Testimony of Jennifer Danis, Esq.

Associate Research Scholar/Lecturer in Law
Columbia Law School

on behalf of the
New Jersey Conservation Foundation and
The Watershed Institute

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A Hearing on Modernizing the Natural Gas Act to Ensure it Works for Everyone

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Columbia Environmental Law Clinic
Columbia Law School
435 West 116th Street
New York, New York 10027
(212) 854-4291 (phone)
(212) 854-3554 (fax)
jdanis@law.columbia.edu

Summary

The Federal Energy Regulatory Commission's ("Commission") issuance of a Certificate of Public Convenience and Necessity for the PennEast Pipeline exemplifies substantial infirmities with the Commission's administration of the Natural Gas Act ("NGA"). The NGA allows private parties seeking to build pipeline infrastructure to take private land so long as the party has acquired a Certificate of Public Need and Necessity.[1] The Commission can only issue a certificate if the company has demonstrated that the project is required by the public interest.[2] While the NGA requires a robust public interest analysis, the Commission regularly disregards this requirement in several ways.

In order to establish that a project is in the public interest, an applicant must first demonstrate a public need for the project,[3] but the Commission has not required PennEast to do more than show local distribution company ("LDC") affiliate contracts for the project in order to ostensibly satisfy this requirement. Likewise, the applicant must demonstrate that the projects' benefits to the public outweigh the harms, environmental and otherwise.[4] Yet the Commission has issued a certificate to PennEast prior to the company's acquisition of a Clean Water Act authorization necessary to assess the project's likely impact on water quality. The Commission has also failed to consider the downstream greenhouse gas impacts of proposed projects,

[1] *See* 15 U.S.C. § 717f(h) (2018).
[2] *See* 15 U.S.C. § 717f(e) (2018).
[3] *Id*.
[4] *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," and, in doing so, the Commission "will balance 'the public benefits against the adverse effects of the project,' including adverse environmental effects") (internal citations omitted); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (noting that the public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of gas in interstate commerce "necessarily and typically have dramatic natural resource impacts").

ignoring potentially the greatest environmental impact of projects like PennEast. These infirmities are not unique to the PennEast project; the Commission regularly fails its mandate under the NGA through these practices and others, such as the use of "tolling orders"—a process by which the Commission "grants" rehearing for the limited purpose of further consideration of the request itself, delaying the appeal of certificate issuances. This Committee's hearing provides an important opportunity to assess these Commission practices and uphold Congress's intent in passing the NGA.

I. Introduction

The PennEast Pipeline, if constructed in accordance with PennEast's January 19, 2018 Certificate of Public Convenience and Necessity, would run approximately 116 miles, from Luzerne County, Pennsylvania, to Mercer County, New Jersey.[5] The original PennEast Pipeline Certificate was the predicate for hundreds of property condemnation suits in New Jersey and Pennsylvania, as well as "negotiated" land sales that were anything but truly voluntary.[6]

[5] That Certificate of Public Convenience and Necessity had an in-service date of January 19, 2020, which has now lapsed. On December 30, 2019, PennEast requested an extension of that in-service date. PennEast Pipeline Company, LLC, Request for Extension of In-Service Date, Docket No. CP15-558 (Dec. 30, 2019). This past Thursday, January 30, 2020, PennEast filed an application to amend that outdated authorization. PennEast Pipeline Company, LLC, Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity, Docket No. CP20-47-000 (Jan. 30 2020). With this new application (styled as an amendment), PennEast asserts that the project could be constructed just in Pennsylvania as a stand-alone venture. This is an entirely new project, with unnamed shippers allegedly contracting for about 52% of its capacity; it is simply astounding that PennEast does not even name the shippers, let alone their contract quantities or terms of their agreements. Moreover, the cost of the project now appears to hover around 50% more than the original. PennEast's supposed market data is marked privileged, and likely consists of no more than the precedent agreements with these unnamed shippers. There are no data supporting PennEast's assertions that this new stealth project will "relieve constraints" and "increase flexibility." This pivot highlights precisely the problem with the way FERC administers the Natural Gas Act, as set out below.

[6] *See, e.g.*, Jarret Dieterle, The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners, 17 Federalist Society Review 38 (Oct. 2016) (describing the disparate power between landowners and government during condemnation proceedings).

Landowners across the route had two choices: agree to PennEast's price or their land would be seized regardless. They lost their property rights prior to any opportunity for judicial review of the merits of PennEast's Certificate. Now that the project has been reimagined for just Pennsylvania, New Jersey landowners must watch as PennEast tells the Commission that it might not ever build the pipeline through the farms and homesteads it seized.

A project of this magnitude, and eminent domain powers of this scale, should only be delegated to a private party such as PennEast after undergoing the rigorous scrutiny mandated by the NGA and subject to the Constitutional limits accorded by the Fifth Amendment. However, the Commission has distilled its mandate to protect the public interest and to only approve projects that are absolutely required by the public need down to checking a box: if shippers have taken contracts for capacity, the project de facto serves the public interest.[7] And worse, here, the Commission granted PennEast a Certificate that it used to commence eminent domain proceedings without any data about the public harms the project would cause to New Jersey water quality.

With the Commission's recent declaratory order providing its interpretation of Section 717f(h), a statutory provision that the Commission has heretofore repeatedly disclaimed any ability to interpret or implement,[8] and PennEast's petition for certiorari at the Supreme Court, national attention is currently focused on one important aspect of the project: a private party's

[7] We adopt and incorporate the testimony provided by Jonathan Peress regarding the skewed economics resulting from LDC affiliated transactions, a distortion present in not only the Spire pipeline case but also PennEast. *See* Brief of the Environmental Defense Fund as Amicus Curiae in support of Petitioners, Delaware Riverkeeper v. F.E.R.C., Case No. 18-1128 (D.C. Cir. 2018). A clear understanding of the Commission's failure to assess public need from an economic perspective is crucial to appreciating the magnitude of the unconstitutional condemnations flowing from these certificates.

[8] Mountain Valley Pipeline, LLC, 163 FERC ¶ 61,197 at PP 72–73; see Millennium Pipeline Co., L.L.C., 158 FERC ¶ 61,086, at P 6 (2017) ("Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the Natural Gas Act, including issues regarding compensation, are matters for the applicable state or federal court.").

attempt to condemn State-owned lands preserved explicitly for their significant ecological value.[9] National attention is also focused on the significant separation of powers issues this decision raises: the Commission has postulated that it is the arbiter of Congressional intent and judicial interpretation. But this issue should not overshadow the fact that the entire PennEast project rests on a Certificate of Public Convenience and Necessity that is fundamentally insufficient to meet the NGA's legal requirements. The PennEast project is a prime example of the myriad flaws with the Commission's administration of that statute.[10]

The NGA only allows the Commission to issue a Certificate when the pipeline company has demonstrated a public need for that project.[11] The Commission has not required PennEast to do more than show LDC affiliate contracts for the project.[12] Likewise, the applicant must demonstrate that the project is in the public interest: in other words, that the benefits to the public outweigh the harms, including environmental harms.[13] By issuing a Certificate before PennEast

[9] New Jersey, like many states, has dedicated significant resources to preserving open spaces as development has made those spaces increasingly scarce. New Jersey statutes specifically recognize "preserving open spaces" and, by doing so, protecting water quality, to be in the public interest. *See* Appellants' Merits Brief, In re PennEast Pipeline Company, LLC., 938 F.3d 96 (3rd. Cir. 2019), at 5–6.

[10] The Commission's administration of the NGA is made all the more troubling by the fact that the federal district courts charged with hearing certificate-holders' condemnation actions are not empowered to examine the merits of the certificate upon which the use of eminent domain is predicated. *Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm'n*, 897 F.3d 187, 194 (3d Cir. 2018), *cert. denied sub nom. Adorers of the Blood of Christ, U.S. Province v. F.E.R.C.*, 139 S. Ct. 1169, 203 L. Ed. 2d 256 (2019) ("Once issued, the FERC order was undoubtedly under the exclusive purview of the NGA's provision for appellate review of the circuit courts of appeals"). District courts currently view their role as limited to approving condemnations as long as the condemning party can establish "(1) that it is the holder of a FERC certificate of public convenience and necessity; (2) that it has been unable to acquire the necessary property interests by contract or agreement; and (3) that the alleged value of the property interest exceeds $3000." *In re Penneast Pipeline Co., LLC*, No. CV 18-1585, 2018 WL 6584893, at *17 (D.N.J. Dec. 14, 2018), *vacated and remanded sub nom. In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019).

[11] *See* 15 U.S.C. § 717f(e).

[12] Worse, independent energy experts in fact showed that the project's intended service region had a glut of gas capacity. On the coldest day of the "Bomb Cyclone" Winter, New Jersey was sending gas out of the region because it had simply too much gas, and no shortage of infrastructure. *See* Greg Lander, Skipping Stone, Analysis Of Regional Pipeline System's Ability To Deliver Sufficient Quantities Of Natural Gas During Prolonged And Extreme Cold Weather (Winter 2017–2018) (Feb. 11, 2018).

[13] *See Sierra Club*, 867 F.3d at 1373 ("Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," and, in doing so, the Commission "will balance 'the public benefits against the adverse effects of the project,' including adverse environmental effects") (internal citations omitted); *Pub. Utils. Comm'n of Cal.*, 900 F.2d at 281 (noting that the

has acquired the Clean Water Permits, the Commission has also failed in this statutory duty: no regulator could balance data regarding wetlands and water quality harms that has yet to be collected or assessed by the agency tasked with making such an assessment. These failures are not unique to this project, as Commissioner Glick has repeatedly pointed out in his dissents to Commission decisions.[14] In fact, in April 2018, under Commissioner McIntyre's leadership, the Commission issued a Notice of Inquiry ("NOI") soliciting input on its generalized practice of assessing public need and interest by relying solely on precedent agreements.[15] This was a brief moment of reflection indicating that its practices might be in need of substantial reform. Despite comments highlighting numerous issues in the Commission's administration of the NGA,[16] the Commission took no action. This Committee's hearing to solicit and consider what changes ought to be made to address the serious inequities arising from the Commission's administration of the NGA provides an important opportunity to assess whether its practices have reformed since the NOI was issued almost two years ago. They have not. As a result, the PennEast Pipeline today is but one example of the Commission's dereliction of its NGA duties.

II. The Commission Consistently Fails to Uphold the Fifth Amendment By Issuing Certificates That Purport to Trigger Section 717f(h) On the Basis of Affiliate Precedent Agreements, Prior to the Acquisition of Clean Water Act Authorizations, and Without Taking into Account Climate Impacts of Greenhouse Gases

public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of gas in interstate commerce "necessarily and typically have dramatic natural resource impacts").

[14] *See e.g.*, Commissioner Richard Glick, *Dissent of Commissioner Richard Glick Regarding Eagle LNG Partners Jacksonville LLC*, FERC Docket Nos. CP17-41-000 (September 19, 2019), https://www.ferc.gov/media/statements-speeches/glick/2019/09-19-19-glick-C-2.asp#.XjL3hWhKg2w; Commissioner Richard Glick, *Partial Dissent regarding Transcontinental Gas Pipe Line Gateway Expansion Project*, FERC Docket No. CP18-18-000 (December 12, 2018), https://www.ferc.gov/media/statements-speeches/glick/2018/12-12-18-glick.asp#.XjL3h2hKg2w.

[15] Certification of New Interstate Natural Gas Facilities, Notice of Inquiry, 163 FERC ¶ 61,042, Docket No. PL18-1-000 (2018).

[16] Comments of New Jersey Conservation Foundation, The Watershed Institute, and Sierra Club, Certification of New Interstate Natural Gas Facilities, Docket No. PL18-1-000 (2018).

The power of eminent domain in the United States is typically reserved to governments and is restricted significantly by the Fifth Amendment. The NGA allows private parties seeking to build pipeline infrastructure to take private land so long as the company acquires a Certificate of Public Need and Necessity from the Commission. By the terms of the NGA, parties can only be awarded a certificate by showing a project is required by the public interest, or else the NGA directs the Commission to deny it.[17] Among other troubling Commission practices, such as the Commission's use of the tolling order fiction,[18] two in particular yield condemnations that cannot withstand the restrictions placed upon them by the Fifth Amendment: (1) exclusive reliance on LDC affiliate precedent agreements; and (2) certificates conditioned on Clean Water Act authorizations. Additionally, by failing to consider the downstream greenhouse gas impacts of proposed projects, the Commission cannot make accurate determinations of whether a project is in the public interest and is not in compliance with the NGA in issuing Certificates of Public Need and Necessity.

A. LDC Affiliate Precedent Agreements are Insufficient to Show that a Project is Necessary for the Public Interest

Under the current framework, the Commission determines that a project is in the public interest by the project's exclusive showing of precedent agreements: shippers' contracts for firm

[17] *See* 15 U.S.C. § 717f(e).

[18] *See Allegheny Def. Project v. Fed. Energy Regulatory Comm'n*, 932 F.3d 940, 948 (D.C. Cir. 2019) (Millett, J., concurring), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019) ("[T]he Commission has twisted our precedent into a Kafkaesque regime. Under it, the Commission can keep homeowners 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. The Commission does so by casting aside the time limit on rehearing that Congress ordered—treating its decision as final-enough for the pipeline companies to go forward with their construction plans, but not final for the injured landowners to obtain judicial review.").

gas capacity on the proposed pipeline.[19] Despite the Commission's policy statement, which specifically states that the Commission cannot rely solely on precedent agreements, the Commission's current practice is to do just that when determining project need.[20] The Commission's current practice is flawed in two ways: first, it fails to appropriately scrutinize the precedent agreements on which it relies as a source of need, and second, it does not consider any factors beyond those already flawed precedent agreements. PennEast's recent application for a certificate amendment goes even further askew by refusing to publicly name the shippers whose precedent agreements are used as evidence of public need and withholding information pertaining to contract quantities and terms.[21] While relying on arms-length precedent agreements may be appropriate in some cases, LDC affiliate precedent agreements alone cannot be a proxy for public need.[22] A more discerning approach—one that requires a demonstration of market capacity—would prevent compounding the current glut of gas capacity and extra costs to ratepayers.

When the entities signing contracts to purchase gas transmitted by a proposed pipeline are LDCs affiliated with the pipeline company, like PennEast, the pipeline company stands to earn a 14% rate of return awarded for the new pipeline infrastructure, regardless of having no

[19] *See* Comment of New Jersey Conservation Foundation, The Watershed Institute, and Sierra Club, Certification of New Natural Gas Facilities, Docket No. PL18-1-000, at n. 13.
[20] *Compare Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,743 (Sept. 15, 1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000) [hereafter Certificate Policy Statement] ("Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."), *with* Brief of Respondent Federal Energy Regulatory Commission, Delaware Riverkeeper v. F.E.R.C., Case No. 18-1128 (D.C. Cir. 2018) ("Notwithstanding New Jersey's opinion on what constitutes Commission policy, Br. 16, 18-19, the Commission emphatically declared in the orders on review that under its current policy it does not look behind precedent agreements to make judgments about the needs of individual shippers.").
[21] PennEast Pipeline Company, LLC, Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity, Docket No. CP20-47-000 (Jan. 30 2020).
[22] Greg Lander, Analysis of Public Benefit Regarding PennEast Pipeline, in Intervenors' Comments on PennEast's Application, Docket No. CP15-558, Accession No. 20160311-5209, exhibit A at 18–20 (Mar. 9, 2016).

public need for that infrastructure, or whether LDC affiliates are turning back legacy capacity and passing new capacity costs to ratepayers.[23] The Commission can and should distinguish between these affiliate agreements—whose value as an assessment of the public good should be discounted—and actual arm's length precedent agreements. Currently, the Commission grants private parties a certificate enabling them to take people's homes if they can show their affiliates or subsidiaries will contract for its capacity, benefiting corporations at the cost of the public. Even if the Commission were only to consider whether demand for more gas capacity existed, ignoring environmental and economic factors, the current model ignores the Commission's own research indicating "midstream investments over the past 10 years have largely relieved natural gas transportation constraints."[24] The Commission should not continue using LDC affiliate precedent agreements as evidence of demand for gas that is overflowing throughout the Northeast. The Committee's proposed amendment to the NGA would be crucial in this area, as appropriately defining "public interest" to avoid the current pitfalls is key. Moreover, establishing an Office of Public Participation and Advocacy would be an important way to provide a check on the Commission.[25]

B. Conditional Certificates Granted Without Clean Water Act Approvals Cannot Contain A Final Determination That a Project Is Required By the Public Interest

[23] For example, three New Jersey gas utilities chose to purchase gas from PennEast instead of an alternative, lower-cost project, Diamond East, to remunerate their stockholders. See *Williams Announces Open Season For Transco Pipeline's Diamond East Project*, The Williams Companies, Inc. (Aug. 26, 2014), http://investor.williams.com/press-release/williams/williams-announces-open-season-transco-pipelinesdiamond-east-project ("Unlike competing projects designed to serve the New Jersey Market Pool, Diamond East is a cost effective expansion along an existing Transco corridor.").
[24] FERC, State of the Markets Report 2015 (2016), at 4.
[25] Committee on Energy & Commerce, Summary of the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act (Jan. 2020), Title II, Subtitle B.

The construction and operation of pipelines such as PennEast "necessarily and typically ha[s] dramatic natural resource impacts."[26] The Commission readily acknowledges that any proper public interest analysis for these projects must weigh their potential environmental damage against the demonstrated public benefits. Congress, in requiring pipeline companies to obtain Clean Water Act ("CWA"), Clean Air Act ("CAA"), and Coastal Zone Management Act ("CZMA") authorizations in addition to acquisition of a Certificate of Public Convenience and Necessity, provided a mechanism to ensure that the promise of economic benefits is not elevated above foreseeable environmental harms, and recognized the public's significant interest in protecting natural resources counterbalancing the economic interests of pipeline projects. By explicitly incorporating CWA, CAA, and CZMA authorizations into the NGA, Congress made clear that these environmental statutes—and the public interests they protect—are not subordinate to the NGA and anticipated that environmental harms associated with certain projects may well outweigh their economic benefits.[27] Under the NGA, if an applicant cannot demonstrate that the project is within the public interest through a consideration of environmental effects, its "application shall be denied."[28]

The Commission regularly violates these requirements by issuing certificates that precede CWA, CAA, and CZMA authorizations.[29] The Commission claims that it has the power to issue such "conditional" certificates under the NGA, which states that "[t]he Commission shall have

[26] *Pub. Utils. Comm'n of Cal.*, 900 F.2d at 281.
[27] 15 U.S.C. § 717b (2018); 15 U.S.C. § 717n (2018).
[28] *Transcontinental Gas Pipeline Co*., 356 U.S. at 17; 15 U.S.C. 717f(e) (2012) (if the pipeline applicant fails to demonstrate that the project is within the public interest, "such application shall be denied.") (emphasis added).
[29] While courts have embraced a no harm, no foul approach to this Commission practice, finding that conditional certificates do not violate Section 401's ordering requirement because such a certificate does not authorize construction, thus no water quality harm can result from it, no court has yet had the opportunity to consider whether this practice violates either Section 717f(h) of the NGA or the Fifth Amendment. See, e.g., Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n, 857 F.3d 388, 399 (D.C. Cir. 2017) (holding that a conditional certificate did not violate Section 401 of the CWA because it "was not itself authorization of any potential discharge activity"); Appalachian Voices v. Fed. Energy Regulatory Comm'n, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (holding that conditional certificates do not violate NGA Section 717f(e)).

the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require."[30] However, these certificates conditioned on other significant federal considerations like CWA authorizations have no textual basis and were not contemplated by Congress, as the laws requiring such federal authorizations were passed decades after Congress gave the Commission the power to attach certain conditions to certificates. There is a plain difference between a certificate with conditions precedent, and a certificate with conditions subsequent. The former has an incomplete public interest analysis missing an essential piece of the balancing test, and the latter has operational conditions that must be maintained in order to preserve the public interest balance that has been finalized therein.

While the pipeline company cannot commence construction or pre-construction until all of the required federal authorizations are approved, conditional certificates have regularly been used as justification for the capture of private and public lands through eminent domain. This process is contrary to the text of the NGA. When Congress amended the NGA in 1947, it specified in the text of the statute that "eminent domain [is] for construction of pipelines."[31] Congress additionally articulated that eminent domain was intended for companies who have "qualified under the NGA to carry out and perform the terms of any certificate."[32] For good reason, Congress evidenced no intent to permit the use of eminent domain prior to the perfection of a certificate.

Without environmental authorizations and the critical data and analyses accompanying them, there is a factual vacuum regarding the environmental harms likely to arise from a project.

[30] 15 U.S.C. § 717f(e).
[31] 15 U.S.C. § 717f(h).
[32] S. Rep. No. 80-429, at 3 (1947).

As such, even if the Commission has satisfactorily determined the existence of a public economic need for the project, there is no way of knowing whether harm to water quality and other environmental factors outweigh that need. An accurate balancing test is essential to the public convenience and necessity public interest analysis.

Additionally, under the NGA, certificate-holders can use the power of eminent domain only to acquire "the **necessary** right-of-way to construct, operate, and maintain a pipe line . . . and the **necessary** land."[33] Case law reaffirms this restriction of eminent domain power to "necessary" lands.[34] However, during the CWA, CAA, and CZMA permitting processes, the applicant may be required to alter the pipeline's route to preserve water quality and avoid sensitive environmental resources. As a result, it is impossible to know whether any parcel of land is "necessary" for pipeline construction until all federal authorizations are issued. Until the CWA, CAA, and CZMA permitting processes are completed, and the land necessary to construct, operate, and maintain the pipeline is thereby determined, the holder of a conditional certificate cannot legally have unfettered eminent domain authority under Section 7(h).

The PennEast Pipeline provides a troubling example of this practice. The Commission issued PennEast's Certificate prior to New Jersey's Section 404 and Section 401 CWA review. New Jersey later denied both of these authorizations. Without them, the PennEast Pipeline cannot be built along the proposed route, and PennEast's massive use of delegated eminent

[33] 15 U.S.C. § 717f(h) (emphasis added). This provision was added to the Natural Gas Act in 1947, decades prior to the existence of ancillary federal authorizations that were required for a fully operational certificate.
[34] *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 550 F.3d 770, 776 (9th Cir. 2008) (noting that to use eminent domain under the NGA, a party must show "that the land to be taken is necessary to the project"); *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 F. App'x 489, 493 (6th Cir. 2018) ("The NGA gives companies that right if … the tract of land at issue is 'necessary to construct, operate, and maintain a pipe line'"); *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate, & Maintain a 42-Inch Gas Transmission Line Across Props. in the Ctys. of Nicholas, Greenbrier, Monroe & Summers*, No. 2:17-cv-04214, 2018 WL 1004745, at *1 (S.D.W. Va. Feb. 21, 2018) ("[A] certificate holder has the power of eminent domain over properties that are necessary to complete an approved project."); *Gas Transmission Nw., LLC v. 15.83 Acres of Permanent Easement*, 126 F. Supp. 3d 1192 (D. Or. 2015); *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011).

domain authority will serve no public interest.[35] PennEast has recently reconceived its pipeline project, relegating the New Jersey construction to an independent project for which it has provided no information about use or need.[36] In the meantime, property owners remain deprived of their lands, and those condemnations or forced sales that have been finalized have no clear judicial path to restoring full property rights. The PennEast Pipeline is just one example of the Commission allowing the use of eminent domain before the certificate-holder has demonstrated that the project is in the public interest and that the condemned lands are necessary for pipeline construction. The situation is untenable and unlawful. And to date, there has been no judicial review of the merits of PennEast's Certificate.

If the Commission is determined to continue issuing preliminary certificates that lack CWA, CAA, and CZMA authorizations, the Commission should condition the pipeline company's exercise of delegated eminent domain authority of Section 7(h), limiting it to the scope of the certificate. All parties agree that conditional certificates do not authorize construction; at most, they authorize the applicant to pursue other requisite federal authorizations. In other words, the certificate should only confer survey access rights necessary to collect additional data essential to a final determination of public interest. Even this limited grant would only be required in those states currently lacking laws providing pre-condemnation access for private entities. Eminent domain power to acquire full property interests cannot be delegated absent certifications required to determine whether the project is in the public interest and to ascertain the lands necessary for the project. Though the Committee addressed this issue

[35] While PennEast's eminent domain use is massive, it is by no means extraordinary. This pipeline is part of a national abuse of delegated condemnation authority, which the proposed amendments this Committee is considering can redress.

[36] PennEast Pipeline Company, LLC, Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity, Docket No. CP20-47-000 (Jan. 30 2020).

in part in the proposed legislation, a more precise solution would be to eliminate as a practice the issuing of certificates conditioned on other federal authorizations that have not yet been obtained.[37]

The inequity of the current situation for landowners is compounded by the fact that they are unable to challenge the viability of the certificate in court until they have exhausted all potential remedies through the Commission.[38] This means that after receiving a contrary decision from the Commission, the aggrieved party must apply for a rehearing and receive a final decision before they may appeal to the D.C. Circuit.[39] While this would seem to be a typical appeals structure, the Commission has transformed it into an unforeseen barrier for plaintiffs, and it one that stands firm while the pipeline company has no such judicial barrier to effectuating condemnation proceedings. Congress intended to set a time-limit on this process, writing into the statute that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied."[40] However, the Commission has created precedent where it issues tolling orders, "granting" rehearing for the

[37] Summary of the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act (Jan. 2020), Title II, Subtitle B. In practice, some environmental conditions that the Commission places on the certificate are operational; that is, they could not be met until after the pipeline is constructed. See. e.g., FERC, Order Issuing Certificates, Docket No. CP15-558 (Jan. 19, 2018) (Environmental Condition #12 provides, "Within 30 days of placing the authorized facilities in service, PennEast shall file an affirmative statement with the Secretary, certified by a senior company official: a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or b. identifying which of the Certificate conditions PennEast has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance"). Thus in fixing the Commission's broken administration of the statutory provision for conditions, Congress should specify that ancillary federal environmental authorizations are integral to the Commission's constitutionally mandated public interest analysis and that certificates conditioned on later obtaining those authorizations can trigger only conditioned exercise of eminent domain, limited to surveying required to obtain those authorizations.

[38] *Allegheny Def. Project*, 932 F.3d 940 at 950 (Millett, J., concurring) ("A scheme that walls homeowners off from timely judicial review of the Commission's public-use determination, while allowing eminent domain and functionally irreversible construction to go forward, is in substantial tension with statutory text and runs roughshod over basic principles of fair process").

[39] 15 U.S.C. § 717r(a) (2018).

[40] *Id*.

limited purpose of further consideration of the request,[41] which it considers an "action" under the statute. So long as the Commission issues a statement within 30 days of the request for rehearing, granting the request for the sole purpose of delaying its final action, the Commission believes it has satisfied all statutory requirements. The consequence is that landowners are blocked from their day in court to challenge the project's merits until their land has already been seized.[42] Worse yet, it is often the case that construction is either fully underway or already completed. This creates the potential for irreparable harm from illegal projects.

Courts originally accepted this action in rate or fee disputes where the stakes were monetary losses,[43] instead of seizure of homesteads, and now find themselves in a moral versus precedential bind, of which they are just now beginning to reconsider.[44] Congressional reform in this area could speed this slow judicial awakening and serve as impactful legislative intervention in the lives of homeowners deprived of judicial review. It would be an important step for the Committee to incorporate a clarification as to what "acting upon" a rehearing request means into the proposed legislation. Congress has the power to protect access to judicial review from the Commission's creative tolling order fiction by specifying that the Commission has thirty days to grant the merits of a rehearing request, or to deny it. Congress should specifically terminate the Commission's extra-statutory practice of granting rehearing requests for the limited purpose of

[41] *Allegheny Defense Project v. Federal Energy Regulatory Commission*, 932 F.3d 940, 944 (D.C. Cir. 2019).
[42] As district courts hearing condemnation actions believe they cannot review a certificate's merits as they relate to condemnation, the NGA's appeals procedures provide the only mechanism for judicial review. *Adorers of the Blood of Christ*, 897 F.3d at 194.
[43] *See California Company v. Federal Power Commission*, 411 F.2d 720 (D.C. Cir. 1969); *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988); *General American Oil Co. of Tex. v. Federal Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969).
[44] For a more detailed description of the tension the Commission has created in this area, see Judge Millet's concurrence in *Allegheny Defense Project v. Federal Energy Regulatory Commission*, 932 F.3d 940, 948–56 (D.C. Cir. 2019). En banc review has recently been granted to reconsider whether the Commission is authorized "to issue tolling orders that extend the statutory 30-day period for Commission action on an application for rehearing." *Allegheny Defense Project v. Federal Energy Regulatory Commission*, 943 F.3d 496 (D.C. Cir. 2019). All briefs and reply briefs are due for submission by March 2, 2020.

giving itself indefinite time to ponder them, while holding the keys to the courthouse door out of all parties' reach.

C. The Commission Cannot Proclaim a Certificate to be in the Public Interest When it Neglects to Analyze Downstream Climate Change Effects

The Commission's public interest determination must also consider the proposed project's impact on climate change. The Commission has recently claimed that it does not need to consider a project's contribution to climate change because it lacks a means to do so, while at the same time concluding that projects will not have significant environmental impacts, including climate change impacts.[45] Such a view stands contrary to the text and purpose of the NGA.

As a matter of law, the Commission must consider adverse environmental effects when making its public interest determination. Under Section 7 of the NGA, if the pipeline applicant fails to demonstrate that the project is within the public interest, "such application shall be denied."[46] In making this public interest determination, the Commission must "balance 'the public benefits against the adverse effects of the project,' including adverse environmental effects."[47] Modern science has demonstrated beyond all doubt that the human-driven release of greenhouse gas emissions is a direct cause of climate change, and that climate change has dire environmental, economic, and safety impacts. As Commissioner Glick stated in his dissent regarding Eagle LNG's Jacksonville LNG Export Facility, "[a] public interest determination that

[45] Commissioner Richard Glick, *Dissent of Commissioner Richard Glick Regarding Eagle LNG Partners Jacksonville LLC*, FERC Docket Nos. CP17-41-000 (September 19, 2019), https://www.ferc.gov/media/statements-speeches/glick/2019/09-19-19-glick-C-2.asp#.XjL3hWhKg2w.
[46] 15 U.S.C. § 717f(e).
[47] *Sierra Club*, 867 F.3d at 1373. *See also Pub. Utils. Comm'n of Cal.*, 900 F.2d at 281.

systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decision-making."[48] Former Commissioner LaFleur also stated that, in her analyses, she has consistently "viewed the full-burn estimate of downstream GHG emissions as important to [the Commission's] environmental review, and necessary for [FERC's] public interest determination under NEPA."[49] In other dissents she has implored the Commission that it "simply cannot ignore the environmental impacts associated with those downstream emissions."[50]

The Commission cannot avoid its obligations under Section 7 of the NGA by asserting that no singular or perfect quantitative tool exists for analyzing climate change impacts. As Commission Glick stated in his partial dissent regarding the Transcontinental Gas Pipe Line Gateway Expansion Project, "[t]he fact that the Commission may not know the exact magnitude of the Project's contribution to climate change is no excuse for assuming the impact is zero," and the Commission must instead "engage in a case-specific inquiry into the reasonably foreseeable effects and estimate the potential impact—making assumptions where necessary—and then give that estimate the weight it deserves."[51] The Social Cost of Carbon is a readily available tool for conducting this case-specific inquiry, measuring, in dollars, the long-term damage done by a ton of carbon dioxide (CO2) emissions in a given year.[52] This tool provides the Commission a

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[48] Commissioner Richard Glick, *Dissent of Commissioner Richard Glick Regarding Eagle LNG Partners Jacksonville LLC*, FERC Docket Nos. CP17-41-000 (September 19, 2019), https://www.ferc.gov/media/statements-speeches/glick/2019/09-19-19-glick-C-2.asp#.XjL3hWhKg2w.

[49] Commissioner Cheryl A. LaFleur, *Concurrence in Part, Dissent in Part of Commissioner Cheryl A. LaFleur on PennEast Pipeline Co. LLC*, FERC Docket Nos.: CP15-558-001 (August 10, 2018), https://www.ferc.gov/media/statements-speeches/lafleur/2018/08-10-18-lafleur-PennEast.pdf.

[50] Commissioner Cheryl A. LaFleur, Dissent in Part, *Order Denying Rehearing to Dominion Transmission, Inc.*, Docket No. CP14-497-001 at 42 (May 18, 2018), https://www.ferc.gov/CalendarFiles/20180518111142-CP14-497-0011.pdf.

[51]Commissioner Richard Glick, *Partial Dissent regarding Transcontinental Gas Pipe Line Gateway Expansion Project*, FERC Docket No. CP18-18-000 (December 12, 2018), https://www.ferc.gov/media/statements-speeches/glick/2018/12-12-18-glick.asp#.XjL3h2hKg2w.

[52] *EPA Fact Sheet*: *SOCIAL COST OF CARBON*, Environmental Protection Agency (December 2016), https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf.

method for linking GHG emissions to particular climate impacts and assessing the magnitude of a proposed project's impact on the climate.[53] Former Commissioner LaFleur pushed for the adoption of this tool, noting that "the Social Cost of Carbon can meaningfully inform the Commission's decision-making to reflect the climate change impacts of an individual project."[54] Given the availability of the Social Cost of Carbon to the Commission, there is no legal justification for failing to consider climate impacts under the NGA's public interest determination. The Committee's proposed amendment would address this problem effectively and is an excellent step towards the clean energy economy it seeks to expedite.[55]

III. Protecting the Principle of Sovereign Immunity Does Not Jeopardize Legitimate Pipeline Proliferation

This past Thursday, January 30, 2020, the Commission issued a Declaratory Order that contradicts the U.S. Court of Appeals for the Third Circuit's interpretation of Section 717f(h), stating that the ambiguous text of the section provided authorization to expand the condemnation power conferred on parties by Congress to apply to state-owned land.[56] In applying for the order, PennEast asserted that the federal court would somehow jeopardize the nation's pipeline infrastructure system, and the Commission responded by issuing an interpretation that ignored the basis of the Third Circuit opinion: canons of constitutional avoidance and the clear statement rule.[57] It was an obsequious and unprecedented maneuver, and as Commissioner Glick pointed

[53] Commissioner Richard Glick, *Partial Dissent regarding Transcontinental Gas Pipe Line Gateway Expansion Project*, FERC Docket No. CP18-18-000 (December 12, 2018), https://www.ferc.gov/media/statements-speeches/glick/2018/12-12-18-glick.asp#.XjL3h2hKg2w.
[54] Commissioner Cheryl LaFleur, *Partial Concurrence and Partial Dissent Regarding the PennEast Pipeline Company Order on Rehearing*, FERC Docket No. CP15-558-001 (Aug. 10, 2018).
[55] Summary of the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act (Jan. 2020), Title II, Subtitle B.
[56] Order on Petition for Declaratory Order, PennEast Pipeline Company, LLC, Docket No. RP20-41-000 (Jan. 30, 2020).
[57] Petition for Declaratory Order, PennEast Pipeline Company, LLC, Docket No. RP20-041-000 (Oct. 4, 2019).

out in his dissent, was a discredit to the Commission.[58] The Third Circuit decision did not alter, much less jeopardize, private pipeline companies' rights. Rather, it is consistent with the rights that states have always retained, but rarely chosen to assert.

While two Commissioners decry a court order as an attack on the pipeline industry, nothing has changed after the Third Circuit's decision. It has been true since before the country's founding that states have no obligation to be haled into court by private parties for any reason by nature of their sovereignty. This includes condemnation proceedings. What has really happened is this: as private pipeline companies have become emboldened (with 99% of projects receiving Commission approval) to seek certificates for projects so clearly lacking public need in order to garner profits borne on ratepayers' backs, and chosen to route those projects without regard to ecologically sensitive state-preserved lands, the projects have crossed a line that some states cannot abide.

The Commission claims that the Third Circuit's opinion would have an "immediate chilling effect"[59] on the development of interstate natural gas infrastructure, yet in the intervening six months there is no indication that pipeline infrastructure has slowed down in development at all. As Commissioner Glick articulately lays out in his dissent, this Declaratory Order highlights what is fundamentally wrong with the Commission's practice, stating "[i]t is not appropriate for the Commission to issue a declaratory order in an effort to buttress a private

[58] Commissioner Richard Glick, *Dissent Regarding Order on Petition for Declaratory Order, PennEast Pipeline Company, LLC*, Docket No. RP20-41-000 (Jan. 30, 2020) ("I appreciate that my colleagues disagree with the conclusion reached by the Third Circuit and that some badly want to see it overturned. But that disagreement, profound as it may be, does not excuse the ends-oriented reasoning in today's order, which is both deeply troubling and, frankly, a discredit to the agency.").

[59] Order on Petition for Declaratory Order, PennEast Pipeline Company, LLC, 170 FERC ¶ 61,064, Docket No. RP20-41-000, at 44 (Jan. 30, 2020); New natural gas pipelines are adding capacity from the South Central, Northeast regions, U.S. Energy Information Administration (Nov. 7, 2019) https://www.eia.gov/todayinenergy/detail.php?id=41933#.

party's litigation efforts."[60] The Commission's actions demonstrate that it is behaving as a captured agency, beholden to the interests of private corporations rather than the public interest it was created to protect. The proposed Congressional amendments to the NGA can realign Commission practice with the statute's command to protect the public from excessive corporate power.[61]

IV. Conclusion

The Commission's current administration of the NGA is inadequate to serve the public and does not satisfy Congressional intent to harmonize the CWA with the NGA.[62] Congress conceived the NGA to incentivize gas infrastructure and improve the lives of the public at a time when there was not enough gas to heat people's homes, and a post-war steel shortage to build pipes to transport that gas. The eminent domain regime designed by 717f(h) allows private parties access to a more limited power normally reserved only for the federal government. The ability to seize private property and irreversibly alter that property is not one that should be taken lightly; it should be exercised by private parties only under close supervision.[63] The eminent domain power is reserved for governments in part because our governments are democratically

[60] *Id*. at 53.
[61] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944) ("The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies").
[62] CWA Section 401 makes clear that Congress intended States to have the power to protect their waters from NGA projects that would harm them. 33 U.S.C. § 1341 (2018). The NGA itself confirms the supremacy of that public interest. 15 U.S.C. § 717b; 15 U.S.C. § 717n.
[63] *United States v. Carmack*, 329 U.S. 230, 243 n. 13 (1946) ("...in the case of statutes which grant to [a non-sovereign entity], such as public utilities, a right to exercise the power of eminent domain on behalf of themselves...[t]hese are, in their very nature grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers.").

accountable. Delegating the eminent domain power to parties that are free from accountability by the general public requires special oversight to fill that gap.

The Commission is not providing that supervision under the current practice. The NGA contemplates that supervision through the gating of the eminent domain power behind a Certificate of Public Convenience and Necessity, which should only be granted if the project is actually beneficial to the public. The Commission has subverted the NGA's goals by ignoring that requirement and granting applications for certificates virtually carte blanche. We appreciate the Committee's leadership in attempting to address the significant harms from the Commission's current practices.

I thank the Committee for giving me the opportunity to submit this testimony and to appear before it. I also thank Edward Lloyd, Esq., Professor of Law at the Columbia Environmental Law Clinic, and Jacob Elkin, Joel Beacher, Deandra Fike, Alyson Merlin, Hannah Yindra, and Michael Bloom, legal interns at the Columbia Environmental Law Clinic, Michael Pisauro, Esq. of the Watershed Institute, and Tom Gilbert of the New Jersey Conservation Foundation, for their contributions to the preparation of this testimony. I nonetheless take full responsibility for the contents of this testimony.