

No. 19-1039

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In the  
**Supreme Court of the United States**

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PENNEAST PIPELINE COMPANY, LLC,

*Petitioner,*

v.

STATE OF NEW JERSEY, et al.,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**JOINT APPENDIX  
Volume II of II**

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**Declaratory Order, *PennEast Pipeline Co., LLC*,  
170 FERC ¶ 61,064 (Jan. 30, 2020)**

1. On October 4, 2019, PennEast Pipeline Company, LLC (PennEast) filed a petition for a declaratory order (Petition) following a decision from the U.S. Court of Appeals for the Third Circuit (Third Circuit) in *In re PennEast Pipeline Company, LLC*.<sup>1</sup> PennEast seeks the Commission's interpretation of the scope of the eminent domain authority in section 7(h) of the Natural Gas Act (NGA).<sup>2</sup> The Commission grants the Petition in part, and denies it in part, as discussed below.

**I. Background**

2. PennEast is a Delaware limited liability company, managed by UGI Energy Services, LLC, pursuant to a Project Management Agreement.<sup>3</sup> On January 19, 2018, in Docket No. CP15-558-000, the Commission issued a certificate of public convenience and necessity for the PennEast Project, an approximately 116-mile greenfield natural gas pipeline designed to provide firm natural gas transportation service from receipt points in the eastern Marcellus Shale region, in Luzerne County, Pennsylvania, to delivery points in

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<sup>1</sup> 938 F.3d 96 (3d Cir. 2019) (*PennEast*).

<sup>2</sup> 15 U.S.C. § 717f(h) (2018).

<sup>3</sup> PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of AGL Resources Inc. (20 percent interest); NJR Pipeline Company, a subsidiary of New Jersey Resources (20 percent interest); SJI Midstream, LLC, a subsidiary of South Jersey Industries (20 percent interest); UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC (20 percent interest); and Spectra Energy Partners, LP, a subsidiary of Enbridge Inc. (20 percent interest). Petition at 3-4.

New Jersey and Pennsylvania, terminating at an interconnection with Transcontinental Gas Pipe Line Company, LLC in Mercer County, New Jersey.<sup>4</sup> The project's total certificated capacity of 1,107,000 dekatherms per day<sup>5</sup> is approximately 90 percent subscribed pursuant to long-term agreements for firm transportation service and will provide service to markets in New Jersey, New York, Pennsylvania, and surrounding states.<sup>6</sup> Upon commencement of activities authorized in the Certificate Order, PennEast will become subject to the Commission's

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<sup>4</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom. Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, et al. (first petition filed May 9, 2018) (argument held in abeyance October 1, 2019, "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision").

<sup>5</sup> *Id.* A dekatherm is approximately equal to 1000 cubic feet of natural gas. To put this number in perspective, the Energy Information Administration records that New Jersey consumed 44,410 million cubic feet of natural gas in January 2019, its peak demand month last winter. *See* <https://www.eia.gov/odata/qb.php?sdid=NG.N3010NJ2.M>. On average, that would be 1,432,580 dekatherms per day. Thus, the PennEast project here could serve 77 percent of New Jersey's last peak winter demand.

<sup>6</sup> Certificate Order, 162 FERC ¶ 61,053 at PP 4, 6. The twelve shippers that have subscribed capacity on the PennEast Project will use the gas for a variety of purposes, including but not limited to, local distribution service for end-use consumers and electric generation; the additional capacity will also support supply diversity and reliability. *Id.* PP 4, 28.

jurisdiction as a natural gas company under NGA section 2(6).<sup>7</sup>

3. PennEast states that, following issuance of the certificate, it was unable to reach agreement with the State of New Jersey to acquire easements for the portions of its proposed pipeline route that would cross land in which New Jersey holds a property interest.<sup>8</sup> Consequently, PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District Court) in order to obtain these and other necessary easements.<sup>9</sup> The State of New Jersey and its agencies (collectively, “State” or “New Jersey”) claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation: two parcels in which New Jersey holds fee simple ownership interests, and forty parcels in which New Jersey claims non-possessory property interests, including conservation easements and restrictive covenants mandating under state law a particular land use.<sup>10</sup>

4. New Jersey moved to dismiss the condemnation actions for lack of jurisdiction, asserting that the Eleventh Amendment grants New Jersey sovereign immunity from suit by private parties such as PennEast in federal court.<sup>11</sup> The District Court

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<sup>7</sup> 15 U.S.C. § 717a(6).

<sup>8</sup> Petition at 5-6.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United



granted PennEast’s application for orders of condemnation, and rejected New Jersey’s sovereign immunity argument.<sup>12</sup> Responding to New Jersey’s assertion that “their arguments would [have been] different if the United States government were pursuing eminent domain rights[,]” the District Court found that PennEast “has been vested with the federal government’s eminent domain powers and stands in the shoes of the sovereign.”<sup>13</sup> The District Court further reasoned that “the NGA expressly allows” certificate holders to utilize eminent domain in District Court, and as “PennEast holds a valid certificate . . . issued by the FERC[,]” New Jersey’s Eleventh Amendment arguments failed.<sup>14</sup>

5. New Jersey then appealed to the United States Court of Appeals for the Third Circuit, which held that the NGA does not abrogate New Jersey’s sovereign immunity and vacated the District Court’s order.<sup>15</sup> The Third Circuit found that while the NGA delegates eminent domain authority to certificate holders, the text of “the NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.”<sup>16</sup> In the

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States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

<sup>12</sup> *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, at \*12, 25 (D.N.J. Dec. 14, 2018).

<sup>13</sup> *Id.* at \*12.

<sup>14</sup> *Id.*

<sup>15</sup> *In re PennEast*, 938 F.3d at 99, 111-13 (3d Cir. 2019) (*In re PennEast*), *reh’g en banc denied* (Nov. 5, 2019).

<sup>16</sup> *Id.* at 112-13; *accord id.* at 99-100; *see id.* at 111-12.

court's view, "there are powerful reasons to doubt the delegability of the federal government's exemption from Eleventh Amendment immunity,"<sup>17</sup> particularly when that delegation occurs through a statute enacted pursuant to the Commerce Clause.<sup>18</sup> However, the court consciously avoided that constitutional question<sup>19</sup> by holding that the text of the NGA failed to provide an "unmistakably clear" delegation of the federal government's exemption from Eleventh Amendment immunity.<sup>20</sup> Ultimately, the Third Circuit declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."<sup>21</sup>

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<sup>17</sup> *Id.* at 105; *accord id.* at 111; *see id.* at 100; *id.* at 107-11 (reviewing precedent).

<sup>18</sup> *Id.* at 105, 108 & nn.13, 15 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996) (*Seminole Tribe of Fla.*)); *see also id.* at 108 & n.13 (explaining that *Seminole Tribe* abrogated *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (*Union Gas Co.*)).

<sup>19</sup> *See id.* at 111 (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008) ("As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.")); *id.* at 111-12 (quoting *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (describing the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (citation and alterations omitted)).

<sup>20</sup> *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *see id.* at 107-08 & n.12 (discussing *Dellmuth* and *Atascadero*).

<sup>21</sup> *Id.* at 112.

6. On October 4, 2019, PennEast petitioned the Commission to issue a declaratory order providing the Commission's interpretation of three questions under NGA section 7(h). Specifically, PennEast requests a declaratory order that addresses the following:

- 1) Whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;
- 2) Whether NGA section 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and
- 3) Whether NGA section 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.<sup>22</sup>

## **II. Public Notice, Interventions, Protests and Comments**

7. Notice of the Petition was published in the *Federal Register* on October 10, 2019.<sup>23</sup> The notice established October 18, 2019, as the deadline for filing comments and interventions.<sup>24</sup> Timely, unopposed motions to intervene were filed by the entities listed in Appendix A. These motions to intervene are granted automatically by operation of Rule 214 of the Commission's Rules of Practice and Procedure.<sup>25</sup> During the comment period, the New Jersey

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<sup>22</sup> See Petition at 2.

<sup>23</sup> 84 Fed. Reg. 54,600.

<sup>24</sup> *Id.*

<sup>25</sup> 18 C.F.R. § 385.214(c)(1) (2019).

Conservation Foundation and Niskanen Center (collectively, Niskanen), Maya K. van Rossum and the Delaware Riverkeeper Network (collectively, Riverkeeper),<sup>26</sup> the Township of Hopewell, U.S. Senator Cory A. Booker, the Environmental Defense Fund, the New Jersey Division of Rate Counsel, and the State of New Jersey<sup>27</sup> filed protests of the Petition, and numerous commenters, including landowners, filed comments in opposition to the Petition. After the comment deadline, U.S. Representatives from New Jersey filed a letter in opposition to the Petition.<sup>28</sup> Several protestors assert that it is inappropriate for the Commission to grant the instant Petition when the Third Circuit has already spoken on the matter and argue that submitting a brief as *amicus curiae* would be a more proper avenue for the Commission to express its opinion.<sup>29</sup> Protestors also agree with the Third Circuit's decision that the NGA does not provide delegated authority for a pipeline to condemn lands in which a state has a property interest.<sup>30</sup>

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<sup>26</sup> The protests are substantially identical; hereinafter, we cite only the Delaware Riverkeeper Network protest.

<sup>27</sup> The State of New Jersey includes the New Jersey Department of Environmental Protection, the New Jersey Board of Public Utilities, and the Delaware and Raritan Canal Commission.

<sup>28</sup> Letter from, Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019).

<sup>29</sup> *See* New Jersey Protest at 14; New Jersey Division of Rate Counsel (Rate Counsel) Protest at 5; Riverkeeper Protest at 2, 5; *see also* Niskanen First Protest at 5-6, 8-9 (omitting suggestion that the Commission file an *amicus* brief); Senator Cory A. Booker Protest at 1 (same).

<sup>30</sup> *See* New Jersey Protest at 2-3, 6-7, 14; Riverkeeper Protest at 9-10; Township of Hopewell, Mercer County, New Jersey Protest

8. Numerous parties, including natural gas transporters, local distribution companies, and associations within the natural gas industry, commented in support of the Petition. Several parties state that the text and legislative history of NGA section 7(h) demonstrates that Congress specifically intended to delegate federal eminent domain authority to certificate holders against all owners of property needed for a project with whom a certificate holder cannot reach agreement, including states, and that this eminent domain authority has been an essential part of a comprehensive regulatory scheme since the statute was amended to include that authority in 1947.<sup>31</sup> Commenters note that certificates of public convenience and necessity may only be obtained through a quasi-judicial adjudicatory process administered by Commissioners appointed by the President and confirmed by the Senate and that this adjudicatory process is replete with robust opportunities for public participation.<sup>32</sup> Commenters further contend that the Commission grants certificate holders only a limited authority to condemn specific rights of way with little ability to alter the route without further Commission approval, a process heavily regulated by federal oversight and

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at 1; Township of Kingwood Motion to Intervene at 1; Township of Holland Comments at 1.

<sup>31</sup> See Interstate Natural Gas Association of America (INGAA) Comments at 4-6; Transcontinental Gas Pipe Line Company, LLC Comments at 4; TC Energy Corporation Comments at 15-18; American Gas Association (AGA) Comments at 11; American Public Gas Association (APGA) Comments at 3-6.

<sup>32</sup> INGAA Comments at 6-9; TC Energy Corp. Comments at 5, 12-14.

enforcement.<sup>33</sup> Finally, commenters assert the Third Circuit’s decision will have significant adverse consequences on end-use consumers, local distribution companies, and the natural gas industry as a whole.<sup>34</sup> Commenters support the Petition because they agree that a decision of this magnitude should not be made without input from the regulatory agency charged with administration of the statute.<sup>35</sup>

9. On October 11, 2019, the New Jersey Conservation Foundation and Niskanen Center jointly filed a motion to extend the deadline for comments until November 1, 2019. The Commission’s Secretary denied the motion for extension of time by notice issued on October 16, 2019. Niskanen criticized the length of the comment period.<sup>36</sup> However, “[t]he Commission, like other agencies, is generally master of its own calendar and procedures.”<sup>37</sup> The

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<sup>33</sup> INGAA Comments at 8-9; TC Energy Corp. Comments at 14-16.

<sup>34</sup> See New Jersey Natural Gas Company Comments at 3-6; INGAA Comments at 10-13; TC Energy Corp. Comments at 18-20; AGA Comments at 9-13.

<sup>35</sup> See AGA Comments at 7-9, 12; TC Energy Corp. Comments at 2, 5-7; APGA Comments at 5-7.

<sup>36</sup> Niskanen Request for Extension at 2-3; Niskanen First Protest at 3-4; Niskanen Second Protest at 1-2.

<sup>37</sup> *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984); see *id.* at 61,002 n.3 (collecting precedent); see, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (“[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.”); *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (“[A] reviewing court may not . . . dictat[e] to the

Commission’s discretion to issue declaratory orders includes the discretion to expedite requests and deny extensions as “time, the nature of the proceeding, and the public interest” dictate.<sup>38</sup> We reject Niskanen’s argument that the initial comment period was too short in these circumstances. The length of the initial comment period was driven by PennEast’s request for expedited action in light of then-applicable deadlines for appellate litigation in the Third Circuit; furthermore, the comment period was also plainly sufficient to allow interested parties—including Niskanen—to submit robust comments, all of which have been thoroughly considered by the Commission

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agency the methods, procedures, and time dimension of the needed inquiry . . . .”); *Richmond Power & Light v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) (“Agencies have wide leeway in controlling their calendars . . . .”) (citing *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967)); *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977) (deferring to an agency’s choice of procedures and allocation of resources because “[t]he Commission should ‘realistically tailor the proceedings to fit the issues before it’”) (quoting *Mobil Oil Corp. v. Fed. Power Comm’n*, 483 F.2d 1238, 1252 (D.C. Cir. 1973) (quotation marks omitted)); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1266 (3d Cir. 1974) (“[T]he ultimate choice of procedure . . . is left to the discretion of the agency involved, and will be reversed only for an abuse of discretion.”); see also *Public Administrative Law and Procedure*, 73A C.J.S. *Public Administrative Law & Procedure* § 543 (2019) (“The ultimate choice of procedure by an agency in making its orders is not ordinarily subject to judicial revision.”).

<sup>38</sup> 5 U.S.C. § 554(c)(1) (2018). Niskanen’s contrary argument rests on a case involving a rulemaking proceeding under 5 U.S.C. § 553 (2018). See Niskanen Second Protest at 4 (citing *Ober v. EPA*, 84 F.3d 304, 314 (9th Cir. 1996)). That reliance was misplaced. Compare 5 U.S.C. § 553(b)-(c) (rulemaking), with *id.* § 554 (adjudications).

in the development of this order. Further, we considered late comments as they were not so late as to delay the proceeding or prejudice any party.

10. On October 28, 2019, PennEast filed a motion for leave to answer and answer to the protests and comments. Although the Commission's Rules of Practice and Procedure do not permit answers to protests,<sup>39</sup> our rules also provide that we may waive this provision for good cause.<sup>40</sup> On October 30, 2019, Niskanen filed a protest to PennEast's October 28, 2019 answer, urging the Commission to deny PennEast's motion to answer.<sup>41</sup> However, we will accept PennEast's Answer here because it has provided information that has assisted us in our decisionmaking.<sup>42</sup>

### **III. Discussion**

#### **A. The Commission's Authority to Act on the Petition**

11. We start with our jurisdiction to act on this petition: protesters claim we have none; we disagree.

12. New Jersey contends<sup>43</sup> that issuing an order in this case would contradict our prior statement in the underlying proceedings that "[i]ssues related to the

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<sup>39</sup> 18 C.F.R. § 385.213(a)(2) (2019).

<sup>40</sup> See 18 C.F.R. § 385.101(e).

<sup>41</sup> See Niskanen Second Protest at 4.

<sup>42</sup> Niskanen objects to PennEast filing an answer after the initial comment deadline, but this is not unusual. See, e.g., *Gulf Crossing Pipeline Co. LLC*, 169 FERC ¶ 61,169, at P 10 (2019); *Transcon. Gas Pipe Line Co., LLC*, 169 FERC ¶ 61,051, at P 11 (2019).

<sup>43</sup> New Jersey Protest at 15-18.



acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court.”<sup>44</sup> However, New Jersey omits the context of that statement in the Certificate Rehearing Order. That order rejected New Jersey’s request that we limit the land on which PennEast may exercise eminent domain because “[t]he Commission does not have the authority to *limit* a pipeline company’s *use of eminent domain* once the company has received its certificate of public convenience and necessity.”<sup>45</sup> Courts have consistently affirmed that position.<sup>46</sup>

13. Contrary to New Jersey’s overbroad reading of the word “related,” the Certificate Rehearing Order did

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<sup>44</sup> *E.g., id.* at 5, 16, 20 (quoting Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33); *accord id.* at 17, 19 (eliding portions of same).

<sup>45</sup> Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (emphasis added).

<sup>46</sup> *See, e.g., Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that the NGA section 7(h) “contains no condition precedent” to right of eminent domain other than issuance of the certificate when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . . Thus FERC does not have discretion to withhold eminent domain once it grants a Certificate.” (citation omitted)); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . . The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (citation omitted)).

not disclaim Commission jurisdiction over all “issues related to the acquisition of property rights by a pipeline,” because every certificate order must necessarily consider and decide such issues in connection with approving the route in the first place. Importantly, the issue before the Commission here relates to an interpretation of NGA section 7(h), which the Commission has been given authority to apply and interpret. As the Commission has more fully explained in other certificate orders, the issues appropriately addressed in judicial eminent domain proceedings are those related to “the timing of acquisition or just compensation.”<sup>47</sup> Nothing in this order contradicts any

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<sup>47</sup> *E.g.*, *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018) (“Nonetheless, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of NGA section 7(h), *including issues regarding the timing of acquisition and just compensation* are matters for the applicable state or federal court.” (emphasis added)); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018) (same). Some orders have followed the formula used in the Certificate Rehearing Order and have not specified the relevant eminent domain issues. *See, e.g.*, *Nexus Gas Transmission, LLC*, 162 FERC ¶ 61,011, at P 6 (2018); *Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 35 (2017), *cited in* Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 n.82. Other orders have specified the applicable issue. *Compare 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.” (emphasis added)), *Nw. Pipeline, LLC*, 156 FERC ¶ 61,086, at P 12 (2016) (same), *and Fla. Se. Connection, LLC*, 154 FERC ¶ 61,264, at P 10 (2016) (same); *with Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 68 (2017) (“Issues related to the acquisition of property

of our findings in the orders that are currently pending review in the D.C. Circuit.

14. Some parties oppose the issuance of a declaratory order on separation of powers grounds.<sup>48</sup> Riverkeeper emphasizes that it is the role of the judiciary, not the Commission, to decide sovereign immunity issues and to interpret the law.<sup>49</sup> Senator Booker similarly states that it is the role of Congress and the courts, not the Commission, to consider constitutional issues, and that Congress is the appropriate body to resolve any pipeline siting obstacles or implications stemming from the Third Circuit's decision.<sup>50</sup> Senator Booker argues that the Commission should not weigh in on sovereign immunity because Congress did not provide the Commission with that authority.<sup>51</sup> The Watershed Institute<sup>52</sup> submits that the Petition serves as "an improper attempt to circumvent" the Third Circuit.<sup>53</sup> New Jersey and Riverkeeper state that a declaratory order would not assist any court and not be entitled

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rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA, *including issues regarding the timing of acquisition*, are matters for the applicable state or federal court." (emphasis added)).

<sup>48</sup> See, e.g., Senator Cory A. Booker's Protest at 1; Niskanen First Protest at 5; Riverkeeper Protest at 2-4.

<sup>49</sup> Riverkeeper Protest at 3-4.

<sup>50</sup> Senator Cory A. Booker Protest at 1-2; see also Letter from Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019).

<sup>51</sup> *Id.*

<sup>52</sup> Stony Brook Millstone Watershed Association refers to itself as Watershed Institute.

<sup>53</sup> Watershed Institute Motion to Intervene at 2.

deference.<sup>54</sup> Niskanen and New Jersey claim that the Commission has previously stated that it does not have jurisdiction or expertise to resolve constitutional challenges pertaining to the NGA eminent domain provision.<sup>55</sup> Fund argue that interpretation of the Eleventh Amendment does not fall within the ambit of the Commission's expertise.<sup>56</sup> New Jersey also contends that the Commission deserves no deference "when its interpretation runs headlong into the canon of constitutional avoidance."<sup>57</sup> However, consistent with the *Mountain Valley* and *Atlantic Coast* certificate orders New Jersey cited<sup>58</sup> and as discussed below, we decline to address the constitutional issues raised in the Petition.

15. We emphasize that this declaratory order sets forth the Commission's interpretation of the NGA, and thereby does not implicate any separation of powers concerns. It is well within our authority to interpret the NGA and our own regulations, particularly when we issue our interpretation in the form of a declaratory

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<sup>54</sup> Riverkeeper Protest at 2, 4; New Jersey Protest at 22.

<sup>55</sup> New Jersey Protest at 20 (citing *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 63 (2017) ("[O]nly the courts can determine whether Congress'[s] action in passing section 7(h) of the NGA conflicts with the Constitution."); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 81 (2017) (same)); Niskanen First Protest at 9.

<sup>56</sup> Environmental Defense Fund Protest at 3; Riverkeeper Protest at 9.

<sup>57</sup> New Jersey Protest at 22.

<sup>58</sup> See *supra* note 55.

order.<sup>59</sup> Moreover, our interpretation of NGA section 7(h) merits deference.<sup>60</sup> The Third Circuit’s ruling does not diminish the Commission’s authority to speak on a statute that we administer.<sup>61</sup> Because the Third Circuit did not “hold[] that its construction follows from the unambiguous terms of the statute,” its construction of the NGA does not foreclose a subsequent or different Commission interpretation of

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<sup>59</sup> See *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) (“The declaratory order process can be very useful to persons seeking reliable, definitive guidance from the Commission. . . . As with other formal Commission actions, a declaratory order represents a binding statement of policy that provides direction to the public and our staff regarding the statutes we administer and the implementation and enforcement of our orders, rules and regulations. A declaratory order is therefore the most reliable form of guidance available from the Commission.”) (discussion of supporting precedent omitted).

<sup>60</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”).

<sup>61</sup> The gravamen of the Third Circuit’s decision is that NGA section 7(h) is either silent or lacks the requisite specificity to support a delegation of the federal government’s exemption from assertions of state sovereign immunity under the Eleventh Amendment. See *PennEast*, 938 F.3d at 112 (“[W]e will not assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design.”); see *id.* (“[N]othing in the text of the statute even ‘remotely impl[ies] delegation[.]’”) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)); *id.* at 111 (“[N]othing in the NGA indicates that Congress intended to do so.”); *id.* at 100 (“[N]othing in the text of the NGA suggests that Congress intended to do so.”).

that statute.<sup>62</sup> Nor does that court's construction bind other courts of appeals.<sup>63</sup>

16. New Jersey, Division of Rate Counsel (Rate Counsel), Niskanen, and Senator Booker assert that it would violate Commission regulations for the Commission to order declaratory relief.<sup>64</sup> Again, we disagree. As those parties note, the relevant regulation specifies that a person must file a petition when seeking “[a] declaratory order or rule to terminate a controversy or remove uncertainty.”<sup>65</sup> The Commission's regulation does not define what sort of uncertainty may be appropriate to justify a petition for declaratory relief, and the New Jersey parties offer no precedent on this score either. In our view, as we will describe more fully below, the Third Circuit's opinion creates sufficient uncertainty as to the proper role of the Commission in condemnation proceedings such

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<sup>62</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (finding that an appellate court's prior interpretation of an ambiguous statutory provision did not preclude a federal agency from adopting a contrary reasonable interpretation in subsequent proceedings); *cf. also United States v. Mendoza*, 464 U.S. 154, 158 (1984) (*Mendoza*) (finding the doctrine of nonmutual offensive collateral estoppel inapplicable against non-private litigants).

<sup>63</sup> *See, e.g., Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 429 (3d Cir. 2018); *Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004) (citing *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 n.17 (D.C. Cir. 1984)); *Humphreys v. DEA*, 105 F.3d 112, 117 (3d Cir. 1996); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1257-58 (D.C. Cir. 1996).

<sup>64</sup> Senator Cory A. Booker Protest at 1; New Jersey Protest at 2; Rate Counsel Protest at 4; Niskanen First Protest at 7-9.

<sup>65</sup> 18 C.F.R. § 385.207(a)(2) (2019).

that it is appropriate for us to address these issues in this order.<sup>66</sup> That the New Jersey parties agree with the Third Circuit and perceive no uncertainty, of course, does not prevent the Commission from considering petitions submitted under its regulations.

17. Niskanen and New Jersey argue that a declaratory order in this instance would be unprecedented and that “PennEast can point to no Commission Declaratory Orders that waded into already-adjudicated constitutional waters.”<sup>67</sup> Riverkeeper states that the Commission has previously declined to issue a declaratory order that would result in a “generic finding,” and that a declaratory order granting a petition should be based on specific facts and circumstances.<sup>68</sup> Contrary to

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<sup>66</sup> See 5 U.S.C. § 554(e) (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”); 18 C.F.R. § 385.207(a)(2) (providing for a party to petition for “[a] declaratory order or rule to terminate a controversy or remove uncertainty”). In any event, the Commission’s regulations also provide for a party to petition for “[a]ny other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.” 18 C.F.R. § 385.207(a)(5).

<sup>67</sup> Niskanen First Protest at 8; see New Jersey Protest at 19-20.

<sup>68</sup> Riverkeeper Protest at 6 (citing *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016)). The Commission’s finding that a declaratory order was not appropriate to deal with the specific requests in ITC’s petition is limited to that particular case. See *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206 at P 48. We note that the cited order also states that the Commission’s determinations in its declaratory orders are “generally legal in nature” and may “cover a broad range of issues, including jurisdictional issues and the applicability to specific parties of specific *rights and duties arising under the statutes* that the Commission administers.” *Id.*

protesters' assertions, the Commission remains consistent in its use of declaratory orders to provide authoritative guidance to regulated entities on important questions of interpretation regarding statutes, regulations, tariffs, or precedent.<sup>69</sup> Though it is uncommon, the Commission has acted on petitions for declaratory order filed in response to adverse judicial determinations.<sup>70</sup> In our view, this order is

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P 42 (emphasis added) (citations omitted). Nothing in our regulations prevents the issuance of a declaratory order to address the rights and duties of certificate holders under the NGA.

<sup>69</sup> See, e.g., *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, at PP 15, 17-18, *order denying reh'g*, 169 FERC ¶ 61,046 (2019) (clarifying the application of a D.C. Circuit decision regarding waiver of section 401 water quality certification under the Clean Water Act to related cases); *Nat. Gas Pipeline Co. of Am.*, 56 FERC ¶ 61,250, at 61,939- 40 (1991) (clarifying the extension of jurisdiction to account for state court monetary judgments under its interpretation of D.C. Circuit precedent).

<sup>70</sup> See *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 263 (10th Cir. 1989) (*Williams Nat. Gas Co.*) (upholding FERC's denial of a rehearing request that "completely disapproved of the conflicting state opinion") (citing *Williams Nat. Gas Co.*, 47 FERC ¶ 61,308, at 62,103 n.5 (1989)); *S. Union Co. v. FERC*, 857 F.2d 812, 817-18 (D.C. Cir. 1988) (vacating the Commission's denial of a petition for a declaratory order on the merits in response to adverse state court judgments, because the Commission erroneously determined the matter was not controlled by relevant precedent); *NextEra Energy, Inc.*, 166 FERC ¶ 61,049, at PP 23, 27 (2019) (acknowledging contrary court authority in the issuance of a declaratory order); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 5 (acting on a petition for a declaratory order filed after a circuit court found that it lacked jurisdiction), *order on reh'g*, 164 FERC ¶ 61,029 (2018); *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,183, at PP 3, 27 (2012) (declaring, contrary to a state court order denying summary



warranted because it will remove uncertainty about the Commission's interpretation of the NGA.

18. New Jersey and Rate Counsel argue that the Commission should have intervened in the Third Circuit appeal or sought leave to file an amicus curiae brief, instead of issuing a declaratory order.<sup>71</sup> Homeowners Against Land Taking—PennEast, Inc. (HALT) and the State of New Jersey contend that the Commission has no authority to re-interpret judicial decisions, and that the Commission can file an amicus brief with either the Third Circuit or the United States Supreme Court, if PennEast petitions for a writ of certiorari.<sup>72</sup> New Jersey and Niskanen similarly assert that the Commission has implicitly conceded jurisdiction by consistently declining to participate, either by filing an intervention or filing as amicus curiae, in other cases where this issue was raised.<sup>73</sup>

19. Despite protesters' contention that the Commission has somehow waived the ability to speak on these issues by not intervening in other proceedings, the Third Circuit never sought the Commission's opinion in this matter. Moreover, it would be impractical for the Commission to intervene in every federal court proceeding involving an interstate pipeline company, particularly those where the validity of a Commission-issued certificate is not

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judgement in a tort action, that negligence claims are limited against Regional Transmission Organizations).

<sup>71</sup> New Jersey Protest at 14; Rate Counsel Protest at 8-9.

<sup>72</sup> HALT Motion to Intervene at 1; New Jersey Protest at 14, 21.

<sup>73</sup> Niskanen First Protest at 9-10; New Jersey Protest at 2.

in question.<sup>74</sup> We also disagree that the optimal way for the Commission to express its interpretation of the statutes and regulations it superintends is through *ad hoc* litigation pleadings filed by Commission staff rather than through an order issued by the Commission itself. Protesters themselves concede that “agency ‘litigating positions’ raised for the first time on judicial review” are entitled to no deference.<sup>75</sup> As PennEast acknowledges, the Commission “has not had frequent occasion” to speak to many of the issues present in the Petition,<sup>76</sup> namely, the operation of section 7(h) and Congress’s intent in amending the NGA to include it. Therefore, any brief filed by Commission staff as amicus curiae would not have benefitted from the Commission’s articulation of a

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<sup>74</sup> With a few exceptions, the Commission has traditionally refrained from exercising its independent litigation authority to intervene in appellate proceedings in the absence of an invitation to do so. For example, the Commission previously accepted the Third Circuit’s invitation to participate as an amicus in *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), but did not participate in the Fourth Circuit’s parallel consideration of a closely-related preemption question in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff’d sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (*Hughes*). Similarly, the Commission participated as an amicus by invitation in *Electric Power Supply Ass’n v. Star*, 904 F.3d 518, 522 (7th Cir.), *reh’g denied* (Oct. 9, 2018), *cert. denied*, 139 S.Ct. 1547 (2019), but did not participate in the consideration of a closely-related preemption question in *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass’n v. Rhodes*, 139 S.Ct. 1547 (2019).

<sup>75</sup> Riverkeeper Protest at 4 (citing *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (2011)).

<sup>76</sup> Petition at 24.

formal interpretation of NGA section 7(h) and the critical role that provision has in the Commission's successful administration of the NGA's "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce."<sup>77</sup>

20. We disagree with protesters' argument that issue preclusion and claim preclusion doctrines barred PennEast from seeking a declaratory order, or bar us from acting on the Petition.<sup>78</sup> Courts have long understood that preclusion principles are applied differently in administrative proceedings.<sup>79</sup>

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<sup>77</sup> *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (*Schneidewind*) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963) (*N. Nat. Gas Co.*) (internal quotation marks omitted); *see also* 15 U.S.C. § 717(b).

<sup>78</sup> *See* New Jersey Protest at 9-14; Rate Counsel Protest at 5-8.

<sup>79</sup> *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982) (finding that collateral estoppel "does not apply when a judgment of policy is reconsidered by an agency in quasi-legislative proceedings"). Other courts have explained that preclusion principles are limited in administrative agency proceedings when, unlike here, the agency is acting in a judicial capacity and reviewing previously "resolved disputed issue of fact properly before it." *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966); *cf. also Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand."); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930) ("A rate order is not *res judicata*."); *Duvall v. Atty. Gen.*, 436 F.3d 382, 387-88 (3d Cir. 2006) (finding collateral estoppel applicable to a factual dispute so long as "application of the doctrine does not frustrate congressional intent or impede the effective functioning of the agency"). Even if we were in a quasi-judicial proceeding instead of a quasi-legislative proceeding, as here, typical preclusion principles would not apply because the question

Administrative agencies like the Commission are “not in a position identical to that of a private litigant.”<sup>80</sup> Protesters’ assertions that the Commission is precluded from acting on the petition lack merit.<sup>81</sup> In light of the Commission’s statutory responsibilities under the NGA, and the possibility that other circuits not bound by the Third Circuit’s opinion may face similar questions, the Commission is not barred from declaring its interpretation of a statute it implements.<sup>82</sup> Indeed, the Supreme Court has

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presented is a pure question of statutory interpretation. *See, e.g., United States v. Moser*, 266 U.S. 236, 242 (1924) (“[Res judicata] does not apply to unmixed questions of law.”).

<sup>80</sup> *Mendoza*, 464 U.S. at 159 (quoting *INS v. Hibi*, 414 U.S. 5, 8 (1973)).

<sup>81</sup> *Cf. Montana v. United States*, 440 U.S. 147, 157 (1979) (finding estoppel where, unlike here, the government was a party to the proceeding and the “question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged’ adversely to the Government in state court”) (citation omitted); *United States v. Utah Constr. and Mining Co.*, 384 U.S. at 422 (holding that res judicata applies to the parties “[w]hen an administrative agency is acting in a judicial capacity.”).

<sup>82</sup> *See, e.g., Mendoza*, 464 U.S. at 160 (“A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”); *Harris v. Martin*, 834 F.2d 361, 365 (3d Cir. 1987) (following *Mendoza*); *see also* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 683, 719 (1989) (explaining that “in pursuing a policy of intercircuit nonacquiescence, by definition the agency is not acting inconsistently with the case law of the court of appeals that will review its action” and concluding that there is no “per se constitutional bar against nonacquiescence”).

recognized that a contrary rule—in which a single court of appeals can bind subsequent agency interpretations of a statute that Congress has delegated to the agency—would “lead to the ossification of large portions of our statutory law.”<sup>83</sup> Furthermore, the Supreme Court has implicitly approved this practice by routinely granting certiorari for the purpose of vacating and remanding prior appellate court decisions in light of subsequent agency action.<sup>84</sup>

21. In acting on a straightforward question of law—the Commission’s interpretation of NGA section 7(h)—we are not proceeding in the traditional civil-litigation setting in which the doctrines of issue and claim preclusion typically apply.<sup>85</sup> As such, the dual purposes of preclusion doctrines, i.e. “protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless

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<sup>83</sup> *Brand X*, 545 U.S. at 982-83 (internal quotation marks and citation omitted) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

<sup>84</sup> See, e.g., *Coventry Health Care of Mo., Inc. v. Nevils*, 135 S.Ct. 2886 (2015) (remanding for further consideration in light of new regulations promulgated by an agency); *Aetna Life Ins. Co. v. Kobold*, 135 S.Ct. 2886 (2015) (same); see also *Mouelle v. Gonzales*, 548 U.S. 901 (2006) (remanding for further consideration in light of interim rule promulgated by an agency); *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006) (remanding in light of informal guidance); *Slekis v. Thomas*, 525 U.S. 1098 (1999) (same).

<sup>85</sup> See *supra* note 79 and accompanying text.

litigation,” would not be served by restraining the Commission from acting through this declaratory order.<sup>86</sup> Preclusion is particularly unwarranted here because we make no attempt to address the Eleventh Amendment question left unanswered by the Third Circuit:<sup>87</sup> whether the NGA’s delegation of the federal government’s exemption from state sovereign immunity was a valid, constitutional exercise of federal power.<sup>88</sup> Our more limited focus here is whether the text of the statute itself, along with its legislative history, suggests any limit on the exercise of eminent domain under NGA section 7(h) based on the owner of the property at issue. As clarified in PennEast’s Answer, the Petition does not request that the Commission interpret the Eleventh Amendment, but rather states that its request concerns the scope of NGA section 7(h).<sup>89</sup>

22. Moreover, New Jersey cannot use claim or issue preclusion doctrines to bind the Commission to a judgment in an adjudication in which the Commission

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<sup>86</sup> *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979) (citation omitted); see also *Nat’l R.R. Passenger Corp. v. Pa. Pub. Util. Comm’n*, 288 F.3d 519, 525 (3d Cir. 2002) (noting issue preclusion doctrine’s “twin goals of fairness and efficient use of private and public litigation resources”).

<sup>87</sup> See, e.g., *Nat’l R.R. Passenger Corp. v. Pa. Pub. Util. Comm’n*, 342 F.3d 242, 252 (3d Cir. 2003) (describing the elements for collateral estoppel, including that the issue sought to be precluded is the same as that involved in the prior action).

<sup>88</sup> *In re PennEast*, 938 F.3d at 112-13 (holding that “the NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity”).

<sup>89</sup> PennEast Answer at 6.

was not a party.<sup>90</sup> Nor can New Jersey argue that the Commission is precluded by attempting to apply the “first-filed” rule to this proceeding.<sup>91</sup> The “first-filed” rule only arises when “two cases between the same parties . . . are commenced in two different Federal courts.”<sup>92</sup> Moreover, the Commission is not bound by the Third Circuit’s passing reference to a possible “work-around” that would allow some federal official (perhaps the Commission) to bring a condemnation action in a pipeline’s stead—this reference was not “essential to the judgment,” so issue preclusion does not apply.<sup>93</sup> Furthermore, PennEast’s Answer points out that “[a] substantially identical petition could have been (and still could be) filed by any . . . other companies with a stake in these issues.”<sup>94</sup> Denying the Petition on a strained preclusion theory would likely result in a subsequent duplicative agency proceeding,

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<sup>90</sup> See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (holding that “[litigants] who never appeared in a prior action—may not be collaterally estopped without litigating the issue”); *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 173 (3d Cir. 2009) (noting that *res judicata* requires a showing that the prior suit involved “the same parties or their privies,” while collateral estoppel requires a showing that “the party being precluded from relitigating the issue was fully represented in the prior action”) (internal citations and quotation marks omitted).

<sup>91</sup> New Jersey Protest at 11.

<sup>92</sup> *Washington Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980); see *Cont’l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960).

<sup>93</sup> See *Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006) (quoting Restatement (Second) of Judgments § 27 (1982)).

<sup>94</sup> PennEast Answer at 20.

pointlessly elevating form over substance.<sup>95</sup> For this reason, we conclude that granting the Petition is appropriate.

23. Before we move to the merits of the Petition, we must clarify the extent of our authority. Numerous parties express concern about the Commission “attempt[ing] to overrule the Third Circuit.”<sup>96</sup> It should go without saying that we can do no such thing. Nor are we attempting to “subvert the judicial process,” as Niskanen suggests.<sup>97</sup> As a “creature of statute,”<sup>98</sup> the Commission—like any administrative agency—has no power to act “unless and until Congress confers power upon it.”<sup>99</sup> We have no authority to “overrule” a precedential opinion of a

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<sup>95</sup> Here, for example, another certificate holder that has intervened in this proceeding is currently encountering similar obstacles in exercising eminent domain against the State of Maryland. *See infra* P 64.

<sup>96</sup> Riverkeeper Protest at 7; *see* New Jersey Protest at 3 (“FERC should not break procedures and misread the law to indulge PennEast’s efforts to overrule that correct holding.”); Rate Counsel Protest at 1 (“That decision [by the Third Circuit] is authoritative and binding as to PennEast, and the Commission cannot overrule it by declaration.”); Niskanen First Protest at 6 (“[I]t is not within the Commission’s power to upend a federal court’s constitutional holding by issuing a declaratory order that purports to overrule that decision.”); Letter from Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019) (agreeing with Rate Counsel that the Third Circuit’s decision cannot be overruled by the Commission).

<sup>97</sup> Niskanen First Protest at 4.

<sup>98</sup> *Tesoro Alaska Co. v. FERC*, 778 F.3d 1034, 1038 (D.C. Cir. 2015) (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (*Atl. City Elec.*)).

<sup>99</sup> *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).



United States Court of Appeals. PennEast refutes the notion that its Petition requests that the Commission overrule the Third Circuit; rather, PennEast states that its Petition serves to “allow the Commission to provide its considered interpretation of [s]ection 7(h) of the NGA, without negating the role of the Third Circuit.”<sup>100</sup> Furthermore, this order does not incentivize forum shopping, as Environmental Defense Fund claimed,<sup>101</sup> because it does not provide an avenue by which losing parties can circumvent appellate courts: this order neither compels the Third Circuit to reverse its decision, nor compels New Jersey to consent to suit, nor compels any landowner to transfer its property. This order does nothing more than set out the Commission’s interpretation of a statute it administers.

#### **B. PennEast’s Request for a Declaratory Order**

24. In the Petition, PennEast requests the Commission’s interpretation of NGA section 7(h).<sup>102</sup> As discussed below, we grant the Petition in part and deny it in part.

25. First, PennEast requests the Commission address whether a certificate holder’s right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest.<sup>103</sup> We grant this request and find that NGA section 7(h) does not limit a certificate holder’s right to exercise eminent domain

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<sup>100</sup> PennEast Answer at 32.

<sup>101</sup> Environmental Defense Fund Protest at 3.

<sup>102</sup> Petition at 2.

<sup>103</sup> *See id.*

authority over state-owned land.<sup>104</sup> The text of NGA section 7 is expansive and NGA section 7(h) contains no limiting language concerning state land;<sup>105</sup> the legislative history of NGA section 7(h) describes a specific intent to prevent states from conditioning or blocking the use of eminent domain by certificate holders;<sup>106</sup> and caselaw—including both federal precedent shortly after the statute’s enactment<sup>107</sup> and the Commission’s earliest hearing orders<sup>108</sup>—supports this view. Additionally, Congress’s decision to amend an analogous statute to expressly carve out state lands, but not to similarly amend NGA section 7(h), indicates its understanding that the eminent domain authority exercised by certificate holders under NGA section 7 does, in fact, apply to state lands.<sup>109</sup>

26. Second, PennEast requests the Commission clarify to whom the federal government’s eminent domain authority has been granted.<sup>110</sup> We grant this request and find that NGA section 7(h) delegates

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<sup>104</sup> See *infra* PP 28-48.

<sup>105</sup> See 15 U.S.C. § 717f(h).

<sup>106</sup> See S. Rep. No. 80-429, at 1-4 (1947).

<sup>107</sup> *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950) (*Thatcher*).

<sup>108</sup> *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, at 65,203-04 (1977) (*Tenneco Atlantic*) (“[T]he eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands.”); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977) (same).

<sup>109</sup> See *infra* note 170 (quoting Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992); H.R. Rep. No. 102-474, at 99 (1992)).

<sup>110</sup> See Petition at 2.

eminent domain authority solely to certificate holders and not to the Commission.<sup>111</sup> It is “beyond dispute” that the federal government has the constitutional power to acquire property by exercise of eminent domain.<sup>112</sup> The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of a certificate of public convenience and necessity, when needed to fulfill the certificate.<sup>113</sup> Critically, the Commission itself was never granted the authority to exercise eminent domain. Although we are responsible for the public convenience and necessity determination that then, by operation of law under a separate statutory provision, automatically confers federal eminent domain authority over a specified route to certificate holders,<sup>114</sup> we do not subsequently grant, exercise, or oversee the exercise of that eminent domain authority.<sup>115</sup>

27. Finally, PennEast requests the Commission address whether NGA section 7(h) necessarily

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<sup>111</sup> See *infra* PP 49-53.

<sup>112</sup> *Tenneco Atlantic*, 1 FERC at 65,203 (citing *United States v. Carmack*, 329 U.S. 230 (1946) (Carmack)); *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

<sup>113</sup> *Tenneco Atlantic*, 1 FERC at 65,203-04 & n.53 (citing *Thatcher*, 180 F.2d 644); see also *E. Tenn. Nat. Gas Co.*, 102 FERC ¶ 61,225, at P 68 (2003) (*East Tennessee*); *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 128, 131 (2003) (*Islander East*).

<sup>114</sup> 15 U.S.C. § 717f(c).

<sup>115</sup> Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (citing *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250 at P 35); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018).

delegates the federal government's exemption from state sovereign immunity.<sup>116</sup> We agree that is how the statute reads and was intended to operate, but we deny PennEast's petition to the extent that it would require the Commission to evaluate the constitutional sufficiency of NGA section 7(h) for purposes of abrogating state sovereign immunity or delegating federal authority under the Eleventh Amendment.<sup>117</sup> Although the Commission typically refrains from opining on the constitutionality of the statutes it superintends,<sup>118</sup> we find it appropriate to address the necessity of broad eminent domain powers for the successful administration of the NGA's "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce."<sup>119</sup> To that end, we discuss the potential implications of

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<sup>116</sup> See Petition at 2.

<sup>117</sup> See *infra* PP 54-55.

<sup>118</sup> *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) (explaining that administrative agencies "have neither the power nor the competence to pass on the constitutionality of administrative or legislative action," except when "called upon to determine facts or to apply its expertise") (quoting *Murray v. Vaughn*, 300 F.Supp. 688, 695 (D.R.I. 1969)); see, e.g., *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984) ("[A]dministrative bodies like the Board do not have the authority to adjudicate the validity of legislation which they are charged with administering."); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976) (finding that the federal agency erred by making a constitutional determination); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.").

<sup>119</sup> *Schneidewind*, 485 U.S. at 300; see *supra* note 77.

the Third Circuit’s decision on the natural gas industry.<sup>120</sup>

**1. NGA Section 7(h) Delegates the Authority to Certificate Holders to Condemn State Property**

28. PennEast asserts that Congress possesses the authority both to condemn state property and to delegate that authority to private companies.<sup>121</sup> PennEast states that federal eminent domain authority has been accepted for well over a century and “does not depend on having the consent of the state in which the property is located.”<sup>122</sup> To require a state’s consent to the condemnation of its property pursuant to Congressional authority, effectively allowing a state to “block the federal government’s use of eminent domain in furtherance of Congress’s other constitutional authorities,” would allow a state to render a “constitutional grant of authority . . . nugatory.”<sup>123</sup>

29. This interpretation of the federal eminent domain scheme is consistent with longstanding Commission precedent holding that “it is beyond dispute” the federal government can acquire property through eminent domain and may delegate this authority to a certificate holder “when needed to fulfill the

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<sup>120</sup> See *infra* PP 56-65.

<sup>121</sup> Petition at 16-18.

<sup>122</sup> *Id.* at 16 (citing *Kohl v. United States*, 91 U.S. 367, 372 (1875) (*Kohl*)).

<sup>123</sup> *Id.* (citing *Kohl*, 91 U.S. at 371).

certificate.”<sup>124</sup> The Third Circuit’s opinion does not dispute this scheme.

30. Central to this grant of authority, PennEast asserts, is Congress’s intent to “authorize certificate holders to condemn any necessary lands, including state-owned lands.”<sup>125</sup> PennEast further suggests that as NGA section 7(h) contains no language limiting the type of property a certificate holder may acquire through the exercise of eminent domain, Congress intended to delegate to certificate holders the right to condemn state-owned land.<sup>126</sup> Riverkeeper argues that if Congress intended to prevent state sovereign immunity in terms of interstate natural gas pipelines, it could have done so when drafting the NGA.<sup>127</sup> Further, Riverkeeper contends that Congress did not delegate the federal government’s eminent domain power to certificate holders.<sup>128</sup>

31. The Commission’s principal obligation under the NGA is to “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>129</sup> Specifically, the NGA provides the

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<sup>124</sup> *Infra* notes 146 and 147 (quoting precedent).

<sup>125</sup> Petition at 19.

<sup>126</sup> *Id.* at 20.

<sup>127</sup> Riverkeeper Protest at 10.

<sup>128</sup> *Id.* at 12.

<sup>129</sup> *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669-70 (1976); accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. at 669-70); see, e.g., *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,743, 61,751 (1999) (Certificate Policy Statement), *clarified on*

Commission with jurisdiction over the “transportation of natural gas in interstate commerce . . . [and] the sale in interstate commerce of natural gas for resale.”<sup>130</sup> In NGA section 7(c), Congress gave the Commission jurisdiction to determine whether the construction and operation of proposed pipeline facilities are in the public convenience and necessity.<sup>131</sup> Once the Commission has made that determination, NGA section 7(h) provides the certificate holder with eminent domain authority to acquire the land necessary to construct the approved facilities, in the event the certificate holder cannot acquire the land by other means.<sup>132</sup> Section 7(h) further states that when the value of the property to be condemned is greater than \$3,000, the condemnation proceeding may be heard in United States district court.<sup>133</sup>

32. Based on the text of NGA section 7(h), and as confirmed by the legislative history, we believe it is evident that Congress, in delegating to certificate holders its power of eminent domain, provided broad eminent domain authority in order to achieve the objectives of the NGA without interference from states and to preserve the Commission’s exclusive jurisdiction over the transportation and sale of natural gas for resale in interstate commerce.

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*other grounds*, 90 FERC ¶ 61,128, *further clarified on other grounds*, 92 FERC ¶ 61,094 (2000).

<sup>130</sup> 15 U.S.C. § 717(b) (2018).

<sup>131</sup> *Id.* § 717f(c).

<sup>132</sup> *Id.* § 717f(h).

<sup>133</sup> *Id.*

**a. Statutory Text and Precedent**

33. The “starting point for interpreting a statute is the language of the statute itself.”<sup>134</sup> NGA section 7(h) provides, in its entirety, that:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-ofway, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner

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<sup>134</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987).



of the property to be condemned exceeds \$3,000.<sup>135</sup>

34. Immediately apparent in the text of NGA section 7(h) is that it is the “holder of the certificate” that is granted the power of eminent domain. NGA section 7 establishes a multi-step process for pipeline companies seeking to acquire land via eminent domain.<sup>136</sup> NGA section 7(c) requires that the pipeline company first receive its certificate of public convenience and necessity from the Commission pursuant to its authority under NGA section 7(e). The pipeline company then must attempt to obtain land identified in the certificate as necessary for the project through purchase or contract.<sup>137</sup> If the certificate holder is still unable to obtain this land, NGA section 7(h) permits it to acquire the land necessary for the project by the exercise of eminent domain.<sup>138</sup> Critically, as PennEast notes, NGA section 7(h) contains no language limiting that exercise of eminent domain “based on the status of the property’s owner.”<sup>139</sup> And the Commission has previously rejected arguments to limit the exercise of eminent domain over state-owned property, relying on the broad and unqualified reference to “the necessary land or other property” in section 7(h).<sup>140</sup>

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<sup>135</sup> 15 U.S.C. § 717f(h).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Petition at 20.

<sup>140</sup> *Islander East*, 102 FERC ¶ 61,054 at P 131 (“[I]n NGA section 7(h), Congress gave the natural gas company authorization to

35. Judicial review of NGA section 7(h) shortly following its enactment supports this view. *Thatcher*,<sup>141</sup> decided in 1950, squarely confronted the constitutionality of the delegation of eminent domain authority to pipelines under NGA section 7(h), which was enacted three years earlier. *Thatcher* did not address the Eleventh Amendment, but resolved several other constitutional objections, including claims that NGA section 7(h) invaded authority reserved to the States under the Tenth Amendment.<sup>142</sup> As relevant here, *Thatcher* held:

Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, leaves us in no doubt that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act, and which in all of its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce. Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not

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acquire the necessary land or property to construct the approved facilities by the exercise of eminent domain . . . .”); *East Tennessee*, 102 FERC ¶ 61,225 at P 68 (same).

<sup>141</sup> 180 F.2d at 646-47.

<sup>142</sup> *See id.* at 645.

operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, by the grant to such company of the right of eminent domain. The possession of this right could well be considered necessary to insure ability to comply with the Commission requirements as well as with all phases of the statutory scheme of regulation.

There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign.<sup>143</sup>

This reasoning in *Thatcher* was followed in contemporaneous decisions of state courts<sup>144</sup> and federal courts<sup>145</sup> regarding the constitutionality of pipeline eminent domain authority.

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<sup>143</sup> *Id.* at 647 (listing Supreme Court precedent).

<sup>144</sup> See *Parkes v. Nat. Gas Pipe Line Co.*, 249 P.2d 462, 467 (Okla. 1952) (“The power of the United States to authorize the exercise of eminent domain within the limits of the several states is not limited to the taking of property by the government itself for its own proper uses, but includes the right to delegate the power of eminent domain to corporations . . .”).

<sup>145</sup> See *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485, 487 (W.D.S.C. 1950) (“Earlier decisions of the Supreme

36. And this Commission has uniformly held this view from its inception<sup>146</sup> through today.<sup>147</sup> One of the Commission's earliest hearing orders, *Tenneco Atlantic Pipeline Co.*, merits restatement because it squarely addressed the question presented here: "may the Congressional grant of eminent domain powers be exercised by a person holding a Commission certificate of public convenience and necessity to acquire a right-of-way through state lands?"<sup>148</sup> *Tenneco Atlantic* answered that question in the affirmative, finding that "the eminent domain grant to persons holding

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Court uphold the authority of Congress to grant eminent domain powers to private corporations in furtherance of interstate commerce."); *id.* at 489 ("[W]hen the Legislature provides for the taking of private property for a public use it may either prescribe specifically the property that may be taken, or delegate that determination to the agency, either public or private, which is charged with developing the public use.").

<sup>146</sup> See *Tenneco Atlantic*, 1 FERC at 65,203-04 ("It is beyond dispute that the federal government has the constitutional power to acquire state property by exercise of eminent domain. In addition, the federal government can delegate to a private party, such as the recipient of a Section 7 certificate, the power to exercise eminent domain when needed to fulfill the certificate.") (internal citations omitted).

<sup>147</sup> See, e.g., *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 at P 87 ("It is beyond dispute that the federal government has the constitutional power to acquire property by exercise of eminent domain. The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of an NGA section 7 certificate, when needed to fulfill the certificate[.]") (internal citations omitted); *Mountain Valley*, 163 FERC ¶ 61,197 at P 75 (same).

<sup>148</sup> *Tenneco Atlantic*, 1 FERC at 65,203.

Section 7 certificates applies equally to private and state lands” for the following reasons:<sup>149</sup>

It is beyond dispute that the federal government has the constitutional power to acquire state property by exercise of eminent domain. In addition, the federal government can delegate to a private party, such as the recipient of a Section 7 certificate, the power to exercise eminent domain when needed to fulfill the certificate. At issue here is whether such a delegatee has lesser powers of eminent domain than does the delegator, the federal government.

On its face, there is nothing in Section 7(h) that compels a reading of the language “owner of property” to exclude a state. On the contrary, although “owner of property” is not defined in Section 2 of the Natural Gas Act, it is reasonable to include a state within the plain meaning of that term, since states can own land. Looking behind the statutory language, there is no legislative history that warrants any other reading. The language of Section 7(h) indicates a Congressional grant of plenary eminent domain power to certificate holders, such a grant satisfying the dictum in [*United States v.*] *Carmack*, [] 329 U.S. [230,] at 243, n.13 [(1946)].

While there are no judicial pronouncements resolving this question explicitly with respect to Section 7(h) of the Natural Gas Act,

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<sup>149</sup> *Id.*

consideration of the analogue and predecessor of this provision under the Federal Power Act is instructive. Section 21 of the Federal Power Act is the model for Section 7(h) of the Natural Gas Act. The corresponding language relevant to this inquiry is identical, and accordingly it is proper to look to judicial decisions interpreting Section 21 to aid in the statutory construction of Section 7(h). When this is done, it is clear that Congress intended to grant recipients of Section 7 certificates the full powers of eminent domain. Specifically, hydroelectric project licensees under Part I of the Federal Power Act have eminent domain power under Section 21 to condemn state land.

Thus, Rhode Island's assertion that a private party possessing eminent domain power conferred by a certificate pursuant to Section 7(h) cannot prevail against a state's ownership interest must be rejected.<sup>150</sup>

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<sup>150</sup> *Id.* at 65,203-04 (footnotes citing supporting authority omitted). The passage from *Tenneco Atlantic* replicated here was itself borrowed nearly verbatim from the Federal Power Commission's formal *Recommendation to the President* regarding the administration of Alaska Natural Gas Transportation System, *supra* note 108. The passage from *Carmack* addressed in *Tenneco Atlantic* and in *Recommendation to the President* describes the distinction between statutes that "authorize 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." *Carmack*, 329 U.S. at 243 n.13 (emphasis added). The Supreme Court explained that statutes in

37. We continue to think that *Tenneco Atlantic* was correctly decided as a matter of *statutory* interpretation. As elucidated throughout this order, this view is supported by the text and legislative history of the amendment, contemporaneous precedent, and analysis of an analogous provision under the FPA. However, whether the text, context, and legislative history of NGA section 7(h) are sufficient to meet *constitutional* requirements for purposes of the Eleventh Amendment is a question that is beyond the scope of this order.<sup>151</sup>

38. More recently, in 2003, the Commission addressed Eleventh Amendment claims to certificate proceedings in *Islander East*,<sup>152</sup> which found the

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that second category—in which NGA section 7(h) appears to fall—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. In such cases the absence of an *express grant of superiority* over conflicting public uses reflects an absence of such superiority.” *Id.* (emphasis added). Thus, when the decision in *Tenneco Atlantic* states that it “satisf[ie]d the dictum in *Carmack*,” 1 FERC at 65,204, it meant the delegation to certificate holders to condemn state land was either “necessarily implied,” or reflected “an express grant of superiority,” or both. We think both elements were satisfied because the authority to condemn state land is necessary to effectuate the express purposes of Congress in granting the Commission exclusive authority to regulate the transportation and sale of natural gas in interstate commerce under 15 U.S.C. § 717(b), including the authority to issue certificates of public convenience and necessity under 15 U.S.C. § 717f.

<sup>151</sup> See *supra* P 27; *infra* P 55.

<sup>152</sup> 102 FERC ¶ 61,054 at P 123 (“The NGA does not address ‘any suit in law or equity’ against a state. Therefore, the application of the Eleventh Amendment and the Court’s ruling in *Seminole*

Eleventh Amendment did not apply to NGA section 7(h) eminent domain proceedings because condemnation actions do not constitute “any suit in law or equity” under the Eleventh Amendment.<sup>153</sup> The Third Circuit criticized the Commission’s holding in *Islander East* as insufficiently supported,<sup>154</sup> and we agree that decision was terse. That does not, however, obviate the validity of that final holding. PennEast argues that *Islander East* was correctly decided, citing Supreme Court authority for the proposition that the Eleventh Amendment does not bar certain types of *in rem* suits against property in which a state has an interest.<sup>155</sup> The Third Circuit found those cases “are confined—by their terms—to the specialized areas of bankruptcy and admiralty law”<sup>156</sup> and contrasted

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*Tribe* has no significance here.”). The Commission emphasized the preemptive sweep of the NGA as a “comprehensive scheme of federal regulation,” *id.* (quoting *Schneidewind*, 485 U.S. at 300-01), and denied Connecticut’s Tenth Amendment arguments for the same reason. *See id.* P 131. A month later, in *East Tennessee*, the Commission similarly denied a claim that the Tenth Amendment bars a certificate holder from acquiring state-owned land under NGA section 7(h). 102 FERC ¶ 61,225 at P 68.

<sup>153</sup> *Islander East*, 102 FERC ¶ 61,054 at P 123.

<sup>154</sup> *In re PennEast*, 938 F.3d at 111 n.19.

<sup>155</sup> *See* Petition at 37-44 (citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004) (“[C]onclud[ing] that a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment[.]”); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 494-95 (1998) (“We conclude that the Eleventh Amendment does not bar jurisdiction of a federal court over an *in rem* admiralty action where the *res* is not within the State’s possession.”)).

<sup>156</sup> *In re PennEast*, 938 F.3d at 110.



authority holding “that sovereigns can assert their immunity in *in rem* proceedings in which they own property.”<sup>157</sup> In the Third Circuit’s view, such specialized precedent was unable to overcome “the general rule” that “[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest.”<sup>158</sup>

39. The question whether an eminent domain proceeding to effectuate a Commission certificate under NGA section 7(h) is properly characterized as a “suit in law or equity” or an *in rem* action for purposes of the Eleventh Amendment is outside the heartland of our quotidian ambit. It involves esoteric matters of constitutional law better suited for review by the Supreme Court on certiorari from the Third Circuit. We decline to umpire that particular dispute unless we must and—unlike the contested certificate proceeding in *Islander East*—we are not obliged to address that distinction again in response to this discretionary petition for declaratory order.<sup>159</sup> Our prior decision in *Islander East*, like our decisions in

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<sup>157</sup> *Id.* (citing *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality)); *id.* at 110-11 n.17 (citing *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1334 (11th Cir. 2010)).

<sup>158</sup> *Id.* at 110 (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 289, (1997) (O’Connor, J., concurring)); *see id.* at 111 n.18 (examining *Coeur d’Alene*).

<sup>159</sup> *See* 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2); *see, e.g., Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 35 (2013) (“Section 554(e) of the Administrative Procedure Act and section 207(a)(2) of the Commission’s Rules of Practice and Procedure provide us the authority and discretion to rule on a petition for declaratory order . . .”).

*East Tennessee* and *Tenneco Atlantic*, was grounded in the view that it would defeat the core purposes of the NGA if states were able to nullify a Commission certificate of public convenience and necessity that affects state land by simply refusing to participate in an eminent domain proceeding brought to effectuate that federal certificate.<sup>160</sup> We continue to adhere to that position now—and, as we next explain, that position is entirely consistent with the legislative history of NGA section 7(h) and with Supreme Court precedent construing the original text of FPA section 21, which is materially identical to NGA section 7(h).

#### **b. Legislative History**

40. The language of NGA section 7(h) is expansive. This is consistent with the legislative history which indicates that the absence of limiting language regarding state land was not an oversight; rather, in amending the NGA to include section 7(h), Congress purposely delegated its eminent domain authority to certificate holders to prevent states from nullifying the effect of Commission certificate orders. The Senate Report for NGA section 7(h) is reproduced, in relevant part, below.

This bill follows substantially the wording of the eminent domain provision of the Federal Power Act (U.S.C.A., title 16, sec. 814) which

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<sup>160</sup> See *supra* notes 150, 152, and accompanying text. We note that neither *Coeur d'Alene* nor any of the other cases the Third Circuit addressed in connection with the *in rem* issue, including the cases cited by PennEast, appears to involve a condemnation action to enforce compliance with a federal agency order. The authorities construing FPA section 21, by contrast, are more directly on point. See *infra* PP 45-47.

confers upon concerns that have acquired licenses from the Federal Power Commission to operate certain power projects, the right to condemn the necessary property for the location and operation of the projects. When the Congress passed the Natural Gas Act, it failed to include a similar provision of eminent domain to those concerns which qualified as natural gas companies under the act and obtained certificates of public convenience and necessity for the acquisition, construction, or operation of natural gas pipe lines.

....

Thus, an interstate natural gas pipe line which is constructed across several States for the purpose of distributing natural gas in a particular area authorized by the Federal Power Commission and which does not distribute natural gas in each of the States crossed, would not have the right of eminent domain under the constitutions and statutes of such States authorizing the taking of property for a public use. The operation of the pipe line would not be for the benefit of the public in those States crossed by the pipe line but in which there is no distribution of natural gas by such line. But it is necessary to cross those States in carrying out the certificate granted by the Federal Power Commission.

....

Therefore, the Congress of the United States in carrying out its constitutional authority to regulate interstate commerce, should correct this deficiency and omission in the Natural Gas Act by the passage of Senate bill 1028 which confers the right of eminent domain upon those natural gas companies which have qualified under the Natural Gas Act to carry out and perform the terms of any certificate of public convenience and necessity acquired from the Federal Power Commission under the act.

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It has also been suggested that the granting of the right of eminent domain is a matter peculiarly within the legislative and constitutional purview of the States and that it is proper that such rights should rest with the States in order that the States may therefore be in a position to require a natural-gas pipe-line company entering the State to serve the people of that State as a condition to obtaining the right of eminent domain. This argument defeats the very objectives of the Natural Gas Act. Under the Natural Gas Act, the Federal Power Commission is given exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and natural-gas companies engaged in such transportation or

sale. The Commission, through its certificate power, is authorized to grant certificates of convenience and necessity for the construction of interstate natural-gas pipe lines from points of supply to certain defined and limited markets. If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.<sup>161</sup>

41. As indicated above, the Senate Report squarely acknowledged objections to the adoption of NGA section 7(h) on the ground “that the granting of the right of eminent domain is a matter peculiarly within the legislative and constitutional purview of the States.”<sup>162</sup> Nevertheless, the Senate Report concluded that it would “defeat[] the very objectives of the Natural Gas Act,”<sup>163</sup> including the Commission’s “exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce,”<sup>164</sup> if states were permitted to “nullif[y]”<sup>165</sup> the Commission’s certificate orders by conditioning or withholding a pipeline’s exercise of the right of eminent domain over land located in such states. In light of the purpose given for enacting NGA section 7(h), it is reasonable to interpret the absence of limitation in that provision as

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<sup>161</sup> S. Rep. No. 80-429, at 1-4.

<sup>162</sup> *Id.* at 3.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 4.

authorization for a certificate holder to condemn state land when necessary “to carry out and perform the terms of *any* certificate of public convenience and necessity acquired from the [ ] Commission under the act.”<sup>166</sup>

**c. FPA section 21**

42. Precedent construing FPA section 21 further strengthens our view that Congress provided the right of eminent domain under NGA section 7(h) so as to prevent states from interfering with the Commission’s regulation of interstate natural gas facilities. As noted in the Senate Report<sup>167</sup> and in the Petition,<sup>168</sup> FPA section 21 served as the model for NGA section 7(h). FPA section 21 provides eminent domain authority to a licensee for a Commission-approved hydroelectric project for lands necessary to project “construction, maintenance, or operation.”<sup>169</sup>

43. In the Energy Policy Act of 1992, Congress amended FPA section 21 to restrict a licensee’s ability to exercise eminent domain to acquire state-owned lands.<sup>170</sup> While Congress also amended parts of the

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<sup>166</sup> *Id.* at 3 (emphasis added).

<sup>167</sup> *Id.* at 1.

<sup>168</sup> Petition at 23.

<sup>169</sup> 16 U.S.C. § 814 (2018).

<sup>170</sup> *See* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992) (limiting the ability of a hydroelectric licensee to use “the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law.”); *see also* H.R. Rep. No. 102-474, at 99 (noting that

NGA, it left section 7(h) unchanged. Notably, NGA section 7(h) was drafted to “follow[] substantially” the *unamended* version of the eminent domain provision of section 21 of the FPA.<sup>171</sup> And though the Third Circuit relied on “context” to dispute the lack of similar language in the NGA and the FPA—i.e., the fact that the FPA was amended after *Union Gas*<sup>172</sup> permitted Congress to abrogate state sovereign immunity under the Commerce Clause, but before the Supreme Court overruled *Union Gas*<sup>173</sup>—we note that the legislative history of the Energy Policy Act of 1992 makes no reference to the status of Supreme Court precedent on state sovereign immunity. In any event, the “best evidence of Congress’s intent is the text of the statute,”<sup>174</sup> and we rely on the text that Congress ultimately chose (or did not choose) for the same right in two analogous statutes administered by the same

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the pre-amendment “current law” under FPA section 21 of the power of eminent domain conferred by a FERC hydropower license included “the power to condemn lands owned by States or local levels of government”).

<sup>171</sup> S. Rep. No. 80-429, at 1.

<sup>172</sup> *Union Gas Co.*, 491 U.S. 1, *overruled by Seminole Tribe of Fla.*, 517 U.S. at 66.

<sup>173</sup> *See In re PennEast*, 938 F.3d at 112 n.20.

<sup>174</sup> *United States v. Schneider*, 14 F.3d 876, 879 (3d Cir. 1994).

agency.<sup>175</sup> Therefore, we agree with PennEast<sup>176</sup> that the congressional choice to restrict private licensees' eminent-domain authority under FPA section 21—but not private certificate holders' authority under NGA section 7(h)—shows that Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21.<sup>177</sup>

44. Riverkeeper emphasizes that the Third Circuit rejected arguments suggesting that because Congress amended the FPA, but chose not to amend the NGA, that Congress intended to allow the exercise of eminent domain over state-owned lands pursuant to the NGA.<sup>178</sup> Riverkeeper asserts that if Congress intended to remove a state's sovereign immunity in relation to interstate natural gas pipelines, it could have done so when drafting the language of the NGA,

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<sup>175</sup> See *Hughes*, 136 S. Ct. at 1298 n.10 (recognizing that relevant provisions of the FPA and the NGA are “analogous”); *Lafferty v. St. Riel*, 495 F.3d 72, 81-82 (3d Cir. 2007) (describing “the common canon of statutory construction that similar statutes are to be construed similarly”); *Ky. Utils. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985) (“It is, of course, well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed *in pari materia*.”).

<sup>176</sup> See Petition at 22 & n.35 (observing that, where Congress intends to restrict a delegation of its eminent domain authority to exclude state-owned lands, “it has done so expressly”).

<sup>177</sup> See *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (“We have often noted that when ‘Congress includes particular language in one section of a statute but omits it in another’—let alone in the very next provision—this Court ‘presume[s]’ that Congress intended a difference in meaning.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

<sup>178</sup> Riverkeeper Protest at 11.



but it did not.<sup>179</sup> Specifically, Riverkeeper takes issue with the “input[ation] [of] congressional intent and interpretation from one law to another because Congress amended the language of one law and not the other.”<sup>180</sup> We disagree and find the eminent domain provisions of FPA section 21 (as it read prior to 1992) and NGA section 7(h) should be read *in pari materia*.<sup>181</sup>

45. The relationship between these two statutes is critical because, while the Supreme Court has not addressed the scope of a pipeline’s delegated authority under NGA section 7(h), the Supreme Court’s decision in *City of Tacoma v. Taxpayers of Tacoma*<sup>182</sup> directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21.<sup>183</sup> The Supreme Court

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<sup>179</sup> *Id.* at 10.

<sup>180</sup> *Id.* at 11.

<sup>181</sup> The Supreme Court “has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.” *Hughes*, 136 S. Ct. at 1298 n.10 (citation omitted) (recognizing provisions of the FPA and NGA to be “analogous”); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its “established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]” due to the relevant provisions being “substantially identical”) (citations omitted).

<sup>182</sup> 357 U.S. 320 (1958) (*City of Tacoma*).

<sup>183</sup> *See id.* at 323 (“The question presented for decision here is whether under the facts of this case the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly [§] 21 thereof.”); *id.* at 333 (“We come now to the core of the controversy between the parties, namely, whether the

answered that question in the affirmative, finding that “the very issue upon which respondents stand here [in *City of Tacoma*] was raised and litigated in the Court of Appeals [in *Washington Department of Game*<sup>184</sup>] and decided by its judgment.”<sup>185</sup> *City of Tacoma* emphasized that Congress intended to commit all questions associated with the issuance of a license—including the legal competence of the licensee to condemn state land—to the Commission alone, with judicial review of the Commission’s orders to take place exclusively in the relevant court of appeals or, following such direct review, in the Supreme Court:

Hence, upon judicial review of the Commission’s order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have ‘exclusive jurisdiction’ to review such orders, and that its judgment ‘shall be final,’ subject to review by this Court upon certiorari or certification. Such

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license issued by the Commission under the Federal Power Act to the City of Tacoma gave it capacity to act under that federal license in constructing the project and delegated to it federal eminent domain power to take upon the payment of just compensation, the State’s fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority.”).

<sup>184</sup> *State of Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391 (9th Cir. 1953) (*Washington Department of Game*).

<sup>185</sup> *City of Tacoma*, 357 U.S. at 339.

statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.<sup>186</sup>

46. *City of Tacoma* carefully examined the Ninth Circuit's decision in *Washington Department of Game* that reviewed the Commission's licensing orders and rejected Washington's contentions "that the City does not have 'any right to take or destroy property of the State' and 'cannot act' in accordance with the terms of its federal license."<sup>187</sup> Thus, the Supreme Court found that the Ninth Circuit had already decided "the very issue" raised by Washington in *City of Tacoma*.<sup>188</sup> Rejecting Washington's claim that the Ninth Circuit had not actually decided that an FPA section 21 licensee can condemn state land, the Supreme Court admonished that "it cannot be doubted that [question] could and should have been [raised in the Ninth Circuit], for that was the court to which Congress had given 'exclusive jurisdiction to affirm, modify, or set aside' the Commission's order[.]"<sup>189</sup> adding that "the State may not reserve the point, for another round of piecemeal litigation . . . ."<sup>190</sup>

47. *City of Tacoma* and *Washington Department of Game* relied heavily on the Supreme Court's earlier

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<sup>186</sup> *Id.* at 336-37 (quoting FPA section 313, 16 U.S.C. § 825l(b)).

<sup>187</sup> *City of Tacoma*, 357 U.S. at 338 (quoting *Wash. Dep't. of Game*, 207 F.2d at 396).

<sup>188</sup> *Id.* at 339.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

decision in *First Iowa Hydro-Electric. Co-op.*,<sup>191</sup> issued a year before NGA section 7(h) was enacted, which held that states may not assert “veto power” over a Commission-licensed hydroelectric project by purporting to require receipt of a state permit “as a condition precedent to securing a federal license for the same project under the Federal Power Act.”<sup>192</sup> That was impermissible because “[s]uch a veto power easily could destroy the effectiveness of the federal act” since it “would subordinate to the control of the State the ‘comprehensive’ planning which the Act provides shall depend upon the judgment of the [ ] Commission or other representatives of the Federal Government.”<sup>193</sup> It does not appear that the Eleventh

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<sup>191</sup> *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm’n*, 328 U.S. 152 (1946) (*First Iowa*).

<sup>192</sup> *Id.* at 164.

<sup>193</sup> *Id.* The Court emphasized that the FPA “was a major undertaking involving a major change of national policy” and “[t]hat it was the intention of Congress to secure a comprehensive development of national resources” such that “[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.” *Id.* at 180-81. *City of Tacoma* summarized *First Iowa* as holding that “state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam.” *City of Tacoma*, 357 U.S. at 339 (quoting *Wash. Dep’t. of Game*, 207 F.2d at 396). The Court’s emphasis on the effectiveness of federal hydroelectric licenses against state resistance was reiterated in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), which explained:

To allow Oregon to veto such use, by requiring the State’s additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. . . . No such duplication of authority is called for by the Act. The Court of Appeals in the

Amendment was raised in *City of Tacoma* or *Washington Department of Game*. However, given the Supreme Court’s acceptance of the proposition that licensees must be able to condemn state land in order to make federal licensing jurisdiction fully effective under the original text of FPA section 21, it is difficult to conceive that the Supreme Court would reach a contrary conclusion when evaluating the materially identical eminent domain provision in NGA section 7(h). In all events, *City of Tacoma* does not convey any sense of alarm that FPA section 21, in its original unconstrained form, would “upend a fundamental aspect of our constitutional design.”<sup>194</sup>

48. In sum, we think it is evident that NGA section 7(h) was enacted by Congress to enable certificate holders to overcome attempts by states to block the construction of natural gas facilities the Commission

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instant case agrees. . . . And see *State of Washington Department of Game v. Federal Power Commission*, . . . . Authorization of this project, therefore, is within the exclusive jurisdiction of the [] Commission, unless that jurisdiction is modified by other federal legislation.

*Id.* at 445-46 (footnotes and citations omitted); *cf. Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19, 120 (1960) (holding that 25 U.S.C. § 177, which prevents “conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians . . . unless the same be made by treaty or convention entered into pursuant to the Constitution,” did not prevent New York from condemning tribal land under a Commission hydroelectric license because “§ 177 is not applicable to the sovereign United States nor, hence, to its licensees *to whom Congress has delegated federal eminent domain powers* under § 21 of the Federal Power Act.”) (emphasis added).

<sup>194</sup> *In re PennEast*, 938 F.3d at 112.

determined to be in the public convenience and necessity. In our view, the broad language of NGA section 7(h) was intended to provide certificate holders with expansive eminent domain authority to acquire land owned by private parties or by states.

**2. NGA Section 7(h) Delegates its Eminent Domain Authority Only to Certificate Holders, Not the Commission**

49. PennEast disputes the Third Circuit’s opinion that the NGA provides a “workaround” where, in the absence of authority for a certificate holder to commence eminent domain proceedings for state property in federal court, an “accountable federal official” could “file condemnation actions and then transfer property interests to the private pipeline developer.”<sup>195</sup> PennEast seeks the Commission’s opinion on whether Congress, through NGA section 7(h), delegated eminent domain authority specifically to certificate holders, or whether NGA section 7(h) authorizes the Commission (or any other federal agency or official) to exercise eminent domain.<sup>196</sup> Riverkeeper argues that, according to the Third Circuit and the plain language of the NGA, Congress did not intend to delegate the federal government’s eminent domain power to certificate holders.<sup>197</sup>

50. The Supreme Court has confirmed, in no uncertain terms, that “an agency literally has no power to act . . . unless and until Congress confers

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<sup>195</sup> Petition at 9 (citing *In re PennEast*, 938 F.3d at 113).

<sup>196</sup> *Id.* at 25-26.

<sup>197</sup> Riverkeeper Protest at 11-12.

power upon it.”<sup>198</sup> As a federal agency, the Commission “is a creature of statute, and ‘if there is no statute conferring authority, FERC has none.’”<sup>199</sup> NGA section 7(h) states, in pertinent part, that “[w]hen any *holder of a certificate of public convenience and necessity* cannot acquire by contract, or is unable to agree with the owner of property . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.”<sup>200</sup> By its plain terms, NGA section 7(h) confers authority to exercise eminent domain to certificate holders alone. And because neither NGA section 7(h) nor any other provision of the NGA authorizes the Commission to exercise eminent domain, the Commission lacks statutory authority to do so. Riverkeeper and Homeowners Against Land Taking –PennEast, Inc. (HALT) concede that the Commission has previously found that it has no role in eminent domain proceedings that result from the issuance of a certificate and that it is not involved in the acquisition of property rights through those proceedings.<sup>201</sup>

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<sup>198</sup> *La. Pub. Serv. Comm’n*, 476 U.S. at 374.

<sup>199</sup> *Tesoro Alaska Co.*, 778 F.3d at 1038 (citing *Atl. City Elec.*, 295 F.3d at 8); see also *Nat. Res. Def. Council v. Nat’l. Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) (“[A]n agency may only act within the authority granted to it by statute.”).

<sup>200</sup> 15 U.S.C. § 717f(h) (emphasis added).

<sup>201</sup> See Riverkeeper Protest at 3 (citing Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33); HALT Motion to Intervene at 1; see also, e.g., Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (“The Commission does not have the authority

51. Nor does the legislative history of NGA section 7(h) suggest that Congress sought to empower the Commission to bring condemnation actions in state or federal court. In first presenting what would become NGA section 7(h) to the House Committee on Interstate and Foreign Commerce in 1947, Representative Schwabe stated in a memorandum to the Committee that as Congress had “invoked its constitutional authority to regulate interstate commerce” via the NGA, Congress should then protect this commerce by conferring “the right of eminent domain upon those natural-gas companies” that have received a certificate from the Commission.<sup>202</sup> Statements in the House committee hearings, both from industry<sup>203</sup> and Congressional representatives,<sup>204</sup> reiterated that certificate

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to limit a pipeline company’s use of eminent domain once the company has received its certificate of public convenience and necessity.”).

<sup>202</sup> *Amendments to the Natural Gas Act: Hearing on H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce*, 80th Cong. 380 (1947) (memorandum of Rep. Schwabe, Member, H. Comm. on Interstate and Foreign Commerce).

<sup>203</sup> *See, e.g., id.* at 609 (statement of John M. Crimmins, representing Koppers Co., Inc.) (referring to the proposed amendment to the NGA as “a change in the act to give natural-gas pipe-line companies the right of eminent domain.”); *id.* at 541 (statement of David T. Searls, representing Texas Eastern Transmission Corp.) (noting that this amendment would cure the government’s “fail[ure] to provide a similar right of eminent domain” in the NGA as in the FPA).

<sup>204</sup> *See id.* at 613 (statement of Rep. Carson, Member, H. Comm. on Interstate and Foreign Commerce) (stating his belief that “we should do something to give the gas companies [eminent domain].”).



holders—not the Commission—would hold the power of eminent domain granted under NGA section 7(h). And, as referenced above, the Senate Report for section 7(h) identified the purpose of the amendment as “confer[ring] the right of eminent domain upon those *natural gas companies* which have qualified under the Natural Gas Act to carry out and perform the terms of any certificate of public convenience and necessity acquired from the [Commission] under the act.<sup>205</sup> Notably, at no point did Congress consider conferring eminent domain under NGA section 7(h), or any other section of the NGA, on the Commission.

52. Beyond the question *whether* the agency has statutory authority to exercise the right of eminent domain, there remains the question, practically speaking, *how* the Commission could wield any such authority. PennEast adds that the NGA “is silent about numerous important considerations that would need to be addressed were the Commission to bring a condemnation action . . . .”<sup>206</sup> Such important considerations include how the Commission would pay just compensation in the absence of an appropriation to do so, and the process of transferring the property from the Commission to the pipeline.<sup>207</sup> We need not address such practical considerations because, as noted above, the NGA does not grant the Commission any authority to bring condemnation actions or transfer land condemned pursuant to a section 7

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<sup>205</sup> S. Rep. No. 80-429, at 3 (emphasis added).

<sup>206</sup> Petition at 25.

<sup>207</sup> *Id.*

certificate of public convenience and necessity to another party.<sup>208</sup>

53. Although NGA section 7(h) requires the Commission's determination as to which land may be condemned for the public convenience and necessity, it delegates eminent domain authority solely to certificate holders and confers no such authority upon the Commission. As a result, contrary to the opinion of the Third Circuit, we conclude that the NGA does not authorize a "work-around" that enables the Commission, rather than private pipeline companies, to acquire state-owned property through the exercise of eminent domain.

**3. This Commission Lacks Authority to Determine the Constitutionality of Congress's Delegation of the Federal Exemption from State Sovereign Immunity to Certificate Holders under NGA Section 7(h)**

54. PennEast states that Congress, in delegating eminent domain authority to certificate holders, necessarily delegated the federal government's exemption from a state's claim of sovereign immunity pursuant to the Eleventh Amendment.<sup>209</sup> PennEast further suggests that, contrary to the doubts raised by the Third Circuit, this delegation of the federal government's exemption from state sovereign

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<sup>208</sup> See *supra* P 50.

<sup>209</sup> Petition at 27-33.

immunity claims raises “no constitutional difficulty.”<sup>210</sup>

55. While we find that a certificate holder’s ability to condemn state land when necessary to fulfill the certificate is a necessary and essential part of the Commission’s administration of the NGA,<sup>211</sup> we deny PennEast’s request to address the constitutional sufficiency of that delegation in the context of this discretionary declaratory order. Justice Harlan famously admonished that “[a]djudication of the constitutionality of congressional enactments . . . [is] beyond the jurisdiction of administrative agencies.”<sup>212</sup> The federal courts of appeals have confirmed this basic constraint in most circumstances<sup>213</sup> and the Commission typically avoids opining on constitutional matters unless they are necessary to a particular

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<sup>210</sup> *Id.* at 33-34.

<sup>211</sup> See *supra* notes 143 (quoting *Thatcher*), 150 (quoting *Tenneco Atlantic* and describing the discussion of *Carmack* therein), 160 (describing the Commission’s rationale in *Islander East*, *East Tennessee*, and *Tenneco Atlantic*), and 193 (discussing the Supreme Court’s interpretation of FPA section 21).

<sup>212</sup> *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); see also *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding . . . whether the action of the branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution.”); *Pub. Utils. Comm’n of State of Cal. v. United States*, 355 U.S. 534, 540 (1958) (“[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.”).

<sup>213</sup> See *supra* note 118.

decision.<sup>214</sup> Therefore, it would be inappropriate for the Commission to purport to decide certain constitutional questions implicated by the instant Petition. These questions include: whether a condemnation action under NGA section 7(h) is a suit in law or equity as those terms are used in the Eleventh Amendment; whether Congress's delegation to certificate holders concerning condemnation of all "necessary" land was sufficient to overcome state immunity under the Eleventh Amendment; and whether Congress's delegation to certificate holders of the federal exemption from Eleventh Amendment immunity is a constitutionally permissible exercise of Congressional authority under the Commerce Clause. Accordingly, we decline to provide an opinion on those questions.

### **C. Implications of the Third Circuit's Decision**

56. While we decline to reach the constitutional validity of Congress's delegation of eminent domain to condemn state land under NGA section 7(h), the implications of the Third Circuit's opinion merit discussion here. The Third Circuit acknowledged that its holding "may disrupt how the natural gas industry,

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<sup>214</sup> See *Tenneco Atlantic*, 1 FERC at 65,203-04 & n.53 (citing *Thatcher*, 180 F.2d 644); *East Tennessee*, 102 FERC ¶ 61,225 at P 68; *Islander East*, 102 FERC ¶ 61,054 at PP 128, 131. As a general matter, reasoned decisionmaking under the Administrative Procedure Act requires the Commission to "answer[] objections that on their face seem legitimate." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001))).

which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.”<sup>215</sup> That is correct.<sup>216</sup> If the Third Circuit’s opinion stands, we believe it would have profoundly adverse impacts on the development of the nation’s interstate natural gas transportation system, and will significantly undermine how the natural gas transportation industry has operated for decades.

57. The NGA provides that, upon a determination by the Commission that a natural gas transportation project is required by the public convenience and necessity, the certificate holder shall have the authority to acquire “the necessary right-of-way to construct, operate, and maintain” the project.<sup>217</sup> This is a “necessary tool[] to make effective the orders and certificates of the Commission.”<sup>218</sup>

58. The Third Circuit’s decision will substantially impair full application of the NGA, including NGA section 7(h), as well as impair Congress’s intent in providing certificate holders with this vital tool because it would allow states to nullify the effect of Commission orders affecting state land—and, apparently, private land in which the state has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought

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<sup>215</sup> *In re PennEast*, 938 F.3d at 113.

<sup>216</sup> *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (agreeing “that the French Revolution ‘modified’ the status of the French nobility”).

<sup>217</sup> 15 U.S.C. § 717f(h); *see also supra* PP 25-26.

<sup>218</sup> *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore).

to effectuate a Commission certificate. It would likewise impair the NGA's superordinate goal of ensuring the public has access to reliable, affordable supplies of natural gas.<sup>219</sup> As stated above, the Commission has no statutory authority or mechanism by which to condemn property and transfer it to certificate holders.<sup>220</sup> As a result of the Third Circuit's decision, states would be free to block natural gas infrastructure projects that cross state lands by refusing to grant easements for the construction and operation of the projects on land for which the state has a possessory interest, regardless of any Commission finding that a particular project is in the public interest under the NGA.<sup>221</sup> Preventing land

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<sup>219</sup> *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) (“Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices.”); see *NAACP v. Fed. Power Comm’n*, 425 U.S. 669-70 (recognizing that “the principal purpose of . . . [the NGA is] to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices”); accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70). See generally *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133, at PP 32-39 (2019) (McNamee, Comm’r, concurring) (detailing the evolution of “enacted . . . legislation promoting the development and use of natural gas”); *id.* at P 24 (“Each of these textual provisions [in NGA section 7] illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.”).

<sup>220</sup> See *supra* PP 49-53.

<sup>221</sup> We note that the court's interpretation would permit states to block construction both on land a state owns (e.g., along or across all state roads and the bottoms of navigable water bodies), and on land over which the state asserts some lesser property

owners and states from impeding interstate natural gas transportation projects was an explicit objective of Congress in amending the NGA to include section 7(h).<sup>222</sup> Thus, the Third Circuit’s opinion casts serious doubt on the effectiveness of the Commission’s certificates of public convenience and necessity and the Commission’s ability to satisfy its statutory NGA mandate.

59. Riverkeeper disagrees that *In re PennEast* undermines the Commission’s administration of the NGA, stating that the decision provides for consistency with the Constitution and preserves the sovereign rights of states.<sup>223</sup> Relying heavily on the questionable federal work-around discussed above,<sup>224</sup> New Jersey similarly contends that PennEast “overstates the purported consequences of that decision.”<sup>225</sup> However, several commenters, including interstate pipeline companies, natural gas utilities, and nongovernmental organizations, as well as the petitioner, raise concerns about the ramifications of

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interests (e.g., conservation easements). If state-owned lands are treated as impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact. If lands over which a state has asserted any property interest also become impassable barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the purpose of NGA section 7(h).

<sup>222</sup> See *supra* PP 28-48.

<sup>223</sup> Riverkeeper Protest at 6.

<sup>224</sup> See *supra* PP 49-53.

<sup>225</sup> New Jersey Protest at 19, 23-24.

the Third Circuit’s opinion. PennEast and INGAA<sup>226</sup> comment on the “immediate chilling effect” the Third Circuit’s opinion would have on the development of interstate natural gas infrastructure by providing states with a mechanism by which they could nullify a certificate of public convenience and necessity.<sup>227</sup>

60. PennEast notes that New Jersey claims possessory interests in approximately 15 percent of the land in the state.<sup>228</sup> Even if a pipeline route were designed specifically to avoid state lands, PennEast states that property owners could simply grant conservation easements or other non-possessory property interests to states or their agencies with the aim of vetoing or re-routing pipelines.<sup>229</sup> INGAA echoes these concerns, alleging that a certificate holder could “be stuck in a never-ending loop requiring endless reroutes to avoid properties in which the state had no interest when FERC was reviewing the proposal.”<sup>230</sup>

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<sup>226</sup> INGAA is a trade association advocating regulatory and legislative positions of the vast majority of the interstate natural gas pipeline companies in the U.S.

<sup>227</sup> Petition at 15; *see* INGAA Comments at 11.

<sup>228</sup> Petition at 12 (“New Jersey currently claims a property interest in more than 1,300 square miles pursuant to its Green Acres and farmland programs. This amount represents more than 15 percent of the 8,729 square miles of land in New Jersey. That figure does not include lands owned in fee by [New Jersey], such as state forests, state parks, and the bottoms of all navigable waterbodies[.]”) (citations omitted).

<sup>229</sup> *Id.* at 9.

<sup>230</sup> INGAA Comments at 13.



61. In contrast, Watershed Institute disputes the concern that property owners could grant conservation easements to states in an attempt to block a pipeline, stating that the process of obtaining and undoing a conservation easement in New Jersey is “extremely burdensome and can only occur under limited circumstances.”<sup>231</sup> As we discuss below, however,<sup>232</sup> the impacts of the Third Circuit’s decision are not limited to New Jersey, which has already proposed new legislation for the purpose of blocking natural gas pipelines.<sup>233</sup> Accordingly, for the Commission to faithfully administer the NGA, it cannot rely on states being measured in granting conservation easements.

62. INGAA further comments that the uncertainty created by the Third Circuit’s decision will exacerbate the risk associated with constructing and operating interstate natural gas facilities, thereby raising the

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<sup>231</sup> Watershed Institute Motion to Intervene at 2.

<sup>232</sup> See *infra* P 64.

<sup>233</sup> See, e.g., *Restricts use of eminent domain by private pipeline companies to those demonstrating pipeline is in the public interest and that agree to certain regulation by BPU*, A.B. 2944, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Restricts use of eminent domain by private pipeline companies to those demonstrating pipeline is in the public interest and that agree to certain regulation by BPU*, S.B. 799, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Prevents use of condemnation to acquire residential and other private property under redevelopment laws*, S.B. 302, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Prevents use of condemnation to acquire residential and other private property under redevelopment laws*, A.B. 947, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Proposes constitutional amendment to restrict use of condemnation power against non-blighted property for private economic development purposes*, A.C.R. 27, 218th Leg., 1st Ann. Sess. (N.J. 2018).

cost of financing the projects.<sup>234</sup> INGAA states that the veto power the Third Circuit’s opinion would afford states would expand the risk associated with projects “exponentially,” as being granted a certificate of public convenience and necessity from the Commission would no longer provide assurance that the approved route is “truly final.”<sup>235</sup> As a result of this higher level of risk and uncertainty, “investors will either increase the interest rate at which they are willing to lend capital or will simply choose to invest elsewhere.”<sup>236</sup> This would result in either increased costs for natural gas consumers or greater supply constraints as a result of a pipeline’s inability to secure capital for construction.<sup>237</sup>

63. Other commenters raise concerns about the impact of the Third Circuit’s decision on local distribution companies (LDCs) and, ultimately, consumers. The APGA<sup>238</sup> states that the court’s decision will prevent LDCs from securing additional transportation capacity or benefiting from new areas of natural gas supply.<sup>239</sup> The AGA<sup>240</sup> comments that LDCs, as state-regulated utilities, have an “obligation

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<sup>234</sup> INGAA Comments at 11.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> The APGA is an association representing over 730 publicly owned natural gas distribution systems across thirty-seven states.

<sup>239</sup> *See* APGA Comments at 3.

<sup>240</sup> The AGA represents over 200 natural gas utilities, which together deliver natural gas to approximately 95 percent of the nation’s natural gas customers.

to provide natural gas service to retail customers” and that the Third Circuit’s decision will jeopardize LDCs’ ability to meet this obligation.<sup>241</sup> According to the AGA, “utilities develop and implement detailed long-term supply plans” to ensure the needs of consumers are met, and utilities enter into transportation agreements in order to “have natural gas supplies available . . . to respond to current and future customer demands and to meet operational needs.”<sup>242</sup> New Jersey Natural Gas Company, a regulated New Jersey natural gas distribution utility, states that the “interstate natural gas transportation pipelines serving New Jersey are not only running regularly at full capacity—they are fully subscribed.”<sup>243</sup> New Jersey Natural Gas states that if interstate pipeline companies such as PennEast are frustrated in their attempts to provide this needed additional capacity “a significant outage event is a realistic threat.”<sup>244</sup>

64. Significantly, the impacts of the Third Circuit’s opinion may not be limited to New Jersey, or to other states within the Third Circuit. PennEast asserts that the decision will influence courts in other jurisdictions, particularly due to the limited case law and Commission precedent on the matter.<sup>245</sup> Indeed, district courts in Maryland and Texas have issued decisions blocking the condemnation of state land pursuant to a Commission-issued certificate on

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<sup>241</sup> AGA Comments at 9-12.

<sup>242</sup> *Id.* at 9-10.

<sup>243</sup> New Jersey Natural Gas Company Comments at 4.

<sup>244</sup> *Id.* at 5.

<sup>245</sup> Petition at 10-11.

Eleventh Amendment grounds.<sup>246</sup> The decision of the District Court for the District of Maryland is currently pending appeal before the Fourth Circuit. TC Energy states that its subsidiary, Columbia Gas Transmission, LLC (Columbia), the certificate holder in the pending Fourth Circuit proceeding, has been prevented from accessing a “small but necessary portion of land, severely impeding Columbia’s ability to construct a project that will serve demonstrated demand and that the Commission has determined to be in the public interest[.]”<sup>247</sup> TC Energy further notes that without the ability to exercise eminent domain over lands in which the state holds a possessory interest “[the] ability to develop needed natural gas infrastructure . . . will be severely hampered to the detriment of consumers[.]”<sup>248</sup>

65. As discussed above, we recognize the potential impact that a state could have in preventing the construction of natural gas pipeline projects authorized by the Commission. For that reason, we believe it is beneficial for the Commission, in its capacity as the agency charged with administering the NGA, to provide here its interpretation of how the NGA’s grant of eminent domain authority to certificate holders is intended to operate. We emphasize our “exclusive jurisdiction over the transportation and sale of natural gas in interstate

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<sup>246</sup> See *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed Sept. 20, 2019); *Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

<sup>247</sup> TC Energy’s Motion to Intervene and Comments at 19.

<sup>248</sup> *Id.* at 3.

commerce for resale.”<sup>249</sup> Therefore, state and local agencies may not, through the application of state or local laws, prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.<sup>250</sup> Indeed, that statement is routinely

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<sup>249</sup> *Schneidewind*, 485 U.S. at 300-01 (citing *N. Nat. Gas Co.*, 372 U.S. at 89); *see also* 15 U.S.C. § 717(b).

<sup>250</sup> *See* 15 U.S.C. § 717r(d)(2) (state or federal agency’s failure to act on a permit is inconsistent with federal law); *Schneidewind*, 485 U.S. at 310 (state regulation that interferes with the Commission’s regulatory authority over the transportation of natural gas is preempted) (quoting *N. Nat. Gas Co.*, 372 U.S. at 91-92); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission); *Williams Nat. Gas Co.*, 890 F.2d at 264 (“We hold that the proceedings in the state court that resulted in the order enjoining Williams’ exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA.”); *Nat. Gas Pipeline Co. v. Iowa State Commerce Comm’n*, 369 F. Supp. 156, 160 (S.D. Iowa 1974) (finding state permit requirements inapplicable to federal eminent domain procedures under the NGA); *cf. City of Tacoma*, 357 U.S. at 328, 341 (upholding the finality of a circuit court’s determination that “state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license” due to the suit being an “impermissible collateral attack” on the circuit court’s decision) (internal quotation marks and citation omitted); *First Iowa*, 328 U.S. at 181 (“The detailed provisions of the Federal Power Act providing for the federal plan of regulation leave no room or need for conflicting state controls.”); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (finding that the practice of states “shelving” Clean Water Act section 401 water quality certifications through a withdrawal and refiling scheme “usurp[s] FERC’s control over whether and when a federal license will issue” and is contrary to the FPA);

included in the orders the Commission issues granting certificates of public convenience and necessity.<sup>251</sup>

#### **IV. Conclusion**

66. In enacting the NGA, Congress established a carefully crafted comprehensive scheme in which the Commission was charged with vindicating the public interest inherent in the transportation and sale of natural gas in interstate and foreign commerce, in significant part through the issuance of certificates of public convenience and necessity for interstate gas pipelines. A key aspect of this scheme was the remit to natural gas companies of the ability to exercise, where necessary, the power of eminent domain to acquire lands needed for projects authorized by the Commission. We here confirm our strong belief that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain and that this authority applies to lands in which states hold interest. A contrary finding would be flatly inconsistent with Congressional intent, as expressed

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*Wash. Dep't of Game*, 207 F.2d at 396 (“[W]e conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license . . .”).

<sup>251</sup> *E.g.*, *Transcon. Gas Pipe Line Co., LLC*, 169 FERC ¶ 61,051 at P 85 (“Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.”).

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in the text of NGA section 7(h), which is also supported by the legislative history.

The Commission orders:

The petition for declaratory order is granted in part, and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,  
Secretary.

**Appendix A**  
**Timely Motions to Intervene**

American Gas Association  
American Public Gas Association  
Angela A. Karas  
Calpine Energy Services, L.P.  
Consolidated Edison Company of New York, Inc.  
Cynthia Niciecki  
Daria M. Karas  
Delaware Riverkeeper Network  
Derrick Kappler  
Environmental Defense Fund  
Frank R. Karas  
HALT—PennEast (Homeowners Against Land  
Taking—PennEast, Inc.)  
Interstate Natural Gas Association of America  
Jodi McKinney (Delaware Township Committee)  
John T. Leiser  
Kelly Kappler  
Kinder Morgan, Inc Entities, et al.<sup>252</sup>

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<sup>252</sup> This includes the following entities: Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Tennessee Gas Pipeline Company, L.L.C.; Natural Gas Pipeline Company of America LLC; El Paso Natural Gas Company, L.L.C.; TransColorado Gas Transmission Company LLC; Mojave Pipeline Company, L.L.C.; Bear Creek Storage Company, L.L.C.; Cheyenne Plains Gas Pipeline Company, L.L.C.; Elba Express Company, L.L.C.;



Leslie Sauer  
Maya K. van Rossum, the Delaware Riverkeeper  
Michael Spille  
New Jersey Conservation Foundation  
New Jersey Department of Environmental Protection,  
et al. (collectively, the State of New Jersey)<sup>253</sup>  
New Jersey Division of Rate Counsel  
New Jersey Natural Gas Company  
Niskanen Center  
Patricia A. Oceanak  
PSEG Energy Resources & Trade, LLC  
Richard D. LaFevre and Pamela LaFevre  
Samuel H. Thompson  
Southern Star Central Gas Pipeline, Inc.  
Stony Brook Millstone Watershed Association  
TC Energy Corporation  
Tellurian Pipeline LLC  
Township of Holland, Hunterdon County, New Jersey  
Township of Hopewell, Mercer County, New Jersey  
Township of Kingwood, Hunterdon County, New  
Jersey

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Kinder Morgan Louisiana Pipeline LLC; and Southern LNG  
Company, L.L.C.

<sup>253</sup> The State of New Jersey's motion to intervene includes, but is not limited to, the following agencies: the New Jersey Board of Public Utilities; the New Jersey Department of Environmental Protection; and the Delaware and Raritan Canal Commission.

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Township of West Amwell, Hunterdon County, New  
Jersey

Transcontinental Gas Pipe Line Company, LLC

Vincent DiBianca

Washington Crossing Audubon Society

GLICK, Commissioner, *dissenting*:

1. I dissent<sup>1</sup> from today's order on both procedural and substantive grounds. There is no need for the Commission to insert itself into what is primarily a constitutional question that is being litigated where those questions belong: The federal courts. Nor is this an area where the Commission has the particular expertise the majority is so quick to claim. The NGA requires the Commission to determine whether an interstate pipeline is required by the public convenience and necessity.<sup>2</sup> If the Commission finds that a proposed pipeline is so required, section 7(h) of the NGA automatically provides the pipeline developer eminent domain authority without any action or further involvement by the Commission. The congressional intent behind a statutory provision that governs a judicial scheme, which the Commission has no role in administering, is not a subject on which we are especially well-qualified to opine.

2. Turning to the substance of today's order, I disagree with the majority that Congress unambiguously intended section 7(h) to apply state lands. In my view, the evidence simply is not clear one way or the other. The majority's confidence in its conclusion is better evidence of its own ends-oriented

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<sup>1</sup> Although I agree with the conclusion in today's order that section 7(h) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(h) (2018), delegates eminent domain authority to the holder of an NGA section 7 certificate and not to the Commission, I dissent in full because the Commission should not be issuing this order in the first place. *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064, at PP 49-53 (2020) (Order).

<sup>2</sup> 15 U.S.C. § 717f(c).

decisionmaking than any unambiguous congressional intent.

3. I understand that my colleagues may not like the decision of the U.S. Court of Appeals for the Third Circuit (Third Circuit).<sup>3</sup> But we do not ordinarily rush out a declaratory order whenever a couple of commissioners disagree with a court. Nothing in today's order makes a compelling case for why we should be doing so today.

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4. It is not appropriate for the Commission to issue a declaratory order in an effort to buttress a private party's litigation efforts. Moreover, as the majority notes, the important questions presented by PennEast Pipeline Company, LLC's (PennEast) effort to condemn New Jersey's property interests "involve[] esoteric matters of constitutional law."<sup>4</sup> In other words, the real stakes at issue involve the Eleventh Amendment to the U.S. Constitution; the majority's attempt to divine congressional intent is just nibbling around the edges. Other than signaling the majority's dissatisfaction with the Third Circuit, I see little to be achieved by today's order.

5. The majority contends that today's order is useful because its interpretation of Congress's intent in enacting section 7(h) merits deference from the courts. It supports that statement with a single general citation to *Chevron v. Natural Resources Defense*

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<sup>3</sup> *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019).

<sup>4</sup> Order, 170 FERC ¶ 61,064 at P 39.

*Council, Inc.*<sup>5</sup> But courts do not afford an agency *Chevron* deference when the relevant issue was not delegated to the agency to decide. “Deference in accordance with *Chevron*. . . is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’”<sup>6</sup> And *Chevron* deference “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>7</sup> That said, ambiguity alone will not always suffice: Congress must also have delegated to the agency in question the authority to fill in that ambiguity.<sup>8</sup> Where the relevant issues are

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<sup>5</sup> *Id.* P 15. The Commission also asserts, notably without citation, that it has the authority to apply and interpret section 7(h). *Id.* at P 13. For the reasons discussed below, that is not the case. See *infra* PP 6-7.

<sup>6</sup> *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); see *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (explaining that not all agency statutory interpretations qualify for *Chevron* deference; only those interpretations that meet the criteria outlined in *Gonzalez*).

<sup>7</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>8</sup> See *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ([M]ere ambiguity in a statute is *not* evidence of congressional delegation of authority in the first instance. Rather, *Chevron* deference comes into play of course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.” (internal quotation marks and citations omitted) (emphasis in the original)).

not ones that Congress has left for the agency to decide, *Chevron* does not apply.

6. The scope of the eminent domain authority in section 7(h) is not an issue that Congress left for the Commission to decide. Section 7(h) provides a mechanism for a certificate holder to go into court and condemn land that it has been unable to purchase on its own.<sup>9</sup> The Commission has repeatedly made clear that it has no role to play in the proceedings contemplated by section 7(h) or the actual exercise of eminent domain more generally.<sup>10</sup> As the Commission has explained, eminent domain is an “automatic right” that is incident to the Commission’s public convenience and necessity determination<sup>11</sup> and

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<sup>9</sup> See 15 U.S.C. § 717f(h).

<sup>10</sup> *E.g.*, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 74 (2018) (“In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain . . . . The Commission itself does not grant the pipeline the right to take the property by eminent domain.”); *Atl. Coast Pipeline*, 161 FERC ¶ 61,042, at PP 66, 77 (2017) (same).

<sup>11</sup> *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 72; see *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (citations omitted)); *Atl. Coast Pipeline*, 161 FERC ¶ 61,042 at P 78 (“[O]nce a natural gas company obtains a certificate of public convenience and necessity, it may exercise

disputes about the exercise of that eminent domain authority are best addressed by the federal courts.<sup>12</sup>

7. Because the Commission has no role in implementing or administering the eminent domain authority conveyed by section 7(h), the majority cannot reasonably argue that Congress delegated to the Commission the responsibility to address any ambiguity in that provision.<sup>13</sup> Questions about the scope of a private party's right to commence an action in federal or state court are not issues that Congress would have given this Commission to decide. Instead, the obvious venue to address those questions in the first instance is those courts themselves. Accordingly, the prospect of securing judicial deference is also not, in my opinion, a valid reason to put out today's order.

8. Turning to the substance of today's order, the majority's conviction that Congress unambiguously intend section 7(h) to apply to state lands is dead wrong. The "evidence" that the majority relies on to argue that the eminent domain authority in section 7(h) applies to state lands is, at best, inapt or susceptible to multiple interpretations. Even viewed as a whole and in a light most charitable to the

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the right of eminent domain in a U.S. District Court or a state court.").

<sup>12</sup> *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.").

<sup>13</sup> See, e.g., *Atl. City Elec.*, 295 F.3d at 9; *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001).

majority, the evidence discussed in today's order simply does not demonstrate a clear congressional intent one way or another. All today's order proves is that the majority believes that certificate holders should be able to condemn state lands, not that Congress intended that to be the case.

9. The majority begins, as it must, with the text of section 7(h).<sup>14</sup> But there is not much to say. The Commission's two-paragraph discussion consists of one paragraph quoting section 7(h) in full<sup>15</sup> and a second paragraph summarizing how it works.<sup>16</sup> The only substantive point today's order makes about the text of section 7(h) is that Congress did not expressly prohibit condemnation of state lands.<sup>17</sup>

10. On that point, I agree. But the absence of an express limitation on condemning state lands is hardly an unambiguous signal that Congress intended section 7 certificate holders to have that authority. After all, section 7(h) also does not contain an express prohibition on condemning federal land and, to my knowledge, no one believes that section 7(h) therefore conveys such authority. The majority references the "broad and unqualified reference to 'the necessary land or property in section 7(h),' " suggesting that this language extends condemnation authority to any land

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<sup>14</sup> Order, 170 FERC ¶ 61,064 at PP 33-34; *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statutory provision] begins where all such inquiries must begin: with the language of the statute itself.").

<sup>15</sup> Order, 170 FERC ¶ 61,064 at P 33.

<sup>16</sup> *Id.* P 34.

<sup>17</sup> *Id.*



deemed necessary to develop a proposed pipeline.<sup>18</sup> Perhaps, but a more plausible reading is that the word “necessary” acts as a limiting provision, which makes clear that section 7(h) is not a general right of eminent domain and can be deployed only to condemn property that will be used in connection with the pipeline. Under that reading, the term “necessary” does not indicate anything one way or another about section 7(h)’s application to state lands.

11. With that, the majority turns to proffer a discussion of “[j]udicial review of section 7(h).”<sup>19</sup> That discussion cites exactly one section 7(h) case: *Thatcher v. Tennessee Gas Company*,<sup>20</sup> which is entirely irrelevant. *Thatcher* involved a dispute between a natural gas pipeline and a private landowner, who argued that section 7(h) was unconstitutional because, among other things, it did not regulate interstate commerce and eminent domain authority could not be exercised by a private company.<sup>21</sup> Based on principles that were well established even then, the U.S. Court of Appeals for the Fifth Circuit rejected those arguments.<sup>22</sup> The court said nothing about the extent of the eminent domain authority conveyed by section 7(h) or whether that authority extended to state lands.

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<sup>18</sup> *Id.* (quoting 15 U.S.C. § 717f(h)).

<sup>19</sup> *Id.* P 35.

<sup>20</sup> *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 645 (5th Cir. 1950).

<sup>21</sup> *Id.* (summarizing the Thatcher’s arguments).

<sup>22</sup> *Id.* at 646-48; *accord* Order, 170 FERC ¶ 61,064 at P 29 (noting that the Third Circuit’s opinion does not question these well-established principles).

Simply put, *Thatcher* is irrelevant for our purposes, as the majority itself seems to recognize.<sup>23</sup>

12. As part of its discussion of “judicial review,” the majority also points to *Tenneco Atlantic*, a decision issued by an administrative law judge (ALJ) in 1977, thirty years after Congress enacted section 7(h).<sup>24</sup> I agree that, in *Tenneco Atlantic*, the ALJ explained his belief that section 7(h) gave the certificate holder the authority to condemn state land.<sup>25</sup> But I disagree that a single ALJ opinion issued three decades after the relevant amendments tells us much, if anything, about the extent of the eminent domain authority that Congress intended to convey in section 7(h).<sup>26</sup>

13. In addition, the majority points to the Commission’s decision in *Islander East*, which rejected an Eleventh Amendment argument on the basis that a condemnation action was not a “suit in law or equity”<sup>27</sup>—exactly the question that today’s

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<sup>23</sup> Order, 170 FERC ¶ 61,064 at P 35.

<sup>24</sup> *Id.* P 36.

<sup>25</sup> *Id.*

<sup>26</sup> In that same section of the opinion, the ALJ described as “patently absurd” the notion that Congress would authorize the use of eminent domain to develop a pipeline to serve a liquefied natural gas import/export facility yet deny the use of eminent domain for the actual import/export facility itself. *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, 65,204 (1977). Of course, that is exactly what the law currently does. Compare 15 U.S.C. § 717b (no provision for eminent domain) with 15 U.S.C. § 717f(h) (providing for eminent domain). Accordingly, it might be worth taking with a grain of salt the ALJ’s conclusion that Congress obviously intended the condemnation authority in section 7(h) to apply to state lands.

<sup>27</sup> *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 123 (2003).

order declines to address on the basis that it is outside “the heartland of our quotidian ambit.”<sup>28</sup> As the majority recognizes, the Third Circuit dismissed the Commission’s conclusion in *Islander East*, calling it “an outlier and one that was reached with little, if any, analysis.”<sup>29</sup> “More importantly,” the Third Circuit stated, “it is flatly wrong.”<sup>30</sup> That sums it up pretty well. I appreciate that the majority likes the outcome in *Islander East*,<sup>31</sup> but, as the Third Circuit noted, there is no reasoning or analysis in that order to support that outcome or explain why it is consistent with congressional intent.<sup>32</sup> Simply put, it sheds no light on the question before us.

14. Next, the majority turns to cherry-picking examples from the NGA’s legislative history to bolster its case.<sup>33</sup> It begins with the Senate report associated with the 1947 legislation that added section 7(h) to the NGA. It contends that the Senate report demonstrates that section 7(h) reflected a generalized concern about

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<sup>28</sup> Order, 170 FERC ¶ 61,064 at P 39.

<sup>29</sup> *In re PennEast*, 938 F.3d at 111 n.19.

<sup>30</sup> *Id.*

<sup>31</sup> Order, 170 FERC ¶ 61,064 at P 38 (recognizing that the holding in *Islander East* was “terse,” but asserting that being light on analysis “does not . . . obviate the validity of th[e] final holding”).

<sup>32</sup> *In re PennEast*, 938 F.3d at 111 n.19.

<sup>33</sup> *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’” (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983))).

states' ability to invade the Commission's jurisdiction or "nullif[y]" its determinations—which, according to the majority, supports the conclusion that Congress plainly intended section 7(h) to apply to state lands.<sup>34</sup>

15. That is quite a leap. In fact, the Senate report indicates that a particular, relatively narrow concern motivated Congress to add section 7(h): Providing a federal right of eminent domain for pipeline developers that were ineligible to utilize state eminent domain laws. The report begins by noting that, because section 7 did not contain an eminent domain provision, certificate holders at the time were required to utilize state eminent domain laws.<sup>35</sup> However, the report explains, an interstate pipeline may not qualify for eminent domain under certain state laws because, for example, the pipeline traverses the state without delivering gas, which can mean that it does not provide the "public use" needed to justify eminent domain under state law<sup>36</sup> or because certain states outright prohibit the exercise of eminent domain authority by "foreign" (*i.e.*, out-of-state) corporations.<sup>37</sup> To address that concern, the report proposes to create a federal right of eminent domain, so that certificate holders are not left at the mercy of

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<sup>34</sup> Order, 170 FERC ¶ 61,064 at P 41.

<sup>35</sup> S. Rep. 80-429, at 2 (1947).

<sup>36</sup> *Id.* (discussing *Shedd v. Northern Indiana Public Service Company*, 188 N.E. 322 (Ind. 1934)); *id.* (collecting other cases to the same effect).

<sup>37</sup> *Id.* (explaining that Arkansas and Wisconsin prohibit the use of eminent domain by companies that are not registered corporations within the state).

a patchwork of state eminent domain laws.<sup>38</sup> But the report says nothing about the scope of that federal right of eminent domain or the entities against which it can be exercised.<sup>39</sup>

16. In addition, a careful reading of the report indicates that the committee was also concerned about another particular and relatively narrow way in which state decisions might interfere with or invade Commission jurisdiction. The report explains that natural gas pipelines frequently transport gas long distances between producing regions and consuming markets, often crossing multiple intervening states without delivering gas for consumption in those states.<sup>40</sup> The report further explains that the Commission certifies the transport of gas “from points of supply to certain defined and limited markets” and that this defined certification of transportation service from point A to point B would be “nullified” if the intervening states could condition eminent domain authority on the pipeline also

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> If anything, aspects of the report could suggest that the committee may not have believed that section 7(h) would apply state-owned lands at all. For example, in enumerating the problems with relying on state eminent domain laws, the report notes that, under Arkansas’s Constitution, “a foreign corporation shall not have the power to condemn *private* property.” *Id.* at 2 (emphasis added). One could infer that the focus on *private* property indicates that private lands were all the senators had in mind at the time, although, unlike the majority, I am hesitant to find clear congressional intent based on circumstantial inferences alone.

<sup>40</sup> *Id.* at 3.

delivering gas to points C, D, and E along the way.<sup>41</sup> Once again, nothing about that defined problem—states seeking to force interstate natural gas pipelines to deliver gas within their borders—or Congress’s solution—a federal right of eminent domain—says anything about the scope of that federal right of eminent domain or the entities against which it can be exercised.<sup>42</sup>

17. The majority then turns to discuss the divergent evolution of the eminent domain provisions under the NGA and the Federal Power Act (FPA).<sup>43</sup> And, to be fair, the majority is on relatively stronger ground here. As today’s order explains, the Energy Policy Act of 1992 amended the FPA to limit the exercise of eminent domain against state lands without making a corresponding change to section 7(h).<sup>44</sup> From that, the majority concludes that “Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21.”<sup>45</sup> The implication, as I understand it, is that because Congress limited the

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<sup>41</sup> *Id.* at 4 (“If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.”).

<sup>42</sup> *Cf. In re PennEast*, 938 F.3d at 113 n.20 (“As for the legislative history, it demonstrates that Congress intended to give gas companies the federal eminent domain power. . . . But it says nothing about Congress’s intent to allow suits against the States.” (citing S. Rep. No. 80-429, at 2-3)).

<sup>43</sup> Order, 170 FERC ¶ 61,064 at PP 42-43.

<sup>44</sup> *Id.* P 43.

<sup>45</sup> *Id.*

power to condemn state land under section 21 of the FPA, such limits must have been necessary and because Congress did not similarly limit the power to condemn state land under section 7(h) of the NGA, that power must be unlimited.<sup>46</sup>

18. That is one plausible interpretation, but it is hardly the only one. It is equally possible that Congress did not modify NGA section 7(h) because, for whatever reason, it did not believe that section 7(h) presented the same concerns. Although my colleagues may think that Congress would have been wrong in reaching that judgment, that opinion tells us relatively little about Congress's actual motivations. In any case, the fact that Congress subsequently sought to limit the scope of eminent domain under the FPA sheds little light on what Congress intended when it enacted section 7(h) of the NGA roughly 45 years earlier.<sup>47</sup>

19. In addition, the Third Circuit posited another reason why Congress might have added this language when amending the FPA in 1992: "When Congress passed the NGA and [section 7(h)] in 1938 and 1947, respectively, Congress was legislating under the consensus that it could not abrogate states' Eleventh

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<sup>46</sup> *Id.* PP 43-44.

<sup>47</sup> See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))); accord *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously.").

Amendment immunity pursuant to the Commerce Clause.”<sup>48</sup> The Energy Policy Act of 1992, by contrast, was enacted during a brief period in which the Supreme Court held that Congress could abrogate state sovereign immunity pursuant to its Commerce Clause powers, giving Congress a reason to explicitly limit eminent domain against state lands.<sup>49</sup> It is possible that, in addressing the FPA in 1992, Congress saw fit to provide newly relevant limits on eminent domain—limits that it did not, for whatever reason, apply to section 7 of the NGA, which the Energy Policy Act of 1992 did not modify.

20. The majority attempts to cast doubt on that possibility by noting that the relevant committee report for the Energy Policy Act of 1992 does not discuss the Supreme Court’s sovereign immunity jurisprudence.<sup>50</sup> Although it is true that the report does not mention the Supreme Court’s sovereign immunity cases, the absence of any such discussion hardly proves that those cases were irrelevant to Congress’s thinking. As the Supreme Court has explained, when using legislative history to “ascertain[] the meaning of a statute, [we] cannot, in the manner of Sherlock Holmes,” find clear meaning in “the theory of the dog that did not bark.”<sup>51</sup>

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<sup>48</sup> *PennEast*, 938 F.3d at 113 n.20 (internal quotation marks omitted).

<sup>49</sup> *Id.*

<sup>50</sup> Order, 170 FERC ¶ 61,064 at P 43.

<sup>51</sup> *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (citing Arthur Conan Doyle, *The Silver Blaze*, in *The Complete Sherlock Holmes* (1938)).



21. Finally, the majority asserts that this relationship between the eminent domain provisions in the NGA and FPA is of paramount importance because the Supreme Court “directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21” in *City of Tacoma v. Taxpayers of Tacoma*.<sup>52</sup> Except that it didn’t. In *City of Tacoma*, the Court held that section 313(b) of the FPA provided the “specific, complete and exclusive mode for judicial review of the Commission’s orders,”<sup>53</sup> that the issues then before the Court—which arose on appeal from a decision of the Supreme Court of Washington<sup>54</sup>—could only have been properly raised in an appeal pursuant to section 313(b), and that those issues were, in fact, raised in such an appeal to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit).<sup>55</sup> *City of Tacoma* is a case about the procedures for judicial review of Commission action, not the scope of eminent domain authority under the FPA. Accordingly, the fact that the Supreme Court was not, in the majority’s judgment, “alarm[ed]” by the prospect of eminent domain against state lands<sup>56</sup> is of no real help in deciding the issues before us today.

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<sup>52</sup> Order, 170 FERC ¶ 61,064 at P 45.

<sup>53</sup> *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

<sup>54</sup> *Id.* at 332-333.

<sup>55</sup> *Id.* at 339.

<sup>56</sup> Order, 170 FERC ¶ 61,064 at P 47.

22. The majority also points, albeit briefly, to the Ninth Circuit<sup>57</sup> case referenced in *City of Tacoma* and the Supreme Court's earlier decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.<sup>58</sup> But, once again, neither case squarely addresses the scope of the relevant eminent domain authority. Instead, both cases stand for a single clear proposition: That "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States."<sup>59</sup> That conclusion, which would appear to be a relatively straightforward application of the Supremacy Clause,<sup>60</sup> says nothing about the scope of the eminent domain authority in FPA section 21. The majority implies that the Ninth Circuit must have approved of the exercise of eminent domain against state property because the licensee in that case, the City of Tacoma, intended to exercise that authority.<sup>61</sup> But whatever the court may have thought about such an exercise of eminent domain is irrelevant, since the question before the court was whether a subdivision of a state could act contrary to state law if it was doing so pursuant to a federal license—a question that the court answered in the

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<sup>57</sup> *State of Wash. Dep't of Game v. FPC*, 207 F.2d 391 (9th Cir. 1953).

<sup>58</sup> 328 U.S. 152 (1946).

<sup>59</sup> 207 F.2d at 396-97 (citing *First Iowa*).

<sup>60</sup> *E.g., id.*

<sup>61</sup> Order, 170 FERC ¶ 61,064 at P 47.

affirmative, without addressing its implications for eminent domain.<sup>62</sup>

23. It bears repeating that I am not certain whether Congress intended section 7(h) of the NGA to apply to state lands or not. The evidence simply is not clear one way or the other. I have gone through the foregoing discussion to highlight the extent to which the Commission has misconstrued the evidence or ignored the limits of the authority on which it relies. 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.

24. Finally, the majority concludes by asserting that the Third Circuit's decision will "have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system."<sup>63</sup> That discussion is, frankly, the most honest part of today's order, as it reflects the majority's belief that the Third Circuit's decision is a bad outcome. But it is not clear just how "profound[]" or "adverse" those effects will actually turn out to be. That question depends on a number of factors that are difficult to predict in a vacuum.

25. For one thing, the primary effect of the Third Circuit's ruling may be to encourage pipeline developers to undertake greater efforts to cooperate

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<sup>62</sup> 207 F.2d at 396.

<sup>63</sup> Order, 170 FERC ¶ 61,064 at P 56.

and coordinate with the relevant states—not necessarily a bad outcome. And, moreover, it is not clear that requiring such coordination would represent an insuperable obstacle to pipeline development. After all, until recently, the Commission interpreted section 401 of the Clean Water Act<sup>64</sup> to create essentially the same type of state-level veto authority that the majority now sees in the Third Circuit’s decision.<sup>65</sup> And, notwithstanding that effective veto, the development of interstate pipelines did not exactly grind to a halt.<sup>66</sup>

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<sup>64</sup> 33 U.S.C. § 1341(a)(1) (2018).

<sup>65</sup> See *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (explaining that the “withdrawal-and-resubmission scheme” that the Commission had previously interpreted to be consistent with the Clean Water Act and the FPA was invalid because it would allow for the “indefinite[] delay [of] federal licensing proceedings and undermine FERC’s jurisdiction”).

<sup>66</sup> In 2017 and 2018, roughly 1,500 miles of interstate natural gas pipelines entered service with a combined capacity of 25 billion cubic feet per day (Bcf/d). FERC, *2018 State of the Markets Report* 7 (Apr. 2019), available at <https://www.ferc.gov/market-assessments/reports-analyses/st-mkt-ovr/2018-A-3-report.pdf> (“Over 13 Bcf/d and 689 miles of Commission-jurisdictional pipeline capacity entered service during 2018.”); FERC, *2017 State of the Markets Report* 4 (Apr. 2018), available at <https://www.ferc.gov/market-assessments/reports-analyses/st-mkt-ovr/2017-som-A-3-full.pdf> (“Nearly 12 Billion Cubic Feet per day (Bcf/d) and 773 miles of Commission-jurisdictional natural gas pipeline capacity went into service in 2017.”). The combined total capacity of those pipelines is equivalent to nearly a third of U.S. natural gas consumption. See U.S. Energy Info. Admin., *Short-Term Energy Outlook* (Jan. 2020), available at [https://www.eia.gov/outlooks/steo/pdf/steo\\_full.pdf](https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf) (“Total domestic U.S. natural gas consumption averaged an estimated 85.3 billion cubic feet per day (Bcf/d) in 2019.”).

26. And we must not forget that Congress can have the last say. If Congress disapproves of the Third Circuit's decision, it can step in and remedy the situation.<sup>67</sup> Congress has a long and well-documented history of responding to judicial decisions with which it disagrees, including decisions involving state sovereign immunity and the Eleventh Amendment.<sup>68</sup> If the Third Circuit's decision stands, Congress could, for example, amend section 7(h) of the NGA, attempt to validly abrogate state sovereign immunity under the NGA, or pursue measures, such as the "work-around" contemplated by the Third Circuit,<sup>69</sup> to facilitate pipeline developers' efforts to acquire rights-of-way over state land.

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<sup>67</sup> See *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); *Hamilton v. Lanning*, 560 U.S. 505, 537 (2010) (Scalia, J., dissenting) ("But it is in the hard cases, even more than the easy ones, that we should faithfully apply our settled interpretive principles, and trust that Congress will correct the law if what it previously prescribed is wrong."); *Teague v. Lane*, 489 U.S. 288, 317 (1989) (White, J., concurring in part and concurring in the judgment) ("If we are wrong . . . , Congress can of course correct us.").

<sup>68</sup> Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317, 1445 & n.453(2014) (explaining that Congress responded to the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), by explicitly abrogating state sovereign immunity not just in the Rehabilitation Act of 1973, the statute at issue in *Atascadero*, but also in a handful other statutes).

<sup>69</sup> *In re PennEast*, 938 F.3d at 113.

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For these reasons, I respectfully dissent.

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Richard Glick  
Commissioner

**Order Denying Rehearing, *PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135 (May 22, 2020)**

1. In this order, we deny rehearing of our January 30, 2020 order granting in part and denying in part a petition for declaratory order filed by PennEast Pipeline Company, LLC (PennEast).<sup>1</sup> In that order, we addressed the nature and scope of the eminent domain authority conferred to pipelines that have been granted a certificate of public convenience and necessity under the Natural Gas Act (NGA).

2. We issued the Declaratory Order in light of the recent Third Circuit decision finding that the NGA did not confer on pipeline certificate holders the right to condemn land in which states hold an interest.<sup>2</sup> In doing so, we determined that it was vitally important to provide our views on this issue of national significance, based on our decades of experience administering the NGA, given the profoundly adverse impacts of the Third Circuit's decision on the development of the nation's interstate natural gas transportation system. In our view, the Third Circuit's decision significantly undermines how the natural gas transportation industry has operated for decades.<sup>3</sup>

3. We found in the Declaratory Order that the text of NGA section 7(h),<sup>4</sup> as confirmed by the relevant legislative history, provides the holders of certificates

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<sup>1</sup> *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 (2020) (Declaratory Order).

<sup>2</sup> *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019) (*In re PennEast*), *reh'g en banc denied* (Nov. 5, 2019).

<sup>3</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 27, 56-65.

<sup>4</sup> 15 U.S.C. § 717f(h) (2018).

of public convenience and necessity with broad eminent domain authority to condemn land, including land in which a state holds an interest, necessary to construct, operate, and maintain a pipeline and appurtenant facilities.<sup>5</sup> We also explained that NGA section 7(h) does not authorize the Commission to condemn land on a certificate holder’s behalf, as the Third Circuit had suggested, as an alternative way for pipelines to be routed through state lands.<sup>6</sup> However we declined to answer constitutional questions raised by the petition as being outside the Commission’s jurisdiction.<sup>7</sup>

4. One party—the Delaware Riverkeeper Network (Riverkeeper)—filed a request for rehearing of the Declaratory Order on February 26, 2020. We deny rehearing for the reasons discussed below.

### **I. Background**

5. On January 19, 2018, in Docket No. CP15-558-000, the Commission issued a certificate of public convenience and necessity for the PennEast Project.<sup>8</sup> Due to the inability to reach an agreement with New

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<sup>5</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 25, 32, 48, 66.

<sup>6</sup> See *id.* PP 26, 49-53.

<sup>7</sup> See *id.* PP 27, 54-55.

<sup>8</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (Certificate Order), *order on reh’g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom. Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, *et al.* (first petition filed May 9, 2018) (argument held in abeyance on October 1, 2019, “pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit’s decision”).



Jersey to acquire easements for the portions of its certificated pipeline route that would cross land in which New Jersey holds a property interest,<sup>9</sup> PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District Court) in order to obtain these and other necessary easements.<sup>10</sup> New Jersey claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation: two parcels in which New Jersey holds fee simple ownership interests, and forty parcels in which New Jersey claims nonpossessory property interests, including conservation easements and restrictive covenants mandating under state law a particular land use.<sup>11</sup> The District Court granted PennEast's application for orders of condemnation and rejected New Jersey's sovereign immunity argument.<sup>12</sup>

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<sup>9</sup> PennEast October 4, 2019 Petition (Petition) at 5-6. Riverkeeper states that New Jersey asserted in the Third Circuit case that PennEast did not attempt to contract with New Jersey to obtain the necessary rights-of-way. Riverkeeper February 26, 2020 Request for Rehearing at 4 n.10. The Third Circuit noted New Jersey's argument that "PennEast had failed to satisfy the jurisdictional requirements of the NGA by not attempting to contract with the State for its property interests." *In re PennEast*, 938 F.3d at 101. Whether PennEast satisfied the prerequisites for filing an eminent domain action was a matter, if raised, for the court to consider. Riverkeeper's argument is not relevant to the questions addressed in this proceeding.

<sup>10</sup> Petition at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, \*12, 25 (D.N.J. Dec. 14, 2018).

6. New Jersey appealed to the United States Court of Appeals for the Third Circuit (Third Circuit), which vacated the District Court’s order, and held that the NGA does not abrogate New Jersey’s sovereign immunity.<sup>13</sup> The Third Circuit found that while the NGA delegates eminent domain authority to certificate holders, it “does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.”<sup>14</sup> In the court’s view, “there are powerful reasons to doubt the delegability of the federal government’s exemption from Eleventh Amendment immunity,”<sup>15</sup> particularly when that delegation occurs through a statute enacted pursuant to the Commerce Clause.<sup>16</sup> However, the court consciously avoided that constitutional question<sup>17</sup> by holding that the text of

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<sup>13</sup> *In re PennEast*, 938 F.3d at 99. PennEast filed a petition for certiorari with the Supreme Court on February 18, 2020.

<sup>14</sup> *Id.* at 112-13; *accord id.* at 99-100; *see id.* at 111-12.

<sup>15</sup> *Id.* at 105; *accord id.* at 111; *see id.* at 100; *id.* at 107-11 (reviewing precedent).

<sup>16</sup> *Id.* at 105, 108 & nn.13, 15 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996)); *see also id.* at 108 & n.13 (explaining that *Seminole Tribe* abrogated *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>17</sup> *See id.* at 111 (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008) (“As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.”)); *id.* at 111-12 (quoting *Guerrero- Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (describing the “cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”) (citation and alterations omitted)).

the NGA failed to provide an “unmistakably clear” delegation of the federal government’s exemption from Eleventh Amendment immunity.<sup>18</sup> Ultimately, the Third Circuit declined to “assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design.”<sup>19</sup>

7. On October 4, 2019, PennEast petitioned the Commission to issue a declaratory order providing the Commission’s interpretation of three questions under NGA section 7(h):

- 1) Whether a certificate holder’s right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;
- 2) Whether NGA section 7(h) delegates the federal government’s eminent domain authority solely to certificate holders; and
- 3) Whether NGA section 7(h) delegates to certificate holders the federal government’s exemption from claims of state sovereign immunity.<sup>20</sup>

8. On January 30, 2020, the Commission issued a Declaratory Order granting in part and denying in part PennEast’s petition. Specifically, the Commission provided its interpretation, as the agency that administers the NGA, that NGA section 7(h) confers

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<sup>18</sup> *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); see *id.* at 107-08 & n.12 (discussing *Dellmuth* and *Atascadero*).

<sup>19</sup> *Id.* at 112.

<sup>20</sup> See Petition at 2.

to certificate holders the federal government’s eminent domain authority to condemn any land necessary to effectuate the certificate, including state land.<sup>21</sup> The order stated that the Commission—like its predecessor, the Federal Power Commission (FPC)—has held this view since its inception.<sup>22</sup>

9. The Declaratory Order also explained why we disagreed with the Third Circuit’s suggestion that there is a “workaround” whereby the Commission itself may condemn land needed for a certificated pipeline when a state holds an interest in such land.<sup>23</sup> As we explained, the Commission lacks the statutory authority and the administrative mechanisms needed to condemn state land on behalf of certificate holders.<sup>24</sup> Further, we declined to address the constitutional questions raised in the petition, namely, whether NGA section 7(h) delegates to certificate holders the federal government’s exemption from state claims of sovereign immunity pursuant to the Eleventh Amendment.<sup>25</sup>

## II. Procedural Matters

10. On March 17, 2020, PennEast filed a motion for leave to answer and answer to the request for rehearing. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure prohibits an answer to a request for rehearing “unless otherwise ordered by the

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<sup>21</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 28-48.

<sup>22</sup> See *id.* P 25 & n.108; *id.* P 36 & nn.148-50.

<sup>23</sup> *In re PennEast*, 938 F.3d at 113.

<sup>24</sup> Declaratory Order, 170 FERC ¶ 61,064 at PP 49-53.

<sup>25</sup> *Id.* PP 54-55.

decisional authority.”<sup>26</sup> We are not persuaded to accept PennEast’s answer and will, therefore, reject it.

### III. Discussion

#### A. Threshold Issues

11. Riverkeeper raised three threshold issues that do not go to the merits of the Declaratory Order, asserting that: (1) the Commission may only issue declaratory orders “to terminate a controversy or remove uncertainty regarding a matter within the Commission’s jurisdiction;”<sup>27</sup> (2) the Declaratory Order violates the separation of powers doctrine;<sup>28</sup> and (3) agency declaratory orders are owed no deference.<sup>29</sup> These arguments have no merit and are easily resolved.

12. The Third Circuit’s opinion created uncertainty about the entire regulatory scheme established under the NGA.<sup>30</sup> As the agency responsible for

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<sup>26</sup> 18 C.F.R. § 385.213(a)(2) (2019).

<sup>27</sup> Request for Rehearing at 11.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 7-8.

<sup>30</sup> Since its adoption, the NGA has provided the regulatory scheme established by Congress to promote the orderly development of natural gas pipelines in interstate commerce so as to provide access to and the development of natural gas at just and reasonable rates. The amendment to the NGA in 1947 that provided a certificate holder with the sovereign power of eminent domain has been consistently applied against the states since its adoption. The decision of the Third Circuit would change over 70 years of precedent in applying NGA section 7. In addition, the Third Circuit’s proposed “work around” of having the Commission condemn land on behalf of the applicant has no statutory basis, would expand the powers of the Commission, and would require Congress to both authorize and appropriate

administering this Act, it is entirely appropriate for this Commission to provide its views on this issue and on the far-reaching effects of the Third Circuit's opinion if allowed to stand. We do this not as an attempt to overrule the Third Circuit, but to provide our views based on our experience in administering the NGA. Furthermore, we believe that we are entitled to deference as to reasonable interpretations of our own regulations.<sup>31</sup> We address each of these issues in detail below.

### **1. Issuance of the Declaratory Order was Not a Violation of Commission Regulations**

13. Riverkeeper asserts that the Commission, by issuing the Declaratory Order, violated its own guidance and regulations regarding declaratory orders,<sup>32</sup> claiming that the Commission may only issue declaratory orders “to terminate a controversy or remove uncertainty regarding a matter within the Commission’s jurisdiction.”<sup>33</sup> Riverkeeper contends the Declaratory Order contravened Commission

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funding to engage in such acquisitions on behalf of certificate holders.

<sup>31</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (“Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law.”); see also Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; cf. *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 712 (1994) (finding that EPA’s interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

<sup>32</sup> Request for Rehearing at 6.

<sup>33</sup> *Id.* at 11.

regulations because, in its view, no controversy or uncertainty has been presented to the Commission and the Commission lacks jurisdiction over the “eminent domain proceedings or controversies.”<sup>34</sup>

14. As the agency charged with administration of the NGA, the Commission may issue declaratory orders to interpret the NGA and any section therein.<sup>35</sup> Furthermore, we are entitled to deference as to reasonable interpretations of our own regulations.<sup>36</sup>

15. Riverkeeper asserts the Commission’s authority to issue a declaratory order is narrow and limited.<sup>37</sup> But Rule 207 permits a party to petition for a declaratory order in order to “terminate a controversy or remove uncertainty,”<sup>38</sup> and “does not define what sort of uncertainty may be appropriate to justify a petition for declaratory relief.”<sup>39</sup> The Commission has explained that a declaratory order “provides direction to the public and our staff regarding the statutes we administer.”<sup>40</sup> Further, we continue to find that the Third Circuit’s opinion—particularly the suggestion

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<sup>34</sup> *Id.*

<sup>35</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; *cf. PUD*, 511 U.S. at 712 (finding that EPA’s interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

<sup>36</sup> See *Kisor*, 139 S. Ct. at 2422 (“Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law.”).

<sup>37</sup> Request for Rehearing at 11-13.

<sup>38</sup> 18 C.F.R. § 385.207(a)(2) (2019).

<sup>39</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 16.

<sup>40</sup> *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) (emphasis added).

that there is there is a “workaround” through which the Commission itself may condemn property—created uncertainty and required the Commission to explain why such a work-around is neither feasible nor authorized under NGA section 7(h).<sup>41</sup> Accordingly, the Commission properly determined it was both appropriate and necessary to provide guidance on how section 7(h) was intended to operate and has been applied since 1947.<sup>42</sup>

16. Riverkeeper contends that “the ‘controversy’ was a legal, constitutional matter before the courts and the ‘uncertainty’ was resolved by the Third Circuit.”<sup>43</sup> We disagree. The uncertainty that the Declaratory Order addressed was with respect to the Commission’s interpretation of the language of section 7(h) and whether there is an administrative “work-around” to avoid the deleterious effects of the court’s holding. Nothing in the Declaratory Order purports to address constitutional matters; indeed, the Declaratory Order expressly declined to address constitutional questions.<sup>44</sup>

17. Riverkeeper asserts that “[t]he Commission cannot issue a binding policy statement that is directly contrary to a holding of the Third Circuit.”<sup>45</sup> However, the Declaratory Order is an interpretative action, not a policy statement (nor are policy statements binding). Even if the Third Circuit’s decision conflicts with the

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<sup>41</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 49.

<sup>42</sup> *See id.* P 65.

<sup>43</sup> Request for Rehearing at 11.

<sup>44</sup> Declaratory Order, 170 FERC ¶ 61,064 at PP 14, 27, 39, 55.

<sup>45</sup> Request for Rehearing at 13.



Commission's interpretation of section 7(h), the Commission is still permitted to provide its interpretation of the statute it administers.<sup>46</sup> The Commission did not purport to overrule the court's decision, an action it has no authority to take. Rather, due to the potential for nationwide litigation and for confusion in the energy sector, we reached the legitimate conclusion that the interpretation by the Commission may benefit other courts where the issues raised here may arise as matters of first impression.<sup>47</sup> Indeed, another case pending in the United States Court of Appeals for the Fourth Circuit has raised the same issues addressed in the Third Circuit's decision.<sup>48</sup>

## **2. Issuance of the Declaratory Order Did Not Violate the Separation of Powers Doctrine**

18. Riverkeeper asserts that the Declaratory Order violates the separation of powers doctrine,<sup>49</sup> contending that the Third Circuit's opinion "construed the law", and that the Commission, in issuing the Declaratory Order after the issuance of the Third Circuit's opinion "is acting as though it were a court of

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<sup>46</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (finding that an appellate court's prior interpretation of an ambiguous statutory provision did not preclude a federal agency from adopting a contrary reasonable interpretation in subsequent proceedings).

<sup>47</sup> See *id.*

<sup>48</sup> See *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed 4th Cir., No. 19-2040, Sept. 20, 2019).

<sup>49</sup> Request for Rehearing at 7.

higher authority and not a part of the executive branch.”<sup>50</sup>

19. Several parties raised separation of powers concerns in comments on PennEast’s Petition, which we address in the Declaratory Order. Regarding such assertions, we state in the Declaratory Order that “[w]e have no authority to [‘]overrule[‘] a precedential opinion of a United States Court of Appeals.”<sup>51</sup> As we explained, the purpose of the Declaratory Order was only to “set out the Commission’s interpretation of a statute it administers[,]” not to somehow overturn, or otherwise undermine the Third Circuit’s opinion;<sup>52</sup> nor was the Declaratory Order an attempt to “improperly influence potential litigation in other circuits[,]” as Riverkeeper contends.<sup>53</sup> Further, the Commission does not purport to decide any constitutional questions implicated by the petition.<sup>54</sup> Thus, we find that it is appropriate for the Commission to provide its interpretation of section 7(h), particularly given the statute’s ambiguity and silence with respect to lands in which states hold an interest,<sup>55</sup> and reiterate our determination that

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<sup>50</sup> *Id.* at 16.

<sup>51</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 23.

<sup>52</sup> *Id.* P 23 (“[T]his order neither compels the Third Circuit to reverse its decision, nor compels New Jersey to consent to suit, nor compels any landowner to transfer its property. This order does nothing more than set out the Commission’s interpretation of a statute it administers.”).

<sup>53</sup> Request for Rehearing at 17.

<sup>54</sup> Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

<sup>55</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Deference under *Chevron* to an agency’s construction

providing this interpretation “does not implicate any separation of powers concerns.”<sup>56</sup>

20. Protestors claim that, as a general rule, agency declaratory orders are owed no deference.<sup>57</sup> We disagree. Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.<sup>58</sup> Deference is appropriate “if the statute is silent or ambiguous with respect to the specific issue[.]”<sup>59</sup> The Third Circuit held that NGA section 7(h) is silent with regard to whether “Congress intended to delegate the federal government’s exemption from state sovereign immunity to private gas companies” and, for the purpose of avoiding a constitutional conflict, declined to “assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design.”<sup>60</sup> The Commission’s interpretation of NGA section 7(h) stems from decades of experience in administering the comprehensive NGA regulatory scheme, and it is a reasonable interpretation of the text of NGA section 7(h), confirmed by the legislative history of that provision and the Federal Power Act

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of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”).

<sup>56</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 15.

<sup>57</sup> Request for Rehearing at 7-8.

<sup>58</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 15; see *City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013); *Brand X*, 545 U.S. at 982; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*).

<sup>59</sup> *Chevron*, 467 U.S. at 843.

<sup>60</sup> *In re PennEast*, 938 F.3d at 112; Declaratory Order, 170 FERC ¶ 61,064 at P 15 n.61.

(FPA) hydroelectric licensing provision on which NGA section 7(h) was modeled. In any event, whether our order warrants deference is matter for the courts to address: that question does not preclude us from issuing a declaratory order in response to a petition from a regulated entity.

21. Riverkeeper also asserts that the Third Circuit “held that there is no statutory ambiguity in the NGA with regard to federal delegation of eminent domain powers to private parties to condemn a State’s property interest.”<sup>61</sup> In doing so, Riverkeeper cites to the Third Circuit’s discussion of the Supreme Court’s *Blatchford* decision,<sup>62</sup> specifically the need for “unmistakably clear language in the statute” in order to abrogate state sovereign immunity. Riverkeeper improperly conflates whether there is ambiguity that permits an agency to interpret the statute it administers with the requirement for “unmistakably clear language” needed to indicate congressional intent to abrogate. As noted above, the Declaratory Order does not address the latter, i.e., whether section 7(h) abrogates a State’s sovereign immunity.

22. Riverkeeper contends that the Commission does not “qualify for *Chevron* deference” when construing NGA section 7(h).<sup>63</sup> We disagree. As discussed in the Declaratory Order, the Commission has not disclaimed jurisdiction over every possible issue that may be deemed “related to the acquisition of property

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<sup>61</sup> Request for Rehearing at 18.

<sup>62</sup> *In re PennEast*, 938 F.3d at 102 (citing *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775 (1991)).

<sup>63</sup> Request for Rehearing at 19.

rights by a pipeline.”<sup>64</sup> The Commission acknowledges that Congress put the burden of executing condemnation proceedings on state and district courts through NGA section 7(h),<sup>65</sup> and the Commission has appropriately refused to adjudicate issues such as “the timing of acquisition or just compensation.”<sup>66</sup> Nevertheless, the Declaratory Order was appropriate under our statutory mandate because it addresses the operation of NGA section 7(h) within the NGA’s “comprehensive scheme of federal regulation.”<sup>67</sup> While Riverkeeper may disagree with the Commission’s interpretation,<sup>68</sup> it is nonetheless our duty to ensure

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<sup>64</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 13.

<sup>65</sup> See 15 U.S.C. § 717f(h).

<sup>66</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 13 n.47 (quoting *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018) and *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018)).

<sup>67</sup> See *id.* PP 19, 27 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quoting *N. Nat. Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 91 (1963))) (internal quotation marks omitted); see also 15 U.S.C. § 717(b) (2018).

<sup>68</sup> See Request for Rehearing at 17 (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 23 (Glick, Comm’r, dissenting)). The dissent to this rehearing order states that reviewing courts need not defer to the Commission’s interpretation of NGA section 7(h), arguing that “*Chevron* ‘deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.” *Infra* P 4 (Comm’r Glick, dissenting). The dissent argues, however, that in construing section 7(h) “a reasonable person could find only ambiguity and questions left unanswered,” *id.* P 1, so the dissent’s objections necessarily turn on the argument that “the Commission has no role to play whatsoever in administering that provision,” *id.* P 5. We disagree. The Commission administers the certification process under NGA

the faithful execution of the NGA,<sup>69</sup> which includes the removal of uncertainty and termination of controversy.<sup>70</sup>

23. Additionally, Riverkeeper asserts that declaratory orders are not entitled to *Chevron* deference and do not have any legal weight. We disagree. Riverkeeper mistakenly bases this contention on the D.C. Circuit's decision in *Industrial Cogenerators v. FERC*,<sup>71</sup> arguing that "courts have held that unlike a declaratory order of a court, a declaratory order of FERC 'is of no legal' moment and

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section 7, which relies on the eminent domain authority granted to certificate holders under NGA section 7(h) to effectuate the federal regulatory scheme and give effect to the Commission's determination that a given pipeline route "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). We have found that nothing in any part of NGA section 7—including NGA section 7(h)—limits the Commission's authority to grant a certificate that crosses state-owned land or land over which a state asserts some lesser property interest. *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 32-34, 66. We think that the text of the statute, as further confirmed by the legislative history, compels only one conclusion. *Id.* P 32. But, to the extent that a reviewing court may find that NGA section 7 is ambiguous because it does not specifically discuss the Eleventh Amendment, the Commission's interpretation should be entitled to judicial deference in order to ensure the successful administration of the federal regulatory scheme when confronted with a contrary interpretation that permits states to nullify the Commission's certificate authority through a collateral attack mounted in eminent domain proceedings.

<sup>69</sup> *See* 15 U.S.C. § 717(a).

<sup>70</sup> 18 C.F.R. § 385.207(a)(2).

<sup>71</sup> 47 F.3d 1231 (D.C. Cir. 1995).

would be legally ineffectual.”<sup>72</sup> Riverkeeper, however, has taken language from that decision out of context. The quoted language was directed to the declaratory order at issue in that case, and it addressed whether the declaratory order was binding on specific parties. The D.C. Circuit’s opinion continues with the following:

The Commission nowhere purported to make the Declaratory Order binding upon the [Florida Public Service Commission], nor can we imagine how it could do so. *Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission’s position.* It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position. *While such knowledge of the FERC’s position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency’s regulations in an private enforcement action; and because that could only be a district court, this court cannot have*

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<sup>72</sup> Request for Rehearing at 21-22 (quoting *Indust. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995)).

pre-enforcement jurisdiction to review the Declaratory Order.<sup>73</sup>

Nothing in the D.C. Circuit’s opinion suggests that the Commission’s statutory interpretation, which may be articulated through the issuance of a declaratory order, is not entitled to deference. To the contrary, the D.C. Circuit recognizes that a Declaratory Order has to the “ability to persuade (*or to command the deference of*) a court that might later have been called upon to interpret the Act and the agency’s regulations.”<sup>74</sup> Further, Riverkeeper’s reliance on purportedly contrary precedent concerning “opinion letters . . . policy statements, agency manuals, and enforcement guidelines” is misplaced<sup>75</sup> because, as previously stated, declaratory orders command deference. Indeed, the Supreme Court has applied deference to an agency’s declaratory interpretations of a statute the agency administers.<sup>76</sup>

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<sup>73</sup> *Indus. Cogenerators v. FERC*, 47 F.3d at 1235 (emphasis added).

<sup>74</sup> *Id.* (emphasis added).

<sup>75</sup> See Request for Rehearing at 21 (quoting *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

<sup>76</sup> See, e.g., *City of Arlington*, 569 U.S. at 307 (applying *Chevron* deference to the FCC’s declaratory ruling regarding its own jurisdiction because “Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority”). The Commission, “*with like effect as in the case of other orders*, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e) (2018) (emphasis added).



**3. Issuance of the Declaratory Order, rather than Participation in the Third Circuit Proceeding, was an Appropriate Means of Addressing the Relevant Issues**

24. Riverkeeper attempts to relitigate its claim that administrative agencies are not permitted to issue declaratory orders after court decisions unless they have participated in prior litigation.<sup>77</sup> As explained in the Declaratory Order, we disagree.<sup>78</sup> The Third Circuit's decision does not bind other courts of appeals or preclude the Commission from subsequently adopting a different interpretation of the statute.<sup>79</sup> As the Supreme Court has recognized, allowing a single court of appeals to bind all subsequent agency interpretations of a statute would "lead to the ossification of large portions of our statutory law."<sup>80</sup> Despite Riverkeeper's repeated contentions, neither the Administrative Procedure Act (APA) nor the Commission's regulations indicate that the Commission's authority to issue a declaratory order is contingent on its participation in litigation.<sup>81</sup> As we previously stated, it would be impractical for the Commission to intervene in every condemnation proceeding involving an interstate natural gas

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<sup>77</sup> See Request for Rehearing at 8.

<sup>78</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 19.

<sup>79</sup> *Brand X*, 545 U.S. at 982; cf. *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (finding the doctrine of nonmutual offensive collateral estoppel inapplicable against non-private litigants).

<sup>80</sup> *Brand X*, 545 U.S. at 983.

<sup>81</sup> See 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2).

pipeline company.<sup>82</sup> Moreover, the issuance of a declaratory order provides the Commission's formal interpretation, as opposed to *ad hoc* litigation pleadings filed by Commission staff.<sup>83</sup> In issuing the Declaratory Order, the Commission complied with past agency practice as well as its statutory mandates under the APA and NGA.<sup>84</sup>

**B. Congress Intended NGA Section 7(h) to Empower Certificate Holders to Condemn Lands in which the State Maintains an Interest**

25. We now address the merits. Riverkeeper contends that the Declaratory Order's conclusion that Congress intended to grant broad eminent domain authority to certificate holders through NGA section 7(h) is "dead wrong."<sup>85</sup> We disagree.

26. First, Riverkeeper asserts that NGA section 7(h) lacks the unmistakably clear language necessary to abrogate Eleventh Amendment immunity.<sup>86</sup> Riverkeeper further contends that the Commission inappropriately looked to legislative history despite the "clear statement rule" and the Commission's

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<sup>82</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 19.

<sup>83</sup> *Id.*

<sup>84</sup> *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

<sup>85</sup> Request for Rehearing at 25.

<sup>86</sup> *Id.* at 26-31.

recognition that NGA section 7(h) is silent with regard to the states.<sup>87</sup> To support this claim, Riverkeeper cites precedent under the Rehabilitation Act<sup>88</sup> and the Education of the Handicapped Act.<sup>89</sup>

27. Riverkeeper's argument fails for two reasons. First, the Declaratory Order did not need to consider the Eleventh Amendment clear statement rule, which instructs courts not to interpret a statute in a way that abrogates states' rights unless the statute unmistakably intends that result,<sup>90</sup> because the Commission assumes the constitutionality of the statutes it administers. Rather, the Commission's determination was confined to interpreting NGA section 7(h), using typical rules of construction, as further informed by the legislative history of NGA section 7(h) and FPA section 21.<sup>91</sup>

28. Second, employing the federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule. Though not addressing the specific 11th Amendment argument, we note for the purposes of statutory interpretation that the precedents cited by Riverkeeper are inapplicable here because they did not involve a grant of the federal eminent domain power, but rather a grant of authority for individuals

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<sup>87</sup> See Request for Rehearing at 30.

<sup>88</sup> See *Atascadero*, 473 U.S. 234.

<sup>89</sup> See *Dellmuth*, 491 U.S. 223.

<sup>90</sup> See *id.*, 491 U.S. at 228; *Atascadero*, 473 U.S. at 242.

<sup>91</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

to obtain monetary damages.<sup>92</sup> Since only the sovereign may confer the power of eminent domain, and the grant of eminent domain is express, there is no question as to the character of the power conferred.<sup>93</sup> Moreover, states are able to raise any objections they have to the route set in a Commission certification proceeding during that proceeding, on rehearing, and on direct judicial review of the Commission's orders.<sup>94</sup> Accordingly, the Commission appropriately found the absence of limiting language

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<sup>92</sup> Compare *Dellmuth*, 491 U.S. at 232 (holding that “[t]he Eleventh Amendment bars respondent’s attempt to collect tuition reimbursement”) and *Atascadero*, 473 U.S. at 235, 247 (finding that “litigants seeking retroactive monetary relief under [29 U.S.C. § 794]” were barred by the Eleventh Amendment) with *Blatchford*, 501 U.S. at 785 (recognizing that, “[t]o avoid [the clear statement rule], respondents assert that [28 U.S.C.] § 1362 represents not an abrogation of the States’ sovereign immunity, but rather a delegation to tribes of the Federal Government’s exemption from state sovereign immunity”) and *In re PennEast*, 938 F.3d at 112-13 (vacating because “sovereign immunity has not been abrogated by the NGA, nor has there been . . . a delegation of the federal government’s exemption from the State’s sovereign immunity”).

<sup>93</sup> Compare *Blatchford*, 501 U.S. at 785-86, 788 (refusing to find delegation in a general “arising under” statute) with *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) (upholding a private railroad corporation’s condemnation of tribal land because “it is necessary that the United State government should have an eminent domain still higher than that of the state in order that it may fully carry out the objects and purposes of the constitution”).

<sup>94</sup> See Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)); see also *infra* P 23.

in NGA section 7(h) supported its decision to consider the legislative history.

29. Riverkeeper additionally argues that the legislative history of the NGA and the FPA is irrelevant and inconclusive. The Declaratory Order explains why we disagree. As a threshold matter, Riverkeeper's assertion that the clear statement rule precludes interpretation of the legislative history is inapplicable to the instant case because this case involves a certificate holder's exercise of the federal power of eminent domain, not the abrogation of state sovereign immunity from suits for monetary damages. Riverkeeper asserts that the Commission took "a large, unsupported leap of logic" in finding that the Declaratory Order was supported by legislative history of NGA section 7(h).<sup>95</sup> The legislative history is replete with concern over state interference with the build-out of energy infrastructure, explaining Congress' decision to grant the federal eminent domain power to certificate holders, free from potential state interference.<sup>96</sup>

30. Riverkeeper further challenges our reference in the Declaratory Order to Congress' amendment of FPA section 21 to impose restrictions on holders of hydroelectric licenses ability to condemn state lands pursuant to the parallel grant of eminent domain

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<sup>95</sup> Request for Rehearing at 35.

<sup>96</sup> See Declaratory Order, 170 FERC ¶ 61,064 at PP 40-41; S. Rep. No. 80-429, at 4 (1947) ("If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.").

authority under the FPA. As we explained, “the congressional choice to restrict private licensees’ eminent-domain authority under FPA section 21—but not private certificate holders’ authority under NGA section 7(h)—shows that Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21.”<sup>97</sup>

31. Riverkeeper asserts that the Commission cannot “extrapolate congressional intent” regarding NGA section 7(h) from the legislative history of FPA section 21.<sup>98</sup> However, we consider the legislative history and judicial interpretations of statutory text that Congress “follow[ed] substantially” in the creation of NGA section 7(h) to be informative and persuasive.<sup>99</sup> Additionally, we do not find the fact that “[t]he FPA . . . was amended during the period between *Union Gas* and the overruling of *Union Gas* by *Seminole Tribe*” to be significant.<sup>100</sup>

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<sup>97</sup> Declaratory Order, 170 FERC ¶ 61,064 at PP 42-44.

<sup>98</sup> Request for Rehearing at 37.

<sup>99</sup> S. Rep. No. 80-429, at 1. The Supreme Court “has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016) (citation omitted) (recognizing provisions of the FPA and NGA to be “analogous”); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its “established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]” due to the relevant provisions being “substantially identical”) (citations omitted).

<sup>100</sup> Request for Rehearing at 37. Riverkeeper submits that the forty-five years between the passage of NGA section 7(h) and the 1992 amendment of FPA section 21 detract from the Commission’s position that the amendment elucidates Congress’s

32. We are likewise unpersuaded by Riverkeeper’s challenge to the Commission’s reliance on the Supreme Court’s ruling in *City of Tacoma*, which involved a hydroelectric licensee’s condemnation of state land. Riverkeeper asserts that the Supreme Court’s decision was based on procedural grounds and did not address the merits of whether the licensee could condemn state land.<sup>101</sup>

33. We recognize that *City of Tacoma* was dismissed on procedural grounds due to it being an “impermissible collateral attack[] upon . . . the final judgment of the Court of Appeals,”<sup>102</sup> which had declined to interfere with the Commission’s license order.<sup>103</sup> Nonetheless, the question presented to the Court was: “whether . . . the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued . . . under the Federal Power Act and more particularly [section] 21 thereof.”<sup>104</sup> As stated in the Declaratory Order,

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intent as to the scope of the eminent domain authority provided for in NGA section 7(h) and FPA section 21 prior to its amendment. *Id.* (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 18 (Glick, Comm’r, dissenting)). We disagree and note that the Energy Policy Act of 1992 also amended portions of the NGA while leaving unchanged the language of NGA section 7(h).

<sup>101</sup> *Id.* at 39.

<sup>102</sup> *City of Tacoma*, 357 U.S. at 341.

<sup>103</sup> *State of Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391, 398 (9th Cir. 1953).

<sup>104</sup> *City of Tacoma*, 357 U.S. at 323. Despite the dissent’s assertion that *City of Tacoma* “says nothing about the issue now before us[.]” *infra* P 8 (Glick, Comm’r, dissenting), we are not so

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eager to dismiss instruction from the Supreme Court. Moreover, we fail to see why raising a collateral attack to the Commission's certificate orders in an eminent domain proceeding is any more acceptable than other types of collateral attack on certificate orders that the federal courts routinely dismiss on the basis of the Supreme Court's decision in *City of Tacoma*. For example, the Third Circuit itself recently affirmed the dismissal of a complaint alleging that a pipeline certificate order violated the Religious Freedom Restoration Act, explaining that:

Indeed, the Supreme Court has long held that the Federal Power Act's ("FPA"), statutory review scheme, 16 U.S.C. § 825*l*, which is materially identical to the NGA's, "necessarily preclude[s] de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review," and that challenges brought in the district court outside that scheme are therefore "impermissible collateral attacks." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 341 (1958); *see also Me. Council of the Atl. Salmon Fed. v. Nat'l Me. Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) ("The Supreme Court has made clear that the jurisdiction provided by [the Federal Power Act's jurisdictional provision] is 'exclusive,' not only to review the terms of the specific FERC order, but over any issue 'inhering in the controversy.'" (quoting *City of Tacoma*, 357 U.S. at 336).

*Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 197 (3d Cir. 2018) (footnotes and parallel citations omitted), *cert. denied*, 139 S. Ct. 1169 (2019); *see also, e.g., Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) ("Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding, *McCulloch [Interstate Gas Corp. v. Fed. Power Comm'n]*, 536 F.2d [255,] at 913 [(10th Cir. 1976)] . . . Moreover, the prohibition on collateral attacks applies whether the collateral action is brought in state court, *e.g., City of Tacoma*, or federal court, *e.g., McCulloch*"); *Woodrow v. FERC*, No. 20-6 (JEB), slip op. at 9-10 (D.D.C. May 6, 2020) (dismissing several constitutional challenges to the



“*City of Tacoma* emphasized that Congress intended to commit all questions associated with the issuance of a license—including the ‘legal competence of the licensee’ to condemn state land—to the Commission alone, with judicial review of the Commission’s orders to take place exclusively in the relevant court of appeals or, following such direct review, in the Supreme Court[.]”<sup>105</sup>

34. In the Declaratory Order, the Commission cited to the Fifth Circuit’s *Thatcher* decision, decided shortly after the enactment of NGA section 7(h). As the Commission explained, *Thatcher*<sup>106</sup> “resolved several other constitutional objections, including claims that NGA section 7(h) invaded authority reserved to the States under the Tenth Amendment.”<sup>107</sup> Riverkeeper argues that *Thatcher* is inapplicable because it did not explicitly address the Eleventh Amendment. We never asserted otherwise and explicitly acknowledged this point in the Declaratory Order.,<sup>108</sup> However, the novel claim that section 7(h) did not confer the right to condemn state land required the Commission, like any adjudicator, to draw analogies, inferences, and comparisons to come to a determination. Drawing

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Commission’s pipeline authority, and citing, among numerous other collected cases, *City of Tacoma*, *Adorers of the Blood of Christ*, and *Williams*).

<sup>105</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma*, 357 U.S. at 336-37).

<sup>106</sup> *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950).

<sup>107</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 35.

<sup>108</sup> *Id.* (“*Thatcher* did not address the Eleventh Amendment, but resolved several other constitutional objections . . .”).

such inferences in these circumstances is neither improper nor unusual. In that regard, *Thatcher* appropriately informed the Commission regarding implementation of NGA section 7(h), as the Fifth Circuit upheld the constitutionality of Congress's grant of federal eminent domain authority to certificate holders against a Tenth Amendment challenge.<sup>109</sup>

35. After challenging the Commission's reliance on *Thatcher*, Riverkeeper asserts that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by any judicial precedent. However, neither Riverkeeper nor the dissent note any precedent prior to the Third Circuit's decision, other than a 2017 federal district court decision,<sup>110</sup> supporting a contrary interpretation of the Commission's otherwise unchallenged interpretation of NGA section 7(h). That the issue had not been raised in the courts in 70 years despite extensive pipeline construction reinforces the Commission's conclusion that section 7(h) confers the right to condemn state lands. Prior to 2017, it does not appear that courts doubted that proposition.

36. Riverkeeper further alleges that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by Commission precedent,<sup>111</sup> mischaracterizing supportive

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<sup>109</sup> *Thatcher*, 180 F.2d at 647; see Declaratory Order, 170 FERC ¶ 61,064 at P 35.

<sup>110</sup> See *Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

<sup>111</sup> Request for Rehearing at 31-34.

Commission precedent as “a single [Administrative Law Judge (ALJ)] opinion[.]”<sup>112</sup> The dissent similarly errs,<sup>113</sup> contending that “the Commission had, what was to my knowledge, an unblemished record of ducking any and all questions related to section 7(h)[.]”<sup>114</sup> That is incorrect.<sup>115</sup> First the decision of the ALJ in *Tenneco Atlantic* referenced in the Declaratory Order repeated verbatim the reasoning of a statutorily-mandated Presidential recommendation from the Federal Power Commission, issued in that same year, which likewise found that “[t]he eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands.”<sup>116</sup>

37. Second, the FPC decision cited in *Tenneco Atlantic* constitutes yet another precedent. That decision addressed numerous issues arising from the legislation<sup>117</sup> directing the FPC to make recommendations regarding the construction of the so-called Alaska Natural Gas Transportation Systems

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<sup>112</sup> *Id.* at 32-33 & n.39 (citing Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm’r, dissenting)).

<sup>113</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm’r, dissenting).

<sup>114</sup> *Infra* P 6 (Glick, Comm’r, dissenting).

<sup>115</sup> Declaratory Order, 170 FERC ¶ 61,064 at PP 12-13 (Glick, Comm’r, dissenting) (discussing cases in which the Commission dealt with Eleventh Amendment issues implicated by NGA section 7(h)).

<sup>116</sup> *Id.* at P 25 n.108 (quoting *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025 (1977); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977)).

<sup>117</sup> Alaska Natural Gas Transportation Act, 15 U.S.C. § 719 (2018).

(ANGTS) intended to transport natural gas from fields on Alaska's North Slope. One such issue was the ability of a certificate holder to use its section 7(h) eminent domain authority to condemn the extensive Alaska state land ANGTS necessarily would have to traverse. The FPC conducted the same analysis we conducted in the Declaratory Order of the statutory language, the legislative history, and the parallel provisions of FPA section 21.<sup>118</sup> Based on that analysis, the FPC concluded, as we do here, that "the eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."<sup>119</sup>

38. Third, the Commission cited to *Islander East*, which rejected an Eleventh Amendment argument.<sup>120</sup> Riverkeeper questions such reliance, due to the Third Circuit "dismiss[ing] the relevance of *Islander East*."<sup>121</sup> The court's conclusion notwithstanding, the Commission cited *Islander East* to illustrate its consistent implementation of NGA section 7(h) over the past seven decades.

39. Finally, Riverkeeper claims that the Commission has exaggerated the potential impact of the Third Circuit's decision.<sup>122</sup> We disagree. As explained in the Declaratory Order, if state-owned lands are treated as

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<sup>118</sup> *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. at 1453-55.

<sup>119</sup> *Id.* at 1454.

<sup>120</sup> Declaratory Order at P 38 (citing *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 128, 131 (2003) (*Islander East*)).

<sup>121</sup> Request for Rehearing at 34.

<sup>122</sup> *Id.* at 40-42.

impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact.<sup>123</sup> If lands over which a state has asserted any property interest become impassable barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the Commission's Congressionally-conferred authority over interstate natural gas pipeline construction.

40. For instance, Columbia Gas Transmission, LLC (Columbia), the certificate holder in the pending Fourth Circuit proceeding, has been prevented from accessing a "small but necessary portion of land, severely impeding Columbia's ability to construct a project that will serve demonstrated demand and that the Commission has determined to be in the public interest[.]"<sup>124</sup> Furthermore, the Commission's analysis of potential impacts was buttressed by the concerns of commenters.<sup>125</sup>

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<sup>123</sup> Declaratory Order, 170 FERC ¶ 61,064 at P 58 n.221.

<sup>124</sup> TC Energy's October 18, 2019 Motion to Intervene and Comments at 19. We note that the condemnation proceeding for the Eastern Panhandle Expansion Project involves approximately .12 acres of land in which the State of Maryland holds an interest. *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv- 1444 (D. Md. Aug. 22, 2019) (appeal filed Sept. 20, 2019).

<sup>125</sup> *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 59-60, 62-64.

**IV. Conclusion**

41. We confirm our conclusions in the Declaratory Order that, in enacting the NGA, Congress established a carefully-crafted, comprehensive scheme in which the Commission was charged with the exclusive authority to issue certificates of public convenience and necessity for interstate gas pipelines; that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain to acquire lands needed for authorized projects; and that this authority applies to lands in which states hold interest. Riverkeeper provides no convincing argument or authority to the contrary.

The Commission orders:

The request for rehearing is denied.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,  
Secretary.

GLICK, Commissioner, *dissenting*:

1. I dissented from the underlying order because the Commission went out of its way to bolster a private party's litigation efforts regarding the meaning of the U.S. Constitution.<sup>1</sup> I also disagreed with several aspects of the Commission's slipshod analysis of the questions it chose to address. As I explained, the Commission magically saw clear congressional intent where a reasonable person could find only ambiguity and questions left unanswered. The bottom line was that "[t]he majority's confidence in its conclusion [wa]s better evidence of its own ends-oriented decisionmaking than any unambiguous congressional intent."<sup>2</sup>

2. Today's order is more of the same, and I do not need to repeat all of my underlying dissent. A few points, however, are worth a brief mention.

3. The first is the Commission's attempt to bolster its claim to *Chevron* deference.<sup>3</sup> In the underlying order, the Commission asserted, *ipse dixit*, that its interpretation would receive deference by the courts.<sup>4</sup>

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<sup>1</sup> *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064, at P 15 (2020) (Order) (Glick, Comm'r, dissenting at P 1 & n.1).

<sup>2</sup> *Id.* (Glick, Comm'r, dissenting at P 2).

<sup>3</sup> *PennEast Pipeline Company, LLC*, 171 FERC ¶ 61,135, PP 20-22 (2020) (Rehearing Order); *see generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing deference).

<sup>4</sup> Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 5) ("The majority contends that today's order is useful because its interpretation of Congress's intent in enacting section 7(h) merits deference from the courts. It supports that statement with a single general citation to *Chevron*.").

The Commission tries a little harder in today's order, contending that *Chevron* deference is appropriate because the Commission is the agency charged with administering other provisions of the Natural Gas Act (NGA).<sup>5</sup> But the end result is the same, as today's order once again misapprehends the purpose and role of *Chevron*.

4. As the Supreme Court has repeatedly held, “[d]eference in accordance with *Chevron* . . . is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’”<sup>6</sup> In particular, *Chevron* “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>7</sup> An implicit delegation can be found where an “agency’s generally conferred authority and other statutory circumstances [indicate] that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”<sup>8</sup> But that must

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<sup>5</sup> Rehearing Order, 171 FERC ¶ 61,135 at PP 20-22.

<sup>6</sup> *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); see *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (explaining that not all agency statutory interpretations qualify for *Chevron* deference; only those interpretations that meet the criteria outlined in *Gonzalez*).

<sup>7</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>8</sup> *Mead*, 533 U.S. at 229.



mean that ambiguity by itself is not sufficient to implicate Chevron; otherwise there would be no need to consider what Congress would “expect” from the agency.<sup>9</sup> “Rather, *Chevron* ‘deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.’”<sup>10</sup>

5. As I explained in my earlier dissent, nothing in the NGA indicates that Congress would have expected the Commission to fill in ambiguity regarding the scope of section 7(h).<sup>11</sup> That is because the Commission has no role to play whatsoever in administering that provision.<sup>12</sup> Rather, section 7(h) provides what the Commission describes as an “automatic right”<sup>13</sup> that affords certificate holders the ability to begin eminent domain proceedings in federal court, with no Commission supervision. The Commission’s oft-stated position is that all it does is evaluate whether a proposed pipeline is required by

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<sup>9</sup> *Id.*; see *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) (“Mere ambiguity in a statute is *not* evidence of congressional delegation of authority.” (quoting *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001))).

<sup>10</sup> *Atl. City*, 295 F.3d. at 9 (emphasis in the original) (quoting *Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)).

<sup>11</sup> Order, 170 FERC ¶ 61,064 (Glick, Comm’r, dissenting at P 6).

<sup>12</sup> This is a point the Commission makes frequently—almost every time eminent domain comes up in the certification process. See *id.* (collecting recent Commission orders disclaiming responsibility over the scope of certificate holders’ eminent domain authority or how they exercise that authority).

<sup>13</sup> *Id.* (Glick, Comm’r, dissenting at P 6) (quoting *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 72 (2018)).

the public convenience and necessity and that the “Commission itself does not grant the pipeline the right to take the property by eminent domain.”<sup>14</sup>

6. Indeed, the Commission has an impressive record of ducking questions related to section 7(h), insisting that the courts are the proper forum for those questions.<sup>15</sup> That makes sense given that section 7(h) provides no role for the Commission to play and there is nothing in the NGA’s “generally conferred authority and other statutory circumstances” that indicates that “Congress would expect the [Commission] to be able to speak with the force of law” when interpreting section 7(h).<sup>16</sup> Against that backdrop, the Commission’s role

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<sup>14</sup> *E.g., Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 74 (“In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain . . . . The Commission itself does not grant the pipeline the right to take the property by eminent domain.”).

<sup>15</sup> *See, e.g., Order*, 170 FERC ¶ 61,064 (Glick, Comm’r, dissenting at P 6). The Commission notes that it has not formally “disclaimed jurisdiction over every possible issue that may be deemed related to the acquisition of property rights by a pipeline.” Rehearing Order, 171 FERC ¶ 61,135 at P 22 (internal quotation marks omitted). That statement, which is supported only by a citation to an unsupported section of the underlying order, tells us nothing. An agency’s statement that it has not formally disclaimed jurisdiction hardly proves that it had it in the first place.

<sup>16</sup> *Mead*, 533 U.S. at 229. The Commission also suggests that its experience administering the NGA more generally entitles it to deference, even with regard to the provisions of the NGA that it

in administering other aspects of the NGA's certification process is irrelevant.<sup>17</sup>

7. Second, the Commission attempts to rehabilitate its reliance on a series of cases that are—to put it charitably—inapt. As I previously explained, no reasonable person could read those cases to support the assertion that section 7(h) clearly vests certificate

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does not administer. Rehearing Order, 171 FERC ¶ 61,135 at P 20. But that is not the theoretical foundation on which *Chevron* is based. *See supra* notes 6-10 and accompanying text; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (explaining that “the ‘expertise’ of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes” is “hardly a valid theoretical justification” for judicial deference). Instead, the theory of *Chevron* is that when Congress has not spoken to a specific issue and delegated to an agency the lawmaking authority to fill that gap, it is not for the courts’ to second guess the agency’s reasonable interpretation. The fact that the agency may have experience with other areas of the statute is beside the point where there is no indication from the “generally conferred authority and other statutory circumstances” that Congress would have expected the agency to fill in the ambiguity. *Mead*, 533 U.S. at 229.

<sup>17</sup> The Commission’s principal response is a run-on footnote that rehashes its above-the-line arguments. In particular the Commission reiterates that it “administers the certification process under NGA section 7,” that it believes that the statute’s silence on the issue of certificate holders’ ability condemn state lands is unambiguous evidence that they can do so, and that, in any case, it deserves deference in resolving any ambiguity. Rehearing Order, 171 FERC ¶ 61,135 at n.68. Those unsupported assertions are nothing that the Commission has not already said and repeating them does not make the points any more convincing.

holders with the authority to condemn state lands.<sup>18</sup> Indeed, the Commission's reliance on those cases only highlights the absence of persuasive authority supporting its position.

8. Today's order begins with the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*.<sup>19</sup> Unlike the underlying order, the Commission this time admits that the case was decided on procedural grounds that are irrelevant to the question before us.<sup>20</sup> That should be the end of the analysis, since it means that all today's order has to contribute is the observation that the substantive question presented in a case dismissed on jurisdictional grounds<sup>21</sup> was whether a subdivision of a state could condemn state land under section 21 of the Federal Power Act (the most analogous provision to section 7(h) under the NGA).<sup>22</sup> The Court, of course, could not address that

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<sup>18</sup> See Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at PP 11, 21).

<sup>19</sup> Rehearing Order, 171 FERC ¶ 61,135 at P 33 (discussing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 338 (1958))

<sup>20</sup> Compare *id.* (“recogniz[ing] that *City of Tacoma* was dismissed on procedural grounds”) with Order, 170 FERC ¶ 61,064 at PP 45-47 (claiming that “the Supreme Court’s decision in *City of Tacoma* . . . directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21”).

<sup>21</sup> *City of Tacoma*, 357 U.S. at 334-37 (explaining that the Court lacked jurisdiction to review the claims because they could only have been—and, in fact, were—brought through an appeal pursuant FPA section 313(b)).

<sup>22</sup> *Id.* at 323. In any case, as I explained in my earlier dissent, the City of Tacoma’s substantive arguments appear to have addressed the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. 6, cl. 2, not the scope of section 7(h). Order, 170 FERC

question,<sup>23</sup> and so that case says nothing about the issues now before us.<sup>24</sup>

9. In a pseudo-response, the Commission slips into a footnote a new theory of *City of Tacoma*'s relevance, asserting that it is an example of the Court's willingness to dismiss collateral attacks on the

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¶ 61,064 (Glick, Comm'r, dissenting at P 22); see *State of Wash. Dep't of Game v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953) (explaining that the authority conferred by a federal license trumped state law limitations on a city's capacity to exercise that authority); see also *City of Tacoma*, 357 U.S. at 339 (explaining that the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) resolved the case based on its "[c]onclu[sion] that . . . state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license"); *City of Tacoma*, 357 U.S. at 341 (Harlan, J., concurring) (explaining that the question decided by the Ninth Circuit was "whether state or federal law governed" the particular dispute between the parties).

<sup>23</sup> See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (explaining that addressing the merits of any proceeding before establishing subject-matter jurisdiction violates Article III of the U.S. Constitution and "offends fundamental principles of separation of powers" (citing *Ex parte McCordle*, 7 Wall. 506, 514 (1868)); see also *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56 (D.C. Cir. 2015) (dismissing an appeal for lack of subject-matter jurisdiction because the petitioner did not comply with FPA section 313(b)). That means that any substantive discussion therein was not just *dicta*, but *dicta* about an issue on which the Court lacked subject-matter jurisdiction to opine.

<sup>24</sup> The Commission criticizes this "assertion," Rehearing Order, 171 FERC ¶ 61,135 at n.104, but then fails to respond to the arguments on which it is based. That tells you all you need to know. The Commission's evident frustration with the holes in its argument does not rob the counterarguments of their force.

Commission's certificate orders.<sup>25</sup> Although that theory correctly characterizes *City of Tacoma* (for the first time), its implication badly mischaracterizes New Jersey's claim of sovereign immunity.<sup>26</sup> Whether right or wrong, a state's assertion of its "dignity" interest in not being haled into court without its consent, is hardly just a collateral challenge to a Commission certificate.<sup>27</sup> Immunity from suit in federal court is an altogether different theory than a substantive challenge to a section 7 certificate, and a condemnation proceeding is exactly the forum in which one would expect a state to raise that putative right.<sup>28</sup> So brusquely dismissing a state's attempt to assert its Constitutional immunity from suit in federal court as nothing more than a collateral challenge to a certificate order is quite the contrast to my colleagues'

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<sup>25</sup> Rehearing Order, 171 FERC ¶ 61,135 at n.104.

<sup>26</sup> It also has nothing in common with the interpretation the Commission spent four pages advancing in the underlying order. See Order, 170 FERC ¶ 61,064 at PP 43- 48.

<sup>27</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." (citing *In re Ayers*, 123 U.S. 443, 505 (1887)); see also *Alden v. Maine*, 527 U.S. 706, 748 (1999) ("The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" (citing *In re Ayers*, 123 U.S. at 505)).

<sup>28</sup> Cf., e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent.").

oft-repeated commitments to federalism and states' rights.

10. Next, the Commission turns to briefly defend its reliance on *Thatcher v. Tennessee Gas Transmission Company*,<sup>29</sup> a case from the U.S. Court of Appeals for the Fifth Circuit, which upheld section 7(h) against a challenge under the Tenth Amendment to the U.S. Constitution.<sup>30</sup> But, as I explained in my earlier dissent, the fact that section 7(h) did not violate the Tenth Amendment is irrelevant when considering whether Congress intended section 7(h) to apply to state lands or what that means for the Eleventh Amendment.<sup>31</sup> Nevertheless, the Commission insists that considering *Thatcher* was appropriate because, lacking any cases directly on point, it was forced to resort to “analogies, inferences, and comparisons.”<sup>32</sup> It may well be that *Thatcher* is all the Commission can point to as it works with what little authority it has.<sup>33</sup> But, if so, that only proves my point that we do not

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<sup>29</sup> 180 F.2d 644 (5th Cir. 1950).

<sup>30</sup> Rehearing Order, 171 FERC ¶ 61,135 at P 34.

<sup>31</sup> Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 11).

<sup>32</sup> Rehearing Order, 171 FERC ¶ 61,135 at P 34. The Commission suggests that *Thatcher* is somehow relevant because I do not cite old cases that involve the Eleventh Amendment or that present the Third Circuit's interpretation of section 7(h). *Id.* Now we're really grasping for straws. As I have maintained throughout this proceeding, the question before us simply cannot be answered clearly one way or the other. Why that ambiguity justifies the Commission in building an over-confident interpretation of section 7(h) on a foundation of irrelevant cases is beyond me.

<sup>33</sup> *Cf.* Bob Dylan, *Like A Rolling Stone* (1965) (“When you ain't got nothing, you got nothing to lose.”).

have a clear answer regarding Congress' intentions behind section 7(h).

11. Finally, I am glad to see today's order this time explicitly acknowledge that the text of section 7(h) is ambiguous.<sup>34</sup> Although I think that is the only reasonable conclusion, it means that this proceeding is not one that can be decided on the basis of the text alone, as the Commission suggested in the underlying order.<sup>35</sup> Instead, the outcome must turn on the other indicia of congressional intent that the Commission spent—and, in today's order, spends—so much time discussing.<sup>36</sup> I have reviewed those materials again

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<sup>34</sup> Rehearing Order, 171 FERC ¶ 61,135 at P 19 (asserting that it is appropriate for the Commission to weigh in “given the statute’s ambiguity and silence with respect to lands in which states hold an interest”); *see also id.* P 20 (claiming *Chevron* deference and noting that “[d]eference is appropriate ‘if the statute is silent or ambiguous with respect to the specific issue’” (quoting *Chevron*, 467 U.S. at 843)).

<sup>35</sup> Order, 170 FERC ¶ 61,064 at P 32.

<sup>36</sup> It is also noteworthy that the Commission addresses for the first time the consequences of that ambiguity. Despite the Commission’s claim in the underlying order to be addressing only the “straightforward questions of law” regarding Congress’ intent in enacting section 7(h), Order, 170 FERC ¶ 61,064 at P 21, today’s order wanders so far afield as to theorize about whether the Supreme Court’s clear statement rule for abrogating states’ Eleventh Amendment immunity applies in the context of an eminent domain proceeding, Rehearing Order, 171 FERC ¶ 61,135 at P 28 (“[E]mploying the federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule”); Rehearing Order, 171 FERC ¶ 61,135 at n.92 (speculating about distinctions in the nature of authority conferred by Congress)—hardly a matter within “the heartland of our quotidian ambit,” Order, 170 FERC ¶ 61,064 at P 39.



and, for the reasons discussed in my earlier dissent, can only reach the same conclusion as before: “The evidence simply is not clear one way or the other . . . whether Congress intended section 7(h) of the NGA to apply to state lands or not.”<sup>37</sup> As a result, the Commission had no business issuing the Declaratory Order that it did.

For these reasons, I respectfully dissent.

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Richard Glick  
Commissioner

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<sup>37</sup> Order, 170 FERC ¶ 61,064 (Glick, Comm’r, dissenting at PP 2, 23).