changes that were made came as the result of a notorious pipeline tactic, *i.e.*, "Sign the easement, and we'll agree to the change you want. Don't sign and we won't"?

The Commission's preference of discussing a pipeline project's mitigation efforts or other useless metrics, such as the number of meetings a pipeline has had, over conducting an actual analysis or providing data on adverse impacts is flatly bizarre. In PennEast, for example, "The Commission found that PennEast incorporated 70 of 101 requested route variations into its proposal in order to reduce any adverse impacts on landowners and communities, and held over 200 meetings with public officials, and 15 'informational sessions' with impacted landowners in order to better assess local concerns. Additionally, approximately 37 percent of the pipeline route will be

[18] ACP Disposition and Restoration Plan, Accession No. 20210302-3019, p. 17.

[19] An extreme example of this can be found in Jordan Cove, where the Commission allegedly explained its balancing test in a section of the Rehearing Order entitled, "Balancing of Adverse Impacts" without properly addressing or analyzing eminent domain. JCEP RO PP 62-65.

[20] Another 13 of the route changes (totaling another 9.6 miles) could plausibly be attributed to landowners, e.g., the "Sherando Lake Road" entry ("Adjustment to increase distance from residences"); Massengale Road entry ("Adjustment to avoid a future home site development").

collocated alongside existing rights-of-way." PennEast RO P 25. Again, the Commission failed to measure or account for the adverse impacts that affect *real* people, and instead focused on the chosen metric of "avoided impacts resulting from requested route variations", without even bothering to note (as at least it did with ACP) whether private residential landowners were either among those lucky 70 (which could be utilities, any other corporation, or any local, state, or government agency). Citing to the miles of pipeline route that would be co-located with existing rights of way is the same thing; no adverse impact from those miles, but again there was *zero consideration* of the impacts on landowners for the remaining 63% of the pipeline.

FERC's reliance on the number of meetings with public officials and landowners as evidence of lack of adverse impact on the latter also completely disregards the required balancing test. Deeming 15 'informational sessions' for landowners, where PennEast could tell them personally that it was going to force them to sell their property, as evidence of the lack of adverse impact on them is clearly irrelevant. Immediately after this recitation FERC concluded that, "Based on the benefits the project will provide to the shippers, the lack of adverse effects on existing customers, other pipelines and their captive customers, and effects on landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of PennEast's proposal." PennEast CO P 40.

b. The "Balancing Test"

The CPS describes the critical step of *how* the Commission weighs "adverse impacts avoided" against the project's benefits as "essentially an economic test." CPS p. 19. In ACP, right after repeating those words ("The Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic, not an environmental analysis"; ACP RO P 62) the Commission's conclusion was, "that Atlantic has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities, and that the benefits of the ACP Project outweigh the identified

impacts on landowners and surrounding communities." This is not an acceptable or true economic analysis.

In sum, regardless of what the Certificate Policy Statement or FERC itself says, the Commission's *modus operandi* for determining need under section 7 is, and has been, to (1) rely exclusively on precedent agreements, almost all of which are with affiliates; (2) use those affiliate agreements as the excuse for ignoring any evidence – no matter how credible – from project opponents that shows a lack of need; (3) ignore adverse impacts on landowners and instead analyze the meaningless metric of "adverse impacts avoided"; (4) accept anything the applicant does as evidence of avoided impacts, including merely talking to people; (5) balance the public need for the project against adverse impacts via a 1-sentence "economic test" that does not quantify either the benefits or the adverse impacts, and (6) approve the project.

Recommendation:

At a minimum, FERC should revise the CPS to require the Commission to (1) look behind affiliate precedent agreements whenever credible evidence is presented that those agreements do not represent actual market demand; (2) acknowledge that landowners compelled to sell their property under threat of eminent domain are as adversely affected as landowners who refuse to 'voluntarily' sign easement agreements; (3) if it maintains the fiction that the balancing of the project's public benefits against its adverse impacts is an "economic test", actually determine the quantified impacts on landowners (number of landowners who are either compelled to sell under threat of eminent domain as well as ones subject to it, the total amount of their property at issue, and damages suffered by the latter that are not included in a "just compensation" determination), as well as the project's quantified public benefits; and (4) explain how it assigned quantified values to each of those factors.

Most importantly, FERC must actually implement its own policy, and enact these policy revisions through a binding order. Until the Commission does so, its Section 7 policy could remain a sham process that makes it "difficult to articulate to landowners and community interests why their land must be used for a new pipeline project".

D. <u>Exports Do Not Serve the Public Convenience and Necessity Under the NGA</u>.

The Natural Gas Act states that it is the "transporting and selling [of] natural gas *for ultimate distribution to the public*" that is "affected with a public interest." 15 U.S.C. 717(a) (emphasis added). "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944). "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.,* 360 U.S. 378, 388 (1959). Exporting natural gas serves none of these public interests.

Since the Commission seeks comments only on its Section 7 process, and not Section 3, this comment will address the specific issue of FERC's Section 7 approvals for new interstate natural gas pipelines supplying LNG terminals. To begin with, as the D.C. Circuit has reminded FERC, exports simply are outside the scope of Section 7: "Section 7 states that the Commission may issue a certificate of public convenience and necessity for 'the transportation in *interstate commerce*,' § 717f(c)(2) (emphasis added), and we have explicitly refused to interpret 'interstate commerce' within the context of the Act 'so as to include foreign commerce.'" *Oberlin*, 937 F.3d at 606-07 (citing *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948), and *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1063 (D.C. Cir. 1974)); 15 U.S.C. 717a(7) (defining interstate commerce as commerce taking place within the United States).

FERC relies on several stratagems for finding public benefits from a pipeline supplying LNG terminals. The first is to simply ignore the issue, and simply state that such pipelines serve the

public interest without ever saying how. *See, e.g.*, *Golden Pass Products, LLC*, 157 FERC ¶ 61,222 (Dec. 21, 2016), P 32 (Conclusory statement that there are benefits from the project without ever describing them); *Port Arthur LNG, LLC*, 167 FERC ¶ 61,052 (April 18, 2019) P 36 (same).

FERC's second stratagem is to talk about how the pipeline will result in increased domestic gas supplies. *Cameron LNG, LLC,* 147 FERC ¶ 61,230 (June 9, 2014) P 29 ("Among other things, DOE found that exports from Cameron LNG's facility would result in increased production.") However, elsewhere FERC itself has gone out of its way to insist that new LNG terminals do not lead to any additional gas production. *E.g.*, *Freeport LNG Development*, 148 FERC ¶ 61,076, P33 (Jul. 30, 2014) ("[T]here is no connection between the projects before us and any specific, quantifiable induced production."); *Trunkline Gas Co.*, 153 FERC ¶ 61,300, P 137 (Dec. 17, 2015), ("There is no showing that there is a sufficient causal link between authorization of this LNG project and any additional production."); *Cameron LNG,* 147 FERC ¶ 61,230, P 68 (June 19, 2014) ("induced production is not caused by the Liquefaction Project"); *Magnolia LNG*, 155 FERC ¶ 61,033, P116 (Apr. 15, 2016) (no "sufficient causal link" to "any additional production").

FERC's third stratagem is to describe how a new pipeline will add supposed "transportation options" for the natural gas industry.. *See, e.g.*, JCEP RO P 40 ("We view transportation service for all shippers as providing domestic public benefits . . . include[ing] shippers transporting gas in interstate commerce for eventual export, since such transportation will provide domestic public benefits.") That is a perfect tautology; as then-Commissioner Glick noted in the certificate order for the Nexus Pipeline, "If the benefit of new pipeline capacity is that it will provide new pipeline capacity, then the Commission's assessment of need is little more than a circular 'check-the-box' exercise." *NEXUS Gas Transmission*, 172 FERC ¶ 61,199 (Sept. 3, 2020), Comm'r Glick, dissenting, P 7.

FERC's final stratagem to justify these pipelines is to point to "benefits to the local and regional economy," (JCEP CO P 84), which presumably means the jobs and local tax revenues resulting from building and operating a new pipeline. However, Congress did not enact the NGA as an employment program; by definition, building any pipeline creates jobs; if jobs were the purpose of Section 7, then this economic benefit alone would be a sufficient public benefit and there would be no need for a public convenience and necessity finding. Indeed, there would no reason for a new pipeline to carry any gas, since the vast majority of those jobs would be created by building a pipeline, not by operating it. As the Iowa Supreme Court noted in another pipeline case, "[i]f economic development alone were a valid public use," then the Dakota Access pipeline could have used eminent domain to condemn land to build a palatial mansion, "which could be defended as a valid public use so long as 3100 workers were needed to build it, it employed twelve servants, and it accounted for $27 million in property taxes." *Puntenney v. Iowa Utils. Bd.,* 928 N.W.2d 829, 848 (Iowa 2019). No court has ever held that the Act's goal was to create construction jobs or, indeed, that the jobs and tax benefits that result from any government infrastructure approval *alone* satisfies the Takings Clause.

Recommendation:

Congress could not have been clearer: the NGA's public benefits are, "transporting and selling [of] natural gas *for ultimate distribution to the public*", (15 U.S.C.A. § 717(a)) and exported gas does not in any conceivable way serve this end. The Commission should not consider exported gas as a public benefit in considering pipeline applications under Section 7.

E. FERC Must Assess Needs Differently Based on Reality.

FERC must assess needs differently based on the existence of multiple pipeline applications in the same geographic region, or if there is a pipeline application to build in a region where a pipeline already exists. Pretending that pipeline projects exist in a vacuum and that a proposed

project's alleged need is in no way impacted by other potential means of fulfilling the very same need (such as another pipeline) is a legal and practical fallacy. As a former FERC Commissioner LaFleur noted, "[g]oing forward, when multiple projects are proposed in the same region, with similar timing, [there should be] a regional review for the development of natural gas infrastructure to assess both the need for pipeline capacity in the region, and the environmental impacts of multiple proposed pipelines on the region." ACP RO, LaFleur Dissent at 3 (Aug. 10, 2018).

A recent stark example of the approval of damaging duplicated pipelines is FERC's approval of the Atlantic Coast Pipeline and the Mountain Valley Pipeline. These two pipelines were routed to run through similar geographic regions and routes, were receiving gas at the same location and sending gas to similar markets. Neither of these projects should have been approved, especially given the fact that there was viable merged system/on-pipe alternative on the able that would have resulted in environmental advantages and less adverse impacts to landowners. *See ACP Order on Rehearing,* Commissioner LaFleur dissent at 2-3, 164 FERC ¶ 61,100 (Aug. 10, 2018). In her dissent on MVP's Certificate Order, Commissioner LaFleur aptly described the importance of considering the impacts of both projects in the aggregate, and why when one does so, the record demonstrated that neither project was in the public interest:

> Deciding whether a project is in the public interest requires a careful balancing of the need for the project and its environmental impacts. In the case of the ACP and MVP projects, my balancing determination was heavily influenced by similarities in their respective routes, impact, and timing. ACP and MVP are proposed to be built in the same region with certain segments located in close geographic proximity. Collectively, they represent approximately 900 miles of new gas pipeline infrastructure through West Virginia, Virginia and North Carolina, and will deliver 3.44 Bcf/d of natural gas to the Southeast. The record demonstrates that these two large projects will have similar, and significant, environmental impacts on the region. Both the ACP and MVP cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Furthermore, the projects traverse many important cultural, historic, and natural resources, including the Appalachian National Scenic Trail and the Blue Ridge Parkway. Both projects appear to be receiving gas from the same location, and both deliver gas that

> can reach some common destination markets. Moreover, these projects are being developed under similar development schedules, as further evidenced by the Commission acting on them concurrently today. *Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects. In so doing, I am not persuaded that both of these projects as proposed are in the public interest.*

Mt. Valley Pipeline, LLC Equitrans, L.P., et al., Certificate Order, 161 FERC ¶ 61,043 (Oct. 13, 2017) Commissioner LaFleur dissent at 1-2 (FERC 2017) (footnotes removed and emphasis added).

FERC needs to make it clear through its revised Policy Statement that if there are multiple pipeline applications in the same geographic area, or multiple applications proposing to serve the same or similar markets, that those applications will be evaluated differently than a project that is proposed without any such 'sister' application or market destination. Namely, for example, if there are multiple pipeline applications in the same geographic area, the collective, aggregate adverse impacts need to be weighed against the alleged economic need for each project. Before approving a pipeline in this context, alternatives, such as merged systems alternatives or extensions of already existing infrastructure, should be considered. All new routes and merged systems should utilize the route that is least damaging to affected communities and the environment.

II. <u>FERC MUST ADEQUATELY ADDRESS AND PROTECT LANDOWNER INTERESTS.</u>

The recent steps taken by FERC thus far to revise its broken practices are commendable, but more needs to be done to ensure a more balanced, transparent, and efficient Section 7 certificate application process for all parties, including those most adversely impacted—landowners.

A. <u>FERC Needs to Remedy its Broken Notice and Communication Methods.</u>

It's no secret that landowners are largely left in the dark during FERC Section 7 pipeline proceedings. This is by no fault of their own—FERC's landowner notification and communication methods are broken and in dire need of an overhaul.

FERC claims in the NOI that, since 2018, it has "updated its web resources for landowners and its notice documents (e.g., Notice of Application) to more clearly explain . . . how and when interested entities can participate in Commission proceedings." NOI, at P. 11. While some of FERC's most recent updates (i.e., end of 2020, *see infra* at 25-28) to its Notices of Application are significant steps in the right direction, they are still missing vital details that will allow all potential intervenors, regardless of expertise in FERC regulations or computer literacy, the understanding necessary and ability to intervene.[21] It also remains unclear what updates FERC made to its Notices that it will use in *each and every* Section 7 pipeline proceeding moving forward, and a clear standard for such notice should be developed and implemented.

1. Background on FERC's Broken Landowner Notice Process.

Section 7 Certificate holders have extraordinary powers, including the ability to exercise federal eminent domain authority to take private land from unwilling sellers. 15 U.S.C. 717f(h). Although FERC is the federal agency granting this extraordinary authority to seize people's property, FERC has delegated to Certificate applicants FERC's own Fifth Amendment and Natural Gas Act ("NGA") responsibilities to provide "affected landowners"[22] with notice of the proceeding, the potential impact it could have on them, and their rights during FERC's administrative process. 15 U.S.C. 717f(c)(1)(B) (requiring FERC to provide notice of this proceeding to all "interested persons"); 18 CFR 157.6(d) (delegating FERC's landowner notice responsibility to Certificate

[21] Niskanen discussed these issues with FERC's notice and communication methods in its comments on FERC's Creation of the Office of Public Participation, and reiterates those comments in part here—as it remains unclear how FERC plans to fix these issues, and the Policy Statement could play a significant role. *See generally The Niskanen Center's Comments on FERC's Creation of the Office of Public Participation,* Accession No. 20210423-5052, Docket No. AD21-9 (April 23, 2021) (hereinafter "Niskanen's OPP Comments").

[22] "Affected landowners" include owners of property that will be directly affected (i.e., crossed or used) by the pipeline, abuts the edge of a proposed pipeline, or contains a residence within 50 feet of the proposed construction work area. CFR 157.6(d)(2).

applicants); 18 CFR. 157.6(d)(3) (requiring applicants to provide affected landowners with, *inter alia*, the notice of application, information on intervention, landowner rights, and FERC's administrative process).[23]

2. <u>FERC, through the Pipeline Companies, Provides Incomplete, Confusing, and Contradictory Information on Intervention Requirements.</u>

There are three places where FERC conveys information about intervention: 1. FERC's notice of applications (NOAs), 2. FERC's landowner pamphlet, and 3. FERC's information sheet. Despite the 2018 revisions, this information is still confusing for landowners on how they can intervene and why they should do so.

a. <u>FERC's Confusing Instructions in its Notice of Applications (NOAs).</u>

Niskanen reviewed two NOAs FERC issued since April 2018[24] from proposed pipeline construction projects seeking a section 7(c) Certificate of Public Convenience and Necessity seeking the power to acquire land from private landowners.[25] Both contain just a single sentence on the need for landowners to intervene in the Certificate proceeding in order to obtain judicial review of FERC's Certificate order: "Only parties to the proceeding can ask for court review of Commission orders in the proceeding." This sentence only offers passing reference to the fact that only "parties" can request court review of FERC orders, with no further information or clear reference to the rights forfeited should landowners fail to understand the necessity of intervention to preserve their rights.

[23] The only FERC oversight mechanism in place over the pipeline sending affected landowners notice is the requirement that Certificate applicants submit a list of the names and addresses of the landowners it allegedly notified, which is all currently done 'confidentially'. 18 CFR 157.6(d)(5). These lists should be made public and readily available to any affected landowner who requests a copy.

[24] Niskanen's review of NOAs from 2018 and four other section 7(c) pipelines can be found in its OPP Comments at 3-5.

[25] These NOAs are for: *Equitrans, L.P.* (84 FR 29195; June 12, 2019) and *Double E Pipeline, LLC* (84 FR 43118; August 20, 2019).

In addition to offering vague language about landowner rights, the NOAs offer unclear language on intervention requirements. First, FERC only generally states that persons wishing to intervene should file "a motion to intervene in accordance with the requirements of the Commission's Rules of Practices and Procedure (18 CFR 385.214 and 385.211) and the Regulations under the NGA (18 CFR 157.10)," but FERC does not state or clearly articulate what those requirements are. FERC also offers contradictory language on intervention requirements. The NOAs state that "[a] party ***must submit 3 copies of filings*** made in the proceeding with the Commission and must provide a copy to the applicant and to every other party" and "[t]he Commission **strongly encourages electronic filings of comments, protests and interventions** in lieu of paper using the "eFiling" link" and "[p]ersons unable to file electronically ***should*** **submit an original and 3 copies of the protest or intervention** to [FERC]." (Emphasis added).[26] The first instruction *requires* 3 copies to be mailed to FERC and a single copy on every other party in the proceeding, while the second instruction then encourages electronic filing with no explanation as to how the electronic filing relates to the alleged requirement of the submission of three copies. Then, the third instruction further muddies the water by stating in the alternative to electronic filing, one must submit a total of four copies (original plus 3) just to FERC. The only thing that is clear in these NOA instructions is the sheer confusion that they elicit.

FERC appears to have again amended its intervention language in the NOAs around November 2020. Niskanen reviewed three NOAs[27] FERC issued since that time for pipeline

[26] *Equitrans, L.P.* (84 FR 29195; June 12, 2019) and *Double E Pipeline, LLC* (84 FR 43118; August 20, 2019).

[27] Niskanen could not find any NOAs for a section 7(c) application for new pipeline construction that seeks to take privately owned land issued after the apparent November 2020 revisions, but Niskanen assumes FERC intends this new language to apply to *all* Section 7(c) NOAs—including new pipeline project Section 7 applications—going forward.

projects under section 7(c) of the Natural Gas Act.[28] While these most recently updates to the intervention language in the NOAs are a *significant* step in the right direction, the NOAs could still use some improvement. For example, FERC should make it abundantly clear how a landowner would fulfill the intervention requirements of Rule 214, with a step-by-step guide on how exactly to intervene. FERC generally references Rule 214 in passing without making it explicitly clear how landowners can and will fulfill the Rule's requirements. Without further explanation, such a reference will inevitably lead to confusion and frustration—especially considering that even if a landowner has the resources and know-how to locate Rule 214, the reading of the Rule will only add onto any confusion.

Assuming a landowner could even locate Rule 214, 18 CFR § 385.214(b) tells landowners that an intervention motion must contain the following information:

> (b) Contents of motion.
>
> (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.
> (2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
> (i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
> (ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
> (A) Consumer, FERC should include a 'sample' motion to intervene template, both timely and 'out of time' for landowner reference. (B) Customer,
> (C) Competitor, or
> (D) Security holder of a party; or
> (iii) The movant's participation is in the public interest.

Astonishingly, the Commission's regulation does not list "landowners whose property may be taken" as an example of someone who "has an interest which may be directly affected by the

[28] These NOAs are for: *Natural Gas Company of America, LLC* (85 FR 69619; November 3, 2020), *Algonquin Gas Transmission, LLC* (85 FR 86552; December 3, 2020), and *Gulf States Transmission, LLC* (86 FR 20686; April 21, 2021).

outcome of the proceeding". In fact, an affected landowner reading this might think that they have no basis for intervention at all.

FERC should also include a more robust step-by-step guide on how to eRegister so potential intervenors can then eFile. FERC should include the actual URLs that direct individuals to the eRegister site instead of relying only on linked text. Further, the document-less intervention guide link (https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf) does not work and needs to be updated.

b. The Commission's pamphlet *An Interstate Natural Gas Facility on My Land? What do I Need to Know?* is also no help.

Unfortunately, neither of the two FERC documents that the pipeline company is required to include in its landowner notice letter remedy these issues. Niskanen believes that the required FERC "pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners" under 18 CFR 157.6(d)(3)(ii), refers to the pamphlet titled *An Interstate Natural Gas Facility on My Land? What do I Need to Know?*[29] Again, in this document there are only a few sentences – in a 32-page document – that describe vaguely how landowners can preserve their Due Process rights to challenge any Commission Certificate decision: "Becoming an intervenor is not complicated and gives you official rights. As an intervenor, you will receive the applicant's filings and other Commission documents related to the case and materials filed by other interested parties. You will also be able to file briefs, appear at hearings and be heard by the courts if you choose to appeal the Commission's final ruling." *Id.* at p. 6. This is hardly calculated to adequately inform recipients of the need to intervene in order to preserve their rights to rehearing or judicial review. This vague yet vital legal information is also largely overshadowed by the highlighted section that immediately

[29] *Available at:* https://www.ferc.gov/sites/default/files/2020-04/AnInterstateNatualGasFacility.WhatYouNeedToKnow.pdf (Last visited April 21, 2021).

follows it that aims to dissuade landowners from intervening, which describes the process as overly burdensome:

> ***However, along with these rights come responsibilities. As an intervenor, you will be obligated to provide copies of what you file with the Commission to all the other parties at the time of filing by electronic means (direct attachment of the document to an e-mail or by referencing a link to the filed document in eLibrary) or by mail. In major cases, there may be hundreds of parties.***

Id. at pp. 6-7. This emphasis on the difficulty of intervention—offered in bold, italicized lettering—is the original formatting contained within the pamphlet. Additionally, this pamphlet states that "if you submit a request for intervention through the mail, ***you should include 14 copies*** of your request." (Emphasis added) *Id*. at p. 7.

The timeline for filing as an intervenor is further misleading, "You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register, although the Commission may accept late intervention if good reasons are given." *Id*. As explained below, 21 days is not accurate, often landowners have far fewer days in which to file as intervenors. *Infra*. at 30-31 §d.

c. <u>FERC's "information sheet on how to intervene in Commission proceedings".</u>

Equally uninformative is FERC's "information sheet on how to intervene in Commission proceedings" (https://www.ferc.gov/ferc-online/ferc-online/how-guides, last visited April 21, 2021), which contains the single sentence, "Intervenors becomes *[sic]* participants in a proceeding and have the right to request rehearing of Commission orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal." Like in FERC's pamphlet, this sentence does not even hint that intervention is the *only* means of preserving the right to administrative and judicial review.

Not only does the information sheet neglect to describe what must be included in the actual motion for intervention, it also exacerbates the confusion on filing requirements. In almost poetic

fashion, the information sheet declares that "Persons unable to file electronically should send **an original and three copies** of the motion to intervene by overnight services" to FERC officials. (Emphasis added) *Id.* FERC should eliminate any and all contradictory instructions on how to file an intervention.

d. <u>Deadlines for Intervention are Inappropriately Short.</u>

Unusually for federal agency proceedings, FERC has not established a regulatory deadline for intervention in the Certificate process. This means that for each Certificate proceeding, FERC simply picks a date; the only Commission description of its procedure in choosing intervention deadlines Niskanen could find comes from *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?,* p. 7: "You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register[.]"

Unfortunately, this is not only incorrect, it is affirmatively misleading. Contrary to the Commission's own statement that affected landowners "must normally file for intervenor status within 21 days of our notice of the application in the Federal Register", with one exception it appears that FERC's completely *ad hoc* practice is to give landowners 21 days *from the date of the NOA* to file for intervention. The actual time between Federal Register publication and the intervention deadline was between 7 and 15 days.[30] Nor does FERC ever explain why it has chosen the particular deadline in each instance.

[30] From the 5 pipeline NOAs issued between 2018 through present that Niskanen reviewed (see FN 4 and 7 above), the *Natural Gas Company of America, LLC* NOA was dated October 27, 2020, appeared in the Federal Register on November 3, 2020, and had an intervention deadline of November 10, 2020 (7 days after it appeared in the federal register and only 14 days after the NOA was dated); the *Algonquin Gas Transmission, LLC* NOA was dated December 22, 2020, appeared in the federal register on December 30, 2020, and had an intervention deadline of January 12, 2021 (13 days later); the *Gulf States Transmission, LLC* NOA was dated April 15, 2021, appeared in the federal register on April 21, 2021, and had an intervention deadline of May 6, 2021 (15 days later); the *Equitrans, LP* NOA was dated June 13, 2019, appeared in the federal register on June 21, 2019, and had an intervention deadline of July 5, 2019 (14 days later); and the *Double E Pipeline, LLC* NOA was

The only alternative way for landowners to discover what the intervention deadline is, is via the applicant's notice letter, which must contain a copy of the NOA. 18 CFR 157.6(d)(vii). The applicant's notice letter itself must be sent "By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application". 18 CFR 157.6(d)(1)(i). This means, that if the Commission issues the NOA on Wednesday, Thursday, or Friday, the applicant has 5 days to mail the letter. Assuming (as does Rule 6(d) of the Federal Rules of Civil Procedure) that first class mail takes up to three days for delivery, the recipient may then have just 13 days to file for intervention with FERC.

B. Remedies to FERC's Broken Notice and Communication Methods.

The importance of meaningful and informative communication with landowners in FERC proceedings cannot be overstated. For example, as noted in greater detail above, if FERC (or the Certificate applicant to whom FERC has delegated this responsibility) fails to provide notice, landowners may lose their right to intervene as a party to FERC's administrative process, and with it the right to seek rehearing by FERC (a precondition to judicial review), and judicial review of FERC's decision. 15 U.S.C. 717r(a), (b). FERC can remedy these significant issues by adopting the proposed solutions outlined below.[31]

1. FERC Should Facilitate the Automatic *Party* Status for Affected Landowners.

While the NGA requires a person to be a "party" to the proceeding in order to request rehearing or seek judicial review (15 USC §717r(a), (b)), the intervention process in order to become

dated August 14, 2018, appeared in the federal register on August 20, 2019, and had an intervention deadline of September 4, 2019 (15 days later).

[31] Many of these solutions ultimately could be realized through the creation and operation of the Office of Public Participation. *See* NOI a P. 12 (noting OPP "could ultimately help facilitate landowner participation in Commission proceedings")(citing to Consolidated Appropriates Act of 2021, Pu. L. No. 116-260, Explanatory Statement for Division D (2021)); *See Niskanen's OPP Comments*. However, OPP is still not in existence, its ultimate scope of responsibilities remains unknown, and many of these issues are urgent and need to be addressed immediately by FERC.

a "party" is entirely FERC-created and FERC-controlled. *See* 18 C.F.R. § 385.214 (Rule 214). For example, under the NGA FERC "may classify persons and matters within its jurisdiction and *prescribe different requirements for different classes of persons or matters.*" 15 USC §717o (emphasis added). In addition, landowners' participation in Section 7 pipeline proceedings wherein private companies seek to take their land most certainly is in the public interest, and FERC "*may admit as a party* [...] *any other person whose participation in the proceeding may be in the public interest.*" 15 USC §717n(e) (emphasis added). Accordingly, it is well within the Commission's discretionary powers to deem affected landowners automatically 'parties' to a relevant proceeding, thereby eliminating the confusing and overly burdensome intervention process, all while protecting landowners' ability to properly assert their Due Process rights.[32]

FERC would of course give every landowner proper notice of the proceeding, their automatic party status, and their rights as a party (to request rehearing and seek judicial review). FERC should also provide an easy mechanism in which any landowner could 'opt-out' of automatic party status/intervention; for example, by having the landowner file a simple form noting that they are 'opting-out' of being a party, or by having a simple 'opt-out' call-in service available within FERC.[33] After any 'opt-out', FERC could send a standard 'opt-out' confirmation letter to the affected landowner.

2. **<u>FERC Needs to Take Ownership and Establish Accountability Over Providing Notice to and Communications with Landowners.</u>**

[32] FERC should further eliminate the overly burdensome service requirements for affected landowner parties, and make the process similar to its rulemaking, administrative, or policy proceedings (RM, AD, and PL Dockets), wherein there are no service requirements.

[33] Niskanen does not foresee many landowners using this service to forfeit their rights, and it should not prove to be an overly burdensome task. If anything, it will detract from all of the work and resources FERC currently has to pour into managing landowner intervention and party status.

As noted above (*supra* at 23-31), FERC's current method of attempting to communicate with affected landowners is failing. FERC needs to meet landowners where they are, and not where FERC or a pipeline company wants them to be. Niskanen outlines below several steps that FERC can take to ensure that affected landowners at the very least understand 1. who is trying to take their land and why, 2. what their rights are in the relevant FERC proceeding and how to assert those rights, and 3. how to properly communicate with FERC and obtain accurate and relevant information.

a. FERC Should Take Over Notice to Landowners.

Assuming that intervention remains a requirement, FERC should first take complete ownership of notice to landowners.[34] Pipeline companies—the entities with *the least* incentive to make sure notice is received or understood by landowners—should not be involved with the initial notice sent to landowners. The FERC should be the entity responsible for ensuring that every affected landowner is properly accounted for and sent notice, and that their information is correct and systematically updated.[35]

Second, FERC should ensure that notice to landowners is easy to understand and accessible. FERC could do this by including in each NOA a simple statement along the following lines:

> If the Commission grants the requested Certificate of Convenience and Public Necessity for the applicant's proposed pipeline, then the applicant will have the right, subject to paying just compensation, to take your property for its pipeline project.
>
> The only way you can have a court review the Commission's decision to grant the

[34] Again, this could be through the OPP.

[35] In contrast with the current 'system', wherein landowners' addresses are perpetually labeled as 'unavailable', resulting in some landowners not even being aware there is a pipeline seeking to take their land until after FERC grants a Certificate. *See, e.g.* FERC's Final EIS in ACP [issued July 21, 2017] 77 landowners are identified wherein the requested right of way would be within 50 feet of their home. Of those 77 landowners, there are at least 13 homes listed with "unavailable physical addresses." If FERC or ACP could not even figure out their addresses over a period of years, those 13 landowners certainly did not receive adequate notice of the project or of ACP's intent to take their land.

Certificate is by intervening now as a party in this proceeding. ***If you do not intervene now, you will not be able to ask FERC or a court to review the Commission's decision to approve the pipeline project.***

You have 90 days from the date of this Notice of Application to intervene in this proceeding, until [insert deadline]. There are two ways for you to intervene:

1. File your request to intervene electronically by using the "efile" link at http://www.ferc.gov. The Commission strongly encourages the use of electronic filing. Attached to this notice is step-by-step instructions on how to create a FERC Online Account and intervene in this proceeding.

2. File paper copies of your request to intervene. To do so, you must send a signed original and 3 copies to FERC by regular mail (at Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426), and one copy to the applicant at its principal place of business, listed in the first sentence of this notice. Be aware that if you choose to use paper filing, in the future you will have to send a copy of any comments or other documents you wish to file not only to FERC and the applicant, but also to every other party in the proceeding, and the number of parties can become very large.

If you are a landowner, your request to intervene should just say that you have received this notice, that your land may be taken or affected by the pipeline company, and include your name, affected property information, and the docket number(s) listed at the top of the first page of this notice. If you include all of this information in your motion to intervene, your motion will fulfill the requirements of FERC Rule 214 and you will become a party to the proceeding.

Niskanen does not believe there is any imaginable impediment to including such notice about the consequences to affected landowners of not intervening, and to giving clear, non-contradictory instructions about the mechanics of intervention.

Nor does Niskanen believe that there is any valid reason for not setting a standard period of time to intervene, and believes that a 90-day period for affected landowners to file to intervene is justified. Given the potential impacts to landowners, allowing them a reasonable amount of time to secure their Due Process rights to judicial review of FERC's decision is justified, especially in Certificate proceedings that can last for years.

In fact, in *other* pipeline intervention situations, FERC gives 60 days' notice for intervention in proceedings for blanket certificates:

> [T]he Secretary of the Commission shall issue a notice of the request within 10 days of the date of the filing, which will then be published in the FEDERAL REGISTER. The notice shall designate a deadline for filing protests, or interventions to the request. The deadline shall be 60 days after the date of issuance of the notice of the request.

18 CFR 157.205(d). Moreover, FERC requires pipeline companies to include specific text in these blanket certification landowner notifications:

> This project is being proposed under the prior notice requirements of the blanket certificate program administered by the Federal Energy Regulatory Commission. Under the Commission's regulations, you have the right to protest this project within 60 days of the date the Commission issues a notice of the pipeline's filing.
>
> If you file a protest, you should include the docket number listed in this letter and provide the specific reasons for your protest. The protest should be mailed to the Secretary of the Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426. A copy of the protest should be mailed to the pipeline at [pipeline address]. If you have any questions concerning these procedures you can call the Commission's Office of External Affairs at (202) 208–1088.

157.203(d)(2)(vi). If FERC can do this for one type of pipeline certificate process, then there is no reason why FERC cannot do so here. Given that each of its Certificate pipeline decisions means that eminent domain will be used against dozens, or even hundreds, of landowners, it is the least FERC can do to satisfy its constitutional and statutory obligations.

When dealing with the sufficiency of notice when a state seized someone's house for delinquent taxes while aware that the homeowner had not received notice, the Supreme Court stated:

> There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. *It is not too much to insist that the State do a bit more to attempt to let him know about it* when the notice letter addressed to him is returned unclaimed.

Jones v. Flowers, 547 U.S. 220, 239 (2006) (emphasis added).

Here, FERC is exerting extraordinary power against property owners, and it is not too much to insist that FERC do a bit more to let landowners know about it.

b. FERC Should Provide Meaningful Landowner Guidance, Communication, and Accessibility.

FERC also needs to fulfill the need for real and continuous guidance and accessibility to landowners throughout the FERC process, something that does not exist right now. *See supra* at 23-31. FERC can fulfill this mandate in a number of ways,[36] including by:

a. having a landowner 'hotline', vastly different from the one that exists now, in that landowners should be able to speak or receive a callback from a knowledgeable FERC staff member:

   i. within a given period of time (say, 3 business days);

   ii. with real answers or information responsive to the landowner's inquiry, including information about the project relevant to landowners (such as the number of easements obtained and reported to FERC); and

   iii. with the option to speak to FERC on the condition of anonymity, as many landowners are justifiably intimidated by or fearful of pipeline companies, and do not report things they otherwise could or would if they could do so anonymously.

b. designating specific leads and points of contact within FERC for each pipeline project, who will be responsible for gathering, saving, and analyzing data on a given project—i.e., an FERC staff member who will know the issues, has access to relevant data, and can readily provide informed answers to landowners' inquiries, also enabling the FERC staff member(s) to identify and flag any significant issues with a given project and provide formal recommendations to

[36] As mentioned previously (*supra* n.21), Niskanen believes many of these solutions could be implemented through the Office of Public Participation.

FERC (such as recommending an investigation after repeated reports of fraudulent behavior by land agents, *see, infra* at 38-39);

c. improving and updating landowner information materials so they make sense and actually inform landowners clearly of the process and of their rights, including by:

    i. mailing a guide to every affected landowner explaining landowner rights[37]—including their right to counsel and relevant survey and eminent domain provisions—before a pipeline company is permitted to begin contacting landowners to negotiate an easement;

    ii. mailing and posting on FERC's website with embedded links clear, step-by-step 'how to' guide on intervention, which explicitly states that **IF YOU DO NOT INTERVENE YOU WILL LOSE YOUR RIGHT TO CHALLENGE ANY FERC DECISION APPROVING A PROJECT BEFORE FERC OR A COURT;**[38]

d. making filing comments more accessible to landowners by creating a FERC email address for comment submission (including for DEIS comments), so affected landowners do not have to navigate FERC's website or filing process;

e. providing a glossary guide with embedded links for a clear explanation of relevant terms and concepts;

f. improving the website for increased user-friendliness;

g. making all affected landowner lists public and readily available to any affected landowner who requests them;

h. improving and having more community-based meetings, including by:

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[37] This would be in addition to the revised NOA described above, *supra* at 33-34.

[38] The current 'How To Intervene' guide on the website does not make this explicit, and cites to a confusing regulation—18 CFR §385.214—without providing guidance in simple terms on how to intervene, and from what Niskanen could find, there is no simple step-by-step guide to assist a layperson.

i. having FERC field officers who are the appointed 'on the ground' person for a specific project to engage with landowners in their respective communities on a regular basis;

ii. hosting more community-based meetings in more locations with various hours, enabling more attendance of working people and landowners who often live very far from any town or city center;

iii. changing FERC's current public meeting format (where individuals are separated into small groups) so as to allow community members to hear from each other; and

iv. automatically recording, transcribing, and filing comments made at the community meetings, unless the landowner commenter opts out of an auto-file system.

3. FERC needs to streamline a system for landowners' legitimate complaints.

FERC is the appropriate place for landowners to go with their complaints about pipeline company behavior, specifically in two areas: abuse and threats by pipeline land agents to intimidate landowners into signing easements, and pipelines' routine violation of environmental conditions in certificate orders that, on paper, were intended to protect landowners. At best, FERC's practice is to ignore this behavior; at worst, to tacitly encourage it.

a. Pipelines' land agents routinely utilize abusive and fraudulent tactics in order to get landowners to sign "voluntary" easements.

Land agents acting for pipeline companies are notorious for their intimidation tactics, especially against the elderly. For example, they have threatened to take property away for refusing to sign, made false statements that all other surrounding landowners have signed, and threatened to route the pipeline purposefully near their home.

This happens all the time, on every pipeline. Niskanen and affected landowners recently filed comments on the proposed abandonment of the ACP pipeline, including the following paragraph:

> ACP used intimidation tactics to quickly obtain access to the land for their own advantage. Prior to the Ravinas signing an easement, ACP sent the sheriff to their home at 8:30 pm one evening. Once at the home, the sheriff, at ACP's behest, demanded that the Ravinas allow

ACP on their land the next day to conduct extensive surveys to prepare pipeline plans for their land.

The Niskanen Center, et al., Motion to Intervene and Comments on the Atlantic Coast Pipeline's Project Disposition and Restoration Plan at 10, Docket No. CP15-554, FERC Accession No. 202104166-5358 (April 16, 2021). To date, FERC has done nothing to curb this sort of behavior, a revised policy statement is an opportunity for the Commission to address what landowners suffer as a result of FERC's process and decision-making.

To begin with, FERC should develop an informal code of conduct for land agents and encourage certificate holders to agree to abide by it (Nighttime visits from the sheriff are among the practices that the code should discourage.). FERC should also inform landowners of their basic rights in eminent domain proceedings, including explaining the process under Rule 71.1 of the Federal Rules of Civil Procedure, which governs condemnation in federal courts. The specific staffer designated to be responsible for landowner relations for each pipeline should take note of landowner complaints about land agent abuse, and report those complaints to the certificate holder, the Office of Energy Projects, the Office of Enforcement, and the Commissioners, as well as make formal recommendations for accountability measures and consequences.[39]

b. Enforcement of Certificate Conditions.

Certificates contain dozens of conditions governing the pipeline's behavior on people's property during construction and operation. And when pipelines violate those conditions, FERC's practice is to ignore landowner complaints to this effect, or refer the landowner back to the perpetrator of the harm—the pipeline company itself. Unfortunately, federal courts have not

[39] The fact that pipeline companies often employ these land agents as 'independent contractors' and use this status to repeatedly disclaim any responsibility for their actions is further evidence that more robust record keeping and monitoring of land agent actions are essential FERC functions to ensure more fair and just proceedings.

allowed landowners to enforce the certificate conditions meant to protect them, leaving this entirely to FERC. Even more unfortunately, FERC has proved to be utterly indifferent to complaints about condition violations.

FERC has a telephone number that landowners can call with complaints called the 'FERC Landowner Hotline' (1-877-337-2237). FERC currently advises landowners to 1. call the gas company point of contact, 2. call the gas company hotline, and 3. *then* call the FERC Landowner hotline, in that order.[40] The typical 'response' from FERC is silence, no matter how many messages a landowner may leave. If they're 'lucky', FERC responds . . . and tells them that they need to work things out with the pipeline company.

FERC should take this problem seriously. A staff member assigned to oversee landowner relations for each pipeline[41] should receive landowner complaints about certificate compliance and report them to OEP and OE, which *must* be tasked with investigating and, if a condition is being violated, *order all activity on that landowner's property and related properties halted until it is remedied.* If OEP and/or OE determine that there is no violation, they should immediately report this to FERC and the landowner. There must also be a means by which a landowner can appeal any determination that there is no condition violation.

C. THE COMMISSION NEEDS TO DEFINE 'CONSTRUCTION.'

FERC needs to clearly define in its revised policy statement what activities a certificate holder may engage in without needing a 'Notice to Proceed' (NTP), and which activities require it.[42]

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[40] *See https://www.ferc.gov/industries-data/natural-gas/landowner-topics-interest,* 8th subheading down from top, 'What is the FERC Landowner Helpline and How Can it Help me? (Last visited April 22, 2021).

[41] Again, potentially as part of the OPP. If not the OPP, FERC needs to house such staff elsewhere.

[42] Niskanen previously noted this fact in its joint comments on FERC's reconsideration of Order No. 871, Accession No. 20210216-5360, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing,* Docket No. RM20-15-001 (Feb. 16, 2021). FERC rejected remedying this problem in the Modified 2021 871-B Order, but noted that it may fix this issue through this

Without adopting a clear, commonsense definition of what "construction" or "construction activities" are, it is likely that many of the issues that arise out of FERC's authorizations to commence with 'construction' before landowners can go to court will remain exactly the same—*e.g.* trees could be cut down and land destroyed for projects that are never built. The Constitution Pipeline[43] and the recent Atlantic Coast Pipeline are examples of this unwarranted destruction.[44] Under FERC's current practice, activities that will permanently alter or destroy land are easily defined as 'pre-construction' activities, and thus not subject to a Notice To Proceed. There is no standardization, and the definition of what constitutes 'construction' vs. 'preconstruction' is determined on a "case-by-case basis" by the Office of Energy Projects:

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proceeding. 871-B Order, 163 ¶ 61,042 at P. 10, n. 28 (indicating that FERC would potentially appropriately define 'construction' through a revision of the Policy Statement).

[43] FERC approved construction for the Constitution Pipeline Project ("Constitution") on December 2, 2014. *Constitution Pipeline, Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order), *reh'g denied*, 154 FERC ¶ 61,046 (2016). The cancellation of the Constitution Pipeline Project was announced on February 24, 2020. *Update 1-Williams cancels N.Y. Constitution natgas pipeline* (Feb. 24, 2020). https://www.reuters.com/article/williams-constitution-natgas/update-1-williams-cancels-n-y-constitution-natgas-pipeline-idUSL2N2AO11B. However, before the cancellation, Constitution commenced construction and eminent domain proceedings against landowners. On just one farm, Constitution cut down more than 550 trees, many of which were sugar maples. Scott Blanchard, *Constitution Pipeline project ends as builder cites 'diminished' return on investment* (Feb. 25, 2020) https://stateimpact.npr.org/pennsylvania/2020/02/25/constitution-pipeline-project-ends-as-builder-cites-diminished-return-on-investment/.

[44] FERC approved construction of the Atlantic Coast Pipeline ("ACP") on October 13, 2017. Atlantic Coast Pipeline, LLC & Dominion Energy Transmission, Inc. 161 FERC ¶ 61,042 (2017) (Certificate Order), reh'g denied, 164 FERC ¶ 61,100 (2018). On July 5, 2020, the cancellation of ACP was announced. Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (Feb. 16, 2021) *https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline*. The cancelled ACP installed approximately 31.4 miles of pipe and completed an additional 82.7 miles of clearing and grading. *See* Atlantic Coast Pipeline's Disposition and Restoration Plan at 1 (Dec. 16, 2020) *https://atlanticcoastpipeline.com/resources/docs/public_acp%20disposition%20and%20restoration%20plan.pdf.* Additionally, ACP has performed approximately 222.5 miles of tree felling and of this approximately 108.4 miles of trees are still lying on the right-of-way where they were cut. Id. About 600 landowners have felled trees on their property. *Id.* at 17.

> Staff makes the determination whether to issue a notice to proceed for any particular activity on a case-by-case basis, after reviewing the proposed activity and the applicant's explanations of how it has complied with the requirements of the Commission's order that are prerequisites to conducting the activity in question. Activities needing a notice to proceed can range from tree felling, use of construction yards, mobilization of construction equipment, to construction of facilities.

FERC 28(j) Letter, *Allegheny,* Doc. 1841025 (May 4, 2020).

There is evidence that FERC also believes that "construction" activities, as defined, should not include actions that permanently alter the land—such as tree-clearing or ground-disturbing activities. The recent Certificate for the Pacific Connector pipeline states: "Jordan Cove and Pacific Connector must receive written authorization from the Director of OEP before commencing construction of any Project facilities, *including* any tree-felling or ground-disturbing activities." *Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (March 19, 2020), Environmental Condition 11, p. 133 (emphasis added). In other words, the Commission felt the need – for the first time in Landowners' experience -- to include "tree-felling or ground-disturbing activities" as part of "construction", as opposed to "preconstruction activities."

Niskanen and Landowners thus believe that a simple—yet necessary—action that the Commission must take is define what it means by "construction".[45] Landowners believe that this definition should be: "such activities that include, but are not limited to, any land altering, ground-disturbing, or tree-felling activities," and that any such "construction" requires a Notice to Proceed subject to Modified Order 871-B.[46]

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[45] Clearly defining 'construction' would also potentially clarify restoration activities, wherein FERC directs a pipeline to restore a site to 'preconstruction conditions.' *See, e.g.* Atlantic Coast Pipeline CO P219 (noting pipeline commitment to restore stream beds sand banks to "preconstruction conditions").

[46] With respect to required geotechnical boring and other surveying activities that involve minor alterations or extractions from land, such activities are not included in this definition or subject to a Notice to Proceed with construction. Landowners use "construction" in this sense in these comments.

Landowners note that other federal agencies do not have a problem defining what constitutes "construction" for purposes of their regulatory programs, *e.g.*, the Environmental Protection Agency's definitions of "construction," "commence as applied to construction," and "begin actual construction" under the Clean Air Act's New Source Review program. There, "construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions" (40 C.F.R. 52.21(b)(8)), while "commence as applied to construction":

> . . . means that the owner or operator has all necessary preconstruction approvals or permits and either has: (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

40 C.F.R. 52.21(b)(9). Accordingly, "begin actual construction":

> means, in general, initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

40 C.F.R. 52.21(b)(11). EPA has gone even further than just regulatory definitions, such as the agency's 22-page draft regulatory guidance entitled "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" (March 25, 2020).[47]

EPA also maintains libraries with dozens of its case-by-case guidance decisions further clarifying what constitutes "commence construction," *Commence Construction,* EPA, https://www.epa.gov/nsr/commence-construction (last visited Feb. 16, 2021), and "begin actual

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[47] *Available at: https://www.epa.gov/sites/production/files/2020-03/documents/begin_actual_construction_032520_2.pdf*) (last visited Feb. 16, 2021).

construction." *Begin Actual Construction,* EPA, https://www.epa.gov/nsr/begin-actual-construction-0 (last visited Feb. 16, 2021).

Like EPA's creation of a finely nuanced structure, distinguishing, for example, between a "physical change. . .that would result in a change in emissions," a "continuous program of actual on-site construction," and "onsite construction activities . . . which are of a permanent nature," the Commission should be able to clearly define which actions necessary to build a pipeline are "construction" for purposes of requiring the Commission to issue an NTP.

Defining appropriately what 'construction' is will help avoid the nightmare scenario where any action short of placing the pipe in the trench could be artificially deemed "preconstruction" activities—and thus not "construction" activities requiring an NTP and subject to Order 871-B's protections. Currently, as described above, such activities have been allowed and simply treated as potential enforcement questions, causing irreparable injury[48] to land. *See, e.g., Delaware Riverkeeper v. FERC*, 857 F.3d 388, 395 (D.C. Circuit 2017) (cutting trees is a "pre-construction activity."). Given that every landowner faces this certain, irreparable injury, FERC's approach in Order 871-B makes eminent sense to provide an automatic stay of construction when a landowner requests rehearing. Order 871-B at 21. In a similar vein and as outlined below, it also makes eminent sense to provide an automatic stay of certificates when a landowner requests rehearing.

[48] Pipeline construction – clear-cutting trees, digging the pipeline trench, etc., permanently destroys the land and are irreparable injuries. *League of Defenders/Blue Mountains Biodiversity Project v. Connaughton,* 752 F.3d 755, 764 (9th Cir. 2014) (the logging of thousands of mature trees "cannot be remedied easily if at all" because "[n]either the planting of new seedlings nor the paying of money damages can normally remedy such damage"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that injury to one's "ability to view, experience, and utilize [recreational areas] in their undisturbed state" was irreparable and weighed in favor of a stay (internal quotation marks omitted)).

D. THE COMMISSION NEEDS TO AUTOMATICALLY STAY CERTIFICATES WITH A PENDING LANDOWNER REQUEST FOR REHEARING.

Niskanen commends the Commission for taking the concerns of landowners seriously in its development and issuance of Order No. 871-B, and taken the very practical approach that it will not authorize "construction until the Commission has completed its decisionmaking process".[49] However, the Commission did not go far enough to properly address the more serious issue of landowners being subject to eminent domain before they can seek judicial review of a certificate order. *See* Order 871-B at 3 (adopting a policy of a "presumptive" stay of a certificate when an affected landowner files a request for rehearing).

It is fundamentally unjust for pipeline companies to be allowed to drag landowners into court for condemnation proceedings, with the significant risk of the *immediate* loss of possession via preliminary injunction[50] and the attendant destruction of their property, before landowners can seek judicial relief. To avoid this nightmare scenario, FERC wisely created in Order 871-B a mechanism in which FERC will "*presumptively*" stay a Certificate wherein a rehearing request has been filed by a landowner, until the earlier date of 1. a substantive order or order that indicates FERC will not take

[49] 2021 Order 871-B, 163 ¶ 61,042 at P 25 (hereinafter, "Order 871-B"); *See also* Niskanen's Comments on Order 871 supporting this approach, at 8-11, Accession No. 20210216-5360, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing,* Docket No. RM20-15-001 (Feb. 16, 2021.

[50] *See, e.g.*, *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 223 (4th Cir. 2019) (upholding district court's grant of immediate possession through preliminary injunction); *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pennsylvania*, 907 F.3d 725, 741 (3d Cir. 2018) (same); *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 550 F.3d 770, 777 (9th Cir. 2008) (obtaining immediate possession by preliminary injunction is appropriate where a pipeline company first obtains an order of condemnation). As the D.C. Circuit noted in *Allegheny* (964 F.3d at 8), the Atlantic Sunrise Pipeline obtained partial summary judgment and a possessory injunction within six months of filing its condemnation case (condemnation filed "less than two weeks" after February 3, 2017, and summary judgment and injunction "in August" 2017).

any further action, or 2. 90 days following the date that a request for rehearing may be deemed denied. *See* Order 871-B at P 43. The problem is that ***the stay should be automatic and mandatory for every single certificate order wherein a landowner files a request for rehearing*.**

The current language leaves a stay of the certificate entirely up to the Commission's interpretation of what is meant by "presumptively". Through the issuance of a revised policy statement, it should be made *abundantly clear* that the Commission *must* issue a stay in each and every instance wherein a landowner files a challenge to a Certificate.

Under the current discretionary framework offered under Order 871-B, FERC could still arbitrarily decide not to stay a Certificate—despite a pending landowner challenge to a certificate order under active reconsideration—thereby permitting eminent domain procedures to move forward. Landowners will then find themselves in the exact position as they were in pre-*Allegheny*, or in a "Kafkaesque regime" where they are held in "seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop." *Allegheny Def. Project v. FERC,* 932 F.3d 940, 948 (D.C. Cir.) (Millett, J., concurring), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019), *and on reh'g en banc*, 964 F.3d 1 (D.C. Cir. 2020).

In other words, without proper and reasonable restraints (such as an *automatic* stay of certificates until final resolution of requests for rehearing from affected landowners), *Allegheny's* description of what happens to landowners under tolling orders will just as easily apply if and when FERC decides not to presumptively stay a certificate:

> On top of that, the Commission and private certificate holders use its [certificate] orders to split the atom of finality. They are not final enough for aggrieved parties to seek relief in court, but they are final enough for private pipeline companies to go to court and take private property by eminent domain. And they are final enough for the Commission to greenlight construction and even operation of the pipelines. [Certificate] orders, in other words, render Commission decisions akin to Schrödinger's cat: both final and not final at the same time.

Allegheny, 964 F.3d at 10 (citations omitted).

This would again shift all of FERC's responsibility to protect the public interest by avoiding irreparable landowner impacts to the varied courts entertaining condemnation proceedings. Moreover, those courts do so in the wake of FERC's routine denials of landowners' requests for stays of Certificate Orders with respect to condemnation force and effects. FERC's past practice of refusing to stay Certificates' effects signals to these courts that their role in administering condemnation proceedings is ministerial, at best, and those courts have heeded that message, treating any and all Certificates, however conditional or incipient, as unassailable, and a reasonable predicate even for quick-takes. It's time for a new message, and a new practice that instills and ensures public confidence in FERC's administration of its Gas Act duties and pipeline authorization practices.

Landowners strongly endorse this 'automatic stay' approach, because as outlined below and as FERC well knows, if it does not prevent the exercise of eminent domain while landowner rehearing requests are pending, landowners' property may be condemned and permanent easements imposed on it without any opportunity to contest the pipeline's right to take their property. Condemnation alone is an irreparable injury: "As a result of the Commission's orders, [petitioner] . . . must either sell its land to [the pipeline] or allow [the pipeline] to take its property through eminent domain . . . . That [the pipeline] ultimately will compensate [petitioner] for its property does nothing to erase [petitioner's] legally cognizable injury." *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004) (emphasis added)). "As a general rule, interference with the enjoyment or possession of land is considered 'irreparable' since land is viewed as a unique commodity." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1090 (7th Cir. 2008); *see also Shvartser v. Lekser,* 308 F. Supp. 3d 260, 267 (D.D.C. 2018) ("[I]t is well-settled that unauthorized interference with a real

property interest constitutes irreparable harm as a matter of law." (quoting 7–Eleven, Inc. v. Khan, 977 F.Supp.2d 214, 234 (E.D.N.Y. 2013)); *Carpenter Tech. Corp. v. City of Bridgeport,* 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury from potentially wrongful exercise of eminent domain). In other words, the harm to landowners from having their properties condemned is irreparable, even in the event they receive their constitutionally required compensation. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker"); *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.").

A second irreparable injury is that, even if a court or FERC were to eventually stay or vacate a certificate, any easements a pipeline obtains in the interim would remain valid,[51] because pipeline easements are permanent. *See, e.g., PennEast Pipeline v. Permanent Easement in Hopewell Township*, No. 3:18-CV-001909, Order, D.E. 34 at 4–5 (D.N.J. Jan. 25, 2019) (granting a permanent right-of-way). It appears that if the condemnor acquires good and permanent title if it had the authority to condemn the property at the time it did so; subsequent invalidation of that authority, or lapse of the public use (or vacatur or suspension of a FERC approved project), does not affect the validity of its interest. Nor do landowners have any right to repurchase their property lost to an invalid certificate, and pipelines also have no interest in selling, because they typically obtain easements allowing the construction of any pipeline whatsoever, not limited to a project authorized by FERC and, indeed, not limited to natural gas pipelines at all.

[51] Unless, as argued by Niskanen and landowners in their ACP Abandonment Comments, FERC explicitly imposes an abandonment condition on the pipeline that it should release court-ordered easements back to affected landowners. *The Niskanen Center, et al., Motion to Intervene and Comments on the Atlantic Coast Pipeline's Project Disposition and Restoration Plan* at 32, Docket No. CP15-554, FERC Accession No. 202104166-5358 (April 16, 2021).

Adding to that injury, pipeline companies routinely ask for condemnations well beyond the scope of the FERC certificate. *See, e.g., Defendants' Brief in Support of Second Motion for Partial Summary Judgment, Atlantic Coast Pipeline, LLC v. 4.93 Acres, More or Less*, et al., 3:18-CV-00079, D.E. 48 at 4–6 (W.D. Va. June 4, 2020) (noting that the pipeline seeks condemnation authority well beyond what was granted in its Certificate, including rights to "alter" the pipeline; install "equipment and facilities"; five years of temporary easement access from the date of possession, on top of the three years granted from the date of the Certificate; a permanent right of ingress and egress not merely through easements, but also "to and from" those easements; rights to "any existing roads" on the property); *Gas Transmission Northwest, LLC v. 15.83 Acres of Permanent Easement, et al.*, No. 2:15-CV-00359, D.E. 71 at 10 (D. Or. Aug. 27, 2015) (noting that pipeline conceded that "its Complaint did not conform to the Certificate").

While a 'presumptive' stay is a step in the right direction, an automatic stay (under the appropriate circumstances, i.e. when a landowner requests rehearing) will ensure that landowners will be kept out of the potential "endless administrative limbo," where their property is taken and their land permanently destroyed for projects that may never be built, and industry will have clarity on if and when to begin expending resources on condemnation hearings, and on what exactly comprises the approved route.

1. **In the alternative, FERC at the very least needs to condition the use of eminent domain, and at the *very least* clearly define what it means by a 'presumptive' stay.**

Alternatively, if for whatever reason the Commission decides not to 'presumptively' stay a Certificate Order while there is a qualifying landowner rehearing request pending, under those circumstances the Commission should absolutely condition a pipeline's use of eminent domain on the pipeline obtaining all required permits for construction. Such a condition would be lawful, and FERC has conditioned the use of eminent domain on obtaining further authorization from the

Commission before; there is no reason why it could not do so again. For example, in *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653, 657 (4th Cir. 2011), Environmental Condition 55 of FERC's § 7 Certificate stated that "Mid-Atlantic shall not exercise eminent domain authority granted under [the NGA] section 7(h) to acquire permanent rights-of-way on [residential] properties until the required site specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects]". *See also* Order on Rehearing and Clarification and Denying Stay, 129 FERC ¶ 61,245 at ¶ 24 (Dec. 17, 2009) (certificate holder in *Mid-Atlantic* sought clarification of this eminent domain exercise condition, with FERC affirming that it had this authority.). While an automatic stay of the certificate as outlined above (*supra* at 45-49) is the preferred method of landowners avoiding a FERC-created administrative limbo,[52] conditioning eminent domain is an alternative option.

FERC at the *very least* should offer a clear definition of the 'presumption,' and provide procedural guidance on why and how a party could potentially overcome it. It seems fair to say that FERC meant for this to be a rebuttable presumption, and that FERC will stay a certificate, unless the applicant presents significant evidence to the contrary. It is up to FERC to determine what exactly that evidence needs to be and show, but FERC needs to make this clear for the benefit of itself and all parties. And of course landowners must be afforded the opportunity to respond to any such evidence.

E. FERC MUST RECOGNIZE THAT ITS USE OF CERTAIN, HEAVILY CONDITIONED CERTIFICATES IS UNLAWFUL.

Conditioned certificates violate the Takings Clause because there simply cannot be a "public benefit" or "public purpose" to taking property unless, at a minimum, the project can legally be

[52] *See supra* at 46 (describing in brief this legal and administrative limbo wherein landowners are barred from seeking court review of a FERC decision).

built. If any of the other authorizations necessary to build the pipeline are not granted, then a proposed pipeline project will have taken the property of hundreds of landowners for no purpose whatsoever. Courts have refused to allow exercise of eminent domain in similar situations where there was no legal certainty that the project for which property was taken could actually be built.

By allowing eminent domain based on conditioned certificates, FERC not only assumes that each of the numerous state and federal agency proceedings will grant the necessary permits, but also that each agency will grant permission to construct a proposed pipeline project exactly where the Certificate authorizes. While FERC (most probably) would agree that it could not presume the outcome of its own administrative process, it apparently has no qualms about presuming the outcome of multiple other state and federal administrative processes. And such approvals are by no means certain, as seen repeatedly in a number of pipeline projects, e.g., Pacific Connector (denials of Clean Water Act and Coastal Zone Management Act authorizations); Northeast Supply Enhancement Project (denials of Clean Water Act permits from two states); Constitution (denial of Clean Water Act permit); and Penn East (denial of Clean Water Act permit).

FERC should recognize affected landowners' right to possession until such time as a proposed pipeline has obtained all necessary authorizations and can legally proceed with a project.

1. **Allowing Eminent Domain Based on Conditioned Certificate Violates the Takings Clause by Authorizing Takings that are not Necessarily for a Public Use**

The taking of private land through eminent domain proceedings when there is no public benefit is a Fifth Amendment violation, regardless of what is done to the land post-condemnation or the amount of compensation paid to landowners.

The Supreme Court has long distinguished between laws that authorize government officials to exercise "the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent

domain on behalf of themselves." *United States v. Carmack,* 329 U.S. 230, 243 n.13 (1946). The first type of law "carries with it the sovereign's full powers except such as are excluded expressly or by implication." *Id.* But the second kind of law is more strictly construed; these laws "do not include sovereign powers greater than those expressed or necessarily implied." *Id.* Such strict construction is more than justified in dealing with conditioned certificates.

To put this in a familiar context, just imagine a court being asked to order condemnation of land for a project, when the land would not only need to be re-zoned to accommodate the intended use, but the developer has not even applied for the re-zoning. Or, a more appropriate analogy, when the developer's re-zoning application has already been denied. Even though there will be no "public convenience and necessity" under the NGA allowing construction and operation until such time as a pipeline obtains all of these other authorizations, there is apparently enough "pubic benefit" in the mere possibility that a pipeline will be built to satisfy the Takings Clause. Niskanen and Landowners note that the Commission's Policy Statement provides that, "Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace." 88 FERC ¶ 61,227, p. 20. *If landowners should not be subject to eminent domain for projects that are not "financially viable," it makes no sense why they should be subject to eminent domain for projects that are not yet* ***legally viable***. If a pipeline fails to obtain any of those necessary permits, FERC will have allowed it to take (and destroy) property for no purpose (and certainly no public benefit) whatsoever, an obvious violation of the Takings Clause.

This is not a theoretical problem. The most dramatic recent example of it came in connection with the Constitution pipeline, unfortunately, acting on the basis of its conditioned certificate, Constitution had already seized part of the Holleran family property in New Milford, PA, and cut down more than 500 mature trees. But then New York State denied the necessary § 401 water quality certification and then, after years of administrative proceedings and litigation,

Constitution has announced that it will not be building the Constitution pipeline after all. The Constitution pipeline will never be built, but the Holleran family was left with the rotting mess of hundreds of dead trees where a thriving forest had once stood – all because Constitution was allowed to exercise eminent domain on the basis of a conditioned Certificate.

The issue of whether eminent domain can be exercised when it is not certain that the intended public benefit will materialize is not new. In *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (1994), the Mississippi Supreme Court addressed the situation where the City of Vicksburg condemned the defendant's property in order to convey it to a private corporation for casino development. However, the City's conveyance to the casino company did not specify, in any way, what the company was required to do with the property. Accepting the legislative determination that casino development was a "public use", the Court found that:

> the City failed to provide conditions, restrictions, or covenants in its contract with Harrah's to ensure that the property will be used for the purpose of gaming enterprise or other related establishments. In fact, testimony indicates that Harrah's may do anything it wishes with Thomas' property, limited solely by a thirty year reversionary interest in the City.

Id. at 943. This led the court to conclude that, "Because the use of Thomas' land will be at the whim of Harrah's, the private use of Thomas' property by Harrah's will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best." *Id.* Similarly, in *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 352 (1998), the issue was whether "there are sufficient assurances that the properties to be condemned will be used for the public purposes cited to justify their acquisition." The Court held that there were, in fact, no assurances of the property being used for the cited public uses, because the developer "is not bound to use these properties for those purposes." *Id.* at 357.

For pipelines, there simply can be no "reasonable assurances" that each and every other federal and state agency will grant the necessary permissions, or do so such that each particular parcel of condemned land will be necessary for pipeline construction or operation. As a result,

there can be no "reasonable assurances" that property condemned under the NGA will result in any "public benefit". As the Ohio Supreme Court noted in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 383 (Ohio Sup. Ct. 2006):

> A municipality has no authority to appropriate private property for only a contemplated or speculative use in the future. Public use cannot be determined as of the time of completion of a proposed development, but must be defined in terms of present commitments which in the ordinary course of affairs will be fulfilled.

FERC has no basis for assuming that "in the ordinary course of affairs" pipelines will receive all of the other necessary authorizations, and as a matter of policy should only issue conditioned certificates in exceptional circumstances.

2. <u>The Regular Use of Conditioned Certificates is Premature and Unlawful.</u>

Lastly, FERC's decisions to issue certificates conditioned on future state approval violate the very statutes under which those other permits are issued l. For example, the Clean Water Act and Coastal Zone Management Act do not permit FERC to issue a certificate conditioned on future state approval. 33 U.S.C. § 1341(a)(1) ("certification" under the Clean Water Act, wherein "no license or permit shall be granted" by FERC until a state has approved the project), 16 U.S.C. § 1456(c)(3)(A) ("concurre[nce]" under the Coastal Zone Management Act). These statues clearly impose a limit on the federal agency's issuance of a permit, not a limit on the applicant itself (unlike, for example, much of states' preserved preconstruction permitting Clean Air Act authority).

3. FERC Should Use its Authority to Condition Abandonment of a Project on Restoration of an Affected Landowners' Property and a Release of Land Use Restrictions.

In order to avoid the nightmare scenario unfolds wherein FERC authorizes a pipeline, the pipeline then takes land and begins construction and destroying land, but then cancels or abandons the project, FERC should use its authority as a matter of policy to condition abandonment (whether granted in the original Certificate or upon subsequent request) on 1. restoration of affected

landowners' property (unless a landowner requests otherwise), 2. a release of any land use restrictions, and 3. if possible, a release of any court-ordered easements back to landowners. Given that any taking or destruction of land under these circumstances is the product of Commission authorization, FERC should amend its certificate policy statement to make these conditions a requirement for any abandonment approval.

CONCLUSION

Niskanen and Landowners applaud FERC's initiate and willingness to fix its broken Certificate Policy Statement. By incorporating the above recommendations into a new Certificate Policy Statement, FERC will ensure a more fair and transparent process for landowners, consumers, and industry.

Respectfully submitted,

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