APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1042

[Filed July 25, 2018]

ORUS ASHBY BERKLEY;)
JAMES T. CHANDLER;)
KATHY E. CHANDLER;)
CONSTANTINE THEODORE)
CHLEPAS; PATTI LEE)
CHLEPAS; ROGER D.)
CRABTREE; REBECCA H.)
CRABTREE; GEORGE LEE)
JONES; ROBERT WAYNE)
MORGAN; PATRICIA ANN)
MORGAN; MARGARET)
MCGRAW SLAYTON LIVING)
TRUST; THOMAS TRIPLETT;)
BONNIE B. TRIPLETT,)
)
Plaintiffs - Appellants,)
)
and)
)
DAWN E. CISEK; MARTIN)
CISEK; EDITH FERN ECHOLS;)

ESTIAL E. ECHOS, JR.,)
)
Plaintiffs,)
)
v.)
)
MOUNTAIN VALLEY PIPELINE, LLC; FEDERAL ENERGY REGULATORY COMMISSION; NEIL CHATTERJEE, in his official capacity as Acting Chairman of the Federal Energy Regulatory Commission,)
)
Defendants - Appellees.)

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:17-cv-00357-EKD)

Argued: May 10, 2018 Decided: July 25, 2018

Before GREGORY, Chief Judge, and WYNN, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

ARGUED: Justin Michael Lugar, GENTRY LOCKE, Roanoke, Virginia, for Appellants. Susanna Y. Chu, FEDERAL ENERGY REGULATORY COMMISSION, Washington, D.C., for Appellees Federal Energy Regulatory Commission and Neil Chatterjee. Wade Wallihan Massie, PENN, STUART & ESKRIDGE, Abingdon, Virginia, for Appellee Mountain Valley Pipeline, LLC. **ON BRIEF:** Cynthia M. Kinser, Monica T. Monday, GENTRY LOCKE, Roanoke, Virginia, for Appellants. James P. Danly, General Counsel, Robert H. Solomon, Solicitor, FEDERAL ENERGY REGULATORY COMMISSION, Washington, D.C., for Appellees Federal Energy Regulatory Commission and Neil Chatterjee. Mark E. Frye, Seth M. Land, PENN, STUART & ESKRIDGE, Abingdon, Virginia, for Appellee Mountain Valley Pipeline, LLC.

WYNN, Circuit Judge:

Plaintiffs[1] are landowners along the path of a proposed natural gas pipeline. They brought this action against the Mountain Valley Pipeline, LLC, the Federal Energy Regulatory Commission, and Neil Chatterjee, in his official capacity as Acting Chairman of the Federal Energy Regulatory Commission (hereinafter collectively referred to as "Defendants") challenging the constitutionality of various provisions

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[1] Plaintiffs are Orus Ashby Berkley, James T. Chandler, Kathy E. Chandler, Constantine Theodore Chlepas, Patti Lee Chlepas, Roger D. Crabtree, Rebecca H. Crabtree, George Lee Jones, Robert Wayne Morgan, Patricia Ann Morgan, Margaret McGraw Slayton Living Trust, Thomas Triplett, Bonnie B. Triplett, Dawn E. Cisek, Martin Cisek, Edith Fern Echols, and Estial E. Echols, Jr. After this appeal was filed, Dawn Cisek, Martin Cisek, Edith Echols, and Estial Echols withdrew their discrete appeals. Accordingly, we have updated the caption of this case to reflect their status as Plaintiffs and not as Plaintiff-Appellants.

of the Natural Gas Act, 15 U.S.C. § 717 *et seq*. But the district court, without reaching the merits of Plaintiffs' challenges, dismissed their action for lack of subject-matter jurisdiction on the grounds that their claims must instead be brought through the agency review process laid out in the Natural Gas Act. We affirm.

I.

A.

This case involves a complex administrative review framework that warrants some introduction. In 1977, Congress transferred much of the authority from the now-defunct Federal Power Commission to the new Federal Energy Regulatory Commission ("FERC," or "the Commission"). *See* 42 U.S.C. §§ 7171–72. Among the transferred authorities was regulation of the natural gas industry, as outlined in the Natural Gas Act, 15 U.S.C. § 717 *et seq*. *See also* 42 U.S.C. § 7172 (transferring jurisdiction).

Under the Natural Gas Act, FERC is responsible for vetting and approving construction of new interstate natural gas pipelines and expansions of existing pipelines. *See* 15 U.S.C. § 717f. To approve such construction, FERC must find that the construction "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e). Once FERC makes that required finding and issues a "Certificate of public convenience and necessity" ("Certificate"), a pipeline company can begin construction. *Id.* § 717f(c).

Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. *See id.* § 717f(h). Thus, FERC does not have discretion to withhold eminent domain power once it grants a Certificate. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000). With the transferred power of eminent domain, a Certificate holder can then initiate condemnation proceedings in the appropriate U.S. district court or state court. *See* 15 U.S.C. § 717f(h).

Under the Natural Gas Act, an aggrieved party who seeks review from the issuance of a Certificate must first file for rehearing before FERC. *See id.* § 717r. If FERC either declines to rehear the matter or issues a final order upon rehearing the matter, the aggrieved party can file a petition for review in the appropriate court of appeals, which has "exclusive" jurisdiction "to affirm, modify, or set aside [the final] order in whole or in part." *Id.* § 717r(b).[2]

B.

In the present case, FERC issued a Certificate to Mountain Valley Pipeline, LLC ("Mountain Valley Pipeline") in October 2017. *See* 15 U.S.C. § 717f(c). At the time FERC issued the Certificate, Plaintiffs had already filed the complaint in this matter against Defendants in the U.S. District Court for the Western District of Virginia challenging the constitutionality of

[2] However, there are limits to appellate jurisdiction. For instance, "[n]o objection to the order of the Commission shall be considered by the court [of appeals] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." 15 U.S.C. § 717r(b). Additionally, "[t]he filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." *Id.* § 717r(c).

various provisions of the Natural Gas Act. The Defendants moved to dismiss for lack of jurisdiction.

In December 2017, the district court granted the Defendants' motions to dismiss on two grounds. First, the district court found that Plaintiffs' challenges "inher[e]" in a FERC order and are thus subject to the exclusive review provisions of the Natural Gas Act. J.A. 535–40. Alternatively, the district court held that, even if Plaintiffs' challenges fell outside that regime, Congress implicitly divested the district court of jurisdiction, pursuant to the Supreme Court's framework laid out in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Accordingly, the district court dismissed, without prejudice, three of the four counts for lack of subject-matter jurisdiction. Plaintiffs subsequently stipulated to having the remaining count dismissed with prejudice and timely appealed to this Court.[3]

[3] In a letter filed pursuant to Fed. R. App. P. 28(j), FERC informed this Court of further developments regarding the pending request for rehearing before the Commission in this case. Specifically, on June 15, 2018, FERC took final action on the matter and upheld its issuance of the Certificate to Mountain Valley Pipeline. In the time since FERC's final order, no party has requested that we take any steps in light of this development. Furthermore, although we have an obligation to raise mootness issues *sua sponte*, *see Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002), we do not believe issuance of that final order moots the case at bar, because there are still potential benefits to the Plaintiffs to being able to pursue their original action in district court. *See Smith v. Ashcroft*, 295 F.3d 425, 428 (4th Cir. 2002) (finding a case is not moot when the petitioner is still "unmistakably affected by the legal implications of our decision").

II.

We review the district court's dismissal of a complaint for lack of subject-matter jurisdiction de novo. *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 241 (4th Cir. 2004). Ultimately, we agree with the district court that Congress implicitly divested the district court of jurisdiction to hear claims of the kind brought by Plaintiffs and instead intended for such claims to come to federal court through the administrative review scheme established by the Natural Gas Act. As a result, the district court correctly determined that it did not have jurisdiction to review the matter.

Over the past thirty years, the Supreme Court has issued a trio of cases addressing when Congress intends to divest district courts of jurisdiction over claims that should instead proceed exclusively through administrative review regimes. *See Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). This Court recently synthesized these three cases in *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016).

In *Bennett*, the plaintiff, who owned an investment firm that was the subject of an investigation by the Securities and Exchange Commission ("SEC"), filed suit in district court claiming that the SEC unconstitutionally used administrative law judges as part of its enforcement proceedings. *See id.* at 177–78. In analyzing whether the district court had jurisdiction to hear that claim, this Court distilled the relevant Supreme Court precedent into "a two-step inquiry." *Id.* at 181.

At the first step, the court must consider "whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 207). "This [step] involves examining the statute's text, structure, and purpose." *Id.* At the second step, the court must determine "whether plaintiffs' 'claims are of the type Congress intended to be reviewed within this statutory structure.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212). With this framework in mind, we turn to the case at hand.

A.

To determine whether the district court had jurisdiction to hear Plaintiffs' claims, we begin with the first step of our inquiry: "whether Congress's intent to preclude district-court jurisdiction is fairly discernible in the statutory scheme." *Id.* at 181 (internal quotation marks omitted).

In *Bennett*, this Court found that aspects of the statute at issue in the case, the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, indicated that Congress intended to divest the district court of jurisdiction. First, the statute established a "comprehensive scheme that provides for judicial review in the appropriate court of appeals." *Bennett*, 844 F.3d at 181. Furthermore, the statute "demonstrated [that Congress] knew how to preserve district-court jurisdiction, but declined to do so." *Id.* In particular, the Securities Exchange Act "authorize[d] district courts to exercise jurisdiction over certain actions brought by the agency *but not* by private parties." *Id.* Thus, the statute indicated that Congress did not want cases brought by private parties, like the plaintiff in *Bennett*, to be heard by district courts.

These considerations lead to the same conclusion in this case. Like the Securities Exchange Act, the Natural Gas Act establishes an extensive review framework, including review before FERC and eventually by a court of appeals. *See* 15 U.S.C. § 717r. And, as with the statute in *Bennett*, the Natural Gas Act specifically allows for district court jurisdiction over certain actions, such as condemnation proceedings. *See id.* § 717f(h). Thus, as did the statute in *Bennett*, the Natural Gas Act indicates that Congress knew how to allow for district court jurisdiction, yet it chose not to do so when it came to issues related to review of a Certificate. Rather, in such situations, Congress gave "exclusive" jurisdiction to the appropriate court of appeals—but only after going through the review process with FERC. *Id.* § 717r. Nothing in the Natural Gas Act indicates Congress intended to create exceptions to this exclusive jurisdiction of the courts of appeals, except those exceptions specifically set out in the statute.

So, under this Court's precedent in *Bennett*, the Natural Gas Act's text and structure evince an intent from Congress to remove district-court jurisdiction.

B.

Continuing our analysis of whether the district court had jurisdiction to hear Plaintiffs' claims in this matter, we next consider the second step of our inquiry: "whether plaintiffs' claims are of the type Congress intended to be reviewed within this statutory structure." *Bennett*, 844 F.3d at 181 (internal quotation marks omitted). In so doing, we consider three factors: "(1) whether the statutory scheme foreclose[s] all meaningful judicial review," "(2) the extent to which the plaintiff's claims are wholly collateral to the statute's review provisions, and (3) whether agency expertise could be brought to bear on the . . . questions presented." *Id.* (alteration in original) (internal quotation marks omitted). Of the three factors considered at the second step, we stated in *Bennett* that the first factor—"meaningful judicial review"—is the "most important." *Id.* at 183 n.7.

Regarding the first factor, whether the Natural Gas Act provides for meaningful judicial review in the circumstances before us, Plaintiffs argue that, because their claims are constitutional in nature and challenge the legitimacy of the statute itself, FERC cannot rule on them. Thus, Plaintiffs argue that they are deprived of meaningful review by having to wait until those claims are reviewed by a court of appeals.

In *Bennett*, however, we recognized that the Supreme Court had already rejected a similar line of reasoning. *See id.* at 184. Specifically, in *Thunder Basin*, the Supreme Court said that "constitutional claims . . . [could] be meaningfully addressed in the Court of Appeals," even if the agency could not adjudicate them in the first instance. 510 U.S. at 215. The Supreme Court in *Elgin* said the same. *See* 567 U.S. at 15–18. Thus, notwithstanding that Plaintiffs are "attack[ing] the legitimacy of the forum" itself, review is still meaningful, even if it is withheld until first going through an agency that cannot rule on Plaintiffs' constitutional claims. *Bennett*, 844 F.3d at 184.

For that reason, in *Bennett*, this Court said that a question about the constitutionality of an administrative law judge's authority to hear cases must also go through the agency review process, and that eventual review of the constitutional question before the court of appeals would still be meaningful. *See id.* at 184–86. In this way, *Bennett*, *Thunder Basin*, and *Elgin* fatally undercut Plaintiffs' argument. All three decisions establish that FERC's inability to resolve Plaintiffs' constitutional claims does not mean that the statutory scheme deprives Plaintiffs of meaningful judicial review.

Plaintiffs further attempt to distinguish their case from *Bennett* by arguing that the Natural Gas Act requires FERC to review petitions for rehearing within 30 days and that, by tolling this period, FERC unfairly delays judicial review while simultaneously allowing Mountain Valley Pipeline to begin construction.[4] This argument does not align with the statute, however.

Contrary to what Plaintiffs argue, FERC is not required to finally decide petitions for rehearing within 30 days. Rather, the statute says that "[u]nless the Commission *acts* upon the application for rehearing within thirty days after it is filed, such application may

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[4] According to Plaintiffs—and undisputed by FERC—FERC regularly issues statements within 30 days of petitions for rehearing being filed that state, "[i]n order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order." Appellants' Br. at 20 n.7.

be deemed to have been denied." 15 U.S.C. § 717r(a) (emphasis added). Thus, the statute does not require a final decision within 30 days; it requires FERC to take *some kind of action* within 30 days for the petition not to be deemed denied by operation of law. FERC does so by issuing the tolling order.

That conclusion is not changed simply because the pipeline construction may continue while a rehearing petition is pending. We know this because Congress contemplated construction would be allowed to continue while FERC reviews a petition for rehearing. Specifically, the Natural Gas Act provides that "[t]he filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." *Id.* § 717r(c). Therefore, Plaintiffs have failed to establish that, under the facts of this case, the Natural Gas Act "foreclose[s] all meaningful judicial review." *Bennett*, 844 F.3d at 181 (alteration in original).

To be sure, we acknowledge the possibility that FERC's use of a tolling order in certain cases may, in effect, deny a plaintiff meaningful judicial review, regardless of whether the Natural Gas Act could, in theory, provide such recourse. After all, there is a "strong presumption that Congress did not mean to prohibit all judicial review of executive action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (internal quotation marks omitted), and undoubtedly in some rare situations, agency inaction may turn the promise of meaningful review into meaningless review.

Notably, we recognized in *Bennett* that plaintiffs are denied meaningful review when they are subject to "'some additional and irremediable harm beyond the burdens associated with the dispute resolutions process.'" 844 F.3d at 186 n. 13 (quoting *Tilton v. SEC*, 824 F.3d 276, 286 (2d Cir. 2016)); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496–97 (1991) (holding that respondents were not "as a practical matter . . . able to obtain meaningful judicial review" when they sought to challenge certain procedures used by the Immigration and Naturalization Service, because raising their claims would have also required them to "voluntarily surrender themselves for deportation"); *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (finding that procedural due process was violated where "an erroneous termination" of disability benefits would "damage [the respondent] in a way not recompensable through retroactive payments"); *Hill v. SEC*, 825 F.3d 1236, 1247 (11th Cir. 2016) (finding that the administrative review scheme in the Securities Exchange Act of 1934 provides meaningful review of civil enforcement actions brought by the SEC, because those challenging the actions could not show they "are likely to suffer irreparable injury while awaiting judicial review"); *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 874–75 (3d Cir. 1996) (holding that the Longshore and Harbor Workers' Compensation Act did not provide meaningful review under the *Thunder Basin* standard, because the result of requiring litigants to wait until being heard before the court of appeals, "albeit not necessarily the absence of any judicial review at all, might well be the absence of any effective judicial review," as a result of "serious irreparable injury" that could occur in the intervening time).

However, although Plaintiffs' brief makes a few unsupported assertions about injuries they will suffer, they point to no evidence to corroborate their claims and, more critically, make no detailed arguments about those potential injuries. From the briefing, we have no answer as to what specific injuries Plaintiffs are alleging are potentially irreparable, why those injuries are not recompensable if post-deprivation relief is provided by the court of appeals, and how those specific claims distinguish Plaintiffs' case from seemingly contrary cases, such as *Thunder Basin*, *Elgin*, and *Bennett*. As the case is currently presented, Plaintiffs have not adequately produced evidence of irreparable injury, thereby indicating that the administrative review scheme found in the Natural Gas Act can provide meaningful review for their claims. Thus, the first factor weighs in favor of finding that Congress did not intend for district courts to have jurisdiction over claims such as those brought by Plaintiffs.

We next consider the second factor—that is, whether a claim is "wholly collateral" to the statutory review scheme. *Bennett*, 844 F.3d at 186. In *Bennett*, this Court found that the plaintiff's constitutional claims were not wholly collateral to the administrative proceeding because they were "the vehicle by which she s[ought] to vacate the ALJ's initial findings." *Id.* at 187 (internal quotation marks omitted).

The same analysis applies here. Plaintiffs' constitutional claims are the means by which they seek to vacate the granting of the Certificate to Mountain Valley Pipeline. Therefore, their claims are not wholly collateral to the Natural Gas Act's statutory review scheme. This conclusion accords with the Supreme Court's findings in its trio of cases.

In *Elgin*, for example, the plaintiff's constitutional claims were not wholly collateral to the statutory review scheme found in the Civil Service Reform Act of 1978 because the claims comprised the vehicle by which the plaintiff sought to challenge his firing from government employment. *See* 567 U.S. at 7–8, 22. By way of contrast, in *Free Enterprise*, the plaintiffs' constitutional challenge to the Public Company Accounting Oversight Board's existence was wholly collateral to the review scheme found in the Sarbanes-Oxley Act of 2002, because the plaintiffs' challenge was unrelated to any particular action taken by the Board. S*ee* 561 U.S. at 490–91. District-court jurisdiction was the only way the plaintiffs' claims in *Free Enterprise* could have been reviewed by a court, absent the plaintiffs intentionally incurring a sanction by the Board so as to create an administrative action through which to lodge their constitutional challenge. *Id.*

The situation here is more like that of *Elgin* and *Bennett*. Plaintiffs are seeking to reverse the issuance of a specific Certificate. The statutory review scheme provides for eventual review of this issue before a court of appeals; therefore, Plaintiffs must work through the statutory review scheme first. Thus, the second factor weighs in favor of finding that Congress did not intend for district courts to have jurisdiction over claims such as those brought by Plaintiffs.

Finally, we consider the third factor of "whether agency expertise could be brought to bear on the . . . questions presented." *Bennett*, 844 F.3d at 181 (internal quotation marks omitted). When considering this factor in *Bennett*, this Court said that agencies could "apply [their] expertise to threshold questions that may accompany a constitutional claim against a federal statute, even when the agency disclaimed authority to resolve those constitutional claims." *Id.* at 187 (internal quotation marks omitted). For example, the *Bennett* Court said the SEC "could bring its expertise to bear . . . by concluding that the Division of Enforcement's substantive claims [were] meritless, thereby fully disposing of the case before reaching the constitutional question." *Id.* at 187–88. The Court acknowledged such a result was "unlikely" but nonetheless found that Supreme Court precedent "emphasized that 'one of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review.'" *Id.* at 188 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 n.11 (1980)).

The same is true here. Although perhaps unlikely to occur, FERC had the ability to, upon rehearing Plaintiffs' challenge here—and may still in future cases—revoke its issuance of a Certificate based upon threshold questions within its expertise. If that had occurred, Plaintiffs' constitutional claims would have been moot, without requiring a court to rule on them at all. Thus, under our precedent in *Bennett*, this final factor also weighs in favor of finding that Congress did not intend for district courts to have jurisdiction over claims such as those brought by Plaintiffs.

III.

In conclusion, under the two-step analysis this Court set out in *Bennett*, Congress intended to divest district courts of jurisdiction to hear the claims pursued by Plaintiffs and instead intended those claims to be brought under the statutory review scheme established by the Natural Gas Act. Accordingly, the district court lacked subject-matter jurisdiction to hear Plaintiffs' claims and appropriately dismissed their claims without prejudice.[5]

The judgment of the district court is

AFFIRMED.

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[5] We vacate the portion of the district court's opinion discussing an alternative ground for its holding—that the Plaintiffs' challenges "inher[e]" in a Commission order and are thus subject to the exclusive review provisions of the Natural Gas Act. J.A. 535–40. And because we uphold the district court's conclusion based upon its application of *Thunder Basin*, *Bennett*, and related cases, we decline to address that other line of reasoning in greater detail.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1042
(7:17-cv-00357-EKD)

[Filed July 25, 2018]

ORUS ASHBY BERKLEY;)
JAMES T. CHANDLER;)
KATHY E. CHANDLER;)
CONSTANTINE THEODORE)
CHLEPAS; PATTI LEE)
CHLEPAS; ROGER D.)
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TRUST; THOMAS TRIPLETT;)
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Plaintiffs - Appellants,)
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and)
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DAWN E. CISEK; MARTIN)
CISEK; EDITH FERN ECHOLS;)
ESTIAL E. ECHOLS, JR.,)
)
Plaintiffs,)
)
v.)
)
MOUNTAIN VALLEY PIPELINE,)

LLC; FEDERAL ENERGY)
REGULATORY COMMISSION;)
NEIL CHATTERJEE, in his)
official capacity as Acting)
Chairman of the Federal)
Energy Regulatory Commission,)
)
Defendants - Appellees.)
)

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Case No. 7:17-cv-00357-EKD

[Filed January 9, 2018]

ORUS ASHBY BERKLEY, *et al.*,

Plaintiffs,

v.

MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,

Defendants.

FINAL ORDER

By Order entered December 11, 2017, this Court granted the Defendants' Motion to Dismiss on Counts I-III (Dkt. No. 46).

On December 21, 2017, the West Virginia Plaintiffs filed a Motion for Rule 54(b) Certification (Dkt. No. 49), and on January 4, 2018, Defendant Mountain Valley Pipeline, LLC, filed a Response in Opposition (Dkt. No. 52).

On January 9, 2018, the parties jointly filed a Stipulation of Dismissal pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure dismissing with prejudice Count IV of the Plaintiffs' Complaint (Dkt. No. 53).

As there are no issues remaining before the Court subsequent to the parties' Stipulation of Dismissal, the West Virginia Plaintiffs' Motion for Rule 54(b) Certification is DENIED AS MOOT.

Count IV, the sole remaining claim before this Court, is hereby DISMISSED WITH PREJUDICE.

By separate document, the court will enter final judgment.

The clerk is directed to provide a copy of this order and the final judgment to all counsel of record and to Mark R. Herring, Attorney General of Virginia, Office of the Attorney General, 202 N. Ninth Street, Richmond, Virginia 23219.

Entered: January 9, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Case No. 7:17-cv-00357-EKD

[Filed January 9, 2018]

ORUS ASHBY BERKLEY, *et al.*,

Plaintiffs,

v.

MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,

Defendants.

FINAL JUDGMENT

Pursuant to the final order entered this day, final judgment is hereby entered in favor of defendants as to Counts I, II, and III. Count IV is hereby dismissed with prejudice per the parties' stipulation.

The clerk is directed to strike this case from the active docket of the court.

Entered: January 9, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Civil Action No. 7:17-cv-00357

[Filed December 11, 2017]

ORUS ASHBY BERKLEY, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE,	)
LLC, *et al.*,	)
	)
Defendants.	)
	)

By: Elizabeth K. Dillon
United States District Judge

MEMORANDUM OPINION

Plaintiffs in this case are landowners whose properties are in the path of a proposed natural gas pipeline. Before plaintiffs filed suit, defendant Mountain Valley Pipeline (MVP) had filed an application with the Federal Energy Regulatory Commission (FERC) seeking authority to obtain private land for the building of the pipeline. In addition to suing MVP, plaintiffs named as defendants FERC and its chairman, currently Neil Chatterjee (collectively the FERC defendants). The FERC defendants seek dismissal of the three claims against them—Counts One, Two, and Three—on the ground, among others, that this court lacks jurisdiction over the claims. MVP, too, asserts that this court lacks jurisdiction over the same three counts.[1] The jurisdictional issues have been fully briefed and were argued before the court at a November 3, 2017 hearing. For the reasons explained in this opinion, the court concludes that it lacks jurisdiction over plaintiffs' claims in Counts One, Two, and Three. Thus, it will grant the motions to dismiss for lack of jurisdiction, dismiss Counts One, Two, and Three without prejudice, and dismiss the FERC defendants from the case. The court will hold a separate hearing as to the viability of Count Four against MVP, in which plaintiffs challenge the constitutionality of Virginia Code § 56-49.01, after proper notice has been given to the Commonwealth of Virginia of that claim. Because Count Four is brought only on behalf of Virginia plaintiffs, moreover, the court also will dismiss all non-Virginia plaintiffs from the case.

I. BACKGROUND

Plaintiffs in this case are landowners within the path of MVP's proposed natural gas pipeline. At the time plaintiffs filed suit, MVP had filed an application with FERC to obtain a certificate of public convenience

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[1] MVP admits that the only other count against it, Count Four, is not subject to dismissal on jurisdictional grounds, but urges that it should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because it fails to state a claim.

and necessity, which is required under the Natural Gas Act (NGA), 15 U.S.C. § 717 *et seq.*, for a gas company to assert the power of eminent domain. 15 U.S.C. § 717f(h) (stating requirements for an entity to claim condemnation, including that the entity be a "holder of a certificate of public convenience and necessity" issued by FERC). After suit was filed, but before the hearing on the jurisdictional questions, FERC issued the certificate of public convenience and necessity to MVP, although that certificate contains a number of conditions. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017 Order Issuing Certificates and Granting Abandonment Authority), https://www.ferc.gov/CalendarFiles/20171013192058-CP16-10-000.pdf. After that certificate was issued, MVP filed condemnation actions—including one filed in this court—seeking to exercise eminent domain power over multiple parcels of land. *See, e.g., Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Virginia, et al.,* No. 7:17-cv-492 (W.D. Va.). Those condemnation actions remain pending.

Plaintiffs describe the instant case, "in its simplest form," as a "constitutional challenge to the eminent domain provision of the NGA, 15 U.S.C. § 717f(h), and the resulting unconstitutional acts of FERC and ultimately MVP." (Compl. 2, Dkt. No. 1.) Plaintiffs' complaint contains four counts. In Count One, plaintiffs allege a violation of their Fifth Amendment rights by defendants. In particular, they contend that the standards and tests that FERC uses to determine whether land is being taken for "public use" "fall well below the standard imposed by the Fifth Amendment." (Compl. 29–30.)

Counts Two and Three are related. In Count Two, plaintiffs contend that Congress' delegation to FERC of the power of eminent domain is overly broad and unconstitutional, focusing primarily on the fact that the delegation itself in § 717f(h) is overly broad. (Compl. 30–31.) Specifically, they assert that Congress did not set forth any intelligible principle for FERC to follow, in violation of the non-delegation doctrine. In Count Three, plaintiffs allege that FERC's "sub-delegation" of the power of eminent domain to MVP under § 717f(h) is unconstitutional.[2]

In Court Four, which is brought only against MVP and not the FERC defendants, plaintiffs allege that MVP has violated the Virginia plaintiffs' rights under the Fifth Amendment to the United States Constitution and Article I, § 11 of the Virginia Constitution through surveying it has already conducted on plaintiffs' land.[3]

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[2] With regard to both "delegation" arguments, MVP asserts that the claims are based on an incorrect premise and that there is no sub-delegation. Specifically, it argues that, although Congress delegated regulatory authority over natural gas and natural gas companies to FERC in the NGA, the NGA itself delegates the power of eminent domain directly to natural gas companies. (MVP Mem. Supp. Mot. to Dismiss 15–16, Dkt. No. 11.) MVP cites to many cases holding that the delegation of eminent domain power to gas companies in the NGA does not violate the United States Constitution. (*Id.* at 16.) The court does not address these arguments because it lacks jurisdiction over the claims based on them.

[3] Although it is not clear from the complaint, plaintiffs' briefing makes plain—and their counsel confirmed at the hearing—that

As noted, pending before the court are a motion to dismiss by MVP and a motion to dismiss by the FERC defendants. The two motions raise very similar arguments, with their primary argument being that plaintiffs have brought their challenges in the wrong court at the wrong time. Specifically, they claim that plaintiffs' claims are governed by a provision in the NGA that confers exclusive jurisdiction on specific federal courts of appeals to "to affirm, modify, or set aside" FERC orders. 15 U.S.C. § 717r(b). Plaintiffs counter that they are not raising a challenge to any particular FERC order, but that they are challenging on constitutional grounds the NGA itself and the standards that FERC uses to determine what constitutes a sufficient "public use."

II. DISCUSSION

A. The Natural Gas Act's Exclusivity Provision Precludes This Court's Exercise of Jurisdiction.

The NGA provides its own framework for challenges to FERC orders. Effectively, to challenge a FERC order, a party must first apply for rehearing before FERC and, thereafter, may obtain judicial review before either the United States Court of Appeals for the D.C.

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they believe Virginia Code § 56-49.01 is unconstitutional. (*See, e.g.*, Pls.' Opp'n MVP Mot. Dismiss 15–16, Dkt. No. 22.) Thus, the court directed plaintiffs' counsel to provide notice to the Commonwealth of the constitutional challenge, pursuant to Federal Rule of Civil Procedure 5.1 and 28 U.S.C. § 2403. To date, though, plaintiffs have not filed anything indicating that they have provided the required notice. The court's accompanying order instructs them to do so.

Circuit or any other court of appeals where the natural gas company related to the order "is located or has its principal place of business." 15 U.S.C. § 717r(b).

The pertinent language from NGA § 19, codified at 15 U.S.C. § 717r, provides that "[a]ny person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order." § 717r(a). If, and only if, a person files for rehearing, however, may the person obtain judicial review: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." *Id.* Subsection (b) explains that a person may obtain review of FERC's order "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." § 717r(b). It describes that review as "exclusive," noting that "[u]pon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Id.* It also requires exhaustion: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is a reasonable ground for failure to do so." *Id.*

As the Fourth Circuit recognized almost forty years ago, the NGA's exclusive jurisdiction provision has a broad reach:

> Section 19(b) . . . vests exclusive jurisdiction to review all decisions of the Commission in the circuit court of appeals . . . ; there is no area of review, whether relating to final or preliminary orders, available in the district court. And this has been the uniform construction given the statute.

Consol. Gas Supply Corp. v. FERC, 611 F.2d 951, 957 (4th Cir. 1979) (internal citations omitted). The jurisdictional provision applies to "all issues inhering in the controversy." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 261–62 (10th Cir. 1989) (explaining that the NGA's jurisdictional provision precludes litigation "between the parties of all issues inhering in the controversy, and all other modes of judicial review" and noting that the court "would be hard pressed to formulate a doctrine with a more expansive scope") (citing *City of Tacoma*, 357 U.S. at 335–36).

In a factually similar case, where landowners sought to enjoin the building of a pipeline and recover tort damages for conversion, the Sixth Circuit affirmed the district court's dismissal for lack of jurisdiction, emphasizing that "[e]xclusive means exclusive." *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Likewise, in *Maine Council of Atlantic Salmon Federation v. National Marine Fisheries Service*, 858 F.3d 690 (1st Cir. 2017), the First Circuit affirmed the district court's dismissal of the case before it for lack of jurisdiction, relying on the judicial review provision of the Federal Power Act.[4] There, just as here, a FERC order was issued *after* the filing of the suit, and the appellate court noted: "Once issued, the FERC order was unquestionably subject to the Federal Power Act's provision for direct appellate jurisdiction of the court of appeals . . . ." 858 F.3d at 693.

The court in *Williams Natural Gas Co.*, too, made clear that the fact that suit was filed prior to the issuance of the order does not alter the result that jurisdiction was proper only in the appropriate courts of appeals. As that court reasoned:

> The structure Congress has provided to litigate and resolve disputes arising under the Natural Gas Act should not be lightly disregarded. In the instant case it is apparent that ONG filed its action in state court as a "preemptive strike." It makes little sense for the state court action to have been filed unless ONG at the time of filing knew or had reason to believe that Williams would be awarded the requisite certificate of public convenience and necessity. The roadway to resolution of the dispute between Williams and ONG has been both charted and mandated by Congress. It makes no sense to permit the

[4] Because the judicial review provisions of the Federal Power Act and the NGA are "in all material respects substantially identical," courts routinely cite "interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

> parties to chart their own route and thus allow piecemeal and unending litigation to ensue.

Williams Natural Gas Co., 890 F.2d at 264.

Indeed, defendants have cited to numerous cases, in addition to those cited above, holding that district courts have no jurisdiction to review or modify FERC orders, even in cases where the challenge is not a direct challenge to the order. *See, e.g.*, *Hunter v. FERC*, 569 F. Supp. 2d 12, 15–16 (D.D.C. 2008) (concluding district court lacked jurisdiction over request for declaratory judgment where the claim was "so intertwined" with a FERC order to show cause and the accompanying enforcement proceedings that "it must be construed as an attack on the [order to show cause] itself"); *Pub. Util. Dist. No. 1 v. FERC*, 270 F. Supp. 2d 1, 5 (D.D.C. 2003) (holding that the Federal Power Act's exclusivity provision governed a public utility's claim that FERC commissioners violated the Sunshine Act by being involved in ex parte contact, and so the court lacked jurisdiction over the dispute and was without authority to disqualify the commissioners); *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015) (concluding the court lacked jurisdiction to consider plaintiff's action to stay enforcement of the order of the commission because, in seeking a stay despite the FERC notice to proceed, Dedham was "effectively asking for review of that notice," which could be reviewed only by the courts of appeals under § 717r).

By contrast, plaintiffs have not cited a single case where a district court exercised jurisdiction over claims—whether characterized as constitutional challenges or otherwise—that would require a modification of a FERC order if the claims were successful. Nonetheless, plaintiffs contend that the NGA's jurisdictional provision is inapplicable to their challenges because they are not challenging a FERC order, but are instead raising constitutional challenges to the statutes granting authority to FERC in the first instance.

Given the breadth of the case law interpreting this provision, however, the court concludes that §717r governs plaintiffs' claims.[5] While it is true that none of the cases relied upon by defendants presented the *precise* constitutional challenges that plaintiffs raise, their challenges are "inhering" in the issuance of the FERC order and would fall within the scope of the exclusivity provision. *See City of Tacoma*, 357 U.S. at 336. To conclude otherwise would be to conclude that the claims are separate and apart from any FERC proceeding. But plaintiffs' own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by MVP's proposed pipeline. *See, e.g.*, *Sw. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172–73 (D. Ariz. 1997) (rejecting plaintiffs' argument that they were not challenging FERC authority to issue a license under the Federal Power Act, but FERC's independent affirmative duty to consult with the United States Fish and Wildlife Service under the

[5] Plaintiffs' assertion that this court's dismissal for lack of jurisdiction would deprive them of an opportunity for judicial review over their constitutional claims in an Article III court is incorrect. Their claims can be reviewed by a federal court of appeals. *See* § 717r(b).

Endangered Species Act, and explaining that "[t]he law is clear that any attempt to challenge a license issued by the FERC, however artfully pleaded, will fall under the exclusive jurisdiction of the Federal Courts of Appeal under the FPA.").

Furthermore, there are some cases involving constitutional (or like) challenges where the courts held they lacked jurisdiction due to the NGA's judicial review provision. For example, in *Adorers of the Blood of Christ v. FERC*, No. 17-3163 (3d Cir. Oct. 13, 2017), the Third Circuit issued an order denying an injunction pending appeal "for essentially the reasons" given by the district court in dismissing the claims for lack of jurisdiction. The district court had concluded that it lacked jurisdiction over plaintiff's challenge to a FERC order certifying a natural gas pipeline, even though the challenge was based on religious expression grounds. *Adorers of the Blood of Christ v. FERC*, No. 17-cv-3163, 2017 WL 4310369, at *2–*3 (E.D. Pa. Sept. 28, 2017). The district court called the law concerning the exclusive jurisdiction of the court of appeals "well-settled" and relied heavily on the Sixth Circuit's decision in *American Energy Corp*., 622 F.3d 602. *See also Lovelace v. United States*, No. 1:15-cv-30131-MAP (D. Mass. Feb. 18, 2016) (concluding that plaintiff's claims challenging an anticipated FERC decision, including an allegation of an unconstitutional taking, were outside the jurisdiction of the district court).[6]

In short, all of plaintiffs' challenges can be raised in the appropriate court of appeals reviewing the FERC

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[6] *Lovelace* is Attachment 1 to the FERC defendants' motion to dismiss for lack of subject matter jurisdiction. (Dkt. No. 20.)

order. Thus, the exclusive remedies available to plaintiffs are to ask for a rehearing before FERC and then file in the appropriate court of appeals. This court does not have jurisdiction to adjudicate the claims raised in Counts One, Two, and Three.

B. The *Thunder Basin* Framework Also Precludes This Court's Exercise of Jurisdiction.

Even if plaintiffs' constitutional challenges fell outside the scope of the NGA's broad exclusivity provision, this court would still lack jurisdiction over their claims based on an application of the so-called *Thunder Basin* framework, derived originally from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). This framework is used by courts to determine whether Congress has impliedly precluded jurisdiction in the district courts "by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court." *Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174, 178 (4th Cir. 2016).

The analysis involves two steps and, at the second step, the court looks at three factors. At the first step, the court asks whether Congress' intent to preclude district-court jurisdiction is "fairly discernible in the statutory scheme," based on an examination of the statute's text, structure, and purpose. *Thunder Basin*, 510 U.S. at 207; *Bennett*, 844 F.3d at 181. At the second step, the court asks whether plaintiffs' claims "are of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212. In doing so, the court considers three factors, with the first being the most significant: (1) whether the statutory scheme "foreclose[s] all meaningful judicial review"; (2) the extent to which the plaintiff's claims are "wholly collateral" to the statute's review provision; and (3) whether "agency expertise could be brought to bear on the . . . questions presented." *Id.* at 212–13 (internal quotation marks and alterations omitted); *see also Bennett*, 844 F.3d at 181 (summarizing same framework).

The framework and the primary Supreme Court cases that have employed it were recently addressed at length by the Fourth Circuit in *Bennett.* 844 F.3d 174. *Bennett* did not involve FERC or the NGA, but the court there applied the *Thunder Basin* framework to conclude that a district court lacked jurisdiction over constitutional challenges brought by a person challenging the SEC's administrative enforcement proceeding against her.

In so holding, the Fourth Circuit discussed extensively the primary trio of Supreme Court cases applying the framework: *Thunder Basin*, 510 U.S. 200; *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477 (2010); and *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). In two of the three, *Thunder Basin* and *Elgin*, the Supreme Court concluded that the statutory schemes at issue (under the Federal Mine Safety and Health Amendments Act of 1977 and the Civil Service Reform Act of 1978, respectively) provided the exclusive vehicle for the plaintiffs' constitutional challenges. In the third, *Free Enterprise*, the Court determined that the plaintiff's challenge was not subject to the exclusivity provision of the Sarbanes-Oxley Act of 2002. *See Bennett*, 844 F.3d at 178–81 (discussing the background of all three).

Unsurprisingly, defendants contend that this case is more like *Thunder Basin* and *Elgin*, while plaintiffs argue that the result in this case should be governed by *Free Enterprise* and by *Califano v. Sanders*, 430 U.S. 99 (1977), a case cited but not discussed in detail in *Bennett*.[7] Based on the analysis in *Bennett* and a fair reading of the trio of cases, the court concludes that the cases clearly support its conclusion that it lacks jurisdiction over the plaintiffs' constitutional claims.

First of all, in explaining and analyzing these cases, *Bennett* specifically noted that the *Free Enterprise* case was something of an anomaly from a factual standpoint. 844 F.3d at 182. There, the plaintiff accounting firm had been inspected and criticized in a report by the Public Accounting Oversight Board (the Board), an entity created by the Sarbanes-Oxley Act whose members were appointed by the SEC. 561 U.S. at 484, 487. The accounting firm asserted that the Sarbanes-Oxley Act was unconstitutional because it

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[7] *Califano* is not on point. There, the Supreme Court held that the Social Security Act did not authorize judicial review of a final agency decision refusing to reopen a claim for social security benefits. 430 U.S. 99. Plaintiff seizes on language from the opinion, though, explaining that district court judicial review of such decisions is available where a plaintiff raises a constitutional challenge because "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Id.* at 109. But in *Califano*, the statutory scheme was different than here. There, not allowing constitutional challenges to be heard by a district court would result in no judicial review at all, by any court, beyond a sixty-day time limit. Here, by contrast, there is "delayed" judicial review in designated courts. Thus, the *Thunder Basin* framework is the appropriate analysis to apply here. *See Bennett*, 844 F.3d at 178.

violated separation of powers by conferring executive power on Board members without subjecting them to Presidential control and also because it violated the Appointments Clause. *Id.* at 487. The Supreme Court held that the district court had jurisdiction to hear the constitutional challenges. It reasoned that the exclusive jurisdiction provision in the Act applied to a "final order of the Commission" or a "rule of the Commission," and explained that the Commission is the body that reviews any Board rule or sanction, but the Commission had not issued any order or rule from which there could be judicial review. *Id.* at 489. Indeed, there was not even a sanction imposed by the Board that would allow an appeal to the Commission. *Id.* at 490. Further, the Court noted that the challenges in the case were "object[ions] to the Board's existence, not to any of its auditing standards" and thus were "'collateral' to any Commission orders or rules from which review might be sought." *Id.* Meaningful review was not otherwise available, therefore, because there was no active proceeding against the specific litigants, who would have had to "bet the farm" by either challenging a rule at random or incurring penalties for noncompliance in order to get their challenges addressed within the statutory framework. *Bennett*, 844 F.3d at 185–86. Indeed, the Fourth Circuit in *Bennett* distinguished *Free Enterprise* on that basis because, in *Bennett*, disciplinary proceedings had already been instituted against the plaintiff. 844 F.3d at 182.

In that respect, the case of *Time Warner Entertainment Co. v. FEC*, 93 F.3d 957 (D.C. Cir. 1996), is similar to *Free Enterprise.* There, the court held that a district court had jurisdiction to consider constitutional challenges to an agency's enabling statute. *Time Warner* involved facial challenges under the First Amendment to provisions of two acts applicable to the cable television industry. In *Time Warner*, though—like *Free Enterprise* and unlike here—the constitutional challenge was "entirely independent of any agency proceedings, whether actual or prospective." 93 F.3d at 965. Indeed, the *Time Warner* court distinguished the case before it from another case where the district court had no jurisdiction, even though that case also involved a challenge to an enabling statute, because in the other case there was a related, ongoing agency proceeding. *Id.* at 965 (discussing *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987)).

Here, of course, there was an active FERC proceeding at the time plaintiffs filed suit that had the potential to affect their properties, and now there is a FERC order that still has the potential to affect their properties. Thus, their constitutional challenges to that order are not "wholly collateral" to an ongoing proceeding.

Turning to the application of the *Thunder Basin* factors here, the court first concludes that the intent of Congress to vest jurisdiction in the appropriate court of appeals is "fairly discernible" from the Natural Gas Act. *See Thunder Basin*, 510 U.S. at 207. Much like the exclusive jurisdiction provision that was at issue in *Thunder Basin* itself, the provision here provides for "exclusive" jurisdiction in the court of appeals to "affirm, modify, or set aside such [FERC] order in whole or in part." 15 U.S.C. § 717r(b). And although plaintiffs claim they are simply raising a general constitutional challenge, the effect of a ruling in their favor would be to modify or set aside the FERC order in whole or in part. By the very text of the statute, the authority to do that lies only with a court of appeals.

Further, as pointed out by defendants, the NGA expressly provides for district court jurisdiction over other aspects of FERC decisions, such as presiding over condemnation proceedings. 15 U.S.C. § 717u. The inclusion of these provisions further supports the conclusion that district courts were to be excluded from addressing the validity of FERC orders and matters related to their validity. *See Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-cv-1250, 2016 WL 3855865, at *14 (S.D. Tex. July 15, 2016) (discussing text and structure of NGA as part of *Thunder Basin* analysis and describing district court involvement set forth in the NGA as "narrowly tailored to assisting FERC in performance of its functions").

The court thus turns to the second step, which is whether plaintiffs' claims "are of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212. In reviewing the three factors to be considered at this step, the court concludes that the first two factors clearly favor a ruling that this court lacks jurisdiction. And significantly, the first factor is the most important one to the analysis. *Bennett*, 884 at 183 n.7 ("We agree with our sister circuits to have addressed the matter that meaningful judicial review is the most important factor in the *Thunder Basin* analysis.").

As to this important first factor, the statutory scheme here does not "foreclose all meaningful judicial review"; it merely vests that review in a court of appeals. Plaintiffs have the ability to raise their constitutional challenges before an Article III court. It is thus clear that the statutory scheme here provides meaningful judicial review: a federal appeals court is an Article III court and well versed in addressing constitutional challenges, and it can address the challenges that plaintiffs raise here in due course. Indeed, *Thunder Basin*, *Elgin*, and *Bennett* all stand for the proposition that meaningful judicial review is available under a statutory scheme similar to the one here.

Second, as already discussed, plaintiffs' claims here are not are "wholly collateral" to the statute's review provision. *Bennett* adopted the following standard as to that prong: "Claims are not wholly collateral when they are the vehicle by which [plaintiffs] seek to reverse agency action." 844 F.3d at 186–87 (citation and internal quotation marks omitted). In *Bennett*, the plaintiff's constitutional claim would have provided an affirmative defense and, if successful, would have invalidated a Commission order. Thus, her claim was not wholly collateral. The same is true here. Indeed, plaintiffs admitted as much at argument, in that they conceded that if they were successful on their constitutional claims, the FERC order would be invalidated, at least insofar as it conveyed to MVP eminent domain authority. (Hr'g Tr. 48–49, Dkt. No. 43.) Thus, the court concludes that plaintiffs' claims are the "vehicle by which plaintiffs seek to reverse agency action," *Bennett*, 844 F.3d at 186–87, despite plaintiffs' protestations to the contrary.

The third factor slightly favors plaintiffs, in that it is true that FERC does not have expertise in ruling on constitutional questions, nor could it rule on whether authority was unconstitutionally delegated to it. But that factor simply is not dispositive of the jurisdictional question. Indeed, in another case applying the *Thunder Basin* factors, the Fourth Circuit noted that even if the agency lacked the expertise or ability to address a constitutional contention, the appropriate court of appeals could still provide meaningful review. *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 240 (4th Cir. 2004) ("[E]ven if the administrative agency elects not to decide the constitutional claims presented[,] . . . this court can do so at the appropriate time.") Furthermore, even where the agency cannot rule on a constitutional question, it may nonetheless have "expertise [that] could be brought to bear on the . . . questions presented." *Thunder Basin*, 510 U.S. at 212–13. Thus, the fact that the agency here has admitted it does not have expertise in, and could not address, constitutional challenges to its own authority, does not mean that a district court must have jurisdiction. Instead, under *Thunder Basin*, the ability of the court of appeals to address the constitutional challenges is key.

To summarize, the *Thunder Basin* framework also supports the court's conclusion that plaintiffs' challenges, including their constitutional challenges, are subject to the NGA's exclusivity provision. Accordingly, this court lacks jurisdiction to address them. *See also Total Gas & Power N. Am., Inc.*, 2016 WL 3855865, at *11, 22 (applying *Thunder Basin* test to conclude that district court lacked jurisdiction over plaintiffs' claims, which included constitutional challenges to FERC's authority to impose civil penalties, and noting that the constitutional challenges could be raised through judicial review under § 717r in the courts of appeals).

III. CONCLUSION

For the foregoing reasons, the court will grant defendants' motions to dismiss (Dkt. Nos. 10, 19) and will dismiss the FERC defendants from this case, as well as all non-Virginia plaintiffs. Plaintiffs' motion for preliminary injunction (Dkt. No. 4), which is based only on the first three counts, will also be denied as moot. An appropriate order will be entered. The order also will require plaintiffs to provide a certificate indicating that they have given the Attorney General of Virginia the notice required by Federal Rule of Civil Procedure 5.1 and 28 U.S.C. § 2403 with regard to Count Four, and that such certificate be filed not later than 10 days after entry of the court's order.

Entered: December 11, 2017.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

APPENDIX D

U.S. Const. art. I, § 1

Article I describes the design of the legislative branch of US Government -- the Congress. Important ideas include the separation of powers between branches of government (checks and balances), the election of Senators and Representatives, the process by which laws are made, and the powers that Congress has. See more...

Section 1.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1, Cl. 1

Section 1.

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

* * *

U.S. Const. art. III, § 1

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. § 717f - Construction, extension, or abandonment of facilities

* * *

(h) RIGHT OF EMINENT DOMAIN FOR CONSTRUCTION OF PIPELINES, ETC.

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-of-way, 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 of the property to be condemned exceeds $3,000.

15 U.S.C. § 717r - Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission‘s order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission‘s order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as “permit”) required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-CV-00357

[Filed July 27, 2017]

ORUS ASHBY BERKLEY,	)
	)
JAMES T. AND KATHY E.	)
CHANDLER,	)
	)
CONSTANTINE THEODORE	)
AND PATTI LEE CHLEPAS,	)
	)
MARTIN AND DAWN E. CISEK,	)
	)
ROGER D. AND REBECCA H.	)
CRABTREE,	)
	)
ESTIAL E. ECHOLS,	)
JR. AND EDITH FERN ECHOLS,	)
	)
GEORGE LEE JONES,	)
	)
ROBERT WAYNE AND PATRICIA	)
ANN MORGAN,	)
	)
MARGARET	)
MCGRAW SLAYTON LIVING	)
TRUST,	)

and	)
	)
THOMAS AND BONNIE B.	)
TRIPLETT,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE, LLC	)
Serve:	)
(Registered Agent)	)
CT Corporation System	)
4701 Cox Road, Suite 285	)
Glen Allen, VA 23060,	)
	)
FEDERAL ENERGY REGULATORY	)
COMMISSION	)
Serve:	)
888 First Street, N.E.	)
Washington, D.C. 20426	)
	)
and	)
	)
CHERYL A. LAFLEUR,	)
in her official capacity as Acting	)
Chairman of the Federal	)
Energy Regulatory Commission,	)
Serve:	)
888 First Street, N.E.	)
Washington, D.C. 20426	)
	)
Defendants.	)
	)

VERIFIED COMPLAINT

The Plaintiffs, by counsel, state their Complaint against Defendants, the Federal Energy Regulatory Commission and Acting Chairman Cheryl A. LaFleur in her official capacity (collectively "FERC" or the "Commission"), and Mountain Valley Pipeline, LLC ("MVP") as follows:

PRELIMINARY STATEMENT OF THE CASE

1. The case before the Court, in its simplest form, is a constitutional challenge to the eminent domain provisions of the Natural Gas Act, 15 U.S.C. § 717f(h), and the resulting unconstitutional acts of FERC and ultimately MVP. In 1947, Congress delegated the power of eminent domain to FERC (at that time, the agency was known as the Federal Power Commission) to condemn properties for the construction and operation of interstate gas pipelines. Congress, however, failed to set forth any set standard, known as an intelligible principle, rendering its delegation of power overly broad and unconstitutional. Without boundaries from Congress, FERC has run wild in the years since, and has unconstitutionally sub-delegated the power of eminent domain to private parties seeking private profits. MVP is one such company seeking FERC's permission to proceed. Worse yet, FERC has published its Statement of Policy regarding its decision-making process for granting the power of eminent domain, and each of the tests falls well short of the Constitution and the Supreme Court's interpretation of the Takings Clause in *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. The Plaintiffs in this case are all landowners within the path of MVP's proposed 42-inch high pressure natural gas pipeline, from Summers County, West Virginia to Franklin County, Virginia. These Plaintiffs seek declaratory and injunctive relief to protect their constitutional rights to secure their private property from a government-sanctioned land grab for private pecuniary gain.

THE PARTIES

3. Orus Ashby Berkley is a resident of Summers County, West Virginia and owns land near Pence Springs, West Virginia and along the Greenbrier River (Summers County Tax ID Nos. 7-15A-13.1, 7-15A-13). Mr. Berkley has invested heavily in his riverfront property and maintains two rental cottages, a commercial sewer system, and a large parking lot. Mr. Berkley has been delayed in completing site development for 50 riverside campsites for over three years due to MVP's plans to utilize his property as an access area to cross the Greenbrier River.

4. James T. and Kathy E. Chandler maintain their family home on Bent Mountain in Roanoke County, Virginia (Roanoke County Tax ID Nos. 111.00-01-62.01-0000, 111.00-01-62.02-0000, and 117.00-01-38.00-0000). MVP's proposed route bisects the Chandlers' property and MVP plans to use the only means of ingress and egress to the property as a permanent access road. James T. Chandler is a trauma orthopedic surgeon called to the operating room at a moment's notice, rendering a permanent access road particularly problematic.

5. Constantine Theodore and Patti Lee Chlepas are residents of Monroe County, West Virginia and maintain their permanent residence on a 21-acre tract near Lindside, West Virginia (Monroe County Tax ID No. 03-12-4). The Chlepas operate Birdsong Farm, LLC, an organic apiary and bee preserve from the property. Birdsong Farm sells natural raw honey, 100% beeswax candles, all-natural insect repellants, essential oils, soaps, lip balm, and other natural products of the hive. MVP's plans entail construction of an access road as well as part of the main pipeline across the Chlepas' property.

6. Martin and Dawn E. Cisek reside along the border of Giles County and Craig County, Virginia in the historic town of Newport (Giles County Tax ID Nos. 47-12A, 47-12B; Craig County Tax ID No. 120-A-9). MVP's proposed line will traverse across the middle of the Ciseks' property and within less than 150 feet of their home.

7. Roger D. and Rebecca H. Crabtree reside in Monroe County, West Virginia near the town of Lindside. The Crabtrees own two parcels of land totalling approximately 30 acres (Monroe County Tax ID Nos. 3-30-18.8, 3-30-38.1). MVP plans to construct its pipeline on the Crabtrees' agricultural parcel, which contains a 20'x24' metal barn, a well, and a livestock watering system comprised of over 1,000' of piping. The Crabtrees raise sheep, chicken, and rams, and harvest hazelnuts, apples, walnuts, chestnuts and peaches. The Crabtrees' residence is located on the second parcel immediately adjacent to the agricultural parcel and is within the blast zone of the pipeline.

8. Estial E. Echols, Jr., a U.S. Army veteran, and Edith Fern Echols are residents of Giles County, Virginia and have maintained their family home in the town of Newport, Virginia (Giles County Tax ID Nos. 46-20A, 46-19B) for 48 years. The center of MVP's proposed line traverses the Echols' property some 62 feet from their kitchen window.

9. George Lee Jones, a U.S. Navy veteran, was born in 1930 on his family farm in Giles County, Virginia (Giles County Tax ID Nos. 47-1, 47-2). The family farm, now maintained by the seventh generation of Jones', will be bisected by the MVP pipeline.

10. Robert Wayne and Patricia Ann Morgan reside in Franklin County, Virginia near the town of Rocky Mount (Franklin County Tax ID No. 0440018700). MVP's proposed pipeline will bisect their tract of property and will be within several hundred feet of the Morgans' residence.

11. The Margaret McGraw Slayton Living Trust owns the residence of Michael E. and Margaret M. Slayton in Montgomery County, Virginia in the Mount Tabor area (Montgomery County Tax ID No. 017-A2D). The Slayton's residence is located along a ridge in the middle of a 90-acre tract of land which will be traversed by MVP's proposed pipeline near the family home.

12. Thomas and Bonnie B. Triplett own five contiguous parcels of land and maintain their residence in Montgomery County, Virginia, less than 1500 feet from the center of the proposed line. MVP's proposed route will divide a 33-acre tract of pristine, old growth forest in half (Montgomery County Tax ID No. 017-

A2C). The Tripletts' affected tract contains an old cabin and serves as a family retreat and bountiful hunting grounds.

13. MVP is a Delaware limited liability company with its principal office located at 625 Liberty Avenue, Suite 1700 in Pittsburg, Pennsylvania 15222 and its registered agent listed as CT Corporation System, 4701 Cox Road, Suite 285 in Glen Allen, Virginia 23060. MVP conducts business in Virginia and West Virginia, including in the Western District of Virginia, Roanoke Division.

14. FERC is an independent federal agency charged with issuing Certificates of Convenience and Public Necessity pursuant to the Natural Gas Act for jurisdictional natural gas pipeline projects. The Commission is headquartered at 888 First Street, N.E., Washington, D.C. 20426.

15. Cheryl LaFleur is the Acting Chairman of FERC, located at FERC's headquarters in Washington, D.C.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action asserts several federal questions of constitutionality.

17. This Court possesses supplemental jurisdiction over the Virginia Plaintiffs' state constitutional challenge pursuant to 28 U.S.C. § 1367.

18. This Court has personal jurisdiction over MVP and FERC because, *inter alia*, MVP and FERC

conduct business in the Commonwealth of Virginia, including, *inter alia*, engaging in activities related to planning and constructing an interstate natural gas pipeline, and entering into agreements for the sale and purchase of property and property rights located in the Commonwealth of Virginia as well as the regulation of pipeline approval, construction, and operations.

19. The properties at issue include properties located within this District.

20. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the acts and transactions complained of herein occurred in this District, pursuant to 28 U.S.C. § 1391(b)(3) because MVP is subject to personal jurisdiction at the time this action is commenced, and pursuant to 28 U.S.C. § 1391(e)(1) because FERC is an agency of the United States.

I. Introduction

21. In the summer of 2014, EQT Corporation ("EQT") and a subsidiary of NextEra Energy, Inc. ("NextEra"), proclaimed their intent to build a 42-inch high pressure natural gas pipeline from Wetzel County, West Virginia to Transcontinental Gas Pipeline Company's ("Transco") Zone 5 compressor station 164 in Pittsylvania County, Virginia. Stretching more than 300 miles through the steep slopes of the Appalachian mountains, across the George Washington National Forest and the Appalachian Trail, through countless watersheds serving the residents of West Virginia and Virginia, EQT and NextEra aptly named the project the Mountain Valley Pipeline ("MVP"). MVP's stated intent in constructing the pipeline is to connect the

Marcellus and Utica shale fields to existing pipeline networks for shipment of cheap, fracked gas to the southeastern United States.

22. Late in the summer of 2014, Dominion Energy ("Dominion") teamed with Duke Energy ("Duke"), among others, and announced its intention to construct a 550-mile 42-inch high pressure natural gas pipeline to connect the same Marcellus and Utica formations from Harrison County, West Virginia to Chesapeake, Virginia and Robeson County, North Carolina. Dominion and Duke called the project the Atlantic Coast Pipeline ("ACP") and proclaimed it would serve markets in the southeastern United States, a reference to Dominion's initial name for the project – the Southeast Reliability Project.

23. As is evinced by the rush to build by ACP and MVP, there is no doubt that former Chairman of FERC Norman Bay was correct in stating, "[t]he shale revolution has upended U.S. energy markets" and global energy markets.[1] Despite these massive changes in the past decade, no federal agency, including the Commission, has ever "conducted a comprehensive study of the environmental consequences of increased production from th[e Marcellus and Utica shale] region."[2] Likewise, in evaluating whether expanding infrastructure warrants certification, FERC has "largely relied on the intent to which potential shippers

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[1] *See* Norman Bay's Separate Statement in Order Granting Abandonment and Issuing Certificates, FERC Docket Nos. CP15-115-000, CP15-115-001 (February 3, 2017).

[2] *Id.*

have signed precedent agreements for capacity on the proposed pipeline" to show market need rather than engage in a comprehensive evaluation of need.[3] Isolated evaluation of applications for new natural gas infrastructure projects within the boom-bust world of the energy industry has led to stranded assets, such as the abandonment of several gas import terminals built in the early 2000s.

24. But the boom in infrastructure projects does not excuse FERC from its fundamental constitutional obligations to exercise power lawfully and in accordance with its jurisdictional mandate. Rather than exercise its delegated powers in accordance with Congress' instructions and well-established intelligible principles, FERC has morphed into judge, jury, and (almost never) executioner for the plethora of natural gas infrastructure expansion by private companies for private gain. Worse yet, not only does FERC exercise authority outside of its delegated powers, FERC has replaced our Founders' guidance in the Fifth Amendment Takings Clause with its own economic sliding scale/balancing test that, at best, weighs perceived public benefits against adverse effects when determining whether to grant a private corporation the uniquely governmental power of eminent domain.

25. When challenged through the administrative process, FERC inevitably tolls all challenges to the Commission's actions under the Administrative Procedures Act, permitting construction to proceed at a blistering pace, thus rendering any challenges moot. FERC's actions embody the spirit of seeking

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[3] *Id.*

forgiveness rather than permission, while landowners and other interested citizens are demoted to subservient permission seekers, bearing no resemblance to the principle of the "consent of the governed" upon which this Nation's laws were derived.

26. FERC should no longer be permitted to exceed its unlawfully delegated authority or to apply an unconstitutional standard in determining when a private corporation should be permitted to take private property for private gain under auspices of the Natural Gas Act, 15 U.S.C. § 717, *et seq*. The Commission's interpretation and application of the Natural Gas Act's eminent domain provisions, 15 U.S.C. § 717f(h), are facially unconstitutional and unconstitutional as applied to the MVP project. This Court is the only check on FERC's exercise of near absolute power; accordingly, FERC must be enjoined from issuing a Certificate to MVP and to any other private natural gas company under the Commission's fundamentally flawed policy for assessing public use/purpose in contravention of the Fifth Amendment.

II. Factual Background

A. The Natural Gas Act

27. The year 1938 marked the 75th anniversary of the Battle of Gettysburg, the first appearance of Superman in Action Comics #1, the terror-inducing first radio broadcast of Orson Welles's *The War of the Worlds*, and Seabiscuit's famous victory over War Admiral at Pimlico. In Europe, Winston Churchill prodded Neville Chamberlain to challenge Adolf Hitler and the rise of Nazism in Germany, while in the United States, the Supreme Court issued its landmark

decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and, with much less fanfare, Congress passed the Natural Gas Act, 15 U.S.C. § 717, *et seq.* Congress determined for the first time that "the business of transporting and selling natural gas in interstate commerce ***for ultimate distribution to the public*** is affected with a public interest." 52 Stat. 821, § 1(a) (1938) (emphasis added). Congress proclaimed that the Natural Gas Act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ***ultimate public consumption*** for domestic, commercial, industrial, or any other use…." *Id.* at § 1(b) (emphasis added).

28. The 1938 Natural Gas Act provided the Federal Power Commission[4] with authority to order a natural gas company to expand its facilities, after notice and an opportunity for a hearing, where the Commission "finds such action necessary or desirable ***in the public interest***." *Id.* at 824, § 7(a) (emphasis added). Section 7(c) addressed the topic of independent, private expansion by a natural gas company, mandating that a company obtain a "certificate that the present or future public convenience and necessity require or will require such new construction or operation…." *Id.* at 825, § 7(c). Congress clarified that "it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ***ultimate public consumption*** for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the

[4] The Federal Power Commission was the predecessor to the Federal Energy Regulatory Commission.

maintenance of adequate service in the public interest." *Id.* (emphasis added). Notably, Congress did not delegate the power of eminent domain to a private natural gas company in 1938 and the issuance of a Certificate did not result in any automatic conferral of governmental power to a natural gas company.

29. Nine years later, Congress amended section 7 of the Natural Gas Act providing 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 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 … it may acquire the same by 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." 52 Stat. 824 (1947). Since 1947, private companies have exercised the power of eminent domain upon obtaining a certificate of public convenience and necessity.

30. Following the oil crisis of 1973, President Carter signed into law the Department of Energy Organization Act of 1977, which consolidated a variety of energy-related agencies under the newly formed Department of Energy. One such independent agency, the Federal Power Commission, was part of this consolidation. *See* 91 Stat. 565 (1977). As part of the creation of the Department of Energy, Congress dissolved the Federal Power Commission, created FERC, and transferred the powers under the Natural Gas Act conferred to the Federal Power Commission to FERC. *Id*; *see also* 42 U.S.C. § 7172(a).

31. Accordingly, when FERC issues a Certificate to a natural gas company, so too does FERC "confer[] on the developer eminent domain authority (15 U.S.C. § 717f(h))."[5] By operation of section 717f(h) in the form of a Certificate granted by FERC, a private natural gas company obtains "the authority to secure property rights to lay the pipeline if the developer cannot secure the necessary rights-of-way from landowners through negotiation."[6] FERC, then, is the governmental agency responsible for conferring the power of eminent domain to a private gas company under the Natural Gas Act, an act which is itself independently unconstitutional.

B. A Boom in Domestic Natural Gas Production Has Led to Overbuilding of Pipeline Infrastructure and a Domestic Gas Glut

32. In more recent times, the domestic production of natural gas has expanded dramatically, and led to unprecedented infrastructure growth, particularly between 1998 and 2013.[7] Growth in production stems largely from the exploitation of the Marcellus and Utica shale fields across the Appalachian Basin and the

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[5] Paul W. Parfomak, *Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review*, Congressional Research Service, January 16, 2015, at p. 5.

[6] *Id.* at p. 6.

[7] *Natural Gas Infrastructure Implications of Increased Demand from Electric Power Sector*, U.S. Departmenet of Energy, Feb. 2015, p.9.

Haynesville field near the Gulf Coast.[8] As a result of this expanded production in the shale fields, energy companies have continued to seek approval to construct and operate natural gas pipelines to get natural gas to market. Recent economic studies conclude, however, that "[t]he pipeline capacity being proposed exceeds the amount of natural gas likely to be produced from the Marcellus and Utica formations over the lifetime of the pipelines."[9] Likewise, economists have concluded that "the supply capacity of the Virginia-Carolina region's existing natural gas infrastructure is more than sufficient to meet expected future peak demand."[10]

33. Concurrent to the pipeline infrastructure boom has been a steep rise in natural gas exports from the United States to the rest of the world. In the U.S. Energy Information Administration's ("EIA") *Annual Energy Outlook 2017*, the United States is on pace to become a net exporter of natural gas on an average

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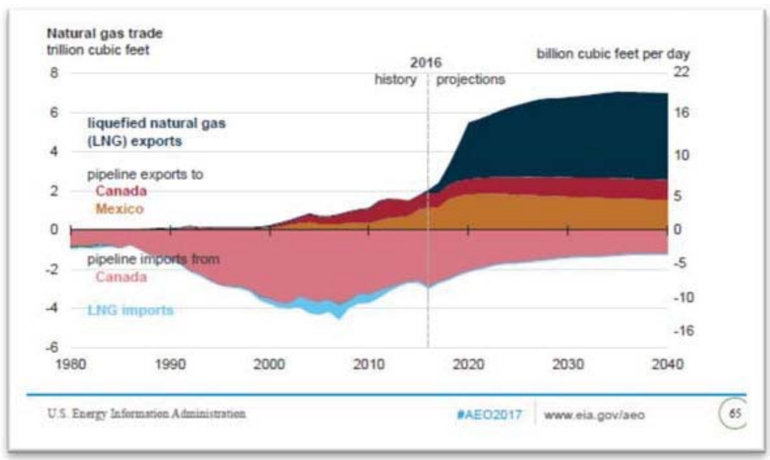
[8] *Id.* at p. 3.

[9] Cathy Kunkel and Tom Sanzillo, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia, Proposed Atlantic Coast and Mountain Valley Pipelines Need Greater Scrutiny, Institute for Energy Economics and Financial Analysis*, p. 11 (April 2016); see also *Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An examination of the need for additional pipeline capacity into Virginia and Carolinas*, Synapse Energy Economics, Inc. (September 12, 2016).

[10] *Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An examination of the need for additional pipeline capacity into Virginia and Carolinas*, Synapse Energy Economics, Inc., p. 1 (September 12, 2016).

annual basis by 2018.[11] The EIA noted that pipeline imports of natural gas will continue to decline, while pipeline exports to Mexico and Canada steadily rise and liquid natural gas ("LNG") exports increase dramatically between 2017 and 2040:[12]



By 2020, at least five LNG export terminals will be in operation and capable of exporting 9.2 billion cubic feet of gas per day. By 2040, LNG exports are expected to grow to 23 billion cubic feet of gas per day.[13] LNG export terminals that have already been approved and are currently under construction include Dominion Energy's Cove Point LNG facility in Lusby, Maryland; Southern LNG Company's Elba Island, Georgia facility;

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[11] *See* U.S. Energy Information Administration, *Annual Energy Outlook 2017*, p. 66; *EIA: LNG exports expected to drive growth in U.S. natural gas trade*, World Oil, February 24, 2017.

[12] Annual Energy Outlook 2017, at p. 66.

[13] *Id.*

and various other LNG facilities in Sabine and Hackberry, Louisiana; as well as Freeport and Corpus Christi, Texas:

Export Terminals

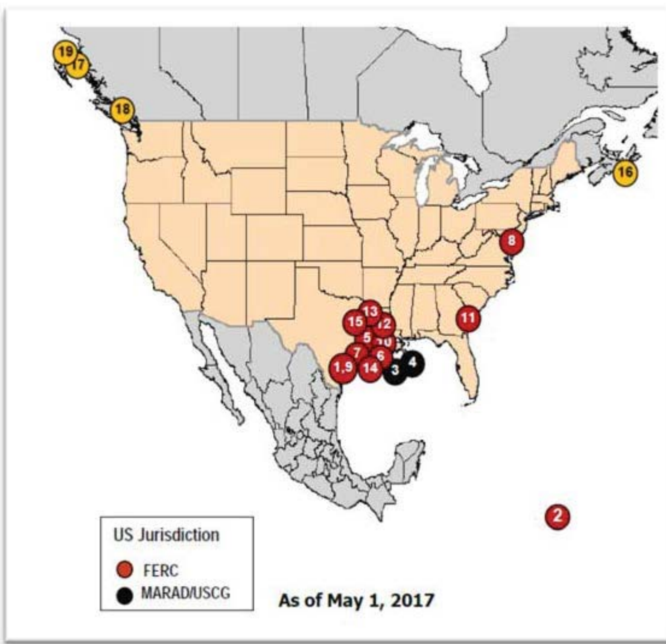
U.S.

APPROVED - UNDER CONSTRUCTION - FERC

5. **Sabine, LA:** 0.7 Bcfd (Cheniere/Sabine Pass LNG) (CP11-72 & CP14-12)
6. **Hackberry, LA:** 2.1 Bcfd (Sempra–Cameron LNG) (CP13-25)
7. **Freeport, TX:** 2.14 Bcfd (Freeport LNG Dev/Freeport LNG Expansion/FLNG Liquefaction) (CP12-509) (CP15-518)
8. **Cove Point, MD:** 0.82 Bcfd (Dominion–Cove Point LNG) (CP13-113)
9. **Corpus Christi, TX:** 2.14 Bcfd (Cheniere – Corpus Christi LNG) (CP12-507)
10. **Sabine Pass, LA:** 1.40 Bcfd (Sabine Pass Liquefaction) (CP13-552) ★
11. **Elba Island, GA:** 0.35 Bcfd (Southern LNG Company) (CP14-103)

APPROVED – NOT UNDER CONSTRUCTION - FERC

12. **Lake Charles, LA:** 2.2 Bcfd (Southern Union – Lake Charles LNG) (CP14-120)
13. **Lake Charles, LA:** 1.08 Bcfd (Magnolia LNG) (CP14-347)
14. **Hackberry, LA:** 1.41 Bcfd (Sempra - Cameron LNG) (CP15-560)
15. **Sabine Pass, TX:** 2.1 Bcfd (ExxonMobil – Golden Pass) (CP14-517)



Three of these LNG facilities, Cove Point, Elba Island, and Sabine Pass, are directly connected to the 10,500-mile Transco line, which traverses from the Gulf Coast to the New York City area and which MVP seeks to connect with in Pittsylvania County at the Zone 5 Hub at Station 165:

C. The Role of the Federal Energy Regulatory Commission

34. The application and approval process for interstate pipelines is regulated by FERC. In order to construct, and then to operate, a natural gas pipeline, a natural gas company must file an application with FERC seeking a Certificate of Public Convenience and Necessity ("Certificate"). If a natural gas company is granted a Certificate, it is granted the power of

eminent domain pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h).

35. As part of any application for a Certificate, a natural gas company is expected to provide information to FERC, such as a "concise description of the proposed service, sale, operation, construction, extension, or acquisition [that] is or will be required by the present or future public convenience and necessity." 18 C.F.R. § 157.6(b)(2). 18 CFR § 157.14(12) requires a natural gas company to provide certain market data in Exhibit I to its application. In particular, the regulations require a natural gas company to provide "[a] system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities are under construction, and actual data of like import for each of the 3 years next preceding the filing of the application." 18 C.F.R. § 157.14(12). Exhibit I should also provide "[n]ames and locations of customer companies and municipalities, showing the number of residential, commercial, firm industrial, interruptible industrial, residential space-heating, commercial space-heating, and other types of customers… [as well as] an explanation of the end use to which each of these industrial customers will put the gas." 18 C.F.R. § 157.14(12)(i). A natural gas company's application must also "contain copies of any contracts, purchase agreements, or other documentation reflecting the sale or transport of natural gas as part of the application." 18 C.F.R. § 157.14(12)(v).

36. Despite this plethora of regulations setting forth the application process and documentation

required by FERC, changes in the natural gas industry due to the shale boom caused FERC to examine its certification policies in 1999 and 2000. FERC analyzed various issues affecting the gas industry, including whether the Commission should independently evaluate markets to determine true need and whether to more closely scrutinize supply agreements between affiliates of the applicant.

37. The Commission issued a Statement of Policy on September 15, 1999 regarding its new approach to certification and pricing of new construction projects. *See* 88 FERC ¶ 61, 227, attached hereto as **Exhibit 1**. Prior to issuing the Statement of Policy, FERC held a public conference and considered comments from interested parties, namely from the natural gas industry. *Id.* After conducting the public conference and considering comments, FERC decided that it needed to review "the Commission's policy for determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest." *Id.* at 2.

38. In considering how to present its policy to stakeholders, FERC solicited responses from commenters on key questions, including: "(1) Should the Commission look behind precedent agreement or contracts presented as evidence of market demand to assess independently the market's need for additional gas service?, and (2) Should the Commission apply a different standard to precedent agreements or contracts with affiliates than with non-affiliates?" *Id.* at 3.

39. In summarizing the weaknesses in FERC's historical policy, the Commission noted that it

previously relied too heavily on the existence of precedent contracts to evince a need in the market, which FERC equates to evincing a public need. Specifically, FERC noted that "[t]he amount of capacity under contract also is not a sufficient indicator by itself of the need for a project…[and u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates." *Id.* at 16. Put another way, FERC recognized that market need as expressed with affiliate/subsidiary precedent contracts may not really establish a market need, but instead establish that a pipeline project seeks approval to ship its indirectly-owned gas.

40. In response, FERC outlined a new analysis focused on balancing "the public benefits against the potential adverse consequences" of a new pipeline project. *Id.* at 18. In determining whether to grant a Certificate, FERC considers "all relevant factors reflecting on the need for the project … [including] precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.* If the supposed public benefits outweigh the adverse effects, FERC grants a Certificate.

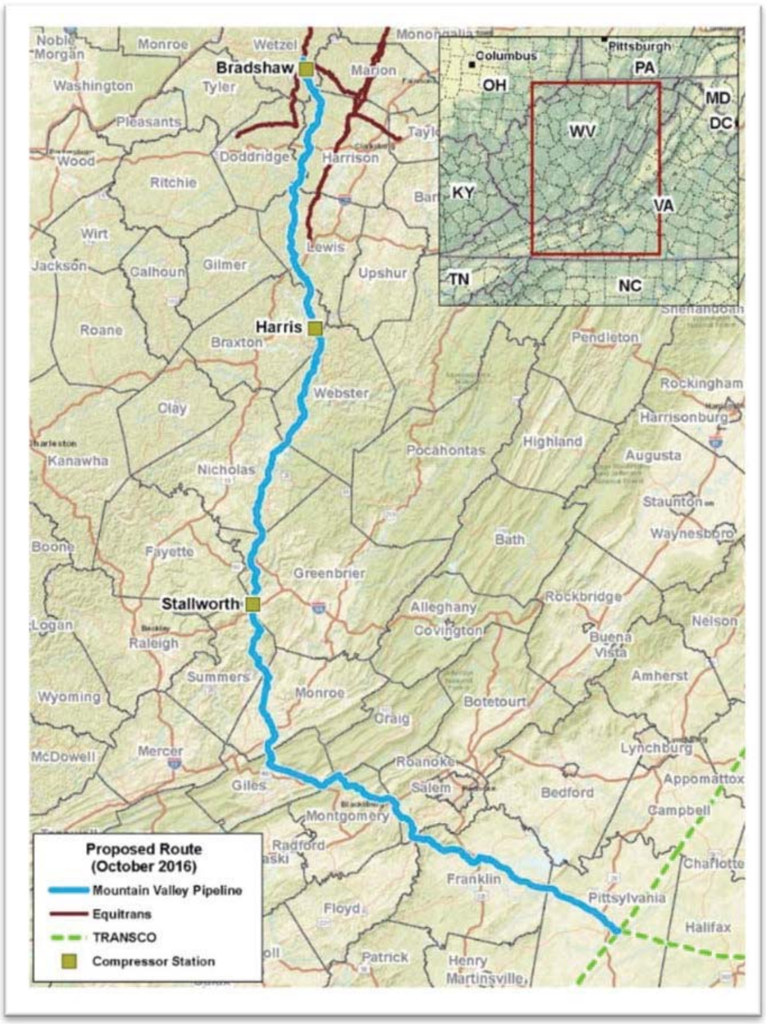
41. In its Statement of Policy, FERC listed several typical indicators of public benefit, such as eliminating bottlenecks, providing access to new suppliers, and providing competitive alternatives. FERC was clear that while "[v]ague assertions of public benefit will not be sufficient," an applicant need not conduct a market study for each project, but "could rely

on generally available studies by EIA or GRI...." *Id.* at 25. FERC described its view of eminent domain as requiring a "sliding scale approach" where "the strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain." *Id.* at 27. Put simply, FERC's decision-making process employs a proportional/sliding scale/balancing test to weigh potential public benefits against the potential adverse effects (e.g., environmental harms, economic harm, landowner interests, etc.).

D. MVP's Application and Its Self-Created Need

42. MVP filed its Application for a Certificate with FERC on October 23, 2015, seeking authorization to construct, own, and operate a 301-mile interstate pipeline through West Virginia and Virginia, as well as three compressor stations and other required facilities. MVP seeks authorization to construct a 42-inch pipeline to provide up to 2.0 million dekatherms per day ("MMDth/d") "of firm transportation service, which has been fully subscribed, to satisfy the growing demand for natural gas by local distribution companies ("LDCs"), industrial users, and power generation facilities in the Mid-Atlantic and southeastern markets, as well as markets in the Appalachian region, using natural gas produced in the Appalachian Basin shale region."[14] MVP's proposed route is as follows:

[14] Certificate Application at 2, available at https://www.mountainvalleypipeline.info/~/media/sites/mvp/files/Certificate-Application-VOL-I.pdf (last accessed July 26, 2017).



43. MVP anticipates four interconnection facilities including one interconnection with Equitrans' exhibiting H-302 pipeline near the MarkWest Mobely Processing facility in Wetzel County, West Virginia; one interconnection in Harrison County, West Virginia near another processing facility; one interconnection in

Braxton County, West Virginia at Columbia's WB System; and one interconnection with Transco near station 165 in Pittsylvania, Virginia. Certificate Application, at 8. MVP claimed that "at least one tap will be installed to serve Roanoke Gas Company, LLC, an LDC in southwestern Virginia." *Id.* at 9.

44. MVP declared in its application that the primary purpose of constructing the pipeline will be to connect shale natural gas supplies from northern West Virginia to Transco Station 165, which is the "existing pooling point for Zone 5 on Transco's system and a gas trading hub for the Mid-Atlantic market." *Id.* at 10. In court proceedings in West Virginia, MVP admitted that "[t]he primary purpose of [MVP's pipeline] is to deliver gas to the Transco pool." *Mt. Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850, 861 (W.Va. 2016).

45. MVP's main evidence of market demand stems from four precedent agreements for 2.0 MMDth/d resulting in the project being fully subscribed prior to approval. *Id.* MVP also cited U.S. Census Bureau population growth estimates, the demands of the Clean Power Plan, as well as the Energy Information Administration's 2015 Annual Energy Outlook as a basis for market need.

46. MVP noted that as a result of the shale boom, "natural gas produced in the Appalachian Basin has greatly outpaced regional market demand" resulting in "reduced gas prices in the Appalachian region to historic lows" and has triggered the emergence of new pipelines to "access this prolific supply and transport it to market." *Id.* at 14-15. MVP claimed in its application that its new 301-mile pipeline "will serve the growing natural gas needs of the Mid-Atlantic and southeastern

markets as well as markets along the pipeline route and will enhance the reliability and flexibility of the interstate pipeline grid in these regions." *Id.* at 15.

47. To illustrate need, MVP attached four precedent agreements accounting for a full subscription to ship 2.0 MMDth/d on the pipeline. *See* Exhibit I to MVP's Application, Market Data. MVP extolled that the line was fully subscribed by EQT Energy, LLC; Roanoke Gas; USG Properties Marcellus Holdings, LLC; and WGL Midstream, Inc. *Id.* at 16. Absent from MVP's application, however, is any mention that the pipeline is fully subscribed solely by affiliates of MVP. EQT Energy, LLC subscribed to 1,290,000 Dth/d, representing 64.5% of the capacity of the pipeline. EQT Energy, LLC operates as a subsidiary of EQT Midstream Partners, LP, and EQT Midstream Partners, LP owns the largest stake in MVP, 45.5%.

48. Similarly, MVP exhibited a precedent agreement with USG Properties Marcellus Holdings, LLC for 500,000 Dth/d, accounting for 25% of the subscription capacity on the line. USG Properties Marcellus Holdings, LLC, is an affiliate of US Marcellus Gas Infrastructure, LLC, the direct owner of 31% of MVP, and a subsidiary of NextEra US Gas Assets, LLC. NextEra US Gas Assets, LLC is an indirect, wholly-owned subsidiary of NextEra Energy Inc.

49. MVP produced an executed precedent agreement for 200,000 Dth/d with WGL Midstream, Inc. accounting for 10% of the subscription capacity. WGL Midstream, Inc. currently owns 10% of MVP.

50. MVP's final precedent agreement was executed with Roanoke Gas Company for 10,000 Dth/d, or 0.5% of the subscription capacity of the pipeline. RGC Midstream, LLC is a subsidiary of RGC Resources, Inc. RGC Resources, Inc. is the holding company for Roanoke Gas Company. RGC Midstream, LLC owns 1% of MVP and joined the MVP joint venture 13 months after MVP was originally incorporated, and just weeks prior to MVP's application for a Certificate.

51. While MVP claimed that its capacity is fully subscribed, 100% of the subscription capacity derives from entities that own the pipeline and the precedent agreements are not binding until after issuance of a Certificate.

52. MVP also conducted several binding open season offers between 2014 and 2015 as well as a non-binding interim period open season to "provide all market participants the opportunity to identify short-term transmission capacity needs at diverse receipt locations in the Appalachian Basin to the new WB Interconnect in Braxton County, West Virginia." Application at 16-17. MVP claimed to have received interest in the non-binding interim open season, but no agreements have been produced to date.

53. Whether MVP obtained interest in its binding open seasons is unknown. However, MVP claimed it has been fully subscribed only by its affiliates. Prior to these affiliate subscriptions, MVP's first open season was announced on June 12, 2014 on joint EQT and NextEra Energy letterhead, and was slated to be closed July 10, 2014. This first open season sought subscriptions for the entirety of the pipeline and noted

that the "primary point of delivery will be Transco Zone 5 Station 165 in Pittsylvania County, Virginia." Exhibit Z-4 to Application. MVP described Transco Zone 5 Station 165 as a "highly liquid trading area" that "merges with the mainline at Station 165 as well as [provides] deliveries to Cove Point LNG." *Id.*

54. MVP's second open season was again advertised on joint EQT and NextEra Energy letterhead as a binding open season between September 9, 2014 and September 29, 2014 for the full length of the proposed line. MVP advertised access to the liquefaction plant at Cove Point, Maryland. On the final date of the binding open season, MVP announced that it would extend the subscription offers to October 6, 2014. MVP extended the open season three more times, to October 10, 2014, October 14, 2014, and October 21, 2014. It is unknown whether any non-affiliates responded to any of MVP's open seasons and MVP's Certificate Application does not mention any binding open seasons for capacity on the entirety of the line, and instead only refers to the interim non-binding open season offered in September 2015.

55. MVP's first executed precedent agreement was entered on March 10, 2015 with 10% owner WGL Midstream. MVP's precedent agreements with Roanoke Gas Company (i.e., RGC Midstream, 1% stake), USG Properties Marcellus Holdings, LCC (i.e., NextEra Energy, 31% stake), and EQT Energy, LLC (*i.e.*, EQT Midstream, 45.5% stake), were executed just days prior to MVP's filing of its Certificate Application.

56. On January 22, 2016, MVP announced that Consolidated Edison, Inc., through its subsidiary Con Edison Gas Midstream, acquired a 12.5% ownership in

MVP, and at the same time a sister subsidiary, Consolidated Edison Company of New York, Inc., entered into a precedent agreement subscribing to 250,000 Dth/d, while USG Properties Marcellus Holdings, LLC decreased its subscription by 250,000 Dth/d.[15]

57. To date, MVP has not exhibited any non-affiliate subscription agreements or any other evidence of negotiations with non-affiliates. Likewise, FERC's Draft and Final Environmental Impact Statement fails to acknowledge, much less highlight, the fact that 100% of the subscription commitments for use of MVP are by owner-affiliates of MVP.

E. FERC's Criteria for Analyzing Certification Falls Well Short of Constitutional Standards

58. As noted above, FERC issued a Statement of Policy on September 15, 1999, setting forth its policies on certification and natural gas pricing of new construction projects due to the rapid changes in the natural gas industry that occurred in the late 1990s. *See* **Exhibit 1**. FERC noted that any effective certification policy should "further the goals and objectives of the Commission's natural gas regulatory policies" including "foster[ing] competitive markets, protect[ing] captive customers, and avoid[ing]

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[15] *See* http://www.roanoke.com/business/news/mountain-valley-secures-new-pipeline-partner-and-customer-in-con/article_419a2c13-3105-5960-b446-cf5b82dfc2cb.html; DEIS at 1-10, available at https://www.mountainvalleypipeline.info/~/media/Sites/MVP/Files/MVP%20EEP%20DEIS%20Sections%201-5.ashx?la=en (last accessed July 26, 2017).

unnecessary environmental and community impacts while serving increasing demands for natural gas." *Id.* at p. 13. FERC's purpose was to introduce and apply "an analytical framework for deciding … when a proposed project is required by the public convenience and necessity" in a manner consistent with the Commission's regulatory policies. *Id.* Notably absent, however, is any reference to, or recognition of, the constitutional standards at play for determining whether the taking of private property, even with just compensation, is for a public use or purpose. Rather than analyze and apply a standard for assessing public purpose/use that comports with the Constitution, FERC devised a series of sliding scale tests that fail to pass constitutional muster.

59. The Commission's primary, and threshold concern, focuses not on determining any need for the project or whether the project would be for a public purpose or use, but instead on what the market effects might be on captive customers of the natural gas company. *Id.* at 18. Consistent with FERC's stated policy goal of protecting captive customers, the Commission analyzes whether the proposed project will be subsidized by current customers of the company as well as what steps the company is willing to take to mitigate the potential adverse effects suffered by current customers, landowners, or the communities affected by the proposed project.

60. In the Commission's own words, "if an applicant can show that the project is financially viable without subsidies, then it will have established the first indicator of public benefit." *Id.* at 22. Put another way, if the natural gas company can finance a project

without pushing the cost of the project to the public (or a small subset of the public: the consumers of that company's services), there is presumed to be a public benefit.

61. Assuming a proposed project meets the threshold requirements on financing, a public benefit will be presumed to exist and FERC moves on to "balance" factors to determine whether the public benefits outweigh adverse impacts. *Id.* at 22-23. An applicant should demonstrate public benefit to FERC by providing "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.* at 23. The natural gas company's path to obtaining the federal power of eminent domain involves making a "sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects." *Id.*

62. In assessing adverse effects, FERC closely examines the interests of the applicant's existing customers, the interests of competition pipelines and their captive customers, as well as the interests of landowners and the surrounding communities. *Id.* The Commission's approach is almost singularly economic in nature, but FERC's Statement of Policy mentions, albeit in passing, that "there are other interests that may need to be separately considered in a certificate proceeding, such as environmental interests." *Id.* While recognizing that landowner and community interests can be distinct from environmental interests, the Commission states that "[t]raditionally, the interests of the landowners and the surrounding community have

been considered synonymous with the environmental impacts of the project." *Id.* at 24.

63. FERC also sets forth a list of factors indicating a public benefit, and an applicant "must show public benefits that would be achieved by the project ***that are proportional to*** the project's adverse impacts." *Id.* at 25. Because the test promulgated by FERC is a proportional test, the Commission's policy is clear that the "amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests." *Id.* Under this approach, if FERC determines that it cannot articulate any adverse effects at all (whether economic, environmental, or otherwise), the Commission would grant a Certificate, as well as the power of eminent domain, upon a showing of no public benefit at all.

64. While the Commission states that "[v]ague assertions of public benefits will not be sufficient" to obtain a Certificate, the Commission nevertheless equates even a scintilla of evidence of market demand, even through affiliate-only precedent agreements, with public benefit. A private market need for a private natural gas company to ship its affiliate-owned fracked natural gas to market, domestic or otherwise, does not equate to a public benefit, much less a public purpose or public use. FERC views precedent agreements, even solely with affiliates, as "significant evidence of demand for the project." *Id.* To FERC, demand equates to public benefit.

65. Indeed, the Commission explains that where a natural gas company can illustrate that it has acquired through negotiations a significant portion of

easements to construct a project, "a few holdout landowners cannot veto a project, as feared by some commenters" because the natural gas company need only "present some evidence of market demand" to outweigh the holdout landowners' concerns. *Id.* at 27.

66. Because FERC has promulgated a proportional balancing test premised upon a sliding scale of evidence for determining whether to confer a Certificate and the power of eminent domain, it does not apply "bright line standards or tests." *Id.* at 26. Instead, as FERC itself articulates, "[t]he objective is for the applicant to develop whatever record is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests." *Id*. Put another way, the Commission will sub-delegate the power of eminent domain to a private natural gas company so long as the private natural gas company gives FERC enough of a record to justify an approval.

F. MVP Has Already Engaged in Unlawful Takings in Virginia in Violation of the United States Constitution and the Virginia Constitution

67. The Virginia General Assembly enacted § 56-49.01 of the Virginia Code in 2004. Section 56-49.01 provides a conditional statutory right of entry to a natural gas company to "make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary …." Va. Code § 56-49.01(A). There are two initial, necessary threshold requirements that must be satisfied before the natural gas company may enter the

property without the owner's permission: the examinations must be necessary "(i) to satisfy any regulatory requirements" and necessary "(ii) for the selection of the most advantageous location or route…." Va. Code § 56-49.01(A)(i)-(ii).

68. Once a natural gas company triggers the right of entry by showing necessity under § 56-49.01(A)(i)-(ii), the company must also satisfy three further conditions including: (a) it must request the landowner's permission in accordance with the strict procedures set forth in § 56-49.01(B); (b) it must show that the owner's permission is not received prior to the date proposed by the company; and (c) it must provide the landowner notice of its intent to enter pursuant to the procedures set out in § 56-49.01(C). Only when all of these conditions are satisfied by the natural gas company does the "right of entry" spring into existence and exempt the particular entry from common law civil and criminal trespass. Va. Code § 56-49.01(D).

69. Eight years after the enactment of § 56-49.01, on November 6, 2012, an amendment to § 11 of Article I (Bill of Rights) of the Virginia Constitution was ratified by an overwhelming majority of voters and took effect on January 1, 2013. The 2012 amendment added significant protection to the right of private property, including "[t]hat the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use." Va. Const., Art. I, § 11. The amendments provided that "a public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or

railroad services" but in any other cases, "a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development …." *Id.*

70. In this case, MVP has been engaged in surveying activities across Virginia under claimed right of entry pursuant to Virginia Code § 56-49.01. The invasive survey activities MVP performs, including *inter alia*, cultural, wetland, endangered species, centerline, water, and soil, cannot be deemed trivial or inconsequential. Like an invasive non-consensual blood draw or an unauthorized disclosure of private medical records, the information and data MVP collects about a landowner's property is not readily ascertainable or available from public records, and amounts to an unlawful private taking. The information and data surveyors gather from a landowner's land through surveying activities is a portable and marketable commodity. In the current age of information, data as well as metadata, are valuable commodities that can readily be sold to the highest commercial bidder, and any and all information obtained by MVP in connection with its surveying activities is not subject to any regulatory oversight.

71. The information gathered by MVP through its surveying activities holds tangible and intangible value that forms just one part of the bundle of rights possessed by a fee simple owner of real property. It has long been recognized that the fee simple holder of real property is the "owner of everything above and below the surface from the sky to the center of the earth, expressed in the maxim, *Cujus est solum, ejus est usque*

ad coelum et ad infernos …." *Clinchfield Coal Corp. v. Compton*, 148 Va. 437, 451 (1927). Everything above and below the surface from the sky to the center of the earth necessarily includes the tangible and intangible property contained therein, including information about the contents and constituent parts of the land, water, flora, and fauna contained within the bounds of a tract of real property.

72. The law also recognizes that the information and data obtained through surveying activities possesses commercial value that receives specific tax treatment under the Internal Revenue Code. As explained by the Tax Court, the "benefit derived" from surveying like that conducted by MVP constitutes "information" and "scientific knowledge" that may qualify as a capital expenditure. *See Louisiana Land & Exploration Co. v. Comm'r*., 7 T.C. 507, 515 (1946) (treating the cost of a geophysical survey by a land developer as a capital expenditure rather than an ordinary business expense). Section 197 of Title 26, United States Code, provides for an amortized deduction for any intangible property, including "business books and records, operating systems, or ***any other information base***." 26 U.S.C. § 197(d)(1)(C)(ii).

73. The law recognizes that intangible and tangible property possesses inherent value. In this case, the intangible and tangible property taken by MVP from Virginians has immense value, so much so that MVP will not share the property it has taken with landowners and treats the information as confidential and proprietary. Specifically, MVP classifies Volume IV of its Application for a Certificate as "Privileged" and includes "[c]ultural resource and landowner

information from Environmental Report and confidential, proprietary contractual information." *See* Cover Letter to MVP's Application for a Certificate of Public Convenience and Necessity, attached as **Exhibit 2.** Indeed, FERC recognizes the value of the information and refuses to release information obtained by MVP and shared with FERC to the very landowners that are the only persons that should have exclusive rights of possession.

Count One: Violation of the Fifth Amendment Rights of All Plaintiffs by FERC and MVP

74. The Plaintiffs hereby incorporate the facts and allegations contained in paragraphs 1-73 above.

75. The Fifth Amendment to the United States Constitution requires that private property may only be taken "for public use" and that "just compensation" must be paid. As outlined above, FERC does not evaluate proposed pipeline projects according to a constitutional standard and instead applies its own proportional, sliding scale economic balancing test to determine if it will approve a project and empower a private party with the power of eminent domain.

76. As applied by FERC generally and ultimately to MVP here, the power to exercise eminent domain as derived under the Natural Gas Act, 15 U.S.C. § 717f(h) is unconstitutional, because FERC's tests for granting the power of eminent domain via a Certificate fall well below the standard imposed by the Fifth Amendment.

77. As applied in this case, then, MVP's application and FERC's application of its tests as set forth in its Statement of Policy cannot pass

constitutional muster. Accordingly, FERC should be precluded from granting MVP a Certificate.

Count Two: Congress' Delegation to FERC of the Power of Eminent Domain under 15 U.S.C. § 717f(h) is Overly Broad and Unconstitutional

78. The Plaintiffs hereby incorporate the facts and allegations contained in paragraphs 1-77 above.

79. FERC cannot lawfully exercise the power of eminent domain delegated to it by Congress via the Natural Gas Act because Congress' delegation of the power under 15 U.S.C. § 717f(h) is overly broad.

80. Under the non-delegation doctrine, Congress must properly limit the exercise of any delegated power by setting forth an intelligible principle—a standard—for the regulatory body to follow in its case-by-case assessments. Congress failed to set forth any intelligible principle to FERC under the Natural Gas Act. In doing so, Congress delegated not only the authority to *execute* the law to FERC but also the authority to determine what the law *shall be*, which is impermissible under the Constitution, regardless of whether the standard applied by FERC could even pass constitutional muster, which it does not here.

81. Because Congress' delegation of the power of eminent domain to FERC is overly broad, FERC cannot lawfully exercise the power of eminent domain and cannot confer the power to MVP or any other natural gas company.

Count Three: FERC's Sub-Delegation of the Power of Eminent Domain to MVP under 15 U.S.C. § 717f(h) Unconstitutional

82. The Plaintiffs hereby incorporate the facts and allegations contained in paragraphs 1-81 above.

83. While Congress' delegation of the power of eminent domain under 15 U.S.C. § 717f(h) is overly broad and unconstitutional on its own as alleged in Count Two, FERC's sub-delegation to MVP pursuant to a Certificate is also constitutionally impermissible.

84. It is well-established that delegated powers cannot lawfully be further delegated as explained by the maxim, "Delegata potestas non potest delegari." *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928). Accordingly, FERC cannot lawfully delegate the power of eminent domain to MVP by issuing MVP a Certificate, or by any other means.

Count Four: MVP Has Already Violated the Virginia Plaintiffs' Rights under the Fifth Amendment and Article I, §11 of the Virginia Constitution

85. The Plaintiffs hereby incorporate the facts and allegations contained in paragraphs 1-84 above.

86. MVP has repeatedly invoked Virginia Code § 56-49.01 to obtain a right of entry to engage in surveying activities on the Virginia Plaintiffs' properties.

87. MVP's surveying activities, including the collection of tangible property (e.g., historical artifacts, soil samples, water samples, etc.) and intangible

property (e.g., data and information not available to anyone other than the landowner and the landowner's designees), constitute an unlawful taking under the Fifth Amendment to the United States Constitution as well as in violation of Article I, § 11 of the Virginia Constitution.

WHEREFORE, the Plaintiffs respectfully request that the Court enter judgment in their favor against the Defendants, and issue a preliminary and permanent injunction declaring the following, as well as any other relief as may be deemed just :

- FERC's Certification process is unconstitutional because it fails to asses public use or public purpose, and instead apples at least three different tests that each fail to satisfy the requirements of the Constitution;
- Any exercise or delegation of the power of eminent domain by FERC under 15 U.S.C. § 717f(h) is unconstitutional because Congress' delegation of the power of eminent domain is overly broad and lacks any intelligible principles;
- Any Certificate issued by FERC to MVP cannot constitutionally sub-delegate the power of eminent domain to MVP and MVP cannot exercise the power of eminent domain even if FERC grants MVP a Certificate; and
- MVP has violated the Virginia Plaintiffs' Fifth Amendment rights and their rights under Article I, § 11 by engaging in unlawful takings of private property.

Respectfully submitted this 27th day of July, 2017,

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VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing factual allegations are true and correct to the best of my knowledge, information and belief.

Kathy E. Chandler

/s/Kathy E. Chandler
Plaintiff

7/26/2017
Date

Exhibit 1

UNITED STATES OF AMERICA88 FERC ¶ 61,227
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

Docket No. PL99-3-000

Certification of New Interstate
Natural Gas Pipeline Facilities

STATEMENT OF POLICY

(Issued September 15, 1999)

In the Notice of Proposed Rulemaking (NOPR) in Docket No. RM98-10-000[1] and the Notice of Inquiry (NOI) in Docket No. RM98-12-000,[2] the Commission has been exploring issues related to the current policies on certification and pricing of new construction projects in view of the changes that have taken place in the natural gas industry in recent years.

In addition, on June 7, 1999, the Commission held a public conference in Docket No. PL99-2-000 on the

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[1] Notice of Proposed Rulemaking, Regulation of Short-term Natural Gas Transportation Services, 63 Fed. Reg. 42982, 84 FERC ¶ 61,087 (1998).

[2] Notice of Inquiry, Regulation of Interstate Natural Gas Transportation Services, 63 Fed. Reg. 42974, 84 FERC ¶ 61,087 (July 29, 1998).

issue of anticipated natural gas demand in the northeastern United States over the next two decades, the timing and the type of growth, and the effect projected growth will have on existing pipeline capacity. All segments of the industry presented their views at the conference and subsequently filed comments on those issues.

Information received in these proceedings as well as recent experience evaluating proposals for new pipeline construction persuade us that it is time for the Commission to revisit its policy for certificating new construction not covered by the optional or blanket certificate authorizations.[3] In particular the Commission's policy for determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest. Many urge that there is a need for the Commission to authorize new pipeline capacity to meet the growing demand for natural gas. At the same time, others already worried about the potential for capacity turnback, have urged the Commission to be cautious because of concerns about the potential for creating a surplus of capacity that could adversely affect existing pipelines and their captive customers.

Accordingly, the Commission is issuing this policy statement to provide the industry with guidance as to how the Commission will evaluate proposals for certificating new construction. This should provide more certainty about how the Commission will evaluate new construction projects that are proposed to

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[3] This policy statement does not apply to construction authorized under 18 CFR Part 157, Subparts E and F.

meet growth in the demand for natural gas at the same time that some existing pipelines are concerned about the potential for capacity turnback. In considering the impact of new construction projects on existing pipelines, the Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain. Of course, this policy statement is not a rule. In stating the evaluation criteria, it is the Commission's intent to evaluate specific proposals based on the facts and circumstances relevant to the application and to apply the criteria on a case-by-case basis.

I. Comments Received on the NOPR

In the NOPR the Commission explained that it wants to assure that its policies strike the proper balance between the enhancement of competitive alternatives and the possibility of over building. The Commission asked for comments on whether proposed projects that will establish a new right-of-way in order to compete for existing market share should be subject to the same considerations as projects that will cut a new right-of-way in order to extend gas service to a frontier market area. Also, in reassessing project need, the Commission said that it was considering how best to balance demonstrated market demand against potential adverse environmental impacts and private property rights in weighing whether a project is required by the public convenience and necessity.

The Commission asked commenters to offer views on three options: One option would be for the

Commission to authorize all applications that at a minimum meet the regulatory requirements, then let the market pick winners and losers. Another would be for the Commission to select a single project to serve a given market and exclude all other competitors. Another possible option would be for the Commission to approve an environmentally acceptable right-of-way and let potential builders compete for a certificate.

In addition, the Commission asked commenters to consider the following questions: (1) Should the Commission look behind the precedent agreement or contracts presented as evidence of market demand to assess independently the market's need for additional gas service? (2) Should the Commission apply a different standard to precedent agreements or contracts with affiliates than with non-affiliates? For example, should a proposal supported by affiliate agreements have to show a higher percentage of contracted-for capacity than a proposal supported by non-affiliate agreements, or, should all proposed projects be required to show a minimum percent of non-affiliate support? (3) Are precedent agreements primarily with affiliates sufficient to meet the statutory requirement that construction must be required by the public convenience and necessity, and, if so, (4) Should the Commission permit rolled-in rate treatment for facilities built to serve a pipeline affiliate? (5) Should the Commission, in an effort to check overbuilding and capacity turnback, take a harder look at proposals that are designed to compete for existing market share rather than bring service to a new customer base, and what particular criteria should be applied in looking at competitive applications versus new market applications? (6) Should the Commission encourage pre-filing resolution of landowner issues by subjecting proposed projects to a diminished degree of scrutiny where the project sponsor is able to demonstrate it has obtained all necessary right-of-way authority? (7) Should a different standard be applied to project sponsors who do not plan to use either federal or state-granted rights of eminent domain to acquire right-of-way?

A. Reliance on Market Forces to Determine Optimal Sizing and Route for New Facilities

PG&E, Process Gas Consumers (PGC), Tejas Gas, Washington Gas, Columbia, Market Hub Partners, and Ohio PUC agree that the Commission should continue to let the market decide which projects to pursue. PG&E states that the Commission should authorize all projects that meet minimum regulatory requirements, looking at whether the project will serve new or existing markets, the firmness of commitments and environmental and property right issues. PGC urges the Commission to refrain from second guessing customers' decisions. Tejas suggests that the Commission rely on the market to the maximum extent; regulatory changes that affect risk/reward allocation will increase regulatory risk and deter new investment. Washington Gas suggests letting the market decide on new construction with market based rates subject only to environmental review and landowner concerns. Columbia comments that it would not be economically efficient to protect competitors from the competition created by new capacity. Market Hub Partners specifies that, when there is no eminent domain involved, the focus should be on competition, not protecting individual competitors from overbuilding. Ohio PUC supports authorizing all applications for new capacity certification which meet the minimum regulatory requirements. Ohio PUC does not support approving a single pipeline's application while excluding all others.

The Regulatory Studies Program of the Mercatus Center, George Mason University suggests allowing projects to be proposed with no certification requirements, but allowing competitors to challenge the need. Investors would be at risk for all investments. Tejas proposes holding pipelines at risk for reduced throughput, thereby avoiding shifting the risk to customers.

On the issue of overbuilding, Millennium, Enron, PGC, Columbia, and Wisconsin PSC disagree with the presumption that overbuilding must be avoided. Millennium asserts that all competitive markets have excess capacity. Enron urges the Commission to be receptive to overbuilding in areas of rapid growth, difficult construction, and environmental sensitivity. PGC agrees that some capacity in excess of initial demand may make environmental and economic sense in that it will reduce the need for future construction, but argues that the pipelines be at risk for those facilities. Columbia alleges that the concern about overbuilding is misguided. Wisconsin PSC contends that concerns of overbuilding should not operate to limit the availability of competitive alternatives to customers currently without choices of pipeline provider. Wisconsin PSC believes the elimination of the discount adjustment mechanism and the imposition of reasonable at risk provisions for new construction will deter pipelines from overbuilding.

On the other hand, UGI recommends that overbuilding be minimized. UGI states that the Commission should ensure a reasonable fit between supply and demand. The Commission should limit certification of new projects to ones which demonstrate unmet demand or demand growth over 1-3 years.

Coastal stresses that competition should not be the only or primary factor in deciding the public convenience and necessity.

Amoco contends that, if the Commission chooses the right-of-way, it will in many cases have chosen the parties that will ultimately build the pipeline. Amoco urges the Commission not substitute its judgement for that of the marketplace unless there are overwhelming environmental concerns. Tejas also objects to the option of the Commission approving an environmentally acceptable right-of-way and letting potential builders compete for a certificate because it believes it would be difficult for the Commission to implement.

Colorado Springs supports the concept of having the Commission select a single project in a given corridor rather than letting the market pick winners and losers.

PGC and Ohio PUC recommend that the Commission authorize all construction applications meeting certain threshold requirements, leaving the market to decide winners and losers. PGC urge the Commission to facilitate construction of new pipelines that will increase the potential for gas flows. Under no circumstances should the Commission deny a certificate based on a complaint by an LDC or a competing pipeline that new construction will hurt their market position or ability to recover costs. The

Commission should not afford protection to traditional suppliers or transporters by constraining the development of new pipeline capacity.

PGC believes that only in unusual situations, where insuperable environmental barriers cannot be resolved through normal mitigation measures, should the Commission select an acceptable right-of-way. Ohio PUC does not support approving a single pipeline's application while excluding all others. Ohio PUC recommends having market forces guide construction projects unless or until obvious shortcomings begin to emerge. In such instances, the option of designating a single right-of-way with competition for the certificate could be used to spur needed construction.

B. Reliance on Contracts to Demonstrate Demand

A number of parties comment that there is no reason to change the current policy regarding certificate need (AlliedSignal, Millennium, Southern Natural, Tejas, Williston, Columbia). National Fuel Gas Supply believes the Commission should keep shipper commitment as the test because it is more accurate than market studies. National Fuel Gas Supply further believes the Commission's present reliance on market forces to establish need, and its environmental review process, form the best approach to reviewing certificate applications. Foothills agrees, but states that a new, flexible regulatory structure for existing pipelines is needed. Indicated Shippers also wants to keep the current policy, but stresses that expedition in processing is needed to lower entry barriers.

Amoco, Consolidated Natural, and Columbia urged the Commission to continue requiring sufficient binding long-term contracts for firm capacity. Millennium and Tejas stated that there is no need to develop different tests for different markets. Columbia also argued that there is no need to look behind contracts. Williams argues that the Commission should not second guess contracts or make an independent market analysis. Williston alleges that reviewing the firmness of private contracts is ineffectual and futile. Market Hub Partners cautions the Commission not to substitute its judgement for that of the marketplace.

PGC argues that there should be no change to current policy where construction affects landowners. Eminent domain is a necessary tool to delivering clean burning natural gas to growing markets; no individual landowners should be given a veto over pipeline construction. PGC adds that the absence of prefiling right-of-way agreements does not mean that a project is less good or necessary or should be treated more harshly. Southern Natural, Millennium, and National Fuel Gas Supply agree that no market preference should be given for projects that do not use eminent domain. National Fuel Gas Supply agrees that such a preference would tilt the power balance to landowners. Millennium argues that the Commission should not establish certificate preferences for pipelines that do not require eminent domain; such preferences are not needed because a pipeline that does not want to use eminent domain can already build projects under Section 311.

On the other hand, Amoco, El Paso/Tennessee, ConEd, and Wisconsin PSC recommend modifying the current policy. El Paso/Tennessee recommend that the Commission look behind all precedent agreements to see if real markets exist. ConEd suggests considering forecasts for market growth; if there is a disparity with the proposal, the Commission should look at all circumstances. Wisconsin PSC urges the Commission to consider market saturation and growth prospects by looking at market power (HHIs) and the degree of rate discounting in a market. Amoco suggests that the Commission analyze all relevant data. Peco Energy believes the current Commission policy, which provides for minimal market justification for authorizing construction of incremental facilities, coupled with its presumption in favor of rolled-in rate treatment, has contributed to discouraging existing firm shippers from embracing longer term capacity contracts.

Consolidated Natural recommends creating a settlement forum for market demand and reverse open season issues. Washington Gas urges the Commission to adopt an open entry, "let the market decide" policy. IPAA supports a need analysis focusing on the ability of existing capacity to handle projected demand. IPAA alleges that the overall infrastructure is already in place to supply current demand projections.

Some commenters support a sliding scale approach to determine need. ConEd states that the Commission should determine need on a case-by-case basis, using different standards for large or small projects. Enron advocates use of a sliding scale, requiring more market support for projects with more landowner and/or environmental impact. Enron supports requiring no market showing for projects using existing easements or mutually agreed upon easements. Enron also suggests, in addition to requiring that at least 25% of the precedent agreements supporting a project be with non-affiliates, that the Commission relax its market analysis if 75% or more of those agreements are with non-affiliates. Enron would require more market data for an affiliate-backed project. American Forest & Paper would allow negotiation of risk if there is no subsidy by existing customers. Sempra and UGI urge the Commission to look at whether projects serve identifiable, new or growing markets. NARUC states that each state is unique and that the Commission should consider those differences. Market Hub Partners believes that a project which is at risk, requires little or no eminent domain authority, and has potential to bring competition to a market that is already being served by pipelines and storage operators with market power should be expedited.

The development in recent years of certificate applicants' use of contracts with affiliates to demonstrate market support for projects has generated opposition from affected landowners and competitor pipelines who question whether the contracts represent real market demand. ConEd, Ohio PUC, and Enron believe that a different standard should be applied to affiliates. ConEd argues that the at risk condition is inadequate when a pipeline serves a market served by an affiliate; risk is shifted. Ohio PUC states that pipelines should shoulder the increased risk and that the Commission should look behind contracts with affiliates. Enron would require more market data for affiliate-backed projects and would require that all projects be supported by precedent agreements at least 25% of which are with non-affiliates.

Nevertheless, most of the commenters support applying the same standard to contracts for new capacity with affiliates as non-affiliates. Amoco, Coastal, Millennium, National Fuel, Southern Natural, Tejas, Texas Eastern, Columbia, Market Hub Partners, El Paso/Tennessee, and PGC all support applying the same standard to affiliates as non-affiliates. Market Hub argues that a contract is a contract; treating affiliates differently would be in the interest of incumbent monopolists. El Paso/Tennessee agree that affiliate precedent agreements are sufficient as long as they are supported by market demand. PGC agrees that the same standard should apply as long as the proposed capacity is offered on a non-discriminatory basis to all in an open season. Amoco makes an exception for marketing affiliates, arguing that they do not represent new demand. Columbia also makes an exception for affiliates that are created just to show market for a project.

Other parties also offered comments on affiliate issues. PGC recommends addressing affiliate issues on a case-by-case basis. Exxon supports offering comparable deals to non-affiliates. If there is insufficient capacity, it should be prorated. AGA supports prohibiting discount adjustments connected with new construction by pipelines or affiliates. National Fuel Gas Supply and Tejas support permitting rolled-in rates for facilities to serve affiliates. PGC argues that there should be no presumption of rolled in rates for affiliates.

The commenters also express concern with the current policy's effect on existing pipelines and their captive customers when the Commission approves pipeline projects proposed to serve the same market. In those cases, they believe that need should be measured differently by, for example, assessing the impact on existing capacity or requiring a strong incremental market showing and more scrutiny of the net benefits. They urge the Commission to balance all the relevant factors before issuing a certificate. A number of parties argued that need should be measured differently when a project is proposed to serve an existing market. UGI urges requiring a strong market showing for such projects. Coastal proposes that the Commission fully integrate the standards announced by the courts[4] with its certificate construction policies, balancing all the relevant factors including the ability of the existing provider to provide the service. El Paso/Tennessee would require more scrutiny of the net benefit. Sempra would require that, prior to construction, all shippers be given the opportunity to turn back capacity. Similarly, Texas Eastern would require the pipeline to use unsubscribed capacity before construction (e.g., a reverse auction).

Other commenters oppose a policy requiring a harder look at projects proposed to serve existing markets. They maintain that market demand for service in order to escape dependence on a dominant pipeline supplier should be accorded the same weight as demand by new incremental load growth. They contend that the benefits of competition and potentially lower gas prices for consumers should control over claims that an existing pipeline needs to be insulated

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[4] Citing FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1, 23 (1961) and Scenic Hudson Preservation Conference v. FERC, 354 F.2d. 608, 620 (2nd Cir. 1965)

from competition because its revenues may decrease. National Fuel Gas Supply, PGC, Florida Cities, Market Hub Partners, and Southern Natural in particular object to having different policies for new or existing pipelines. National Fuel Gas Supply contends that generally the policies on new construction and existing pipelines should match. PGC opposes any policy that protects incumbents by requiring a harder look at projects proposed to serve existing markets rather than new demand. Many existing markets have unmet demand. Likewise, Florida Cities is concerned that the NOPR is intended to elicit a new policy where the import and influence of competition is downplayed to minimize or eliminate the risk of unsubscribed capacity on existing pipelines. Florida Cities supports pipeline-on-pipeline competition as a primary factor in determining which new capacity projects receive certificate authority and are constructed. Florida Cities believes that additional pipeline competition would benefit customers and any generic policy that would decrease or inhibit pipeline competition would not be in the best interest of the consumers the Commission is obliged to protect. Market Hub Partners urges the Commission to attempt to limit market incumbents' ability to forestall competition by defeating the efforts of new market entrants to build or operate new capacity. Market Hub Partners contend that incumbents protest on the basis of project safety and environmental concerns when they are primarily concerned with their own welfare and market share. Southern Natural contends the NGA does not permit a rule disfavoring projects that enhance competitive alternatives. Taking a harder look at competitive proposals would effect a preference for monopoly, clearly not endorsed by the NGA or the Courts of Appeal.

Wisconsin Distributor Group believes that meaningful pipe-on-pipe competition can only exist where there are choices among or between pipelines and unsubscribed firm capacity exists. Wisconsin Distributor Group argues the Commission should view favorably new pipeline projects that propose to create competition by introducing an alternative pipeline to markets where no choices exist. Wisconsin Distributor Group contends the Commission's policy should not be driven by self-protective arguments but by the need for competitive alternatives. Wisconsin Distributor Group supports the Commission's analysis in Alliance and Southern because it considers the benefits of competition and potentially lower gas prices for consumers as controlling over claims that an existing pipeline needs to be insulated from competition because its revenues may decrease. Market demand for service in order to escape dependence on a dominant pipeline supplier should be accorded the same weight as demand by new incremental load growth.

UGI, Sempra, and El Paso/Tennessee would require assessing the impact on existing capacity. Sempra states that if existing rates are below the maximum rate, new capacity may not be needed. Sempra adds that the Commission should look at whether expansion capacity can stand on its own without rolled-in treatment. Texas Eastern believes the Commission must consider how best to use existing unsubscribed capacity and capacity that has been turned back to pipelines.

C. The Pricing of New Facilities

A number of commenters submit that the existing presumption in favor of rolled-in rates for pipeline expansions sends the wrong price signals with regard to pricing new construction. They urge the Commission to adopt policies such as incremental pricing for pipeline projects or placing pipelines at risk for recovery of the costs of construction. They submit that such a policy would reveal the true value of existing capacity and properly allocate costs and risks. A number of parties also raised issues concerning rate design in general, but the Commission is deferring for now consideration of those kinds of issues which also affect the Commission's policies for existing pipelines in order to focus on issues concerning the certification of new pipeline construction.

AGA, ConEd, and Michigan Consolidated stress the importance of ensuring the right price signals. AGA urges the Commission to adopt policies that reveal the true value of existing capacity. ConEd states that rate policies should send proper price signals by properly allocating costs and risks.

AGA contends that the Commission's certification policies should protect recourse shippers. AGA and BG&E recommend that the Commission ensure that pipelines are not able to impose the costs of new capacity or the costs of consequent unsubscribed existing capacity on recourse shippers. Amoco asserts pipelines should be at risk for unsubscribed capacity. Similarly, AGA and Philadelphia Gas Works urge the Commission to ensure that pipelines are at risk for unsubscribed capacity relating to construction projects by the pipeline or its affiliate. However, Tejas believes that treatment of any under recovery must address the unique circumstances of deepwater pipelines.

APGA argues that, if the Commission allows initial rates based on the life of the contract rather than the useful life of facilities, the Commission must at least require a uniform contract with the same terms and conditions for all customers involved in the expansion.

The Williams Companies recommend that all new capacity be subject to market-based rates. The Williams Companies argue that, for new capacity priced on an incremental basis rather than a rolled-in basis, competitive circumstances in the industry support the use of market-based rates and terms of service.

AlliedSignal contends depreciation should be based on the life of the facilities not the life of a contract. If the Commission were to promulgate a general rule, it should state that depreciation rates for pipeline facilities in rate and certificate cases should be set at 25 years unless factors are brought to the Commission's attention justifying a lesser or longer time period. NGSA believes that the Commission's current depreciation methodology is appropriate. NGSA also urges that the appropriate asset life of new facilities be determined when the facilities are constructed and adhered to for the life of the asset. On the other hand, the Williams Companies point out that market-based rates would negate the need for the Commission to approve depreciation rates.

Coastal believes pipelines should have the flexibility to address new facility costs in certificate applications and in rate cases. The Commission should not establish hard and fast rules as to how a facility should be treated in a pipeline's rates over its entire life. Rather, costs should be dealt with in accordance with Commission policies from time to time in pipeline rate cases.

Enron Pipelines contend that the rate treatment for capacity additions should continue to be determined on a case-by-case basis using the system benefits test.

Louisville contends that the Commission should address the question of whether its pricing policies for new capacity provide appropriate incentives at the same time as it considers auctions and negotiated rates and services and that all of these issues should be the subject of a new NOPR.

PGC suggest that initial rates be based on a presumed level of contract commitment (e.g., 80-90%) so the pipeline bears the risks of uncommitted capacity but reaps a reward if it sells at undiscounted rates. Another option would be for the Commission to put at risk only that portion of the proposed facilities for which the pipeline has not obtained firm contracts of a minimum duration. Where an existing pipeline constructs new facilities, PGC support the Commission's current policy favoring rolled-in rates if certain conditions are met.

Williston Basin argues that fixed rates for long-term contracts would create a relatively risk-free contract for shippers while creating a total-risk contract for pipelines.

Arkansas, IPAA, Indicated Shippers, National Fuel Gas Supply, NGSA, Peoples Energy, PGC, and the Williams Companies support the Commission's current policy with its presumption in favor of rolled-in pricing for new capacity only when the impact of new capacity is not more than a 5% increase to existing rates and results in system-wide benefits. AGA, Amoco, IPAA, Philadelphia Gas Works, PGC, and UGI recommend that the Commission more rigidly apply its pricing policy and more closely review claims pertaining to the 5% threshold test and/or system benefits. Nicor urges that pipelines should not be allowed to segment construction with the goal of falling below the 5% pricing policy threshold.

APGA and Consolidated Edison recommend that the Commission adopt a presumption of incremental pricing for pipeline certificate projects. APGA would allow limited exceptions such as when the project would lower rates to existing customers or when the benefits of the project would fully offset the costs of the roll-in. Koch Gateway and Pennsylvania Consumer Advocate also recommend incremental pricing for new capacity.

Arkansas and Brooklyn Union contend that pipelines should be at risk for the recovery of the costs of incremental facilities. Brooklyn Union urges the Commission to eliminate the presumption in favor of rolled-in pricing for new capacity and require pipelines to show the benefits of each new project are proportionate to the total rate increase sought.

El Paso/Tennessee recommend that only fully subscribed projects with revenues equaling or exceeding project costs and supported by demonstrated market need should be eligible for rolled-in rates. El Paso/Tennessee believe that projects intended to compete for existing market should not be eligible for rolled-in rates.

New York questions the 5% presumption for rolled-in pricing and argues that a move away from rolled-in pricing would create competitive markets for new pipeline construction.

AlliedSignal believes pipelines should be at risk for costs relative to new services prior to filing a new rate case. In the new rate case, the burden should be on the pipeline to justify the proper allocation of costs.

Amoco suggests that the pipeline and customer be allowed to enter into any agreement that does not violate existing regulations or statutory requirements, but they must explicitly apportion any risk between themselves.

The Illinois Commerce Commission believes this issue needs more research and should not be addressed until state regulators are consulted further.

Market Hub Partners and PGC contend that rolled-in rate treatment should not be granted for facilities solely or principally being constructed on the basis of affiliate precedent agreements. On the other hand, Millennium asserts that affiliates and non-affiliates should be treated alike with respect to rate design. Also, Southern Natural argues that the fact that an affiliate subscribed for capacity on new facilities cannot alone preclude rolled-in pricing for those facilities; the Commission must leave to individual cases the issue of whether to price facilities on a rolled-in or incremental basis.

Nicor argues that the Commission cannot, in a competitive marketplace, evaluate the enhancements claimed by the pipeline to determine whether new construction should be incrementally priced or receive rolled-in rate treatment. Instead of imposing rolled-in rate treatment on the entire system, the Commission should allow individual "old" shippers to decide whether the supposed benefits are worth the costs.

Pipeline Transportation Customer Coalition contends the existing regulatory process does not reflect a reasonable risk-reward balance between industry segments, asserting that pipeline rates are too high given their relatively low risk exposure.

II. Certificate Policy Goals and Objectives

The comments present a variety of perspectives and no clear consensus on a path the Commission should follow. Nevertheless, the starting point for the Commission's reassessment of its certificate policy is to define the goals and objectives to be achieved. An effective certificate policy should further the goals and objectives of the Commission's natural gas regulatory policies. In particular, it should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas. It should also provide appropriate incentives for the optimal level of construction and efficient customer choices.

Commission policy should give the applicant an incentive to file a complete application that can be processed expeditiously and to develop a record that supports the need for the proposed project and the public benefits to be obtained. Commission certificate policy should also provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project.

The Commission intends the certificate policy introduced in this order to provide an analytical framework for deciding, consistent with the goals and objectives stated above, when a proposed project is required by the public convenience and necessity. In some respects this policy is not a significant change from the kind of analysis employed currently in certificate cases. By stating more explicitly the Commission's analytical framework, the Commission can provide applicants and other participants in certificate proceedings a better understanding of how the Commission makes its decisions. By encouraging applicants to devote more effort before filing to minimize the adverse effects of a project, the policy gives them the ability to expedite the decisional process by working out contentious issues in advance. Thus, this policy will provide more certainty about the Commission's analytical process and provide participants in certificate proceedings with a framework for shaping the record that is needed by the Commission to expedite its decisional process.

III. Evaluation of Current Policy

A. Current Policy

Section 1(b) of the Natural Gas Act (NGA) gives the Commission jurisdiction over the transportation of natural gas in interstate commerce and the natural gas companies providing that transportation.[5] Section 7(c) of the NGA provides that no natural gas company shall transport natural gas or construct any facilities for such transportation without a certificate of public convenience and necessity issued by the Commission.[6]

In reaching a final determination on whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process during which it weighs the factors presented in a particular application. Among the factors that the Commission considers in the balancing process are the proposal's market support, economic, operational, and competitive benefits, and environmental impact.

Under the Commission's current certificate policy, an applicant for a certificate of public convenience and necessity to construct a new pipeline project must show market support through contractual commitments for at least 25 percent of the capacity for the application to be processed by the Commission. An applicant showing 10-year firm commitments for all of its capacity, and/or that revenues will exceed costs is eligible to receive a traditional certificate of public convenience and necessity.

An applicant unable to show the required level of commitment may still receive a certificate but it will be subject to a condition putting the applicant "at risk." In other words, if the project revenues fail to recover the costs, the pipeline rather than its customers will be

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[5] 15 USC 717.

[6] 15 USC 717h.

responsible for the unrecovered costs. Alternatively, a project sponsor can apply for a certificate under Subpart E of Part 157 of the Commission's regulations for an optional certificate.[7] An optional certificate may be granted to an applicant without any market showing at all; however, in practice optional certificate applicants usually make some form of market showing. The rates for service provided through facilities constructed pursuant to an optional certificate must be designed to impose the economic risk of the project entirely on the applicant.

The Commission also has certificated projects that would serve no new market, but would provide some demonstrated system-benefit. Examples include projects intended to provide improved system reliability, access to new supplies, or more economic operations.

Generally, under the current policy, the Commission does not deny an application because of the possible economic impact of a proposed project on existing pipelines serving the same market or on the existing pipelines' customers. In addition, the Commission gives equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties and does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand.[8]

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[7] 18 CFR Part 157, Subpart E.

[8] See, e.g., Transcontinental Gas Pipe Line Corp., 82 FERC ¶ 61,084 at 61,316 (1998).

Under section 7(h) of the NGA, a pipeline with a Commission-issued certificate has the right to exercise eminent domain to acquire the land necessary to construct and operate its proposed new pipeline when it cannot reach a voluntary agreement with the landowner.[9] In recent years, this has resulted in landowners becoming increasingly active before the Commission. Landowners and communities often object both to the taking of land and to the reduction of their land's value due to a pipeline's right-of-way running through the property. As part of its environmental review of pipeline projects, the Commission's environmental staff works to take these landowners' concerns into account, and to mitigate adverse impacts where possible and feasible.

Under the pricing policy for new facilities in Docket No. PL94-4-000,[10] the Commission determines, in the certificate proceeding authorizing the facilities' construction, the appropriate pricing for the facilities. Generally, the Commission applies a presumption in favor of rolled-in rates (rolling-in the expansion costs with the existing facilities' costs) when the cost impact of the new facilities would result in a rate impact on existing customers of five percent or less, and some system benefits would occur. Existing customers generally bear these rate increases without being allowed to adjust their volumes.

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[9] 15 USC 717f(h).

[10] See Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines, 71 FERC ¶ 61,241 (1995).

When a pipeline proposes to charge a cost-based incremental rate (establishing separate costs-of-service and separate rates for the existing and expansion facilities) higher than its existing generally applicable rates, the Commission usually approves the proposal. However, the Commission generally will not accept a proposed incremental rate that is lower than the pipeline's existing generally applicable Part 284 rate.

B. Drawbacks of the Current Policy

1. Reliance on Contracts to Demonstrate Demand

Currently, the Commission uses the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project. Many of the commenters have argued that this is too narrow a test. The reliance solely on long-term contracts to demonstrate demand does not test for all the public benefits that can be achieved by a proposed project. The public benefits may include such factors as the environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure. The amount of capacity under contract is not a good indicator of all these benefits.

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

In addition, the current policy's preference for contracts with 10-year terms biases customer choices toward longer term contracts. Of course, there are other elements of the Commission's policies that also have this effect. However, eliminating a specific requirement for a contract of a particular length is more consistent with the Commission's regulatory objective to provide appropriate incentives for efficient customer choices and the optimal level of construction, without biasing those choices through regulatory policies.

Finally, by relying almost exclusively on contract standards to establish the market need for a new project, the current policy makes it difficult to articulate to landowners and community interests why their land must be used for a new pipeline project.

All of these concerns raise difficult questions of establishing the public need for the project.

2. The Pricing of New Facilities

As the industry becomes more competitive the Commission needs to adapt its policies to ensure that they provide the correct regulatory incentives to achieve the Commission's policy goals and objectives. All of the Commission's natural gas policy goals and objectives are affected by its pricing policy, but directly affected are the goals of fostering competitive markets, protecting captive customers, and providing incentives for the optimal level of construction and efficient customer choice. The current pricing policy focuses primarily on the interests of the expanding pipeline and its existing and new shippers, giving little weight to the interests of competing pipelines or their captive customers. As a result, it no longer fits well with an industry that is increasingly characterized by competition between pipelines.

The current pricing policy sends the wrong price signals, as some commenters have argued, by masking the real cost of the expansions. This can result in overbuilding of capacity and subsidization of an incumbent pipeline in its competition with potential new entrants for expanding markets. The pricing policy's bias for rolled-in pricing also is inconsistent with a policy that encourages competition while seeking to provide incentives for the optimal level of construction and customer choice. This is because rolled-in pricing often results in projects that are subsidized by existing ratepayers. Under this policy the true costs of the project are not seen by the market or the new customers, leading to inefficient investment and contracting decisions. This in turn can exacerbate adverse environmental impacts, distort competition between pipelines for new customers, and financially penalize existing customers of expanding pipelines and of pipelines affected by the expansion.

Under existing policy, shippers' rates may change for a number of reasons. These include rolling-in of an expansion's costs, changes in the discounts given other customers, or changes in the contract quantities flowing on the system. As a customer's rates change in a rate case, it is generally unable to change its volumes, even though it may be paying more for capacity. This results in shippers bearing substantial risks of rate changes which they may be ill equipped to bear.

III. The New Policy

A. Summary of the Policy

As a result of the Commission's reassessment of its current policy, the Commission has decided to announce the criteria, set forth below, that it will use in deciding whether to authorize the construction of major new pipeline facilities. This section summarizes the analytical steps the Commission will use under this policy to balance the public benefits against the potential adverse consequences of an application for new pipeline construction. Each of these steps is described in greater detail in the later sections of this policy statement.

Once a certificate application is filed, the threshold question applicable to existing pipelines is whether the project can proceed without subsidies from their existing customers. As discussed below, this will usually mean that the project would be incrementally priced, if built by an existing pipeline, but there are cases where rolled in pricing would prevent subsidization of the project by the existing customers.[11]

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[11] This policy does not apply to construction authorized under 18 CFR Part 157, Subparts E and F.

The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. These three interests are discussed in more detail below. This is not intended to be a decisional step in the process for the Commission. Rather, this is a point where the Commission will review the efforts made by the applicant and could assist the applicant in finding ways to mitigate the effects, but the choice of how to structure the project at this stage is left to the applicant's discretion.

If the proposed project will not have any adverse effect on the existing customers of the expanding pipeline, existing pipelines in the market and their captive customers, or the economic interests of landowners and communities affected by the route of the new pipeline, then no balancing of benefits against adverse effects would be necessary. The Commission would proceed, as it does under current practice, to a preliminary determination or a final order depending on the time required to complete an environmental assessment (EA) or environmental impact statement (EIS)(whichever is required in the case).

If residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered. It is possible at this stage for the Commission to identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects. If the result of the balancing is a conclusion that the public benefits outweigh the adverse effects then the next steps would be the same as for a project that had no adverse effects. That is, if the EA or EIS would take more than approximately 180 days then a preliminary determination could be issued, followed by the EA or EIS and the final order. If the EA would take less time, then it would be combined with the final order.

B. The Threshold Requirement - No Financial Subsidies

The threshold requirement in establishing the public convenience and necessity for existing pipelines proposing an expansion project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.[12] This does not mean that the project

[12] Projects designed to improve existing service for existing customers, by replacing existing capacity, improving reliability or providing flexibility, are for the benefit of existing customers. Increasing the rates of the existing customers to pay for these improvements is not a subsidy. Under current policy these kinds of projects are permitted to be rolled in and are not covered by the presumption of the current pricing policy. Great Lakes Gas Transmission Limited Partnership, 80 FERC ¶ 61,105 (1997) (Pricing policy statement not applicable to facilities constructed solely for flexibility and system reliability).

sponsor has to bear all the financial risk of the project; the risk can be shared with the new customers in preconstruction contracts, but it cannot be shifted to existing customers. For new pipeline companies, without existing customers, this requirement will have no application.

The requirement that the project be able to stand on its own financially without subsidies changes the current pricing policy which has a presumption in favor of rolled-in pricing. Eliminating the subsidization usually inherent in rolled-in rates recognizes that a policy of incrementally pricing facilities sends the proper price signals to the market. With a policy of incremental pricing, the market will then decide whether a project is financially viable. The commenters were divided on whether the Commission should change its current pricing policy. A number of commenters, however, urged the Commission to allow the market to decide which projects should be built, and this requirement is a way of accomplishing that result.

The requirement helps to address all of the interests that could be adversely affected. Existing customers of the expanding pipeline should not have to subsidize a project that does not serve them. Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace. Existing pipelines should not have to compete against new entrants into their markets whose projects receive a financial subsidy (via rolled-in rates), and neither pipeline's captive customers should have to shoulder the costs of unused capacity that results from competing projects that are not financially viable. This is the only condition that uniformly serves to avoid adverse effects on all of the relevant interests and therefore should be a test for all proposed expansion projects by existing pipelines. It will be the predicate for the rest of the evaluation of a new project by an existing pipeline.

A requirement that the new project must be financially viable without subsidies does not eliminate the possibility that in some instances the project costs should be rolled into the rates of existing customers. In most instances incremental pricing will avoid subsidies for the new project, but the situation may be different in cases of inexpensive expansibility that is made possible because of earlier, costly construction. In that instance, because the existing customers bear the cost of the earlier, more costly construction in their rates, incremental pricing could result in the new customers receiving a subsidy from the existing customers because the new customers would not face the full cost of the construction that makes their new service possible. The issue of the rate treatment for such cheap expansibility is one that always should be resolved in advance, before the construction of the pipeline.

Another instance where a form of rolling in would be appropriate is where a pipeline has vintages of capacity and thus charges shippers different prices for the same service under incremental pricing, and some customers have the right of first refusal (ROFR) to renew their expiring contracts. Those customers could be allowed to exercise a ROFR at their original contract rate except when the incremental capacity is fully subscribed and there are competing bids for the existing customer's capacity. In that case, the existing customer could be required to match the highest competing bid up to a maximum rate which could be either an incremental rate or a "rolled-up rate" in which costs for expansions are accumulated to yield an average expansion rate. Although the focus of this policy statement is the analysis for deciding whether new capacity should be constructed, it is important for the Commission to articulate the direction of its policy on pricing existing capacity where a pipeline has engaged in expansions. This will enable existing and potential new shippers to make appropriate decisions pre-construction to protect their interests either in the certificate proceeding or in their contracts with the pipeline.

This policy leaves the pipeline responsible for the costs of new capacity that is not fully utilized and obviates the need for an "at risk" condition because it accomplishes the same purpose. Under this policy the pipeline bears the risk for any new capacity that is under-utilized, unless, as recommended by a number of commenters, it contracts with the new customers to share that risk by specifying what will happen to rates and volumes under specific circumstances. If the pipeline finds that new shippers are unwilling to share this risk, this may indicate to the pipeline that others do not share its vision of future demand. Similarly, the risks of construction cost over-runs should not be the responsibility of the pipeline's existing customers but should be apportioned between the pipeline and the new customers in their service contracts. Thus, in pipeline contracts for service on newly constructed facilities, pipelines should not rely on standard "Memphis clauses", but should reach agreement with new shippers concerning who will bear the risks of underutilization of capacity and cost overruns and the rate treatment for "cheap expansibility."[13]

In sum, if an applicant can show that the project is financially viable without subsidies, then it will have established the first indicator of public benefit. Companies willing to invest in a project, without financial subsidies, will have shown an important indicator of market-based need for a project. Incremental pricing will also lead to the correct price signals for the new project and provide the appropriate incentive for the optimal level of construction. This can avoid unnecessary adverse impacts on landowners or existing pipelines and their captive customers. Therefore, this will be the threshold requirement for establishing that a project will satisfy the public convenience and necessity standard.

C. Factors to be Balanced in Assessing the Public Convenience and Necessity

Ideally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests from the construction of the new project, and the Commission would be able to approve such projects promptly. Of course, elimination of all adverse effects will not be possible in every instance. When it is not possible, the Commission's policy objective is to encourage the applicant to minimize the adverse impact on each of the relevant interests. After the

[13] "Memphis clause" refers to an agreement that the pipeline may change the rate during the term of the contract by making rate filings under NGA section 4.

applicant makes efforts to minimize the adverse effects, construction projects that would have residual adverse effects would be approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects. Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects discussed below.

1. Consideration of Adverse Effects on Potentially Affected Interests

In deciding whether a proposal is required by the public convenience and necessity, the Commission will consider the effects of the project on all the affected interests; this means more than the interests of the applicant, the potential new customers, and the general societal interests.

Depending on the type of project, there are three major interests that may be adversely affected by approval of major certificate projects, and that must be considered by the Commission. These are: the interests of the applicant's existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. There are other interests that may need to be separately considered in a certificate proceeding, such as environmental interests.

Of course, not every project will have an impact on each interest identified. Some projects will be proposed by new pipeline companies to serve new markets, so that there will be no adverse effects on the interests of existing customers; other projects may be constructed so that there may be no adverse effect on landowner interests.

a. Interests of existing customers of the pipeline applicant

The interests of the existing customers of the expanding pipeline may be adversely affected if the expansion results in their rates being increased or if the expansion causes a degradation in service.

b. Interests of existing pipelines that already serve the market and their captive customers

Pipelines that already serve the market into which the new capacity would be built are affected by the potential loss of market share and the possibility that they may be left with unsubscribed capacity investment. The Commission need not protect pipeline competitors from the effects of competition, but it does have an obligation to ensure fair competition. Recognizing the impact of a new project on existing pipelines serving the market is not synonymous with protecting incumbent pipelines from the risk of loss of market share to a new entrant, but rather, is a recognition that the impact on the incumbent pipeline is an interest to be taken into account in deciding whether to certificate a new project. The interests of the existing pipeline's captive customers are slightly different from the interests of the pipeline. The interests of the captive customers of the existing pipelines are affected because, under the Commission's current rate model, they can be asked to pay for the unsubscribed capacity in their rates.

c. Interests of landowners and the surrounding communities

Landowners whose land would be condemned for the new pipeline right-of-way, under eminent domain rights conveyed by the Commission's certificate, have an interest as does the community surrounding the right-of-way. The interest of these groups is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way. In some cases, the interests of the surrounding community may be represented by state or local agencies. Traditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project; however, these interests can be distinct. Landowner property rights issues are different in character from other environmental issues considered under the National Environmental Policy Act of 1969 (NEPA).[14]

2. Indicators of Public Benefit

To demonstrate that its proposal is in the public convenience and necessity, an applicant must show public benefits that would be achieved by the project that are proportional to the project's adverse impacts. The objective is for the applicant to create a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential

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[14] 42 USC § 4321 et seq.

adverse effects, after efforts have been made by the applicant to mitigate these adverse effects. The types of public benefits that might be shown are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives. Any relevant evidence could be presented to support any public benefit the applicant may identify. This is a change from the current policy which relies primarily on one test to establish the need for the project.

The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests. Thus, projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study. There is no reason for an applicant to do a new market study of its own in every instance. An applicant could rely on generally available studies by EIA or GRI, for example, showing projections of market growth. If one of the benefits of a proposed project would be to lower gas or electric rates for consumers, then the applicant's market study would need to explain the basis for that projection. Vague assertions of public benefits will not be sufficient.

Although the Commission traditionally has required an applicant to present contracts to demonstrate need, that policy, as discussed above, no longer reflects the reality of the natural gas industry's structure, nor does it appear to minimize the adverse impacts on any of the relevant interests. Therefore, although contracts or precedent agreements always will be important evidence of demand for a project, the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity. Of course, if an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project.

Eliminating a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers, which was the subject of a number of comments. A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from the existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers. With respect to the impact on the other relevant interests, a project built on speculation (whether or not it will be used by affiliated shippers) will usually require more justification than a project built for a specific new market when balanced against the impact on the affected interests.

3. Assessing Public Benefits and Adverse Effects

The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact. The objective is for the applicant to develop whatever record is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests.

It is difficult to construct helpful bright line standards or tests for this area. Bright line tests are unlikely to be flexible enough to resolve specific cases and to allow the Commission to take into account the different interests that must be considered. Indeed, the current contract test has become problematic. However, the analytical framework described here should give applicants more certainty and sufficient guidance to anticipate how to structure their projects and develop the record to facilitate the Commission's decisional process.

Under this policy, if project sponsors, proposing a new pipeline company, are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, and the proposal is to serve a new, previously unserved market, it would not adversely affect any of the three interests. Such a project would not need any additional indicators of need and may be readily approved if there are no environmental considerations. Under these circumstances landowners would not be subject to eminent domain proceedings, and because the pipeline was new, there would be no existing customers who might be called upon to subsidize the project. A similar result might be achieved by an existing pipeline extending into a new unserved market by negotiating for a right-of-way for the proposed expansion and following the first requirement for showing need, financing the project without financial subsidies. It would avoid adverse impacts to existing customers by pricing its new capacity incrementally and it is unlikely that other relevant interests would be adversely affected if the pipeline obtained the right-of-way by negotiation.

It may not be possible to acquire all the necessary right-of-way by negotiation. However, the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation. For example, if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners. Similarly, a project to attach major new gas supplies to the interstate grid would have benefits that may outweigh the lack of some right-of-way agreements. A showing of significant public benefit would outweigh the modest use of federal eminent domain authority in this example.

In most cases it will not be possible to acquire all the necessary right-of-way by negotiation. Under this policy, a few holdout landowners cannot veto a project, as feared by some commenters, if the applicant provides support for the benefits of its proposal that justifies the issuance of a certificate and the exercise of the corresponding eminent domain rights. The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures.

Of course, the Commission will continue to do an independent environmental review of projects, even if the project does not rely on the use of eminent domain and the applicant structures the project to avoid or minimize adverse impacts on any of the identified interests. The Commission anticipates no change to this aspect of its certificate policies. However, to the extent applicants minimize the adverse impacts of projects in advance, this should also lessen the adverse environmental impacts as well, making the NEPA analysis easier. The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis. If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.

In another example of the proportional approach, a proposal that may have adverse impacts on customers of another pipeline may require evidence of additional benefits to consumers, such as lower rates for the customers to be served. The Commission might also consider how the proposal would affect the cost recovery of the existing pipeline, particularly the amount of unsubscribed capacity that would be created and who would bear that risk, before approving the project. This evaluation would be needed to ensure consideration of the interests of the existing pipeline and particularly its captive customers. Such consideration does not mean that the Commission would always favor existing pipelines and their captive customers. For instance, a proposed project may be so efficient and offer substantial benefits, such as significant service flexibility, so that the benefits would outweigh the adverse impact on existing pipelines and their captive customers.

A number of commenters were concerned that the Commission might give too much weight to the impact on the existing pipeline and its captive customers and undervalue the benefits that can arise from competitive alternatives. The Commission's focus is not to protect incumbent pipelines from the risk of loss of market share to a new entrant, but rather to take the impact into account in balancing the interests. In such a case the evidence of benefits will need to be more specific and detailed than the generalized benefits that arise from the availability of competitive alternatives. The interests of the captive customers are slightly different from the interests of the incumbent pipeline. The captive customers are affected if the incumbent pipeline shifts to the captive customers the costs associated with its unsubscribed capacity. Under the Commission's current rate model captive customers can be asked to pay for unsubscribed capacity in their rates, but the Commission has indicated that it will not permit all costs resulting from the loss of market share to be shifted to captive customers.[15] Whether and to what extent costs can be shifted is an issue to be resolved in the incumbent pipeline's rate case, but the potential impact on these captive customers is a factor to be taken into account in the certificate proceeding of the new entrant.

In sum, the Commission will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects. Under this policy, pipelines seeking a certificate of public convenience and necessity authorizing the construction of facilities are encouraged to submit applications designed to avoid or minimize adverse effects on relevant interests including effects on existing customers of the applicant, existing pipelines serving the market and their captive customers, and affected landowners and communities. The threshold requirement for approval, that project sponsors must be prepared to develop the project without relying on subsidization by the sponsor's existing customers, protects all of the relevant interests. Applicants also must submit evidence of the public benefits to be achieved by the proposed project such as contracts, precedent agreements, studies of projected demand in the market to be served, or other evidence of public benefit of the project.

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[15] El Paso Natural Gas Company, 72 FERC ¶ 61,083 (1995); Natural Gas Pipeline Company of America, 73 FERC ¶ 61,050 (1995).

V. Conclusion

At a time when the Commission is urged to authorize new pipeline capacity to meet an anticipated increase in the demand for natural gas, the Commission is also urged to act with caution to avoid unnecessary rights-of-way and the potential for overbuilding with the consequent effects on existing pipelines and their captive customers. This policy statement is intended to provide more certainty as to how the Commission will analyze certificate applications to balance these concerns. By encouraging applicants to devote more effort in advance of filing to minimize the adverse effects of a project, the policy gives them the ability to expedite the decisional process by working out contentious issues in advance. Thus, this policy will provide more guidance about the Commission's analytical process and provide participants in certificate proceedings with a framework for shaping the record that is needed by the Commission to expedite its decisional process.

Finally, this new policy will not be applied retroactively. A major purpose of the policy statement is to provide certainty about the decisionmaking process and the impacts that would result from approval of the project. This includes providing participants in a certificate proceeding certainty as to economic impacts that will result from the certificate. It is important for the participants to know the economic consequences that can result before construction begins. After the economic decisions have been made it is difficult to undo those choices. Therefore, the new policy will not be applied retroactively to cases where the certificate has already issued and the investment decisions have been made.

By the Commission. Chairman Hoecker and Commissioners Breathitt and Hébert concurred with a separate statement attached. Commissioner Bailey dissented with a separate statement statement attached.

(S E A L)

David P. Boergers,
Secretary.

Policy Statement for Certification of New Interstate Natural Gas Pipeline Facilities

Docket No. PL99-3-000

(Issued September 15, 1999)

HOECKER, Chairman; BREATHITT and HEBERT, Commissioners, concurring;

Our intention is to apply this policy statement to any filings received by the Commission after July 29, 1998 (the issuance date of the Commission's Notice of Proposed Rulemaking regarding the Regulation of Short-term Natural Gas Transportation Services in Docket No. RM98-10-000 and Notice of Inquiry regarding Regulation of Interstate Natural Gas Transportation Services in Docket No. RM98-12-000), and not before.

James J. Hoecker
Chairman

Linda K. Breathitt
Commissioner

Curt L. Hébert
Commissioner

Certification of New Interstate Natural Gas Facilities

Docket No. PL99-3-000

(Issued September 15, 1999)

BAILEY, Commissioner, dissenting.

Respectfully, I will be dissenting from this policy statement.

The document puts forth the majority's statement of an analytical framework for use in certificate proceedings. Its goal is to give applicants and other participants in those proceedings a better understanding of how the Commission makes its decisions. This is always a good thing to do. But ultimately, I cannot sign on to this statement as representative of my approach to certificate policy for several reasons.

First and foremost, the document purports that the policy outlined is not a significant departure from the kind of analysis used currently in certificate cases. I do not share this view. I know that it does depart from the way I currently look at certificate issues. For example, I cannot say that the sliding scale evaluation process and the weighing and balancing process described in the statement actually reflects the way I look at things. Further, the pricing changes announced are in fact significant departures from current practice. Thus, the document is as much about pricing policy change as it is about articulating an analytical approach to certification questions. I do not completely agree with the statements regarding pricing contained in this document.

The announced policy will now require that new projects meet a pricing threshold before work can proceed on the application – that is they should be incrementally priced and not subsidized by existing customers. The intent behind this is to enhance our certainty that the market is determining which projects come to the Commission.

I do not disagree with the idea that incremental pricing is consistent with the idea of allowing markets to decide. I also recognize that it can protect existing customers from subsidizing expansions as well as insulate existing pipelines from subsidized competition. However, I find the policy statement to be far too categorical in its approach. I am not persuaded that we should depart from our existing policy statement on pricing that we adopted in 1995.

There is too little recognition here that some types of construction projects are not designed solely for new markets or customers, that existing customers can benefit from some projects, and that rolled-in pricing may still be appropriate. Thus, while I can agree with some of the articulated goals such as pricing should allocate risk appropriately, and that if done properly it can assist in avoiding construction of excess capacity, I would not adopt a threshold requirement that virtually precludes use of rolled-in rates.

Finally, I am at a loss to explain the genesis of this particular outcome. I recognize that certificate policy issues have been problematic for a long time. In attempts to address these issues we have had conferences to explore need issues and we have requested comments on certificate issues in the pending gas Notice of Proposed Rulemaking in Docket

No. RM98-10-000 (84 FERC ¶ 61,087 (1998)) and the Notice of Inquiry in Docket No. RM98-12-000 (84 FERC ¶ 61,087 (1998)). The variety of views we have received in these efforts are summarized in the policy statement and it candidly recognizes the lack of clear direction on what path the Commission should follow. Given this lack of industry consensus, I question the advisability of trying to adopt a generic approach at this time. I would prefer to weigh further the relative merits of those comments before embarking on an attempt to articulate a certificate policy.

Vicky A. Bailey
Commissioner

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Case No. 7:17-CV-00357

[Filed July 27, 2017]

ORUS ASHBY BERKLEY,)
)
JAMES T. AND KATHY E.)
CHANDLER,)
)
CONSTANTINE THEODORE)
AND PATTI LEE CHLEPAS,)
)
MARTIN AND DAWN E. CISEK,)
)
ROGER D. AND REBECCA H.)
CRABTREE,)
)
ESTIAL E. ECHOLS, JR. AND)
EDITH FERN ECHOLS,)
)
GEORGE LEE JONES,)
)
ROBERT WAYNE AND PATRICIA)
ANN MORGAN,)
)
MARGARET MCGRAW SLAYTON)
LIVING TRUST,)
)

and	)
	)
THOMAS AND BONNIE B.	)
TRIPLETT,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE, LLC	)
Serve:	)
(Registered Agent)	)
CT Corporation System	)
4701 Cox Road, Suite 285	)
Glen Allen, VA 23060,	)
	)
FEDERAL ENERGY REGULATORY	)
COMMISSION	)
Serve:	)
888 First Street, N.E.	)
Washington, D.C. 20426	)
	)
and	)
	)
CHERYL A. LAFLEUR,	)
in her official capacity as Acting	)
Chairman of the Federal	)
Energy Regulatory Commission,	)
Serve:	)
888 First Street, N.E.	)
Washington, D.C. 20426	)
	)
Defendants.	)
____________________________________	)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Plaintiffs, by counsel, submit this Memorandum of Law in support of their Motion for a Preliminary Injunction.

I. FACTS

The relevant facts are set forth in Plaintiffs' Complaint, which has been verified by Plaintiff Kathy E. Chandler, and are largely based on information published by the Defendants.

Defendant Mountain Valley Pipeline, LLC ("MVP") seeks to construct a 303-mile, 42-inch high pressure natural gas pipeline from Wetzel County, West Virginia to Transcontinental Gas Pipeline Company's ("Transco") Zone 5 compressor station 164 in Pittsylvania County, Virginia. The stated purpose of the pipeline is to transport fracked natural gas from the Marcellus and Utica shale formations through the steep slopes of the Appalachian mountains, across the George Washington National Forest and the Appalachian Trail, through countless watersheds serving the residents of West Virginia and Virginia, to connect to existing pipeline networks for shipment of cheap gas to the southeastern United States.

In order to construct its pipeline so that its affiliates can ship their natural gas to Transco's Zone 5 compressor station 164, the Federal Energy Regulatory Commission ("FERC") must approve the project and issue MVP a Certificate of Public Convenience and Necessity ("Certificate"). Under the Natural Gas Act, 15 U.S.C. § 717f(h) ("NGA"), "[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 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 … it may acquire the same by exercise of the right of eminent domain….”

MVP has filed its application with FERC seeking a Certificate and FERC issued its Final Environmental Impact Statement (“FEIS”) on June 23, 2017. After a mandatory 30-day notice period required by law, FERC may grant or deny MVP’s application. 40 C.F.R. § 1506.10(b)(2) FERC is required by law to either grant or deny a Certificate within 90 days of the publication of the FEIS. 18 C.F.R. § 157.22. At present, FERC could issue a Certificate and delegate the power of eminent domain on any date between July 24, 2017 and September 21, 2017, the date when the 90-day period ends.

In this case, any grant of a Certificate by FERC to MVP violates the United States Constitution and would result in the unlawful and unconstitutional takings of the Plaintiffs’ properties, as well as the land of many others similarly situated along MVP’s proposed route. The Plaintiffs respectfully seek to maintain the status quo pending resolution of their well-founded constitutional challenge.

II. LAW AND DISCUSSION

The Plaintiffs seek the aid of the Court in protecting their respective properties from an unlawful taking. As the Verified Complaint makes clear, the Plaintiffs are entitled to injunctive relief to this effect.

A. Standard for Preliminary Injunction

A plaintiff seeking a preliminary injunction must establish (1) that she is likely to succeed on the merits, (2) that she is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in her favor, and (4) that an injunction is in the public interest. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). See also Dewhurst v. Century Aluminum Co., 649 F.3d 287, 290 (4th Cir. 2011); all of the elements are present here.

1. Success on the Merits

The Plaintiffs are likely to succeed on the merits of the case for three independent reasons. First, FERC's Certification process falls well short of the standard required by the Constitution and under the Supreme Court's ruling in Kelo v. City of New London, 545 U.S. 469 (2005). Second, Congress's delegation of the power of eminent domain to FERC[1] was overly broad and unconstitutional because it lacked any "intelligible principles." Finally, even if Congress's delegation of power to FERC was proper (which it was not), FERC cannot sub-delegate its powers to a private third party such as MVP.

a. FERC's Shifting Scale "Economic-Balancing" Tests Violate the Constitution

As noted in the Plaintiffs' Verified Complaint, the NGA grants the holder of a certificate of public

[1] As noted in the Plaintiffs' Verified Complaint, FERC's predecessor was known as the Federal Power Commission.

convenience and necessity the authority to exercise the power of eminent domain ***automatically*** in circumstances where the holder of the Certificate (i.e., the pipeline company) "cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid." 15 U.S.C. § 717f(h) (internal quotations omitted). In other words, if the landowner either outright denies the company a right of entry or is simply not willing to accept the company's monetary offer, the company can ***forcibly*** acquire a right to enter and construct on the property by invoking the right of eminent domain.

FERC, as the body tasked by Congress with determining whether to issue a Certificate, must also ensure that its actions and decisions conform to the requirements of the U.S. Constitution. FERC's self-described "sliding-scale" test, however, is so flexible that it allows virtually anything to constitute a "public use", since FERC alters the standard to accommodate the particular applicant. In other words, FERC applies different standards depending on the different needs of the applicant and without regard to the demands of the Constitution.

FERC's self-imposed "sliding scale"[2] standard is composed of three tests, from which the Commission selects depending on the particular applicant's facts and circumstances:

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[2] *Statement of Policy*, United States of America 88 FERC ¶ 61, 227, Federal Energy Regulatory Commission, 27.

- ***Test 1: The "Existing Market" Test***

FERC applies the first test to applicants who wish to serve an ***existing market***. In such cases, FERC's scale balances "public benefits" from the project against "adverse effects."[3] FERC describes the "public benefits" to include but not be limited to: demand, access to new supplies, lower costs to consumers, new interconnects to improve the grid, competitive alternatives, increasing electric reliability, and advancing clean air objectives. FERC particularly notes, however, that "*[**a]ny relevant evidence*** could be presented to support ***any public benefit*** the applicant may identify."[4]

In stating so, the Commission effectively ***caters*** to the needs of the particular applicant, not the needs of the community or public. Not only does FERC not reference the constitutional standard for "public use", but even goes so far as to specifically highlight that there is no "bright line standard[]" at all because "[b]right line tests are unlikely to be flexible enough to resolve specific cases" and account for the "different interests."[5] Put another way, a bright line test (i.e., the constitutional test at issue before this Court) plays no role in FERC's analysis, since the Commission deems it too rigid and inflexible to cater to its applicants' desires. And from that standpoint, rightly so: the Constitution does not cater to FERC's typical

[3] *Id*. at 28.

[4] *Id*. at 25 (emphasis added).

[5] *Id*. at 26.

applicants—private profit-seeking companies such as MVP—but to the People of the United States, to the community at-large, and to the specific landowners whose properties are at issue.

Rather than apply the constitutional standard for "public use"—encompassing the requirements laid out in the context and history of eminent domain case law, including the restriction that private gain be incidental, not dominant—FERC applies a ***proportionality*** test, requiring an applicant to show merely that the "public benefits that would be achieved by the project [] are proportional to the project's adverse impacts."[6] The amount of evidence required for a showing of "public ***benefit***"—notably a different standard than "public ***use***" under the Constitution—is again, a flexible test of proportionality, which depends upon the "potential adverse effects of the proposed project" and the relevant "interests."[7] Indeed, the Commission even openly declares that its end-goal is not, in fact, the genuine assessment of public use per the Constitution, but an outright modification of the standard to cater to the needs of the applicant, not the public:

> The objective is for the applicant to develop whatever record is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission ***to be able to find*** that the benefits to the public from the

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[6] *Id*. at 25.

[7] *Id*.

> project outweigh the adverse impact on the relevant interests.[8]

These supposed conditions are neither defined nor mandatory. They are entirely discretionary and dependent upon the outcome of the Commission's proportionality test, which is a shifting scale that accommodates the needs of the applicant. The purported conditions are thus a pretext, not a requirement. Where the Commission deems the adverse effects to be insignificant, the scale changes, until eventually there are no conditions at all.

- ***Test 2: The "New Market" Test***

FERC reserves the second test for applicants who wish to serve a ***new market***. Projects seeking to serve "new demand" may be approved by FERC on a "lesser showing of need and public benefits than those [seeking] to serve markets already served by another pipeline."[9] This test is still a sliding scale of proportionality, weighing public "benefits" against adverse effects. The difference between this test and the previous test for existing market applicants is that the requirements for "need" are loosened because FERC, once again, ***automatically*** assumes that an area not presently served by another pipeline will somehow "obviously" benefit from a new pipeline in total disregard of:

- whether ***that*** pipeline will actually service ***that*** area, as opposed to simply running

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[8] *Id*. at 26 (emphasis added).

[9] *Id*. at 25.

through it (because *servicing* an area and *running through it* are two entirely different matters), and

- whether the public in that area where eminent domain is invoked for the placement of the pipeline will reap any actual use at all from its construction beyond pre-textual "gas taps" installed to manufacture a supposed local use.

The problem ignored by FERC, however, is that the area through which the pipeline is proposed to traverse (the very area in which eminent domain is sought to be invoked) is not actually the area intended to benefit from the pipeline. It is not, in other words, the geographic area that will gain any public use from its installment beyond the token gas taps installed for PR purposes. The geographic area acquiring the public use, if any, is elsewhere, leaving only some distant and abstract notion of the "trickle-down effect" as the justification for the invocation of eminent domain, a power specifically restricted by the Constitution for circumstances where a "public ***use***" is shown, not a "public ***benefit***," as FERC would have it, nor a flexible, abstract, or proportional "public interest." A public ***use***, and only a public use, satisfies the requirements of the Constitution, as intended by the Founders and interpreted by the Supreme Court, not the Commission.

- ***Test 3: The "Nearly All New Market" Test***

The third test employed by FERC is reserved for applicants who wish to serve a *new market and acquire "all or substantially all, of the necessary right-of-way* [easements] by negotiation prior to filing the application."[10] This test is the least restrictive of the three, imposing no conditions or requirements whatsoever. It is, in essence, a flat-line scale because there is no balancing at all. As the Commission explains in its Statement of Policy, "[s]uch a project would not need any additional indicators of need and may readily be approved if there are no environmental considerations."[11] So long as the pipeline company acquires consent from most of the landowners, the Commission need not assess any factors for need at all, even under its own lax standards, leaving the rest of the landowners who were in the minority and did not consent to a right-of-way easement without any assessment of public use, public need, public interest, or public benefit whatsoever. The core problem, yet again, is that FERC ***assumes*** that a company's private need ***automatically*** equates to a public one, especially where there is a new market.

The Constitution, however, does not operate on an assumptive basis and even if it did, the assumption would favor the individual, not the company. In the present case, where an individual landowner's rights are trampled upon for the sake of a collective benefit or collective consensus—such as the one posited under FERC's shifting scale—where a company's future private use of said land is somehow deemed more beneficial than the present private use of the landowner – is an egregious violation of the Constitution. Such a circumstance is reminiscent of the

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[10] *Id*. at 26 (emphasis added).

[11] *Id*.

feudal system, where individual property rights were subservient to the "interests" and "needs" of the lords and noblemen, only here instead of a king, a CEO, instead of a palace, a corporate headquarters. The current situation reflects, in essence, a system of corporate feudalism, quite contrary to the American legal tradition of individual rights and liberties. To take private property from A to give it to B for a different private use[12] under the guise of a trickle-down public benefit is not justifiable under any interpretation of the Constitution, even in light of Kelo's economic development expansion.

(1) "Public Use" is Limited to a Local/Regional Use, Even Under *Kelo*

The Fifth Amendment forbids the government from taking "private property" for "public use, without just compensation."[13] The Constitution does not use any of

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[12] *See, e.g.,* Hairston v. Danville & W. R. Co., 208 U.S. 598, 606 (1908) ("[I]t is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required."); *see also* Dice v. Sherman, 107 Va. 424, 427 (1907) ("'The private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use, against the will of the owner, which cannot be done in any case'") (quoting Fallsburg v.Alexander, 101 Va. 98, 109 (1903).)

[13] The Takings Clause of the Fifth Amendment was made applicable to the states by the Fourteenth Amendment. Kelo v. City of New London, 545 U.S. 469 (2005); Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

the following terms employed by FERC: "public ***benefit***," "public ***interest***," or "public ***need***." The Constitution employs the word "***use***," which immediately connotes a narrower grant of power. The terms "benefit," "interest," and "need," though abstractly similar concepts, carry a much broader meaning than the term "use." A benefit, interest, or need, is not restricted to a geographic scope in the same fashion as a use. A use connotes a direct use by the public, which was historically the original limitation of eminent domain, interpreted as a power that could be invoked only where the public whose land was taken (meaning the public within that region) had access to the new use.[14]

This access-based interpretation represents a striking difference from an abstract or distant benefit/interest of the public-at-large, first because the use would be accessible by *that* particular segment of the population (i.e., located in that region) and secondly, because *that* particular population would have direct access and hence, direct public use. For example, when a road was built, the public would have physical access to that road. That access constituted public use. When a railway was built, the public would have physical access to that form of transportation, either as passengers of the railroad companies or as shippers of goods. The use by the public standard interpreting use as access was abandoned by the courts

[14] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005)(explaining the historical interpretation of "public use" as "use by the public").

in most states,[15] and the Court soon replaced the public access interpretation of use with a public purpose. That expansion, however, was not an expansion of scope but of kind.

Kelo, though an expansion, was still only an expansion of use within the same scope. In other words, the concept of public purpose is still limited by the same geographic scope; that is, it has to serve ***a purpose for the public in that particular region*** where eminent domain is invoked. If the taking serves no purpose for the public whose land is taken, it is not a justifiable invocation of eminent domain. Kelo broadened the kind of use that can justify eminent domain within the same region. It did not broaden the region itself, nor extinguish the directness or scope of public use; it merely reinterpreted "use" as "purpose," as opposed to access, but that purpose still has to be for ***that*** community (i.e., limited by the same scope). A trickle-down benefit does not suffice, nor does the potential of some future public use suffice. See Mt. Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850, 861-62 (W.Va. 2016). While Kelo permits eminent domain to be invoked for economic development, it does not allow just ***any*** economic development. Rather, it permits eminent domain only if there is an economic development for that particular community. The facts of Kelo and related case law plainly demonstrate this scope.

[15] *See, e.g.*, Kelo, 545 U.S. at 479-80.

(2) Kelo Focused Only on Public Purpose Within the City of New London

In Kelo, the Supreme Court recognized economic development as a public purpose for the particular city of New London, Connecticut, where the land was actually taken. At issue was the city's development plan that was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to ***revitalize an economically distressed city***, including its downtown and waterfront areas." Kelo at 472 (internal quotations omitted) (*quoting* 268 Conn. 1, 5, 843 A.2d 500, 507 (2004)) (emphasis added). The city acquired some land by purchasing the property from willing landowners, and sought to acquire the rest through eminent domain. *Id*. The justification for this development project was twofold:

> (1) capitalize on commerce expected from Pfizer, Inc.'s new research facility located ***in New London***, and
>
> (2) revitalize the downtown area ***of New London***.

Id. at 472-75. Notably, both the area where the research facility would be located and the area needing revitalization or "economic development" was the same area where the takings were sought: in New London.

The pharmaceutical company, Pfizer Inc., had just announced it would build a $300 million research facility adjacent to the Fort Trumbull area of New London. Id. at 473. The New London Development Corporation, the public entity in charge of city planning, sought to capitalize on Pfizer's presence by creating a new development plan for 90 acres of the

Fort Trumbull area, including a new waterfront hotel, riverwalk, shopping centers, and urban neighborhood with new residences. The stated purpose of the plan was to revitalize downtown New London, thus directly benefitting the public in New London. The legal issue before the Supreme Court was whether this development plan constituted a "public use" under the Takings Clause of the Fifth Amendment. The Court held that it did. The Court reasoned that public use ought to be interpreted as "public purpose," and that the takings were justified by the "economic development" because the purpose of the taking was to revitalize the city, the place where the purpose would be realized and available for use by the public. Id. at 480.

(3) Social Harm Was Present in Kelo: New London Was Economically Distressed

The Court further reasoned that this set of facts, though different, resembled and satisfied the requirement of social harm laid down in two central eminent domain cases, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) and Berman v. Parker, 348 U.S. 26 (1954). The Court in Midkiff dealt with a Hawaii statute that took land from lessors and transferred it to lessees in order to "reduce the concentration of land ownership." Kelo at 481 (*citing* Midkiff, 467 U.S. 229 (1984)) (internal quotations omitted). The social harm alleviated in Midkiff was extreme wealth. Since 47% of the State's land was owned by only 72 private landowners, the statute was remedying the social harm caused by the concentration of wealth. Midkiff, 467 U.S. at 232. That social harm provided the justification for the invocation of eminent domain against unwilling landowners.

Similarly, in Berman, the Court also dealt with a social harm, only there, it was extreme poverty, not wealth. In Berman, the Court upheld a development plan for a blighted area of Washington D.C., where most of the housing for the area's 5000 residents was "beyond repair." Kelo, 545 U.S. at 480 (*citing* Berman, 348 U.S. 26 (1954)). A store owner who challenged the development plan on the basis that it was not a valid "public use" lost because the Court held that the blighted area must be viewed as a whole, and as a whole, that community would directly benefit from the development of new streets, schools, and other public facilities. In so holding, the Court reasoned that the concept of public welfare is broad and inclusive and as such, the legislature can determine that "the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman, 348 U.S. at 33. In light of the social harm—the "blight"—the Court allowed the redevelopment to go forward.

The Court's decision in Kelo was thus shaped by two central elements: (1) social harm, and (2) the revitalization of a specific geographic area. The social harm being eliminated in New London was a state of impoverishment: the city of New London was designated by a state agency in 1990 as a "distressed municipality" with a declining population and by 1998, an unemployment rate nearly double that of the State of Connecticut. Kelo, 545 U.S., at 473 (internal quotations omitted). In Kelo, the "social harm" element outlined by the Court in Berman and Midkiff was present and satisfied. To alleviate *that* harm in *that* particular area, the Court expanded public use to "public purpose," but that expansion was subject to the limitations of social harm and geographic scope.

The expansion in Kelo, was not, therefore, an all-out expansion of public use for any and all economic development, but only for economic development in the specific area where eminent domain was being invoked. Any generalized interpretation of Kelo that attempts to justify eminent domain by an appeal to a generalized economic development through a trickle-down increase of tax revenues or broad allusions to temporary jobs during construction is a misinterpretation and over-expansion of the Court's reasoning. Indeed, Virginia's citizenry recognized as much in amending the Virginia Constitution in 2012 to limit the possible effects of Kelo in Virginia. See Va. Const., Art. I, § 11 ("a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development."). In sum, a proper invocation of eminent domain is limited by geographic scope and conditioned on the presence of social harm.

(4) The Absence of Social Harm and Limitation of Geographic Scope Prohibit the Use of Eminent Domain by MVP in Virginia and West Virginia

In the instant case, none of these two qualifying elements are present. There is no social harm to alleviate in the areas of Virginia and West Virginia where the pipeline is being constructed. Unlike the cities of New London in Kelo and Washington D.C. in

Berman, the lands targeted by MVP for takings, and the lands owned by the instant Plaintiffs are not blighted or in desperate need of revitalization. Nor is there a state of extreme wealth needing alleviation such as the case in Midkiff. To the contrary, many local businesses and churches in the path of the pipeline are open and prospering, businesses which directly benefit those communities and will be adversely affected by the installment of the pipeline intended to take and transport wealth away from those areas. The only "social harm" is the harm caused by the surveying activity and construction of the pipeline, which has and will continue to negatively affect the local community in that geographic area.

As noted in the Plaintiffs' Verified Complaint, the landowners bringing the instant suit do not own blighted lands. Orus Berkley has invested heavily in his riverfront property and maintains two rental cottages, a commercial sewer system, and a large parking lot. Mr. Berkley has been delayed in completing site development for 50 riverside campsites for over three years due to MVP's plans to utilize his property as an access area to cross the Greenbrier River. Similarly, the Chlepas operate Birdsong Farm, LLC, an organic apiary and bee preserve that sells natural raw honey, 100% beeswax candles, all-natural insect repellants, essential oils, soaps, lip balm, and other natural products of the hive. MVP's plans entail construction of an access road as well as part of the main pipeline across the Chlepas' property, which will severely impact, if not entirely destroy, Birdsong Farms' social, environmental, and economic contributions. The Crabtrees raise sheep, chicken, and rams, and harvest hazelnuts, apples, walnuts, chestnuts and peaches.

Unlike in Kelo, Berman, and Midkiff, there is no social harm or exigency justification for the taking of private property by MVP in these counties. In fact, any taking permitted by FERC and exercised by MVP would create, not eradicate, social and economic harm to the community where eminent domain would be utilized. Such an outcome is anathema to the Supreme Court's dictates.

Even assuming, *arguendo,* that there is a social harm needing alleviation in these localities (which, clearly, there is not), the installment of a pipeline would *still* not alleviate that hypothesized harm in that community. There is no direct economic benefit flowing from the pipeline to the counties in the path of the proposed line.[16] The only direct economic benefit, in fact, is flowing *through* the pipeline, *past* the counties, and *into* the corporate headquarters of MVP, located at 625 Liberty Ave., Suite 1700 in Pittsburgh, PA. The purported economic benefit to the counties, the geographic region where eminent domain is actually being invoked, is a trickle-down benefit of tax revenues and anticipated economic growth for the company, neither of which is sufficient to constitute a public use for that particular public in those particular counties.

Consider, for example, MVP's list of purported "economic benefits" for Franklin County. MVP declares

[16] Mountain Valley Pipeline, *Economic Benefits,* Available at: https://www.mountainvalleypipeline.info/economic-benefits, (Accessed July 22, 2017, 3:31 P.M.).

on its website that Franklin County will experience "construction benefits" in the form of "$400 million in Virginia-based labor," and "4,400 jobs in 2018" at the peak of construction.[17] *Virginia*-based labor, as an initial matter, is not *Franklin County*-based labor, nor is it clear that any of those 4,400—notably temporary—jobs will be available to anyone in Franklin County (or any other affected locality), as opposed to outsourced to foreign workers who will temporarily be present in the areas during construction.

The Economic Benefits Summary offered by MVP, in fact, openly states that the "[o]ngoing operation of the pipeline would support a total of 34 jobs across the state,"[18] meaning that the only long-term benefit of this pipeline is 34 jobs—in total—to 34 people somewhere out there across the entire state. 34 new jobs is a far cry from a direct economic benefit to Franklin County, Roanoke County, Summers County, Monroe County or any other county or locality in the path of MVP. And, even if all 34 of those individuals somewhere out there across the state were, incidentally, all located in one locality such as Franklin County (which they are not), the number of landowners whose businesses and homes are adversely affected far outweighs 34 new jobs.

The balance of interests in the assessment of long-term economic gain clearly tips in favor of the

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[17] Franklin County Benefits Summary (Oct. 2, 2015) Available at: https://www.mountainvalleypipeline.info/economic-benefits, (Accessed July 22, 2017, 3:31 P.M.).

[18] *Id*.

landowners, not these 34 supposed future individuals—whose origins are unknown—spread out somewhere across over 100 miles of the 303-mile pipeline. Moreover, the Franklin County Benefits Summary also claims that Franklin County will have "[d]irect-use benefits," in the form of a "potential lower cost option for natural gas" for the Town of Rocky Mount.[19] As noted by the Supreme Court of West Virginia in McCurdy, a potential future benefit or future use, is not a concrete, direct benefit to the localities affected. Rather, it is a hypothesized, potential occurrence in the future that may or may not occur depending on significant investment by local entities, not MVP or FERC.

Finally, the MVP-promulgated benefit to the manufacturing industry is also nothing more than that: a hypothesized potential benefit that may or may not occur, entirely dependent upon whether a particular locality can afford to spend the local taxpayers' money on infrastructure and whether certain manufacturers actually switch to natural gas. Even if manufacturers benefit from some future gas consumption, however, a purported benefit of "$300,000" annually in savings would not go to the local Franklin County community but into the private coffers of the companies.[20]

The only benefit, once again, is a supposed trickle-down economic benefit, which is markedly different from the direct economic rejuvenation of the cities of New London in Kelo or Washington D.C. in Berman.

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[19] *Id.*

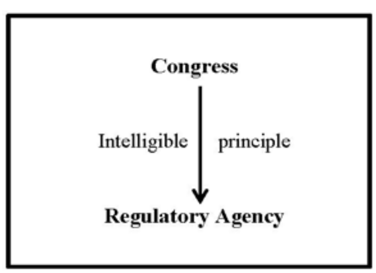
[20] *Id.*

And again, even assuming there were a direct economic benefit (which there is not) to that specific geographic area (i.e., Franklin County), there would still need to be a pre-existing social harm requiring alleviation in each and every place affected by the pipeline. There is none. MVP is thus attempting to invoke eminent domain to take property in a geographic area not for the purpose of benefitting the public within those distinct areas, but for the purpose of benefitting its own corporate coffers, which is neither a public use nor one targeting the revitalization of the area wherein the takings are projected to occur.

b. Congressional Delegation of the Power of Eminent Domain to FERC via the Natural Gas Act is an Unconstitutional, Overly Broad Delegation of Power Resulting In A Sub-delegation to Private Entities

(1) Congressional Power to Delegate Is Limited

While it is uncontroverted that Congress may lawfully delegate its powers, such authority is not unlimited. The first limitation on Congress's authority to delegate power is imposed upon the initial delegation from Congress to the regulatory agency or body, as illustrated below:



Congress possesses authority to delegate power ***so long as*** it prescribes a set standard within which that power must be exercised. The Constitution, in other words, permits Congress to "seek assistance from another branch of government" as long as the "extent and character" of that assistance is fixed by certain limitations, including "common sense" and the "inherent necessities of the government coordination." Clinton v. City of NYC, 524 U.S. 417 (1998) (*quoting* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.)) (internal quotations omitted). As stated by the Supreme Court in Clinton:

> [T]here are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard."

Id. at 442-43 (*quoting* United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 324 (1931)). An overly broad delegation, where power is delegated *without* limitation (i.e., where either (a) no prescribed constitutional standard is provided, or (b) where the one that is prescribed is vague or contrary to the Constitution), is unconstitutional, because Congress's authority to delegate derives *from* and is restricted *by* the Constitution. This principle, known as the "non-delegation doctrine," is an "added Constitutional check upon Congress's authority to delegate power[.]" Id. at 442. Congress cannot simply delegate at its whim; it cannot delegate without a standard, nor can it reinvent one. Every delegation—particularly one concerning constitutional standards—must be strictly limited by a fixed standard, known as an "intelligible principle."

As Chief Justice Taft explained:

> The Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."

Id. at 484 *(quoting* J.W. Hampton*,* 276 U.S. at 409). This "intelligible principle" is the limitation that Congress must impose upon the body to whom the power is being delegated. Simply put, when Congress delegates its power away to another governmental branch or body (i.e. a regulatory agency like FERC), it must *instruct* that body as to how and when the delegated power is to be exercised. Congress, as the delegator, cannot allow the delegatee to create, alter, or re-invent the standards as to how and when the delegated power is exercised. This is the fundamental difference between the power to *execute* law and the power to *make* it:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

J.W. Hampton, 276 U.S. at 407. The delegatee-body may ***execute*** the law, but it cannot determine what the law ***shall be***. The delegatee must, instead, follow the "prescribed" standard, meaning the standard imposed upon the regulatory body at the time of delegation, a standard to which the body must strictly adhere when exercising the power.

The justification for this limitation on delegated powers is a core constitutional principle: Congress is not the originator of power; while it is indeed the delegator as concerns the delegation to the regulatory body, Congress itself is also merely a recipient of delegated power—the power entrusted to it by the People of these United States under the first social compact. Any power held by Congress is derived from the original social compact, which imposes upon Congress a duty to uphold the Constitution and, by extension, to ensure the same by any regulatory agency acting on its behalf, that is, on the authority granted to it by the People:

> There are certain vital principles in our free Republicans governments, which will determine and over-rule an apparant and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to ***take away that security*** for personal liberty, or ***private property***, for the protection whereof the government was established. ***An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority***.

Calder v. Bull, 3 U.S. 386, 388 (1798) (emphasis added). Any Act of Congress or a state legislature must, in other words, adhere to the "great principles of the social compact" in order to be a valid exercise of legislative power. An act that over-reaches (i.e., overly intrudes upon individual liberties) is a breach of that compact and is, thus, an unconstitutional exercise of legislative authority. Examples of such breaches include:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or ***a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it***. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and ***the general principles of law and reason forbid them.***

Id. at 388 (emphasis added). A supposed law that takes property from A and gives it to B (presumably without public use or just compensation), as hypothesized in Calder v. Bull, is not therefore a valid exercise of legislative authority, despite its procedural enactment, not because of any *procedural* deficiency, but because of a *substantive* one: Congress never had the *substantive* authority to create such a law in the first place; it would be so contrary to the nature and spirit of the social compact that the Court must presume its illegality; that is, presume that the People could not possibly have consented to its enactment or, more importantly, the consequent deprivation of their rights. The intelligible principle is thus a necessary *element* (as opposed to a factor) of each and every delegation, acting not merely as a discretionary recommendation but a mandatory "check and balance," a safeguard ensuring both:

- that Congress has delegated the power in accordance with the Constitutional standard at issue (i.e. laid down a limitation or standard on how and when the delegatee-body may exercise the delegated power); and
- that the body to whom the power is delegated understands its power is of a *limited* nature, restrained by the intelligible principle, that is, by existing law.

The absence or misapplication of an intelligible principle at the time of delegation is, therefore, a breach of the social compact. For no delegation is valid without it and no violation more egregious to individual liberties.

The Judiciary is, by extension, the sole vehicle for the enforcement of the non-delegation doctrine. It is the final check and balance imposed upon Congress and its regulatory bodies by the Founders who, in anticipation of a future day, crafted the separation of powers to both prevent and repair breaches of the social compact. This breach of the social compact occurs in one of two ways, as outlined below:

Either When:

- ***Congress Has Authority To Exercise Power X*** But Breaches The Social Compact By Implementing An Overly Broad Delegation Of Power To Another Body.

  This occurs where:
  - o ***No attempt***. Congress delegates its power but does not even attempt to lay down any prescribed standard or limitation whatsoever, resulting in a total absence of an intelligible principle altogether; **or**
  - o ***Failed Attempt***. Congress delegates its power and *does* attempt to lay down some type of standard, but the standard or limitation is either incorrect or too loose, resulting in a principle that is not so intelligible, or at least not in accord with the Constitution.

OR

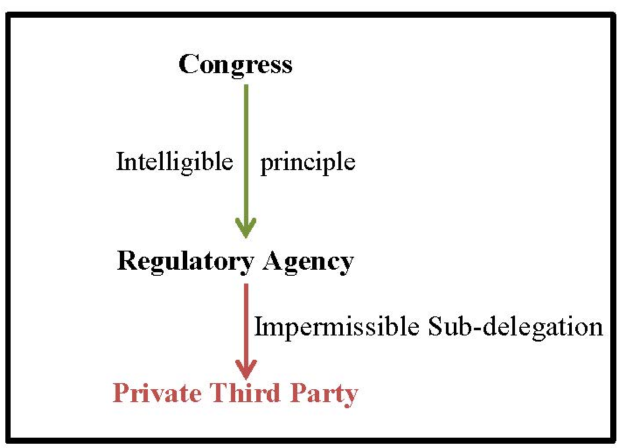
- ***Congress Does Not Have Authority To Exercise Power X*** And Breaches The Social Compact Because It Attempts To Delegate A Power It Never Had In The First Place.

  - o Congress delegates its power but the delegation is unlawful because Congress itself never had authority from the People to exercise that power in the first place. That is, all reason and justice presume that the People would never have consented to such a deprivation of rights and liberties.

The first situation occurs where Congress lawfully possesses the authority to exercise a certain power, but acts unlawfully by implementing an ***overly broad*** delegation, thus resulting in an abuse of power. The second situation, though less likely, occurs where Congress does not possess authority to exercise the power it is attempting to delegate, and thus the entire delegation, however structured, is unlawful. Both types of breach are an unconstitutional delegation of power—a "political heresy"—which must be corrected by the Court, the judicial check and balance upon Congress's authority to delegate. Bull, 3 U.S. at 389.

(2) Congress Cannot Sub-Delegate Power

The second limitation on Congress's authority to delegate power is imposed upon the delegatee-body (i.e. regulatory agency to whom the power is initially delegated) and any subsequent body or entity to whom the power is sub-delegated. This limitation is illustrated by the following diagram:



A sub-delegation by the regulatory body to a third party entity is impermissible. It is a violation of the fundamental doctrine of non-delegation, meaning that delegated powers cannot be further delegated. This doctrine is entrenched in the American legal system, and was discussed at length in J.W. Hampton, Jr., & Co., where Justice Taft stated:

> The well-known maxim "Delegata potestas non potest delegari," applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law.

276 U.S. at 405-06.

The doctrine prohibits a regulatory body such as FERC from further delegating the power entrusted to it by Congress. The general notion is that the Constitution divided the governmental power into three distinct branches, and that in "carrying out that constitutional division," it would be a "breach of the National fundamental law" for Congress to give up its legislative power and transfer it to another branch, i.e. to the Executive or Judicial branches. Id. at 406. Although Congress may—and, indeed, *must* in some circumstances[21]—establish a regulatory agency to assist with the timely application and execution of existing law, it cannot authorize that agency, nor can

[21] State ex rel. Railroad & Warehouse Commission v. Chicago, M. & St. P. R. Co., 38 Minn. 281, 299 (1888) ("The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself.").

the agency authorize itself, to further sub-delegate that power to a private third party.

This is so for two reasons. First, a sub-delegation would undermine the entire purpose of the regulatory agency's existence. Second, the regulatory body is not vested with the power to further delegate (i.e., to private entities) because Congress itself is not vested with that power. Congress's power is derived from the Constitution, which authorizes only Congress to legislate and, when necessary, to seek assistance in the execution of that legislation from another governmental branch—emphasis on "governmental"—not a string of non-governmental, private entities:

> It is, of course, one of the settled maxims in constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body. Where the sovereign power of the state has located the authority it must remain.

State ex rel. Railroad & Warehouse Commission v. Chicago, M. & St. P. R. Co., 38 Minn. 281, 299 (1888).

The "sovereign power" refers to the People. Since the People have located authority in Congress, *only* Congress can exercise that authority—Congress itself being the original recipient of authority—and, by extension, only the body selected by Congress to execute that authority on its behalf is the proper recipient of delegated power. That recipient can no more sub-delegate the power to a private entity than could Congress, and since Congress is unable to do so, so too is the regulatory body.

(3) The Constitution Permits Context, History, and Common Sense to Shape the Standard—the Intelligible Principle—for the Exercise of Delegated Power

The intelligible principle accompanying each delegation of power is shaped by the context and history of the standard in question. As stated by the Supreme Court, "the Constitution permits Congress to rely upon context and history as providing the necessary standard for the exercise of the delegated power." Clinton, 524 U.S. at 488. This approach is not new but, rather, echoes Justice Taft's words in J.W. Hampton, where he explained that the "extent and character" of assistance sought by Congress "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." J.W. Hampton, 276 U.S. at 406.

An inherent necessity, for example, is Congress's need to delegate in circumstances where, for practical reasons,[22] it cannot *conveniently* or *timely* determine when precisely its legislative power is to be exercised and must, therefore, delegate its power to a Commission, which can devote all of its time purely to that subject matter, allowing Congress to address other matters. Congress's power to regulate interstate commerce and determine rates, for instance, was delegated to the Interstate Commerce Commission ("ICC"), which was tasked with fixing tariff rates in

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[22] *Id.*

light of defined limits and the particular facts and circumstances, (i.e., the context) of the standard:

> If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. . .[23]

State ex rel. Railroad & Warehouse Commission, 38 Minn. 281, 300 (1888) ("If this was not permissible, the wheels of government would often be blocked, and the sovereign state find itself helplessly entangled in the meshes of its own constitution.").

The ICC was charged with determining, "in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given[.]" J.W. Hampton, at 408. This delegated power, though discretionary to some extent, was not unlimited. Rather, it was restrained to the mere ***execution*** of existing law, as applied to the particular facts: "These powers often necessarily involve in a large degree the exercise of discretion and judgment, even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found." State ex rel. Railroad & Warehouse Commission, 38 Minn. 281, 300 (1888). Thus, while a Commission may indeed exercise discretion to

[23] *Id*. at 301.

investigate and determine the facts, it may not exercise discretion to determine what the law ***shall be***. The Commission's discretion, though broad, is not broad enough to legislate new law:

> The difference between the power to say ***what the law shall be***, and the power to adopt rules and regulations, or to investigate and determine the facts, in order to carry into effect a law already passed, is apparent.

Id. at 300 (emphasis added). The question, then, is how the Court ought to determine the limitation in each circumstance. The answer lies in the context, history, and common sense of the particular case, meaning that while FERC, and other regulatory bodies, possess a certain amount of discretion, that discretion is limited by common sense and the context, history, scope, and nature of that power.

Even in cases where the standard upheld was deemed "broad," the Court nevertheless maintained defined limits set by the context, history, nature, and scope of the delegated power at play. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), for example, the Court upheld the Communication Commission's power to promulgate regulations regarding chain broadcasting. At issue was the Communications Act of 1934, which vested the Commission with the power to classify and license radio stations. The criterion laid down for the exercise of the Commission's licensing power was the "public interest, convenience, or necessity." National Broadcasting, 319 U.S. at 215 (*citing* The Communications Act §§ 307 (a) (d), 309 (a), 310, 312), in addition to the requirement that the Commission distribute licenses in a manner that provides a "fair, efficient, and equitable distribution of radio service[.]" Id. (*citing* § 307 (b)).

While this discretion is often cited as an infamous example of permissibly broad delegations of power, particularly as regards determinations of the "public interest,"[24] the majority in National Broadcasting made clear that the Commission's power with respect to determining when a "public interest" arose was not unlimited. Specifically, the Court held that the criterion laid down by Congress of "public interest, convenience, or necessity," was "not to be interpreted as setting up a standard so indefinite as to confer unlimited power." Id. at 216. Rather, the Court held that, "[t]he requirement [i.e. 'public interest' standard] is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ." Id. at 216. (quoting Federal Radio Com. v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285 (1933)).

Therefore, even the seemingly broadest delegation of power to a regulatory agency is—and *ought* to be—limited to a mere *execution* of existing law, shaped by the historical context of the power at issue. It is not, even in its broadest form, a license to shape the law at-

[24] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 485 (1998) ("The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. *See, e.g.,* National Broadcasting Co. v. United States, 319 U.S. 190, 225-226, 63 S. Ct. 997, 87 L. Ed. 1344 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require) (internal quotations omitted)).

will to suit the particular circumstances of the applicant. That the Court has only on rare occasion found a delegation overly broad does not defeat the Court's obligation to reign one in when circumstances so require.

Consider, for example, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). In Schechter, the Court held that the Live Poultry Code, promulgated under § 3 of the National Industrial Recovery Act, 15 U.S.C.S. § 703, was an overly broad delegation of power. The Act authorized the President to approve "codes of fair competition" upon application by one or more trade or industrial associations or groups. Id. at 522. The Court held that the Act was an unconstitutional delegation of power because it prescribed no constitutional method or procedure for ascertaining unfair methods of competition. Since the discretion granted to the President was overly broad (i.e., not limited by fixed standards), the delegation was unconstitutional:

> Congress cannot delegate legislative power to the President to exercise an ***unfettered discretion*** to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.

Schechter, 295 U.S. at 537-38 (emphasis added). See also Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

Specifically, the Court found that the Act laid down virtually no limitations on the "scope" of the law and that the only purported limitations that were laid down vested the President with unbridled discretion. Id. at

538. The supposed "restrictions" (which the Court ultimately deemed pre-textual restrictions for unlimited discretion) imposed upon the President in the Act were as follows: First, the President was required to find that the trade or association proposing a code "imposes no inequitable restrictions on admission to membership" and is "truly representative." Id. (internal quotations omitted). Second, the Act required the President to find that the code is not "designated to promote monopolies" or eliminate small enterprises. Id. Third, the Act actually mandated that any code the President approves "shall not permit monopolies or monopolistic practices." Id. (internal quotations omitted). Fourth, the President was directed to impose additional "conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest[.]" Id. at 523.

Despite these purported restrictions or conditions laid down by Congress, the Court nonetheless found that the Act constituted an unlawful delegation of legislative power by Congress to the Executive Branch. The Court reasoned that the restrictions were not actually restrictions at all but, rather, pre-textual guidelines that left "virtually untouched the field of policy" and allowed the President to "roam at will" and "approve or disapprove the[] proposals as he may see fit." Id. Ultimately, the Court concluded that the delegation through the National Industrial Recovery Act ("NIRA") was not simply an overly broad standard (i.e., for determining "fair competition"), but also a "conferral of power on private parties to promulgate rules applying that standard to virtually all of

American industry." Clinton, 524 U.S. at 486 (*citing* Schechter, 295 U.S. 495 (1935)). The delegation was, as concurring Justice Cardozo noted, a "delegation running riot," which outran the "bounds of the authority conferred." Schechter, 295 U.S. at 553 (Cardozo, J., concurring). In sum, three factors created the over-breadth issue in *Schechter*:

(1) the restrictions were overly broad and allowed the President unfettered discretion to create the standard (i.e., intelligible principle) on his own;

(2) the lax standard allowed the President to delegate the power to private parties (i.e., the trade groups or associations filing the code application) resulting in an unconstitutional sub-delegation; and

(3) this delegation running riot would affect the industry nationwide (i.e., widespread effects).

This unbridled discretion coupled with the resulting sub-delegation to the private entity trade groups to shape the constitutional standard on their own rendered the delegation unconstitutional.

By contrast, the delegation of power in Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) was not overly broad. In Skinner, the issue was whether Congress had properly delegated power to the Secretary of Transportation to determine a system of pipeline user fees. The Court ultimately held that the fees did not constitute a tax and that Section 7005 of the Consolidated Omnibus Budget Reconciliation Act ("COBRA") of 1985 (entitled "Pipeline Safety User Fees") did not constitute an unlawful delegation of

Congress's power to tax. The Court reasoned that the Act, which set specific standards, did indeed sufficiently lay down the boundaries of the delegated authority:

> It is "constitutionally sufficient ***if*** Congress clearly delineates the general policy, the public agency which is to apply it, and the ***boundaries of this delegated authority***. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Skinner, 490 U.S. at 219 (*quoting* American Power & Light Co. v. SEC, 329 U.S. 90 (1946) (emphasis added)). The Court's use of conditional language is instructive: the delegation is "constitutionally sufficient" ***if*** Congress delineated the "policy" and "boundaries" of the delegated power. If Congress *did not* delineate the boundaries, however, the delegation is constitutionally *insufficient*. The Court in Skinner ultimately concluded that they need not apply a heightened degree of prudence (i.e., stricter non-delegation doctrine) not because the Court did not require boundaries at all (it did), but because it reasoned that COBRA, the Act in question in Skinner, actually did lay down sufficiently restrictive boundaries for the agency to follow. Specifically, the Act directed the Secretary to "establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines," and to "collect those fees annually." § 7005(a)(1)-(b). Id. at 214.

Furthermore, COBRA also stated that "[t]he fees assessed and collected are to be 'sufficient to meet the costs of [these] activities . . . but at no time shall the aggregate of fees received for any fiscal year . . . exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.'" § 7005(d). The Secretary's role under COBRA was to publish fee schedules after consulting the pipeline industry's trade associations on recommended fee assessments, pursuant to § 7005(a)(1). The Secretary ultimately used pipeline mileage to determine the fees, which resulted in various challenges to the Secretary's exercise of delegated power. Id. at 215-216. In upholding the COBRA statute as constitutional, the Court looked to the ***history and context***[25] of Congress's tax legislation (just as this Court too must look to the context and history of eminent domain), and noted that a further degree of specificity was not required in Skinner, because the

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[25] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 221-22 (1989) ("From its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive in such enactments. *See, e. g.*, Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209 (in the case of fines assessed for nonpayment of liquor taxes, "the secretary of the treasury of the United States [has] . . . power to mitigate or remit such penalty or forfeiture . . . upon such terms and conditions as shall appear to him reasonable") (First Congress); Act of July 6, 1797, ch. 11, § 2, 1 Stat. 528 (in lieu of collecting stamp duty enacted by Congress, the Secretary of the Treasury may "agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of the annual dividend made by such banks") (Fifth Congress). *See generally* Field v. Clark, 143 U.S. 649, 683-689 (1892) (longstanding practice of Congress delegating authority to the President under the Taxing Clause "is entitled to great weight")).

aforementioned limitations were sufficiently restrictive and did not vest the Secretary with unfettered discretion.

In fact, the Secretary's reliance on pipeline mileage was entirely appropriate under the Act, which itself stated that the Secretary may "establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof." Thus, unlike the Natural Gas Act in the instant case, which lays down no intelligible principle—no limiting standard whatsoever—COBRA in Skinner laid down several prescribed limitations to direct and restrict the Secretary's determinations. Skinner is, therefore, a prime example of the *restrictive* nature of delegated power, not a *boundless* one.

Moreover, although some degree of discretion is certainly allowed and, at times, required to ensure the smooth functioning of government,[26] that discretion is permissible only *in light of* a defined boundary, not *in its absence*. A regulatory agency, in other words, may indeed have discretion *within* boundaries but not *without* them. That distinction is what was meant by

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[26] American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) ("The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.") (explaining situations in which it is necessary for Congress to delegate power, notably, however within prescribed boundaries).

the Court in American Power & Light Co. v. SEC, when it described Congress's need to delegate power to ensure the continued functioning of government. The Court in American Power, however, as it did in Skinner, in Schechter, in National Broadcasting, and in Clinton, nonetheless made clear that while delegation was sometimes necessary, it was not boundless, and thus the Court particularly highlighted the importance of the judiciary's role as the ultimate check and balance on unfettered discretion that intrudes upon individual liberties:

> Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here.

American Power & Light Co., 329 U.S. at 105. While there is no constitutional requirement that Commissions themselves fix a formal rule of thumb prior to the assessment of each particular case, that type of case-by-case analysis by a Commission is, again, conditioned on the proper delegation of power in the statutory language:

> If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle. All that can be required is that the Commission's actions conform to the statutory language and policy.

Id. at 106. This principle, however, already assumes that the statute itself is constitutional, that is, that Congress has properly limited the exercise of the delegated power by laying down an intelligible principle—a standard—for the regulatory body to follow in its case-by-case assessments. It is, in other words, an allowance of discretion within statutory bounds, not without. If there is no boundary at the statute's enactment, the discretion is unfettered, as it was in Schechter, and thus the delegation unconstitutional.

(4) Congress Failed to Set Forth Any Intelligible Principle under the Natural Gas Act

Like the National Industrial Recovery Act in A.L.A. Schechter Poultry Corp. v. United States, the NGA, 15 U.S.C.S. § 717f(h), in the present case also does not attempt to set forth an intelligible principle—a restricted standard— for FERC to follow. Instead, it leaves FERC to determine the intelligible principle entirely on its own. In doing so, the NGA delegates not only the authority to *execute* the law to FERC but also the authority to determine what the law *shall be*, which is impermissible under the Constitution.

By allowing FERC to independently set the standard for what constitutes public use (i.e. via the certification process), Congress has unlawfully delegated away its legislative power, not because delegations in general are impermissible per se, but because ***this particular delegation,*** like the one is Schechter and unlike the one Skinner, is overly broad. Indeed, the NGA does not even attempt to set an intelligible principle but, rather, leaves the entire determination to FERC. It is, in effect, a delegation *in whole*, of execution and law-making, as opposed to a delegation *in part*, of execution only. The specific NGA section, codified as 15 U.S.C.S. § 717f(h), states merely that an applicant in possession of a Certificate of Public

Convenience and Necessity has the right of eminent domain assuming they satisfy the Commission's requirements, meaning that an applicant that meets FERC's test ***automatically*** acquires the right of eminent domain:

> 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-of-way, 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. [. . .]

15 U.S.C. § 717f(h) (emphasis added).

The problem with this provision and indeed, with the entire statute, is that it is written in an ***assumptive voice***, already assuming that the Commission's certification process is constitutional. The right of eminent domain is acquired automatically at the issuance of a Certificate from FERC and upon refusal by landowners to consent to a right-of-way. Since the Certificate is itself a right to invoke eminent domain, the question is whether FERC's certification process is constitutional. It is not. Not only has Congress impermissibly delegated an overly broad power to determine what the law shall be, but the regulatory agency's subsequent determination of the law is entirely contrary to the constitutional standard. Indeed, even the language in the statute supposedly describing the requirements for the "granting" of a Certificate delegates the determination of those requirements to the Commission:

> Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

15 U.S.C. 717f(e).

Even assuming, *arguendo*, that FERC's test was not a sliding economic scale (which it is) and actually adhered to the constitutional standard for public use (which it does not), that exercise by FERC in setting the standard would *still* be unconstitutional, as no power may be delegated without an intelligible principle and thus, no agency may determine such principle in and of itself, even if that subsequent determination conforms to the constitutional standard. Since the act of delegation is itself void for lack of an intelligible principle, all subsequent acts by the regulatory agency are equally void, whether they reflect the Constitutional standard or not.

What Congress should have done was restrict FERC to an ***execution*** of existing law on eminent domain, which could have been achieved by setting defined limits on what constitutes "public use" under the Constitution. What Congress actually did was allow FERC to run wild, by enacting the NGA and allowing FERC to independently decide the "public use" criteria (via the certification process) without any reference to the constitutional standard or standing precedent. Congress, in other words, essentially said:

> *You will have the right of eminent domain **as soon as** you have a Certificate from FERC.*

Congress assumes the certification process is constitutional. What Congress should have said instead was:

> *You will have the right of eminent domain **if you meet A, B, and C**. Once you have met A, B, and C, our regulatory agency will issue you a Certificate as proof that you have met the standard set forth by Congress.*

The "A, B, and C" in the example above represents the standard—the intelligible principle—required in every lawful delegation of power. Acquisition of a Certificate is merely proof that the applicant has met the standard; it is not the standard itself.

c. Conclusion

The Plaintiffs are likely to succeed on the merits of the present case. As discussed above, none of FERC's three sliding scale economic tests asks the right questions or analyzes the right issues. Instead of ensuring that any exercise of eminent domain complies with constitutional standards, FERC assumes that a given project, even if entirely private in nature, satisfies the requirements of the Constitution. This derives, in part, from the fact that Congress was overly broad in delegating power to FERC under the Natural Gas Act. Congress's failure to provide FERC with any standard, or intelligible principle, outlining how to execute a particular grant of power, has resulted in unfettered lawmaking, and in this case, law-breaking decisions by FERC.

Worse yet, FERC has sub-delegated, and if permitted to do so, will continue to sub-delegate power it does not even constitutionally wield to purely private actors. Under these industry-driven "governmental" standards, no private property rights are secure in the United States, the Takings Clause has been gutted, and those engaged in the private business of selling energy possess more rights and power to invade one's castle than does any law enforcement agency barring some emergency condition. To be sure, FERC's unintelligible principles have provided fertile ground for corporate feudalism, where corporate "personhood" means more than true personhood, where government works not for the People, but in spite of the people.

2. *Irreparable Harm*

Second, the Plaintiffs are likely to suffer irreparable harm without preliminary relief. As an initial matter, in cases regarding an unconstitutional exercise of power related to private property rights, the harm suffered is irreparable and cannot be remedied through any money damages. The Supreme Court and the Fourth Circuit have recognized the sanctity of constitutional rights and have held, for example, that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion); Rothamel v. Fluvanna County, 810 F. Supp. 2d 771, 787 (W.D.Va. 2011).

Likewise, simple interference with the right of exclusive use and possession of real property constitutes irreparable harm, a right that, while important, pales in comparison to suffering an unconstitutional taking of property. See Marfork Coal Co. v. Smith, 2010 U.S. Dist. LEXIS 17451, *18-*23 (S.D.W.Va. 2010). The same must also be true for the permanent deprivation of a property right through the unlawful exercise of the power of eminent domain. Indeed, the right to private property is recognized as a fundamental right in both Virginia and West Virginia. Article I, section 1 of the Virginia Constitution provides the following:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, ***with the means of acquiring and***

> ***possessing property***, and pursuing and obtaining happiness and safety.

(emphasis added). In 2012, the citizens of the Commonwealth of Virginia amended Article I, section 11, to further emphasis that "private property, the right to which is fundamental" cannot be taken "if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development."

The West Virginia Constitution similarly provides in Article III, section 1 that:

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, ***with the means of acquiring and possessing property***, and of pursuing and obtaining happiness and safety.

(emphasis added).

Even an entry onto the Plaintiffs' properties without legal authority, resulting in a continuing trespass to that real property is "deemed irreparable" under the laws of Virginia and West Virginia. Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 62 (2008); see also Shock v. Holt Lumber Co., 107 W. Va. 259, 263 (1929). Thus, even where the alleged harm is a temporary deprivation of exclusive rights, the law recognizes irreparable harm: where "each individual act of trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury … the owner

[is] protected in the enjoyment of his property whether such [harm] be sentimental or pecuniary." Levisa Coal Co., 276 Va. 44 at 62. (*quoting* Boerner v. McCallister, 197 Va. 169, 172 (1955)). Given that a continuing trespass constitutes irreparable harm to a landowner, certainly a permanent deprivation of a real property right by an unconstitutional exercise of eminent domain, whether a right of entry or a permanent easement to construct a pipeline, constitutes irreparable harm to a landowner.

Simply put, the Constitution provides that persons shall not be "deprived of … property without due process of law … nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. Under no scenario is it constitutional for even a public entity, much less a private person, to take private property for private use, regardless of whether any compensation may be just. Put another way, the harm at issue here does not involve whether or not some monetary sum can right a damage to property, but rather the harm involved centers solely on the deprivation of a constitutional right to be secure in one's private property and the fact that no amount of money can remedy an unconstitutional taking or render it "just" under the Fifth Amendment.

Accordingly, the Plaintiffs will suffer immediate and irreparable harm to their constitutional rights without a temporary injunction preventing FERC and MVP from exercising the power of eminent domain.

3. *Balance of the Equities*

The balance of the equities clearly favors the Plaintiffs. The Plaintiffs seek to protect their constitutional rights and to preserve the status quo, and it is only the Plaintiffs who will suffer if MVP is permitted to construct and operate a pipeline through the unconstitutional exercise of eminent domain granted by FERC.

Neither FERC nor MVP can be harmed by being precluded from violating the U.S. Constitution. If it so wishes, MVP may seek to obtain access to each and every property through voluntary negotiations with the Plaintiffs and any other landowners. MVP may then pay what the market demands to secure the properties it desires for construction of its pipeline, just as every other private company must to obtain real property. If the market precludes MVP from being able to obtain its needed easements, then the pipeline must not (under FERC's and MVP's own logic) be convenient and necessary.

Neither MVP nor FERC possess any rights at all to engage in activities that results in the unlawful and unconstitutional taking of the Plaintiffs' properties. As discussed above, FERC does not have the lawful authority to transfer the power of eminent domain to a private sub-delegatee and FERC cannot lawfully exercise any power of eminent domain because Congress failed to provide FERC with the requisite "intelligible principle" about how to apply the law. In any case, FERC has published and applied its varieties of the sliding scale tests in this case, among others, and none of FERC's tests satisfy the standards set forth in the U.S. Constitution or as outlined by the Supreme Court in Kelo.

Under these circumstances, the equities favor the Plaintiffs. The Plaintiffs possess existing constitutional rights that neither FERC nor MVP lawfully possess and cannot, as a matter of law, constitutionally exercise. Accordingly, the equities entirely favor the Plaintiffs.

4. *Public Interest*

An injunction is in the public interest in this case for several reasons. To begin, "upholding constitutional rights is in the public interest." Legend Night Club v. Miller, 637 F.3d 291, 303 (4th Cir. 2011). Furthermore, it is always in the public interest for owners of property to be secure in their ownership. As noted above, the right to private property in the United States is fundamental and is enshrined in the U.S. Constitution, the Virginia Constitution, and the West Virginia Constitution. There is no public interest in supporting the use of property by persons to whom it does not belong or permitting or sanctioning an unconstitutional exercise of eminent domain.

There is no public interest impacted, hindered, or otherwise affected by preserving the status quo pending determination of the parties' respective rights and in precluding FERC and MVP from engaging in the unconstitutional exercise of eminent domain.

Finally, there is no public interest in ensuring that MVP is able to privately obtain land for private, pecuniary gain. As the Court in Kelo recognized, even a government actor "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." Kelo, 545 U.S. at 477 (2005).

B. Requested Relief

The Plaintiffs are entitled to a Preliminary Injunction because they prevail on each of the Winter factors – (1) likely to succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in Plaintiffs' favor; and (4) that an injunction is in the public interest.

The Plaintiffs request the following relief:

1. A preliminary injunction prohibiting FERC from granting MVP the power of eminent domain under 15 U.S.C. § 717f(h) via issuance of a Certificate of Convenience and Public Necessity.
2. A preliminary injunction prohibiting MVP from claiming or exercising any power of eminent domain under 15 U.S.C. § 717f(h), whether to enter any landowner's property without consent to conduct any activities at all.

C. Bond

The Plaintiffs move the Court to forego the requirement that it post a bond, for several reasons. The potential harm to the Defendants to preserve the status quo is minimal. MVP cannot begin construction until FERC approves its application for a Certificate and FERC has until at least September 21, 2017, to issue a Certificate. Neither MVP nor FERC will incur any harm by being required not to act in an unlawful manner pending resolution of these important constitutional claims.

Notwithstanding these arguments, however, the Plaintiffs stand ready to post a reasonable bond in the amount required by the Court.

III. CONCLUSION

For the reasons set out herein, the Plaintiffs ask the Court to enter an order granting a Preliminary Injunction as described herein, as well as any other relief the Court may deem to be just and proper.

Respectfully submitted this 27th day of July, 2017,

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* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX G

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-CV-357

[Filed August 11, 2017]

ORUS ASHBY BERKLEY, *et al*.,	)
	)
Plaintiffs	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE,	)
LLC, *et al*.,	)
	)
Defendants.	)
	)

MEMORANDUM OF DEFENDANT MOUNTAIN VALLEY PIPELINE, LLC IN SUPPORT OF ITS MOTION TO DISMISS

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* * *

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Defendant, Mountain Valley Pipeline, LLC ("MVP"), respectfully submits this memorandum in support of its motion to dismiss.

I. INTRODUCTION

"FERC has run wild." ECF No. at 2. The proposed project is a "government-sanctioned land grab." *Id.* at 3. There is a "rush to build" pipelines at a "blistering pace." *Id.* at 7-8. "FERC has morphed into judge, jury, and (almost never) executioner." *Id.* at 8. "This Court is the only check on FERC's exercise of near absolute power." *Id.* at 9.

These may be catchy clichés to stick in a press release and generate some headlines, but they are not very useful in a federal complaint, particularly one claiming that the Natural Gas Act, one of the most important energy laws in our nation's history, is unconstitutional.

People have the right to support the project or to oppose it. Whichever side one is on, however, there is a statutory process for debate, for decision, and for judicial review. The applicant must file a complete application with detailed information about the project. An independent federal agency is charged with considering the merits of the project. Interested parties can intervene or comment. And after a full review of the issues, the agency makes a decision. Aggrieved parties then have a specified path of judicial review—through a court of appeals, not a district court.

This complaint asks the Court to bypass the statutory process and block the project before any decision is made, and, at the same time, to invalidate the entire Natural Gas Act, and, presumably, all the other projects that have been or may be authorized under it.

There are multiple problems with this argument—jurisdiction, ripeness, standing, failure to exhaust administrative remedies, and failure to state a claim, to name the main ones. The appropriate court of appeals has exclusive jurisdiction to review a decision granting or denying a certificate. Until a certificate is issued, a challenge to the project is not ripe, and the challenger lacks standing and has failed to exhaust administrative remedies. These jurisdictional defenses aside, there is not a single case supporting the argument that the Natural Gas Act is unconstitutional. To the contrary, the statute has been regularly enforced and applied since its enactment almost 80 years ago.

Under the Federal Rules, motions to dismiss serve the important purpose of weeding out unsupportable and implausible claims like the ones being asserted in this case. Under the authority of Rule 12(b)(1) and 12(b)(6), the Court should give this case the early dismissal it clearly deserves.

II. STATEMENT OF THE CASE

MVP has filed an application for a certificate of public convenience and necessity with defendant Federal Energy Regulatory Commission ("FERC"), which is the federal agency responsible for regulating the siting and construction of interstate natural gas pipelines. 15 U.S.C. § 717(c). It is up to FERC to approve or deny the application. 15 U.S.C. § 717f(e).

Plaintiffs describe themselves as landowners "within the path of MVP's proposed . . . pipeline." ECF

No. 1 at 3. They seek a preliminary and permanent injunction prohibiting FERC from issuing a certificate to MVP for the project and prohibiting MVP from exercising the power of eminent domain under the Natural Gas Act ("NGA"). ECF No. 1 at 3, 32; ECF No. 4 at 2. The complaint alleges that the FERC certification process is unconstitutional because it does not fairly assess public use (Count One), that Congress's supposed delegation of the power of eminent domain power to FERC is unconstitutional because the delegation "lacks any intelligible principle" (Count Two), and that FERC cannot constitutionally "sub-delegate" the power of eminent domain to MVP (Count Three). ECF No. 1 at 29-31. Finally, the plaintiffs in Virginia allege that MVP's precondemnation surveys constitute a taking of their property (Count Four), *id.* at 31-32, a claim that this Court has previously rejected, *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 691-95 (W.D. Va. 2015).

Plaintiffs have made MVP a defendant. Plaintiffs have also sued FERC and its Acting Chair, Cheryl A. LaFleur.

With their complaint, plaintiffs filed a motion for a preliminary injunction. No hearing is set on that motion.

III. STANDARD OF REVIEW

MVP has moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6). Rule 12(b)(1) provides for dismissal of an action when subject-matter jurisdiction is lacking. The plaintiffs have the burden of proving jurisdiction. *Demetres v. E. W. Constr., Inc.*, 776 F.3d

271, 272 (4th Cir. 2015). In turn, this Court has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority. *Jeong Seon Han v. Lynch*, 223 F. Supp. 3d 95, 102 (D.D.C. 2016).

The Court should also dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is intended to spare litigants "needless discovery and factfinding" in actions that are fatally flawed in their legal premises. *Neitzke v. Williams*, 490 U.S. 319 (1989); *see Iacampo v. Hasbro*, *Inc*., 929 F. Supp. 562, 567 (D.R.I. 1996) (describing Rule 12(b)(6) motion as "a form of legal triage, a paring of viable claims from those doomed by law."). To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The tenet that a court must accept as true the allegations in a complaint does not apply to legal conclusions. *Id.* In the end, the complaint must contain sufficient facts from which the court can conclude that the plaintiffs have shown that they are entitled to relief. *Id.* at 679.

IV. ARGUMENT

A. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER COUNTS ONE, TWO, AND THREE

The NGA regulates the interstate transportation and sale of natural gas and the siting and construction of interstate natural gas pipelines. 15 U.S.C. § 717(b) and (f); *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 300-01 (1988). Natural gas companies are subject to the exclusive jurisdiction of FERC, and they cannot construct or operate any pipeline facilities until they have received a certificate of public convenience and necessity from FERC. 15 U.S.C. § 717f(c); *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 84 (2d Cir. 2006).

FERC has promulgated detailed regulations concerning certificate applications. Among other things, an applicant must submit extensive data about the proposed project, its purpose and need. Once the applicant has applied for the certificate, FERC then determines whether the applicant is willing and able to perform the project and whether the project constitutes a "public convenience and necessity." 15 U.S.C. § 717f(e). FERC can approve or deny the application and can "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id*.

Parties aggrieved by FERC action can seek review of the agency's decision. First, the party must apply to FERC for a rehearing. 15 U.S.C. § 717r(a). The rehearing request is mandatory. "No proceeding to review any order of the Commission shall be brought by any person, unless such person shall have made application to the Commission for a rehearing thereon." *Id.* A party who remains aggrieved after rehearing may obtain review "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." These courts of appeal have "exclusive" jurisdiction. 15 U.S.C. § 717r(b).

Ignoring these provisions, plaintiffs allege jurisdiction under 28 U.S.C. § 1331 on the ground that this action asserts several "questions of constitutionality." ECF No. at 6. There is no jurisdiction under § 1331, however, because Congress has granted exclusive jurisdiction to the courts of appeals under 15 U.S.C. § 717r(b). *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378-79 (2012) (stating that Congress can divest district courts of § 1331 jurisdiction by an exclusive grant of jurisdiction to other courts); *Connors v. Amax Coal Co., Inc.*, 858 F.2d 1226, 1230-31 (7th Cir. 1988) (stating that when exclusive jurisdiction to review administrative determinations is vested in courts of appeals, parties cannot sue in district court under § 1331); *Outdoor Power Equip. Inst., Inc. v. Envtl. Prot. Agency*, 438 F. Supp. 1092, 1093-94 (D.D.C. 1977) (finding no subject matter jurisdiction under § 1331 because more specific jurisdictional provision vested exclusive review in courts of appeals). "Exclusive means exclusive," and the NGA does not permit an aggrieved party to pursue collateral review of a FERC certificate in federal district court. *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010).

Plaintiffs cannot evade the NGA's exclusive review framework by alleging that FERC's certification process is unconstitutional. *Urban v. Fed. Energy Reg. Comm'n*, No. 5:17-cv-1005, Report and Recommendation (N.D. Ohio Aug. 7, 2017); *Lovelace v. United States*, No. 15-cv-30131-MAP, Memorandum and Order (D. Mass. Feb. 18, 2016). In *Urban*, landowners sought to enjoin FERC from approving a pipeline application on the alleged grounds that the taking was not for a public use and that FERC unlawfully delegated its responsibility for safety to another federal agency. Report and Recommendation at 6-17; Motion for Preliminary Injunction at 9; Complaint ¶¶ 94, 95. The magistrate judge recommended that the landowners' motion for a preliminary injunction be denied for lack of subject-matter jurisdiction. Report and Recommendation at 2. The magistrate judge stated:

> It is clear that 15 U.S.C. § 717r provides an exclusive scheme for judicial review of FERC orders, namely, in the circuit court of appeals. . . . Should a Certificate issue, Plaintiffs may avail themselves of the review process afforded them under the NGA. At that time, Plaintiffs may raise the challenges that they raise here, provided of course that Plaintiffs first administratively exhaust those challenges through FERC's rehearing process.

Id. at 9.

In *Lovelace*, No. 15-cv-30131-MAP, landowners sought to enjoin FERC from approving a pipeline application on the basis that the NGA unconstitutionally permits the taking of private property without a public use. The court dismissed the case, stating:

> [I]t is simply clear beyond dispute that the district court has no role in litigation of this kind. The exclusive jurisdiction of the Court of Appeals to consider objections to pipeline planning, approval, and construction processes would be entirely undermined if unhappy parties could come to district courts, seeking

> relief under the Fifth Amendment. Plaintiffs' arena to seek consideration for their claims is within the administrative process and, ultimately, with the Court of Appeals.

Memorandum and Order at 2-3.

Numerous other decisions support this conclusion. For example, in *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 611 F.2d 951 (4th Cir. 1979), the Fourth Circuit vacated the district court's order enjoining FERC from continuing an administrative hearing. *Id.* at 957-58. The court explained that "there is no area of review, whether relating to final or preliminary orders" available in district courts. *Id.* at 957. The court rejected the argument that "preliminary matters" that had not yet culminated in final agency action are within the jurisdiction of district courts. *Id.* at 957-58.

In *American Energy*, the Sixth Circuit held that the district court lacked jurisdiction over claims for an injunction and declaratory relief associated with a certificate authorizing construction of a natural gas pipeline. 622 F.3d at 605. The court made "short work" of the plaintiff's attempt to "sidestep" the NGA's exclusive judicial review procedure. *Id.*

In *Town of Dedham v. Federal Energy Regulatory Commission*, CV 15-12352-GAO, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015), FERC issued a certificate, and the plaintiff requested an injunction to stay pipeline construction pending FERC's decision of the plaintiff's request for a rehearing. The district court dismissed the case for lack of subject-matter jurisdiction. *Id.*

Decisions involving analogous jurisdictional statutes further confirm that jurisdiction does not exist in this case. *E.g., Maine Council of Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv. (NOAA Fisheries)*, 858 F3d 690, 693 (1st Cir. 2017) (holding that jurisdiction of courts of appeals under Federal Power Act is exclusive not only to review terms of FERC order, but over any issue "inhering in the controversy"); *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 535 (1st Cir. 1997) ("It is well established that the exclusive jurisdiction given to the courts of appeals [under the Federal Aviation Act] also extends to lawsuits alleging FAA delay in issuing final orders."); *S.W. Ctr. for Biological Diversity v. Fed. Energy Reg. Comm'n*, 967 F. Supp. 1166, 1172-75 (D. Ariz. 1997) (dismissing action for declaratory judgment and injunction against FERC for alleged violation of environmental laws because courts of appeals have exclusive jurisdiction under Federal Power Act).

Because plaintiffs' claims fall within the NGA's review provision vesting exclusive jurisdiction in a court of appeals, this Court lacks subject-matter jurisdiction.

B. PLAINTIFFS' CLAIMS ARE NOT RIPE

Subject-matter jurisdiction is also lacking because MVP's pipeline application is still pending, and plaintiffs' claims are not ripe. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (stating that ripeness is a question of subject matter jurisdiction).

The doctrine of ripeness is drawn both from Article III limitations and prudential considerations. *Id.*, 724

F.3d at 545. It separates those matters that are "premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Nat'l Rifle Ass'n of Am. v. MaGaw*, 132 F.3d 272, 280 (6th Cir. 1997). The NGA codifies this doctrine by limiting judicial review to parties "aggrieved by an order issued by the Commission." 15 U.S.C. § 717r(b). Consequently, issues that remain pending before FERC are unripe as a matter of law. *E.g., Moreau v. Fed. Energy Reg. Comm'n.*, 982 F.2d 556, 567 (D.C. Cir. 1993); *Louisiana Power & Light Co. v. Federal Power Comm'n*, 526 F.2d 898, 910 (5th Cir. 1976).

In *Total Gas & Power North America, Inc. v. Federal Energy Regulatory Commission*, 859 F.3d 325 (5th Cir. 2017), the company sought a declaratory judgment that the Constitution prohibited FERC from adjudicating NGA violations and imposing civil penalties. Total did not allege an existing injury, but argued that FERC may cause a constitutional violation in the future by scheduling a hearing and assessing penalties. *Id*. at 335-37. The Fifth Circuit held that Total's claims were not ripe and affirmed the dismissal of the action. *Id*. at 335, 339 ("If and when FERC conclusively determines that Total has violated the NGA and imposes civil penalties against it, Total can raise all the arguments it now raises to challenge FERC's jurisdiction." "Total's suit is thus not ripe and the district court did not err in dismissing it on justiciability grounds.").

As in *Total*, plaintiffs' claims are predicated on possible future events and are, therefore, not ripe. *Klemic*, 138 F. Supp. 3d at 684 (stating that a claim is not ripe for adjudication if it rests upon contingent future events that may not occur).

C. PLAINTIFFS LACK STANDING

Subject-matter jurisdiction is also lacking because plaintiffs are without standing. *See Miller v. Brown,* 462 F.3d 312, 316 (4th 2006) (stating that standing is part of case and controversy requirement).

To establish standing, plaintiffs must show that they have suffered an "injury in fact" that is fairly traceable to action by FERC. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000). The injury in fact must involve "an invasion of a legally protected interest, which is concrete and particularized, as well as actual or imminent." *Id.* No certificate has been issued, and plaintiffs' allegations of possible future harm from a certificate are too speculative to constitute an injury in fact. *E.g., Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 401-02 (2013) (stating that allegations of possible future injury are not sufficient to establish standing and plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm").

D. PLAINTIFFS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

The complaint should also be dismissed because plaintiffs have not exhausted their administrative remedies under the NGA. *See DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 79 (2d Cir. 1992) ("Failure to exhaust administrative remedies permits a court to dismiss the action because no subject matter jurisdiction exists.").

The doctrine of exhaustion provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). The obligation to exhaust is mandatory. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

The NGA provides a comprehensive administrative process that must be exhausted before a party can resort to the federal courts of appeals:

> Any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order. . . . Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. . . . No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

15 U.S.C. § 717r(a)

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [appropriate] court of appeals . . . No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

15 U.S.C. § 717r(b); *see Fuel Safe Washington v. Fed. Energy Reg. Comm'n*, 389 F.3d 1313, 1320 (10th Cir. 2004) (stating that NGA reflects policy that a party must exhaust its administrative remedies before seeking judicial review).

Because plaintiffs have not exhausted their remedies under the NGA, their complaint must be dismissed.

E. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

1. Count One

FERC has not yet determined whether to grant a certificate to MVP, but, in Count One, plaintiffs anticipate that FERC will apply a Statement of Policy that was issued on September 15, 1999. ECF No. 1 at 23-26, 29-30. Plaintiffs contend that any application of the Statement of Policy will result in a violation of the Fifth Amendment. *Id*. The Statement of Policy is attached to the Complaint as ECF No. 1-1.

Under the Fifth Amendment, the taking of private property need only serve some "public purpose." *Kelo v. City of New London*, 545 U.S. 469, 479-80 (2005). "Without exception," the Supreme Court has "defined that concept broadly, reflecting [its] longstanding policy of deference to legislative judgments in this field." *Id*. at 480. This Court should, likewise, give deference to the NGA, in which Congress "declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." 15 U.S.C. § 717(a); s*ee Midcoast Interstate Transmission, Inc. v. Fed. Energy Reg.*

Comm'n, 198 F.3d 960, 973 (D.C. Cir. 2000) ("[B]ecause, in issuing the certificate to Southern, the Commission has explicitly declared that the North Alabama Pipeline will serve the public convenience and necessity, we hold that the takings complained of served a public purpose."); *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 648 (5th Cir. 1950) (holding that NGA declared interstate natural gas pipelines "a public business and subjected to public control" and did not provide for "the taking of private property for a private use"); *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion Cty., W. Va.*, 145 F. Supp. 3d 622, 631 (N.D. W. Va. 2015) ("Congress concluded that the taking of rights-of-way to build natural gas pipelines is a public use, as it furthers the public interest in 'the business of transporting and selling natural gas for the ultimate distribution to the public.'"); *see also 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.").

The public use requirement of the Fifth Amendment "is coterminous with the regulatory power," and courts should "not strike down a condemnation on the basis that it lacks a public use so long as the taking 'is rationally related to a conceivable public purpose.'" *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)). Therefore, a court's role in reviewing public use is extremely narrow:

> [A]s long as the condemning authorities were rational in their positions that some public purpose was served . . . [t]hat suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objectives.

Id. at 422-23.

The Statement of Policy easily passes the test. The Policy sets out the "analytical steps the Commission will use . . . to balance the public benefits against the potential adverse consequences." ECF No. 1-1 at 18. First, FERC will determine "whether the project can proceed without subsidies from their existing customers." *Id*. Then, it will determine what efforts have been made to eliminate or minimize adverse effects on existing customers, existing pipelines and their customers, and "landowners and communities affected by the route of the new pipeline." *Id*. If adverse effects are identified, FERC "will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects." *Id*. at 19. Finally, FERC will consider environmental impacts. *Id*.

FERC's Statement of Policy provides a rational framework for determining whether a proposed pipeline serves a public purpose. And that "suffices to satisfy the Constitution." *Nat'l R.R. Passenger Corp.,* 503 U.S. at 422-23. Indeed, the Statement of Policy goes further than the Constitution requires, allowing the FERC to deny a certificate if adverse impacts outweigh public benefits. For these reasons, Count One should be dismissed.

2. Counts Two and Three

Counts Two and Three challenge the constitutionality of the NGA. Count Two alleges that Congress's delegation of the power of eminent domain to FERC is "overly broad," and Count Three alleges that FERC cannot "sub-delegate" the power of eminent domain to MVP by issuing a certificate. ECF No. 1 at 30-31.

These claims are based on an incorrect premise. Congress has not delegated the power of eminent domain to FERC. Rather, the NGA delegated the power of eminent domain to natural gas companies. *Sage*, 361 F.3d at 830 ("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."); *Columbia Gas Transmission, LLC v. 252.071 Acres More or Less*, CV ELH-15-3462, 2016 WL 1248670, at *17 (D. Md. Mar. 25, 2016) (stating that NGA gives condemnation power to gas companies); *Equitrans, L.P.*, 145 F. Supp. 3d at 630 (stating that, in NGA, "Congress constitutionally delegated the right to condemn to private licensees"); *Gas Transmission N.W., LLC v. 15.83 Acres of Perm. Easement More or Less, Located in Morrow County*, 126 F. Supp. 3d 1192, 1200 (D. Or. 2015) (stating that Congress gave gas companies condemnation power); *Columbia Gas Transmission, LLC v. 76 Acres More or Less*, CIV.A. ELH-14-0110, 2014 WL 2960836, at *8 (D. Md. June 27, 2014) ("Congress has seen fit to delegate [eminent domain] power to private entities so that those entities can provide natural gas to the public."), *aff'd in part and vacated in part on other grounds and remanded*, 15-2547, 2017 WL 2983908 (4th Cir. July

13, 2017); *Steckman Ridge GP, LLC v. An Exclusive Gas Storage Easement Beneath 11.78 Acres*, No. 08-168, 2008 WL 4346405, at *7 (W.D. Pa. Sept. 19, 2008) (stating that, in NGA, Congress granted condemnation power to gas companies); *USG Pipeline Co. v. 1.74 Acres in Marion County, Tenn.*, 1 F. Supp. 2d 816, 818 (E.D. Tenn. 1998) ("Congress granted to holders of [FERC] certificates . . . the right of eminent domain for construction of pipelines for the transportation of natural gas."); *Florida Gas Transmission Co. v. 9.854 Acre Nat. Gas Transmission Pipeline Easement*, 96-14083 CIV, 1998 WL 2018164, at *9 (S.D. Fla. June 15, 1998) (stating that gas company "was delegated the federal power of eminent domain by Congress in the NGA").

In the NGA, Congress delegated to the FERC *regulatory authority* over natural gas and natural gas companies. *E.g., Columbia Gas Transmission, LLC v. 171.54 Acres of Land, More or Less, in Fairfield, Hocking, Monroe, Morgan, Muskingum, Noble, Perry, and Vinton Cntys. Ohio*, No. 2:17-CV-70, 2017 WL 838214, at *5 (S.D. Ohio Mar. 3, 2017); *USG Pipeline Co.*, 1 F. Supp. 2d at 818. FERC is not subdelegating the power of eminent domain to MVP or to other natural gas companies that receive certificates.

It is well-established that Congress's delegation of the power of eminent domain to gas companies in the NGA does not violate the United States Constitution. *Sage*, 361 F.3d at 821 (stating that Congress may, as it did in the NGA, grant condemnation power to private corporations); *Thatcher,* 180 F.2d at 647-48 (holding that Congress's delegation of power of eminent domain to gas companies through NGA is constitutional);

Columbia Gas, 2014 WL 2960836, at *8 ('[T]the Constitution vests Congress with the power of eminent domain, and Congress has seen fit to delegate that power to private entities so that those entities can provide natural gas to the public. It is not the Court's place to second-guess the wisdom of Congress in providing private entities with that power."); *Equitrans, L.P.,* 145 F. Supp. 3d at 630 ("Congress constitutionally delegated the right to condemn to private licensees under § 717f(h)."); *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485, 487 (W.D.S.C. 1950) ("Congress [may] constitutionally bestow the right of condemnation upon such private licensees as have been charged with the development of the national policy as to the interstate movement of natural gas.").

Consequently, Counts Two and Three should be dismissed for failure to state a claim under Rule 12(b)(6).

3. Count Four

Count Four alleges that MVP's "surveying activities" pursuant to Virginia Code § 56-49.01 "constitute an unlawful taking under the Fifth Amendment to the United States Constitution" and "Article I, § 11 of the Virginia Constitution." ECF No. 1 at 31-32. Every court that has considered this argument has rejected it.

In *Palmer v. Atlantic Coast Pipeline, LLC*, 801 S.E.2d 414 (Va. 2017), the Supreme Court of Virginia held that Article I, § 11 of the Constitution of Virginia does not allow landowners to bar pipeline companies from surveying pursuant to § 56-49.01. *Id*. at 418-20.

In *Williams v. Mountain Valley Pipeline, LLC*, Giles County Case No. CL15000314, landowners alleged that § 56-49.01 violated the taking clauses of the United States and Virginia Constitutions. The court upheld the statute against all challenges and dismissed the case. Thereafter, the Supreme Court of Virginia refused the landowners' petition for appeal. Order dated March 7, 2016 (copy attached as Exhibit 1).

Likewise, in *Terry v. Mountain Valley Pipeline, LLC*, Roanoke County Case No. CL17-668, the circuit court granted a temporary injunction requiring landowners to allow MVP's to survey their property pursuant to § 56-49.01. The landowners petitioned the Supreme Court of Virginia for review, arguing that § 56-49.01 violates the takings clauses of the Virginia and federal constitutions. The Supreme Court of Virginia denied the petition for review. Order dated July 17, 2017 (copy attached as Exhibit 2).

In *Klemic*, 138 F. Supp. 3d 673, this Court dismissed the landowners' suit challenging the pipeline company's rights under § 56-49.01. The Court found that surveying pursuant to § 56-49.01 does not constitute a compensable taking under either the Virginia Constitution or the United States Constitution. *Id.* at 691-95. The landowner initially filed an appeal to the Fourth Circuit. Case 3:14-cv-41, ECF No. 50. That court stayed proceedings pending the decision of *Palmer* and directed the parties to notify the court immediately when *Palmer* was decided. *Id.*, ECF No 53. *Palmer* was decided on July 13, 2017. 801 S.E.2d 414. Eleven days later, the Fourth Circuit granted the landowners' motion to voluntarily dismiss his appeal. *Id.*, ECF No 54.

Finally, to the extent that plaintiffs contend that MVP has appropriated property under the Virginia survey statute, plaintiffs do not allege that they have pursued and been denied a remedy under state law. *Williamson Ctny. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985).

Consequently, Count Four should also be dismissed.

V. CONCLUSION

Plaintiffs have filed this case in the wrong court at the wrong time. Challenges involving FERC proceedings must be brought in the appropriate court of appeals after a certificate is issued. This Court lacks jurisdiction over Counts One, Two, and Three, and none of the counts states a claim upon which relief can be granted. The complaint should be dismissed.

Respectfully submitted,

MOUNTAIN VALLEY PIPELINE, LLC

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* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Case No. 7:17-cv-00357-EKD

[Filed September 1, 2017]

ORUS ASHBY BERKLEY, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,	)
	)
Defendants.	)

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOUNTAIN VALLEY PIPELINE'S MOTION TO DISMISS

I. INTRODUCTION.

Defendant Mountain Valley Pipeline, LLC's("MVP") Motion to Dismiss misses the point entirely: first, with respect to the Court's proper role as a check and balance on the other two branches of government, and second, with respect to the distinction between an administrative issue and a constitutional challenge, two entirely different matters: the former, a regulatory issue for the regulatory agency, and the latter, a pure question of constitutional law for the Court, the only body vested with authority to determine whether the Constitution has been violated by Congress, by a regulatory agency and, indeed, by a private entity.

Dubbing Plaintiffs' constitutional challenge a "catchy cliché" made for "headline" purposes belittles the individual Plaintiffs who suffer and continue to suffer the threat of injury to their property. MVP's response also dismisses outright the role of this Court and the Judiciary as a whole, whose very purpose is to be a "check and balance" on the other branches of government. The Court is, in fact, the only entity charged with the duty of determining whether a statute such as the Natural Gas Act ("NGA") comports with the Constitution of the United States, the supreme law of the land. To suggest, as MVP does, that an agency ought itself determine whether the agency and, by extension, MVP, have violated the Constitution under its own rules is misguided and must be disregarded.

II. ARGUMENT.

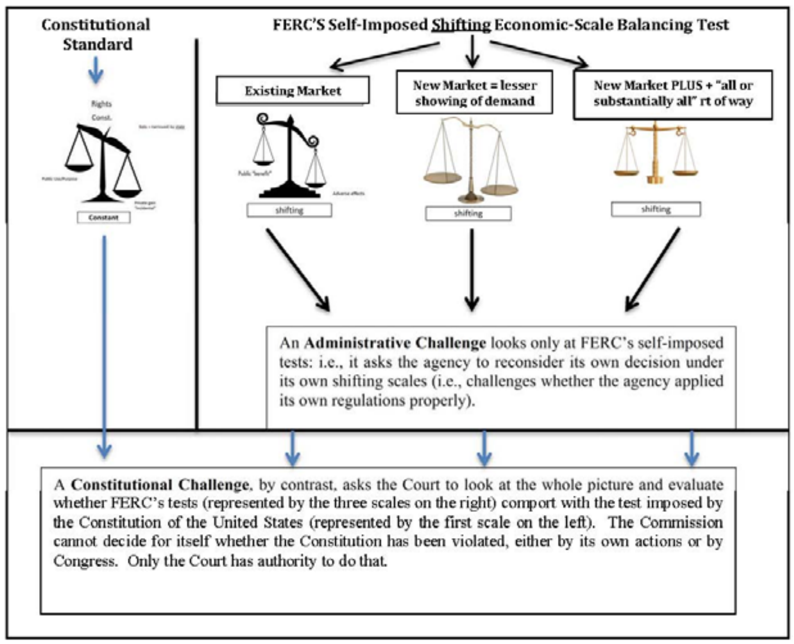
A. MVP, The Administrative Escape Artist, Misses The Critical Distinction Between An Administrative Issue Fit For A Regulatory Agency And A Constitutional Challenge Fit "For The Court's Eyes Only."

Defendant MVP channels an escape artist in attempting to evade the constitutional question by driving the Court towards an irrelevant administrative detour: MVP argues that Plaintiffs must pursue an administrative remedy, noting that "[t]he NGA provides a comprehensive administrative process that must be exhausted before a party can resort to the federal courts of appeals." MVP's Motion to Dismiss at 11. MVP then proceeds to cite 15 U.S.C. § 717 r(a), which states that "a party may apply for a rehearing within thirty days after the issuance of such order . . . Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing[.]" Id. In citing section 717 r(a), MVP defeats its own argument and proves Plaintiffs' point: first, the cited section uses the permissive "may" in allowing an application for rehearing, and second, even if the statute requires administrative exhaustion, such exhaustion applies only to *administrative* challenges (i.e., challenges regarding whether a decision was properly made in accordance with the regulatory rules). But Plaintiffs here are not bringing an administrative challenge. Plaintiffs are not questioning the 'rightness' or 'wrongness' of the Commission's actions as defined by its own regulations. Instead, Plaintiffs challenge the entire basis of regulatory authority upon which the Commission relies in order to act in the first place. Plaintiffs' challenge questions the constitutionality of the NGA and thus, by extension, the Commission's legitimacy and role in issuing certificates. In such a challenge, the Court is the only entity that can determine the constitutionality of the NGA, the potential overreach of Congress in its enactment, and the subsequent abuse of regulatory power by the Commission. For MVP to assert, in response, that the question (of whether Congress and the Commission's actions are constitutional) ought instead be brought before the Commission itself is patently wrong: the Commission is not above the law and it cannot be its own judge. As President Theodore Roosevelt once stated: "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."[1] A constitutional challenge is a not a self-reflection. Nor can it be.

The distinction is this: An administrative challenge says that an administrative decision is wrong *per* the administrative rules. A constitutional challenge says that an administrative decision is wrong *per* the Constitution. An administrative challenge questions whether something was done properly ***within*** the scope of the existing administrative and regulatory rules. It does not question whether those rules are constitutional at their outset. An administrative challenge, by its very nature, *submits* to the administrative agency's authority and recognizes its legitimacy. A constitutional challenge, by contrast, questions the agency's authority and does not submit or recognize its legitimacy or the legitimacy of its regulations. A constitutional challenge says: "The administrative decision is unlawful, ***not*** because it violates the administrative rules (indeed it may very well be in accord with those rules) but because the entire administrative apparatus is unconstitutional." The remedy in an administrative challenge is for an agency to reverse or alter its own decision to comport with its own regulations. The remedy for a constitutional challenge is for a Court to render the statute, and thus all regulatory powers derived from

[1] Theodore Roosevelt, *Third Annual Message To The Senate and House of Representatives* (December 7, 1903).

the challenged statute, unconstitutional. An administrative challenge rests with the regulatory agency. A constitutional challenge, with the Court. This distinction can be demonstrated by the following diagram:



There is no such thing as an 'administrative remedy' for a constitutional challenge. The only remedy is through the Court. It is improper and illogical to ask an agency to determine whether the agency acted properly (i.e., in accord with the Constitution). Such self-assessment is inherently biased and an agency is neither qualified nor charged with determining whether the Constitution has been violated by its own acts or rules. To assert, as MVP does, that the court "has no role" to play in determining whether the legislature and its agency have acted in accord with the

Constitution is plainly wrong and undermines the entire American system of checks and balances. In fact, the Supreme Court in Hawaii Housing Authority v. Midkiff made clear that quite the contrary was true, stating: "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when eminent domain power is equated with the police power." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984). In circumstances as these, where the challenge maintains that the public use is "palpably without reasonable foundation," (i.e., is outside the required geographic scope for takings, is not alleviating a social harm, and is therefore not rationally related to a conceivable public purpose) the Court is rightly called upon to assess whether the legislature exceeded its authority under the Constitution. United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896).

The Judiciary was created for this very reason: to be a check and balance on Congress and its regulatory agencies. As such, this Court clearly—and quite properly—possesses subject matter jurisdiction to decide constitutional challenges, per 28 U.S.C. §1331.

B. Plaintiffs' Claims Are Ripe, Plaintiffs Have Standing, And The Court Has Subject Matter Jurisdiction.

MVP argues a lack of ripeness, jurisdiction, and standing, all of which are clearly satisfied here, in an attempt to side-step the role of the Court and dodge the question of constitutionality entirely. MVP's arguments on all fronts are misplaced. First, Plaintiffs' facial challenge is clearly ripe, as courts have consistently held that takings challenges are ripe the very moment the legislation is passed. As the Fourth Circuit explains: "Facial takings challenges to a regulation are generally ripe the moment the challenged regulation or ordinance is passed." Clayland Farm Enters. v. Talbot County, 672 Fed. Appx. 240, 244 (4th Cir. 2016) (quoting Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 736, n. 10 (1997) (internal quotations omitted)); see also Yee v. City of Escondido, 503 U.S. 519, 534 (1992) ("As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.").

Furthermore, the ripeness doctrine, drawn from both the Article III limitations on judicial power and prudential reasons, dictates that a case "is fit for judicial decision when the issues are purely legal" as they are in the present case, with Congress's enactment of the NGA and FERC and MVP's subsequent use of the statute. Id. at 244. Since the challenged legislation and regulations are already passed and in full force, the legal matters are evidently not "speculative" but rather appropriately fit for adjudication. See Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006). Plaintiffs here suffered concrete and certain injury the moment the legislation was enacted, which allowed FERC and MVP to target their specific properties for taking via eminent domain, some of which have already been entered upon for surveying, the constitutionality of which is still pending before the Virginia Supreme Court in Barr, et al. v. Atlantic Coast Pipeline, LLC. ("ACP"), and all of which have been targeted and selected for the pipeline route, thus already inhibiting the primary and planned use of the properties and impeding various personal and business activities of Plaintiff-landowners.

For example, Plaintiff Orus Ashby Berkley owns two rental cottages, a commercial sewer system, and a large parking lot on his land has been delayed in completing site development for 50 riverside campsites for over three years due to MVP's plans to utilize his property as an access area to cross the Greenbrier River. Similarly, the Chlepas family operates Birdsong Farm, LLC, an organic apiary and bee preserve that sells natural raw honey, 100% beeswax candles, all-natural insect repellants, essential oils, soaps, lip balm, and other natural products of the hive, which business has been and will continue to be severely impacted, if not entirely destroyed, by MVP's plans to build an access road and part of the main pipeline on their property. The Crabtrees likewise depend upon their property to raise sheep, chicken, rams, chestnuts, apples, peaches and the like to maintain their livelihood. Accordingly, it is clear that Plaintiffs already suffer and will continue to suffer injuries and further threats of imminent harm. The fact that FERC has not yet issued a Certificate does not bar a finding of ripeness. Just as the Fourth Circuit reversed the district court's dismissal in Talbot County where the district court improperly held that the case was not ripe because the County had "not yet reached any final decision," so too should this Court find that the present case is ripe and fit for adjudication. See, e.g., Talbot County, 672 Fed. Appx. at 245 (holding that "Clayland Farm suffered concrete injury when the three ordinances were enacted, even if the ordinances may later be modified.").

This position was already echoed by this very Court in Charlottesville Div. v. Dominion Transmission, Inc., where the Court held that plaintiffs' facial challenges to Virginia Code § 56-49.01 were ripe and that the as-applied challenges were not, but not because there was no final decision on certification; rather, because the proposed route for that pipeline was rerouted, which meant that the plaintiffs there no longer faced a threat of injury because they were no longer in the pipeline's path. This Court reasoned that: "Defendants have not entered plaintiffs' properties, and they have no intention of doing so now, given the change to the proposed route of the pipeline." Charlottesville Div. v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 685 (W.D. Va. 2015). Here, by contrast, MVP has ***not*** rerouted the pipeline, shows ***no*** intention of doing so, has ***already*** entered the targeted properties for surveying, and has ***every intention*** of continuing to enter up until certification and afterwards. Thus, unless MVP reroutes the pipeline off of these targeted properties entirely, Plaintiffs face a clear and immediate threat of injury. The facial and as-applied challenges are therefore ripe.

Plaintiffs similarly have standing for much the same reasons: Plaintiffs have suffered and continue to suffer an injury-in-fact, which is concrete and particularized, by having their properties specifically targeted and selected by MVP for the pipeline route. Plaintiffs are facing existing, continuing, and imminent entries for surveying, and an additional "imminent" threat of injury with the looming issuance of a Certificate. Thus the entries for surveying already constitute actual injuries-in-fact to Plaintiffs' property interests (i.e., right to exclude, *inter alia*), the targeting and selection of all the specific properties on the route similarly constitutes actual injuries-in-fact, since the route is not "hypothetical" or "conjectural" but already determined and selected for those specific parcels and, lastly, the imminent issuance of a certificate by FERC constitutes an "imminent" injury-in-fact in the ultimate construction of the pipeline on the properties at issue, in addition to continued entry by MVP, its surveyors, and other employees. These injuries are causally connected and "fairly traceable" to the challenged action of the Defendants and it is entirely "likely" (not just speculative) that said injuries can be redressed by a favorable decision of this Court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Los Angeles v. Lyons, 461 U.S. 95 (1983).

C. FERC's Statement Of Policy Does Not, Contrary To MVP's Assertion, Provide The "Rational Framework" Required To Satisfy The Constitutional Standard For The Invocation Of Eminent Domain.

Contrary to MVP's beliefs, FERC's Statement of Policy does not provide a "rational framework" for determining whether a proposed pipeline serves a public purpose. MVP's Motion to Dismiss at 14. In fact, MVP misunderstands the constitutional requirements for a rational framework altogether. A finding of "rational relation" requires a pre-existing social harm, as existed in Hawaii Housing Authority v. Midkiff, Berman v. Parker, and Kelo v. City of New London. If there is no reduction of "perceived social and economic evils," there is no rational relation (i.e., there can be no finding that the exercise of eminent domain is "rationally related to a conceivable public purpose."

Midkiff, 467 U.S. at 241.) MVP cites no such harm (because it does not exist) and therefore has no basis whatsoever to conclude that the framework used by FERC is in any way "rational." MVP instead draws a conclusory incorrect statement of the law, asserting that "FERC's Statement of Policy provides a rational framework" and that "suffices to satisfy the Constitution." Response at 14 (citing National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992) (internal quotations omitted)). MVP continues with this conclusory line of thought, stating that not only does the Statement of Policy provide a rational framework but also "goes further than the Constitution requires" because it "allow[s] the FERC to deny a certificate if adverse impacts outweigh public benefits." MVP's Motion to Dismiss at 14. MVP's statement is entirely unsupported and conclusory: MVP does not, in other words, explain **why** there is a rational relation (i.e., the basis for that conclusion) and understandably so—because there is none.

MVP cannot cite to a pre-existing social harm within the geographic scope where the takings are occurring because no such harm exists. The existence of harm is critically important because its pre-existence is required in order for the exercise of eminent domain to be rationally related to a conceivable public purpose. Midkiff, 467 U.S. at 241. Rational relation is not, as MVP would have it, based on whether an agency has discretion to say "Yea" or "Nay" to an applicant but rather whether there is a pre-existing social harm requiring alleviation within that area. The discretion of an agency has nothing to do with that qualifying constitutional matter, and it would be absurd to form an agency that did not at all have the ability to deny applications (although FERC's approval rate seems strikingly close to that scenario, given its unfettered discretion). The constitutional question here, again, is not whether the agency does or does not have discretion but, rather, whether that discretion was properly restricted by standards (i.e., "intelligible principles") imposed upon that agency by Congress to satisfy the Constitution, per the context and history of eminent domain. Put simply: MVP contends that, "FERC has discretion and therefore the Constitution is satisfied." But this discretion is precisely the problem, and it proves Plaintiffs' point: FERC has unfettered discretion created by Congress's overly broad delegation of power.

This discretion is unfettered for the very reason MVP attempts to evade: there is no pre-existing social harm and thus no rational framework, both in this particular circumstance, as applied to MVP's project, and at its outset, when the statute was passed and FERC's Statement of Policy created, which Statement Defendant MVP admits and acknowledges in its motion is being used as the guiding framework. That Statement of Policy, as previously asserted by Plaintiffs in their Complaint, is comprised of several shifting scales that cater to the needs of the applicant-company instead of the public. It imposes no requirement whatsoever of pre-existing social harm, let alone harm within the geographic scope where the takings will occur, both of which constitute elements required under the Constitution. Notably, MVP ignores the role of the Constitution in this analysis altogether.

On this point, the case law could not be clearer: a finding of rational relation is based upon the pre-existence of a social harm within the geographic scope at issue. The Court in National R.R. Passenger Corp., the primary case cited by MVP for its reliance on the "rational relation" standard, did not independently create this rational framework test but merely cited to it from Midkiff. In National R.R. Passenger Corp., the court specifically cites to Midkiff and Berman to explain the rational relation test:

> [T]he Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking "is rationally related to a conceivable public purpose." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240-241 (1984); see also *Berman* v. *Parker*, 348 U.S. 26, 32-34 (1954).

National R.R. Passenger Corp, 503 U.S. at 422. Notice, here, that the National R.R. Court is quoting from Midkiff for the "rational relation" test. The Court then specifically explains the social harm at issue in both Midkiff and Berman, the two bases for the rational framework standard, noting:

> In *Midkiff* we upheld land reform legislation which authorized condemnations for the specific purpose of transferring ownership to another private party, **in order to eliminate a land oligopoly**. In *Berman* we permitted land condemnations which contemplated reselling the land to redevelopers, as part of a plan to **restore dilapidated sections** of the District of Columbia.

Id. (emphasis added).

In the one instance, the Court was alleviating the social harm of extreme wealth concentration (i.e., the oligopoly in Midkiff). In the other, extreme poverty was the social harm at play (i.e., the blighted neighborhood in Berman). In both cases, the pre-existing social harm justified the taking and formed the basis for concluding that the exercise of eminent domain in that specific geographic area was rationally related to a public use benefitting said area. Indeed, the Court in Midkiff explicitly stated so, reasoning that, "On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did to **reduce the perceived social and economic evils** of a land oligopoly traceable to their monarchs." Midkiff, 467 U.S. at 241 (emphasis added). The direct alleviation of these social and economic evils present in that region was the basis for the rational relation to the exercise of eminent domain. Without those pre-existing "evils," the invocation of eminent domain would not have served a public purpose. There was, in other words, a direct link (i.e., rational relation) between some pre-existing social harm and the taking intended for its alleviation.

This, too, was echoed in Kelo v. City of New London where, as previously noted by Plaintiffs, the majority specifically relied on the pre-existing social harm—specifically the "distressed" state of affairs including the declining population and high unemployment rate in the City of New London—to justify the taking. Kelo, 545 U.S. at 473. The "economic development" phrasing was thus not in any way an expansion of public use but merely an explanation as to why that ***specific*** economic development was needed to alleviate that ***specific*** social harm present in that ***specific*** geographic area. That is the rational relation to which the Court in National R.R. refers when it cites Midkiff in explaining what type of framework "satisf[ies] the Constitution." National R.R. Passenger Corp, 503 U.S. at 422-23. The harm, in other words, *is* the need, and logically so: for if there is a pre-existing social harm then the public is in need of its alleviation. This, of course, does not alone or automatically justify a governmental taking but its absence certainly forbids it. To conclude, as MVP does, that FERC's Statement of Policy is a "rational framework" without offering any evidence or basis for a pre-existing social harm in the area where the takings will occur is to ignore the rational relation test altogether, which very clearly requires pre-existing harm, or, as the Court in Midkiff explains, the reduction of "social and economic evils." Midkiff, 467 U.S. at 241. MVP does not—and cannot—cite to any such pre-existing social evils in need of alleviation on the properties it intends to take and therefore has no basis to assert a rational framework. The relation is thus irrational and the taking, unconstitutional.

Lastly, the Court has been clear that an agency's action "may not be upheld on grounds other than those relied on by the agency." National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 420 (1992) (citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)). Since neither Defendant MVP nor Defendant FERC has cited to specific social harms needing alleviation on the properties targeted for the takings (nor can they because the Statement of Policy, as noted, does not require a finding of pre-existing social harm), the Court cannot, after-the-fact, uphold said takings on newly-conceived justifications of social harm, assuming, *arguendo*, that said parties can cite to social harms on the targeted properties in the geographic areas at issue. Neither MVP, nor FERC, can point to any social harms here because they do not exist.

D. The Legal Issue Of Delegation Is Properly Brought Before The Court.

Plaintiffs' challenge to Congress's delegation of power to FERC via the NGA is properly brought before this Court as well. Congress does not delegate its discretionary power to a private entity such as MVP, nor can it ever do so. The only power a private entity may obtain is the power to exercise eminent domain ***once*** a regulatory agency has ***already*** decided, within the parameters laid down by Congress, that eminent domain is lawful in that specific circumstance. That is the only meaning of the courts when they state that the power has been delegated to private entities: for the private party is indeed the entity that takes the land, but it is not—and never can be—the entity that determines whether the taking is lawful in the first place under the Constitution. For such a delegation would allow one private party to take property from another private party without restriction, a taking that is clearly forbidden by the Constitution and the Courts. See, e.g., Midkiff, 467 U.S. at 241 ("To be sure, the Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid") (internal quotations and citations omitted); see also Hairston v. Danville & W. R. Co., 208 U.S. 598, 606 (1908) ("[I]t is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required"); Dice v. Sherman, 107 Va. 424, 427 (1907) ("'The private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use, against the will of the owner, which cannot be done in any case'") (quoting Fallsburg v. Alexander, 101 Va. 98, 109 (1903)).

Surprisingly, in stating that "Congress has not delegated the power of eminent domain to FERC" but, rather, "to natural gas companies," MVP proves Plaintiffs' point: if MVP is, in fact, the entity to which Congress delegated the power (as MVP so vehemently insists it is) and is therefore the party that decides whether eminent domain can be invoked, then MVP is admitting that the delegation was to itself, MVP, a private company. Accordingly, MVP admits that the NGA is unconstitutional because its over-breadth (i.e., lack of restrictions) resulted in a sub-delegation of power to private actors such as MVP.

A private party cannot have discretion or authority to decide whether a taking is constitutional. Only the regulatory agency can make such a determination, and even then, the regulatory agency, the party entrusted with this discretion, cannot possess "unfettered discretion," as the Court has described it. Clinton v. City of New York, 524 U.S. 417, 466 (1998); see also A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935) ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."). The discretion as to when and where the invocation of eminent domain is lawful must be restricted by standards imposed upon the regulatory body by Congress at the time of delegation, since only Congress is vested with legislative power and only Congress may determine what the law "shall be." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (explaining that the Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

The regulatory agency is thus restricted to a mere execution of the law, guided by intelligible principles imposed on it by the legislating body. Id. When such delegation goes awry, as the Founders warned it sometimes does, the Court is most properly called upon to exercise its duty in acting as a "check and balance" on the other branches of government. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Clinton v. City of New York, 524 U.S. 417 (1998). Plaintiffs' constitutional challenge is precisely the type of circumstance where only the court can be the deciding body as only the court is the entity vested with authority to determine whether the Constitution has been violated by Congress and, by extension, its regulatory agency as well as the agency's applicant-client, MVP, which apparently has no qualms arguing that it alone is vested with the authority to determine when a purely governmental power may be invoked.

E. MVP's Surveying Activities Have As Their Primary Purpose A Private Gain For A Private Party—The Permanence of Which Gain Is Already Recognized By Tax Law—And The State Surveying Statute, Virginia Code § 56-49.01, Is Therefore Unconstitutional.

A taking, which has as its primary purpose a private gain for a private party, is strictly prohibited even if an objective analysis reveals an incidental public use. For eminent domain to be invoked, the public use must be the driving force, not an incidental benefit. MVP's entry onto Virginia Plaintiffs' property is, in and of itself, an unconstitutional taking because its primary purpose is a private commercial gain. Since MVP derives a permanent private benefit from surveying the Plaintiffs' land, the purported "public use" is merely a pretext for the private commercial gain already acknowledged by the Tax Court. The permanency and commercial value of the benefit derived from surveying is proven through its classification as a capital expenditure. By classifying geophysical surveying as a "capital expense," the Tax Court, and thus our legal system, already recognizes and proves the following:

1. That there is a commercial benefit derived from surveying;

2. That the benefit is the "information" or "scientific knowledge" extracted from the survey; and

3. That such information is not only ***valuable*** but, arguably, even ***more so*** than all other business

> operations because the surveying information is the basis for all future business decisions.

Since the permanency and commercial value derived from surveying are already well established under existing law, this Court too should recognize that under the totality of the circumstances, the purported "public use" claimed by MVP is merely a pretext for the permanent private gain recognized by the Tax Court.

a. The Permanent Nature Of The Information Extracted From The Survey Is Already Recognized By The Tax Court As The Basis Upon Which MVP's Entire Business Operation Is Based.

Expenditures for geophysical surveying are classified as a capital expense precisely because of the permanency and value of the benefit derived. Louisiana Land & Exploration Co. v. Comm'r., 7 T.C. 507, 516 (1946) ("For these reasons we conclude that the geophysical expense in question is a capital expense."). As explained by the Tax Court, the "benefit derived" from surveying is "information," also referred to as "scientific knowledge." Id. at 515. By extracting soil samples, taking measurements, and testing for composition and mineral analysis, the company acquires and retains valuable proprietary information on the composition of the soil, which is then used and retained by the company for a lengthy period of time in order to propel the entire business operation. The Tax Court makes clear that the value derived from the information is not conditional on the results of the surveying; the information is not more or less valuable depending on whether the soil samples return positive or negative results, i.e., for precious metals, drilling, or pipeline exploration. It is, rather, the information itself—regardless of results—that the Court deems a permanent benefit. If, for example, the surveying information reveals that the soil is entirely devoid of precious metals, that information is no less valuable than a result showing a massive ore deposit. This is so because in either scenario, the scientific knowledge derived from the survey is the basis for all future business decisions and is, therefore, appropriately deemed even more valuable than all other business expenses:

> Whether or not the scientific knowledge gained from the survey indicated that drilling would be successful or unsuccessful, it was undoubtedly the information upon which would be based further tests and potential drilling operations during the entire period of petitioner's exploitation of the land for oil and gas.

Id. at 515. *Accord* Parkersburg Iron & Steel Co. v. Burnet. Accord Sun Co. & Subsidiaries (Consol.) v. Commissioner, 677 F.2d 294, 298 (3d Cir. 1982) ("[T]he cost of a geophysical survey constituted a capital expenditure and was not deductible under the IDC option. . . Indeed, that court [Louisiana Land] identified geophysical surveying as an initial stage in property development, and distinguished that activity from both exploratory and developmental drilling."). Since the information derived from geophysical surveying is the "first step" in the "overall development" of the business operation, it is rightly classified a capital expenditure because it is retained and enjoyed by the company for "the entire useful life of the asset being developed." Id. at 516. ("It is well settled that development expenses such as the platting, mapping, and subdividing of a tract of land held for sale must be capitalized and treated as an adjustment of the taxpayer's basis for such property")(citing Stewart v. Commissioner, 35 B. T. A. 406, 412 (1937)).

Whether a survey is conducted to test for precious metals or merely to establish boundaries and perfect title,[2] the expenditure is classified a capital expense precisely because of the "extent and permanency" of the activity in question. Wacker v. Comm'r., T.C. Memo 1980-324, 51 (1980). The purported "public use" claimed by MVP is, therefore, merely a pretext for the permanent private gain described by the Tax Court, which gain "clearly dominates" the public use, rendering the taking unconstitutional. See, e.g., Dice v. Sherman, 107 Va. 424, 427 (1907) (holding that where

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[2] *See* Wacker v. Comm'r., T.C. Memo 1980-324, 53-54 (1980) (holding that survey expenses incurred for determining boundaries and perfecting title are capital expenses):

> While petitioners assert the possibility of a loss of land through adverse possession or fines, they have failed to prove that the survey expenses were incurred for any reason other than to establish definite boundaries for whatever benefit might result therefrom during subsequent years. The cost of defending or perfecting a property's title is a capital expenditure and is not deductible under section 162 or section 212. See section 1.263(a)-2(c), Income Tax Regs. The evidence in the record fails to establish that the survey expenditures were recurring in nature and resulted in a benefit generally realized and exhausted within one year. In our view, the survey costs were incurred to perfect the property's title and therefore constitute a capital expenditure within the meaning of section 263. Id.

a private benefit clearly dominates the public interest, there is no constitutional authority to invoke eminent domain: "The private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use, against the will of the owner, which cannot be done in any case.") (quoting Fallsburg v. Alexander, 101 Va. 98, 109 (1903)). As demonstrated in Dice v. Sherman, the private actor's own characterization of the activity in question as a "public" necessity is immaterial to a takings analysis. Thus, the Court should disregard MVP's own description of its "public use" motivation for invoking eminent domain and find that, under the totality of the circumstances, the multi-fold *permanent* private commercial gain, already recognized by the Tax Court, "clearly dominates" the purported public use and thus amounts to an unconstitutional taking for private gain.

b. The Act Of Surveying Is A "Taking" Even Though The Surveyors' Physical Presence Is Temporary.

Lastly, MVP's entry onto the land is a "taking" even though: (1) the surveyors' actual physical presence is temporary, and (2) the taking is not absolute. A "taking" for purposes of the Fifth Amendment is interpreted broadly. A taking is a direct and substantial interference with property rights. Richmond Elks Hall Asso. v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977) (explaining that "when a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid."). The interference need not be physical in nature or permanent in occupation. It is sufficient if the action is a direct intrusion or interference with the full enjoyment of the owner's rights:

> To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision.

Id. See Pumpelly v. Green Bay Co., 80 U.S. 166 (1871). There is no requirement that the taking be "absolute." In practical terms, this means MVP's agents do not need to ***physically*** occupy or even use the entire parcel of land for the Court to find a taking has occurred. Nor must the intruder-company "directly appropriate the title, possession, or use of the properties[.]" R. J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966). A takings analysis is not based on the literal amount of land used or occupied by either the intruder or the landowner. Permanent physical *occupation*, in other words, is not the test for a taking. It is, rather, the "character of the invasion" and the permanency and effect of the consequences that determines whether a compensable taking has occurred:

> It is "the ***permanence*** of the consequences of the Government act [that] is controlling, and there is no additional requirement that the instrumentality of the consequence be purely a governmental one."

Owen v. United States, 851 F.2d 1404, 1412 (Fed. Cir. 1988) (emphasis added) (quoting Tri-State Materials Corp. v. United States, 213 Ct. Cl. 1, 7 (1977)(citing Wilfong v. United States, 202 Ct. Cl. 616 (1973))). The measure is based on the disturbance and deprivation imposed upon the landowner and his or her rights. An act that "materially impairs the use and enjoyment of lands" constitutes a taking despite the absence of permanent physical occupancy. R. J. Widen Co. v. United States, 357 F.2d 988, 1028 (Ct. Cl. 1966). The length of the surveyors' physical occupancy is therefore not the controlling question in the determination of compensable takings; it is, instead, the "***permanence*** of the ***effect*** of the government action causing the damage that is the proper focus of the takings analysis." See, e.g., Owen, 851 F.2d at 1412 (citing Tri-State, 213 Ct. Cl. 1 (1977)); see also United States v. Causby, 328 U.S. 256 (1946); United States v. Cress, 243 U.S. 316 (1917).

This permanency is measured by the owner's right to "possess and exploit" the land. Causby, 328 U.S. at 261. Since the Virginia Plaintiffs in the instant case evidently cannot, as previously explained, possess and exploit their lands to their full enjoyment and use, MVP's entry for surveying therefore constitutes a compensable taking. Each of the Virginia Plaintiffs lose the right to exclusively access and utilize the "scientific knowledge" gained from the surveying activities, which "information," as stated, has already been recognized by our tax laws, and thus our legal system, to be the entire basis for MVP's business operation, demonstrating, once again, that MVP's private gain "clearly dominates" the purported (and incidental) public use, if any, thus rendering the entire taking—and invocation of eminent domain—unconstitutional.

F. The Court's Most Important Role Is To Be A Check And Balance On Congress And Its Agencies.

Of final note, MVP's notion that it is "not the Court's place to second-guess the wisdom of Congress," particularly because "the statute [the NGA] has been regularly enforced and applied since its enactment almost 80 years ago" is misguided and contrary to the spirit, intent, and purpose of the Constitution, the ultimate protector of rights. MVP's Motion to Dismiss at 17 and 2 (internal quotations omitted). Indeed, had the Court followed MVP's line of reasoning, America would never have seen the reversal of the anti-canon decisions of Buck v. Bell, Dred Scott v. Sanford, Plessy v. Ferguson, and Korematsu v. United States, all of which contained "celebrated dissents" that later helped change and shape the law.[3] Had the legislature's enactments always been constitutional, the Civil Rights Movement would never have seen the light of day nor would state sterilization laws for the intellectually disabled have been rendered unconstitutional. The Court, in fact, exists for that very reason: to be a check and balance on the executive and legislative branches, including Congress and its agencies. As Justice Thomas stated in his dissenting opinion in Kelo, where he joined Justice O'Connor in dissenting from the majority:

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[3] *Journal of Supreme Court History*, 2017 VOL. 42, No. 2, 171.

> When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.

Kelo, 545 U.S. at 523 (Thomas, J., dissenting). Thus, for MVP to suggest that the Court simply has "no role" to play in answering whether a statute passed by Congress is constitutional undermines the very purpose of the Court's existence: to be *the* check and balance on Congress and its agencies.

III. CONCLUSION

MVP's suggestion that these constitutional questions are somehow not matters for the Court (but apparently, as MVP would have it, should instead be addressed to the very agency whose authority is being challenged to allow the agency itself to determine not only the constitutionality of its own actions but also those of Congress) flies in the face of the Constitution, the separation of powers doctrine, and the entire system of checks and balances upon which this Nation was founded, a system intentionally created for these very purposes: to secure our individual liberties by ensuring a judicial check and balance on Congress and its agencies. MVP's Motion to Dismiss should therefore be denied.

Respectfully submitted this 1st day of September, 2017,

ORUS ASHBY BERKLEY, JAMES T. AND KATHY E. CHANDLER, CONSTANTINE THEODORE AND

PATTI LEE CHLEPAS, DAWN E. AND MARTIN CISEK, ROGER D. AND REBECCA H. CRABTREE, ESTIAL E. ECHOLS, JR. AND EDITH FERN ECHOLS, GEORGE LEE JONES, ROBERT WAYNE AND PATRICIA ANN MORGAN, MARGARET MCGRAW SLAYTON LIVING TRUST, AND THOMAS AND BONNIE B. TRIPLETT

By: /s/*Justin M. Lugar*
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* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX I

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-CV-357

[Filed October 27, 2017]

ORUS ASHBY BERKLEY, *et al*.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE,	)
LLC, *et al*.,	)
	)
Defendants.	)
	)

RESPONSE OF DEFENDANT MOUNTAIN VALLEY PIPELINE, LLC TO ORDER DATED OCTOBER 17, 2017

* * *

Orus Ashby Berkley, *et al.* v.
Mountain Valley Pipeline, LLC, *et al.*

Exhibit 1
to Response of Defendant Mountain Valley Pipeline,
LLC to Order Dated October 17, 2017

Order Issuing Certificates and Granting
Abandonment Authority dated October 13, 2017

* * *

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Docket Nos. CP16-10-000 and CP16-13-000

for the project for purposes of section 7(c) of the NGA[86] and that the project served a public purpose sufficient to satisfy the Takings Clause.[87] We have done the same here. The proposed projects in this proceeding, are designed to primarily serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions. Through the transportation of natural gas from the projects, the public at large will benefit from increased reliability of natural gas supplies. Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product. Therefore, we conclude that the proposed project is required by the public convenience and necessity.

63. Notwithstanding the fact that we addressed a takings argument raised in *Transco* and here, such a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution. We note, however, that courts have found eminent domain authority in section 7(h) of the NGA to be constitutional.[88]

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[86] *Id.* PP 20-33.

[87] *Id.* PP 66-67.

[88] *See Thatcher,* 180 F.2d at 647. In addition, the eminent domain authority in many federal statutes mirror the authority in section

e. <u>Conclusion</u>

64. We find that the benefits that the MVP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and NGA section 7(e), and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of Mountain Valley's proposal, as conditioned in this order.

* * *

7(h) of the NGA. For instance, section 21 of the Federal Power Act (FPA), 16 U.S.C. § 814 (2012), provides that when a licensee cannot acquire by contract lands or property necessary to construct, maintain, or operate a licensed hydropower project, it may acquire the same by the exercise of the right of eminent domain in a U.S. District Court or a state court. The U.S. Supreme Court has not questioned the constitutionality of section 21 of the FP A. *See FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 123-24 (1960). Similarly, Congress included the same eminent domain authority for permit holders for electric transmission facilities when it enacted the Energy Policy Act of 2005. 16 U.S.C. § 824p(e)(1) (2012).

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CASE NO. 7:17-CV-357

[Filed November 24, 2017]

ORUS ASHBY BERKLEY, et al.,)
)
Plaintiffs,)
vs.)
)
MOUNTAIN VALLEY PIPELINE,)
LLC, et al.,)
)
Defendants.)
)

MOTIONS HEARING
NOVEMBER 3, 2017
1:59 P.M TO 3:23 P.M.
ROANOKE, VIRGINIA

Before:
HONORABLE ELIZABETH K. DILLON
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

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ALSO PRESENT: SARA WINN

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

* * *

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issued less than a year ago, and it talks about direct-review statutes of the type that we find in the Natural Gas Act.

The *Bennett* decision also refers to the Supreme Court decisions in *Thunder Basin* and *Elgin*. And they all stand for the proposition that, as long as there is a vehicle for judicial redress, that vehicle is in the Court of Appeals. And we believe that the statute does, in fact, provide for such a vehicle.

The certificate order issued on October 13. 15 U.S.C. 717r, little (a) in parens, provides for any aggrieved party to petition for a rehearing before the agency; and after the agency issues a rehearing order, then any aggrieved party can then petition for review either in the D.C. circuit or the circuit in which the pipeline company is located or has its principal place of business. Presumably, that would be the Fourth Circuit.

So our motion would not deprive plaintiffs of any vehicle for redress. Indeed, some of the members of the plaintiff class here are parties before the agency, and the process is already under way, as it is in other pipeline cases.

We do agree with plaintiffs in one respect. My agency, while it's a federal agency, it's obviously not an Article III court. Obviously, we don't sit in judgment on the constitutionality of any federal statute that we

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administer. Rather, we make necessary public interest, public convenience, and necessity findings.

And I think that is demonstrated by the certificate order that we issued on October 13th. In paragraphs 33 to 55, we assessed the need for the project and balanced that against any remaining unmitigated adverse effects.

I think the order demonstrates the thoroughness of the agency's review. We attached dozens of conditions which must be adhered to before pipeline construction can ensue. And we also address arguments that are really related to the arguments being presented here; that this is an improper takings under the Fifth Amendment of the Constitution, which provides for no taking of private property for public use.

The argument before the agency, and also before this Court, is that there's no public use; rather, it is a private use. And the agency explained its private use finding and also explained in paragraphs 57 to 63 that it's not my agency that actually confers eminent domain authority; rather, that authority has been conveyed by Congress in the statute. All my agency does is determine whether a certificate is consistent with the public convenience and necessity; and if we do, that, in fact, is a public use determination.

I'd like to bring this Court's attention to the very first sentence of the Natural Gas Act. "The business of transporting and selling natural gas for ultimate

* * *

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* * *

CERTIFICATE

I, JoRita B. Meyer, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ JoRita B. Meyer　　　　Date: 11/27//2017

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 18-1042

[Filed January 31, 2018]

ORUS ASHBY BERKLEY, *et al.*,)
)
Plaintiffs - Appellants,)
)
v.)
)
MOUNTAIN VALLEY PIPELINE,)
LLC, *et al.*,)
)
Defendants - Appellees.)
)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

OPENING BRIEF OF APPELLANT

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Cynthia M. Kinser
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* * *

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1042 Caption: Orus Berkley v. Mountain Valley Pipeline, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Orus Ashby Berkley, Kathy & James Chandler, Constantine & Patti Chelpas, Martin & Dawn Cisek,
(name of party/amicus)

Roger & Rebecca Crabtree, Estial & Edith Echols, George Lee Jones, Robert and Patricia Morgan, Margaret McGraw Slayton Living Trust, Thomas and

<u>Bonnie Triplett</u>
who are <u>the appellants</u>, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑NO

2. Does party/amicus have any parent corporations? ☐ YES ☑NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims

the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Justin M. Lugar Date: 1/11/2018

Counsel for: Appellants

* * *

[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

INTRODUCTION

This case is about meaningful judicial review, or the lack thereof. The Landowners in this case were before the district court and are now before this Court because they have nowhere else to go. These Landowners cannot have their day in court because an independent agency of the executive branch, the Federal Energy Regulatory Commission ("FERC"), has barred the doors to the courthouse. By virtue of an amendment to the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, FERC wields the awesome power of eminent domain and, by operation of law, conveys that power to private natural gas companies when it approves a pipeline project. But the Landowners here, and other property owners affected by proposed interstate natural gas pipelines, have no forum in which to meaningfully challenge the NGA's eminent domain provisions if jurisdiction does not lie in the district court.

First and foremost, FERC provides no review for challenges to its grant of eminent domain to natural gas companies under the NGA. FERC disclaims any jurisdiction to decide a challenge to the NGA's eminent domain provisions, and goes so far as to publicly proclaim that it lacks power to deny a natural gas company the power of eminent domain if it approves a project. Under the NGA, once a project is approved by FERC through issuance of a Certificate of Public Convenience and Necessity ("Certificate"), the power of eminent domain ***automatically*** conveys to the natural gas company.

Though FERC itself openly states that it is not an Article III court and will not pass on the constitutionality of the NGA or its eminent domain procedures, FERC contends that such claims are subject to the NGA's exclusive statutory review scheme. While disclaiming the power and discretion to decide such claims, FERC nevertheless absorbs any and all challenges it can within the review provisions of section 717r of the NGA. Under this exclusive review scheme, challenges to a final FERC order must first be pursued through a petition for rehearing. The NGA provides that FERC has 30 days to rule on any petition for a rehearing, and if FERC fails to take any action, the law deems the petition denied. Only after exhausting the rehearing provisions can one proceed to judicial review in the Court of Appeals.

Herein lies the trap. FERC will not decide the sorts of claims the Landowners have brought here, but FERC argues that the Landowners' claims must proceed through the FERC rehearing process on the ultimate path to judicial review. But FERC does not rule on a rehearing petition until after a natural gas company obtains easements, condemns all outstanding properties, and begins (and sometimes completes) construction of the pipeline. Instead, FERC avoids the 30-day period outlined by Congress, purports to "grant" the petition for rehearing "for further consideration" and then does nothing until any complaints about FERC's process (or any intertwined constitutional claims) are rendered essentially moot. By the time the Landowners get to any court, if they ever get to court, the deed is done and it cannot realistically be undone. FERC and the natural gas company profit and any opportunity for a change to an unconstitutional system is eradicated.

Similarly, even once FERC issues a Certificate and the power of eminent domain, Landowners cannot substantively challenge the grant of that power through condemnation proceedings in federal district court. Courts across the country have repeatedly held that Landowners cannot challenge the constitutionality of the NGA's eminent domain provisions within a condemnation proceeding because such proceedings are limited to the scope and price of any easement, not whether the authority to condemn was lawfully obtained or conveyed in the first place.

Presented with a scenario that blocks access to the courts at every turn, the Landowners here brought suit in the Western District of Virginia, asserting claims that fall well outside of the statutory review scheme envisioned by Congress. And despite the guidance offered by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the district court found that it did not possess subject matter jurisdiction because of the NGA's review scheme. The district court was wrong and that error must be corrected. Otherwise, the Landowners here, and others similarly situated throughout the country, will never have the opportunity to assert these important constitutional rights and challenge the almighty power of government and big business. All the Landowners seek here is what the law provides: their day in court. Accordingly, the district court's order should be vacated and this case remanded to proceed on the merits.

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The district court possessed jurisdiction under 28 U.S.C. §1331. On January 9, 2018, the court entered final judgment. On the same date, January 9, 2018, the Landowners filed a timely notice of appeal from the final judgment. This Court's jurisdiction over the Landowners' appeal rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in its application of the *Thunder Basin* framework and finding that Congress implicitly divested the district court of subject matter jurisdiction over the Landowners' claims.
2. Whether the district court erred in finding that the Landowners' challenges inhered in the FERC process and thus were subject to the NGA's review provisions set forth in 15 U.S.C. § 717r.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Orus Ashby Berkley, James and Kathy Chandler, Theodore and Patti Chlepas, Martin and Dawn Cisek, Roger and Rebecca Crabtree, Estial "Earl" and Fern Echols, George Jones, Robert and Patricia Morgan, the Margaret McGraw Slayton Living Trust, and Thomas and Bonnie Triplett (collectively the "Landowners") own real property in Virginia and West Virginia in the path of a FERC-approved 42-inch private natural gas pipeline known as the Mountain Valley Pipeline. Mountain Valley Pipeline, LLC ("MVP") is a private joint venture between several large energy companies that are also the sole subscribers to the pipeline. MVP seeks to construct its privately-owned, privately-operated, and privately-subscribed 303.5-mile, 42-inch high pressure natural gas pipeline from Wetzel County, West Virginia to Transcontinental Gas Pipeline Company's ("Transco") Zone 5 compressor station 164 in Pittsylvania County, Virginia. MVP's project plans to cross each of the Landowners' properties.[1] The stated purpose of the pipeline is to transport fracked natural gas from the Marcellus and Utica shale formations through the steep slopes of the Appalachian mountains, across the George Washington National Forest and the Appalachian Trail, through countless watersheds serving the residents of West Virginia and Virginia, to connect to existing pipeline networks for shipment of cheap gas to the southeastern United States.

This proposed pipeline carries real and long-lasting effects for the Landowners. For instance, the Chlepas own and operate an organic apiary and bee preserve, and derive their living from their land. Months of construction and an access road could destroy in a matter of moments what has taken years to build. The Chandlers' property will be bisected by the pipeline, rendering access to roughly half of their property at worst impossible and at best impractical. Similarly, the farm where George Lee Jones was born will be forever

[1] In addition to requiring temporary easements for construction, the Landowners here, and other affected property owners, will be affected by both temporary and permanent access roads.

scarred and irrevocably split in half after seven generations of consistent stewardship by the Jones family. These sorts of changes permanently alter the Landowners' ability to enjoy and use their property as they deem fit. Injuries to these Landowners' property rights cannot be made whole as trees cannot be uncut, springs cannot be "un-sunk," and Archaic-period archaeological sites cannot be re-examined and preserved. That is why it is especially important that the Landowners here obtain their day in court *before* their land is irreparably taken from them and forever changed against their wishes.

II. THE REGULATORY SCHEME, FERC, AND MVP

FERC[2] is the federal agency responsible for regulating the transportation and sale of natural gas in interstate commerce pursuant to the provisions of the NGA. 15 U.S.C. § 717. Among other things, FERC is tasked with monitoring and adjusting rates and charges, and regulating storage of natural gas. Most importantly in this case, FERC is the body responsible for vetting and approving any new proposed interstate natural gas pipelines. 15 U.S.C. § 717f(c), 717f(e).

By operation of law, when FERC grants a Certificate to a natural gas company by finding that the project is "in the public convenience and necessity," it conveys the power of eminent domain to that

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[2] The original agency tasked with regulating the sale and transport of natural gas in interstate commerce was the Federal Power Commission. In 1977, Congress passed the Department of Energy Organization Act, and the Federal Power Commission was essentially renamed as FERC. *See* 42 U.S.C. § 7134 (2018).

Certificate holder. 15 U.S.C. § 717f(h) ("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 … it may acquire the same by exercise of the right of eminent domain…."). FERC itself has repeatedly stated that it possesses no discretion to grant or deny eminent domain power. *See Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion to deny a certificate holder the power of eminent domain."); *Sawgrass Storage, LLC*, 138 F.E.R.C. P61, 180 (2012), *vacated on other grounds*, 146 F.E.R.C. P61, 133 (2014) ("If the Commission finds that a proposed project is required by the public convenience and necessity, it cannot withhold the right of eminent domain."). Thus, the power of eminent domain ***automatically*** transfers to a natural gas company that holds a Certificate under the NGA.

Once a natural gas company obtains a Certificate, it may then initiate condemnation proceedings "in the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. § 717f(h). In this case, FERC issued a Certificate to MVP on October 13, 2017 and little more than a week later, MVP filed condemnation suits against literally hundreds of landowners in Virginia and West Virginia.[3] MVP is in the process of seeking

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[3] *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke*

early entry to these properties in an effort to obtain the requisite authority from FERC and other regulatory agencies to begin tree felling and earth moving activities.

III. THE LANDOWNERS' COMPLAINT AND PROCEEDINGS IN THE DISTRICT COURT

Nearly three months prior to FERC granting MVP a Certificate, the Landowners filed suit in the United States District Court, Western District of Virginia, Roanoke Division, and sought a declaration, *inter alia*, that Congress engaged in an overly broad delegation of the power of eminent domain under the NGA, that FERC's sub-delegation of the power of eminent domain to MVP under the NGA is unconstitutional, and that FERC's automatic grant of the power of eminent domain pursuant to an unconstitutional standard is also unconstitutional. JA 12-80. The Landowners simultaneously sought a preliminary and permanent injunction to prohibit FERC from granting MVP the power of eminent domain under 15 U.S.C. § 717f(h) and to prevent MVP from claiming or exercising any power of eminent domain under the same provision. JA 81-125.

County, Franklin County, and Pittsylvania County, Vir et al, Case No. 7:17-cv-00492-EKD (filed October 24, 2017); *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, and Summers, West Virginia et al*, Case No. 2:17-cv-04214 (filed October 24, 2017); *Mountain Valley Pipeline, L.L.C. v. Simmons et al*, Case No. 1:17-cv-00211-IMK (filed December 8, 2017).

MVP and FERC moved the district court to dismiss the Landowners' complaint for lack of subject matter jurisdiction, each claiming that the Landowners were required to submit their complaints within the NGA regulatory scheme, first to FERC and then to the Court of Appeals via 15 U.S.C. § 717r. JA 126-158, 178-202. The Landowners argued that their claims fall outside the scope of FERC's jurisdiction and expertise, and were properly brought to the federal district court pursuant to 28 U.S.C. § 1331.

The district court, however, found that: (1) the Landowners' claims "inhere" in a FERC order and are thus subject to the exclusive review provisions of the NGA and; (2) even if the Landowners' claims fall outside NGA's exclusivity provisions, Congress implicitly divested the district court of jurisdiction pursuant to the Supreme Court's framework in *Thunder Basin*, 510 U.S. 200. JA 532-547. For those reasons, the district court dismissed Counts I-III, holding that it lacked subject matter jurisdiction. *Id.* The Landowners voluntarily dismissed with prejudice Count IV of their Complaint, the district court entered final judgment, and on the same day, the Landowners filed their Notice of Appeal.

SUMMARY OF ARGUMENT

This Court should reverse the decision below for the following reasons:

The NGA does not divest the district court of subject matter jurisdiction, implicitly or explicitly. Under the analytical framework developed by Supreme Court in the *Thunder Basin* line of cases, it is clear in this case that Congress never intended to divest the district court of subject matter jurisdiction over the Landowners' claims regarding the automatic grant of eminent domain under the NGA.

That Congress never envisioned such a divestment is confirmed by the fact that absent jurisdiction in the district court, the Landowners have no path to judicial review, much less meaningful judicial review. FERC disclaims jurisdiction over the claims asserted by the Landowners here and admits that it lacks the discretion or power to excise a grant of eminent domain from the grant of a Certificate. The Landowners, in turn, cannot challenge the grant of eminent domain within the FERC process. Even if the Landowners could challenge the grant of eminent domain within the review provisions of the NGA, FERC administers its rehearing proceedings in a manner that delays access to the Court of Appeals until *after* a natural gas company has condemned properties and constructed the pipeline. By the time Landowners can access the Court of Appeals, irreparable damage is done, and for all practical purposes, the Landowners' challenges are rendered moot.

The Landowners are also precluded from asserting claims concerning the unlawful grant of eminent domain within condemnation proceedings. District courts across the nation have been unwavering in limiting the issues in condemnation proceedings to the scope of the taking and the amount of just compensation. Lack of a forum in which to assert these important constitutional claims is precisely what the Supreme Court sought to prevent in *Thunder Basin* and its progeny.

The record is also clear that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case. The challenges asserted by the Landowners in this case focus not on the policies, procedures, or analysis of some issue by FERC or even a decision by FERC, but instead center on extra-agency "root" constitutional questions that Congress never intended to be included in agency review. None of the cases relied upon by the district court support its finding that Congress implicitly intended for the Landowners' claims to be subject to the NGA's review provisions. The claims asserted in this case neither "inhere" in the regulatory scheme nor are the claims "intertwined" with agency review.

Instead, under the *Thunder Basin* line of cases, the Landowners' claims here are "wholly collateral" to the regulatory scheme, and every party in this action recognizes that FERC offers no expertise vis-à-vis the claims at issue in this case. And though each aspect of the *Thunder Basin* analysis independently weighs in favor of finding jurisdiction appropriate in the district court, taken as a whole, there can be no doubt that the Landowners' claims here do not fall within the review scheme envisioned by Congress. In this case, jurisdiction lies in the district court.

ARGUMENT

Standard of Review

An appellate court reviews "de novo a district court's dismissal of a complaint for lack of subject-matter jurisdiction." *Bennett v. United States SEC*, 844 F.3d 174 (4th Cir. 2016) (quoting *Nat'l Taxpayers*

Union v. U.S. Soc. Sec. Admin., 376 F.3d 239, 241 (4th Cir. 2004)).

I. UNDER THE *THUNDER BASIN* FRAMEWORK, CONGRESS NEVER INTENDED TO DIVEST THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OF THE LANDOWNERS' CLAIMS

A. The *Thunder Basin* Framework

The Supreme Court has recognized two ways in which Congress may divest a federal district court of federal-question jurisdiction under 28 U.S.C. § 1331. First, Congress may expressly divest the district court of original jurisdiction. *Bennett*, 844 F.3d at 178 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 5 (2000)).[4] Second, Congress may divest a

[4] Though the district court appears to have made some finding that the NGA expressly divests the district court of jurisdiction, there can be no doubt that the NGA does no such thing. To expressly divest a federal district court of jurisdiction over certain claims, Congress must "plainly bar[] § 1331 review … irrespective of whether the individual challenges the agency's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds." *Shalala,* 529 U.S. at 10. In *Shalala*, the statute was explicit: "no action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." *Shalala*, 529 U.S. at 10 (quoting section 405(h) of the Social Security Act). Unlike the express divestment of district court jurisdiction under section 1331 at issue in *Shalala*, the NGA provides no such language. Accordingly, to the extent the district court found an express divestment under the NGA, it committed error.

federal district court of jurisdiction under 28 U.S.C. § 1331 through creation of a "statutory scheme of administrative adjudication and delayed judicial review…." *Bennett*, 844 F.3d at 178 (citing *Thunder Basin*, 510 U.S. at 207). Even where there is a statutory scheme at play, "[p]rovisions for agency review do not restrict judicial review ***unless*** the statutory scheme displays a fairly discernible intent to limit jurisdiction, and the claims at issue are of the type Congress intended to be reviewed within the statutory structure." *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477, 489 (2010) (internal quotations omitted) (emphasis added). The Landowners' claims here are not the type Congress intended to be reviewed within the structure of the NGA, and Congress never intended to limit jurisdiction of a federal district court over the type of claims asserted in this case.

Where questions arise as to whether Congress impliedly divested a district court of jurisdiction, the Supreme Court has promulgated the two-step *Thunder Basin* framework to guide the analysis. First, as this Court has previously held, the reviewing court asks whether Congressional intent to implicitly divest the district court of jurisdiction is "fairly discernible in the statutory scheme." *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 207). Courts are directed to analyze "the statute's language, structure, and purpose" as well as the statute's "legislative history." *Bennett*, 844 F.3d at 181; *Thunder Basin*, 510 U.S. at 207 (stating that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, [] and whether the claims can be afforded meaningful review.") (internal citations omitted).

Second, this Court "ask[s] whether plaintiffs' claims are of the type Congress intended to be reviewed within this statutory structure." *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 212) (internal quotations omitted). The Court analyzes three key factors under this second step of the inquiry: (1) whether the statutory scheme forecloses all meaningful judicial review; (2) the extent to which the plaintiffs' claims are wholly collateral to the statute's review provisions; and (3) whether agency expertise could be brought to bear on the questions presented. *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15.

B. <u>The Landowners are Unable to Obtain Any Judicial Review, Much Less "Meaningful" Judicial Review</u>

In *Bennett*, this Court recognized that "meaningful judicial review is the ***most important factor*** in the *Thunder Basin* analysis." 844 F.3d at 184, n.7 (emphasis added). The Supreme Court confirms that upholding district court jurisdiction is critical "particularly where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212-13. The Landowners here are unable to obtain any judicial review of their claims if the district court is divested of jurisdiction. And, even if the Landowners could obtain judicial review of their claims outside of the district court (which they cannot), there is no path to meaningful judicial review.

The Landowners are unable to obtain judicial review here because FERC possesses no discretion to grant or deny eminent domain power. *See e.g., Midcoast Interstate Transmission*, 198 F.3d at 973; *Sawgrass Storage, LLC*, 138 F.E.R.C. P61, at 180. Put another way, the power of eminent domain conveys automatically with FERC's issuance of a Certificate, leaving no opportunity for the Landowners to challenge that particular act. *See* 15 U.S.C. § 717f(h). And even if the Landowners lodged their claims within the FERC processes, FERC bypasses Congress' 30 day mandatory period by granting a rehearing for further consideration while condemnation proceedings ensue and the pipeline is constructed. By the time FERC denies a request for rehearing, the pipe is in the ground and it is meaningless to seek review in the Court of Appeals. Likewise, the Landowners are precluded from bringing any challenge to a natural gas company's power of eminent domain within condemnation proceedings.

1. FERC Does Not Provide a Forum for the Landowners' Claims and Cannot Provide the Relief Sought

Because the NGA automatically confers the power of eminent domain once a natural gas company obtains a Certificate, FERC's grant of eminent domain to a company such as MVP can never, as a matter of law, be challenged before FERC. While FERC contends that its process determines that a project is in the public interest, there is no opportunity for FERC to make any independent decision about the grant of the power of eminent domain because FERC cannot approve a project without automatically granting that power via issuance of a Certificate. There is simply no forum for the Landowners here, or in any other case, to challenge the grant of eminent domain. The fact that there is no forum or opportunity to challenge a grant of eminent domain before FERC, standing alone, illustrates that the Landowners' claims here fall outside the statutory review scheme envisioned by Congress and outlined in the NGA.[5]

Stated in terms of the relief sought, because FERC does not possess the discretion to grant or deny eminent domain powers under the NGA, it necessarily follows that FERC is precluded by law from granting any relief to the Landowners within the FERC process, even if the claims pleaded were raised before FERC. Because FERC cannot grant any relief to the claims pleaded, the claims will never be subject to a final order as required by the NGA's "exclusive" jurisdiction provisions. 15 U.S.C. § 717r. Again, FERC does not have the power to adjudicate a challenge to the provisions of section 717f(h); therefore, such challenges are not subject to the administrative process and cannot be subject to its exclusive jurisdiction provisions.

Remarkably, FERC itself recognizes and agrees with the Landowners that it cannot and will not hear challenges regarding the automatic grant of eminent domain powers. At the hearing before the district court, FERC's counsel stated the following:

[5] The first step in the *Thunder Basin* framework will be analyzed more fully below.

> We do agree with plaintiffs in one respect. My agency, while it's a federal agency, it's obviously not an Article III court. Obviously, ***we don't sit in judgment on the constitutionality of any federal statute that we administer***. Rather, we make necessary public interest, public convenience, and necessity findings.

JA 480-481 (emphasis added). Likewise, FERC's Certificate issued to MVP notes that "such a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution." JA 357. MVP concedes the same: "Now, it's, of course, true, as Mr. Solomon said, that his agency doesn't generally decide constitutional issues. But the Court of Appeals do." JA 498.

What FERC and MVP ignore, and for good reason, is the fact that the Court of Appeals can only hear challenges to a final order issued by FERC. 15 U.S.C. § 717r(b). FERC lacks jurisdiction and the power to determine the claims presented here; therefore, the Landowners' claims never enter the administrative process or obtain access to even delayed judicial review under 15 U.S.C. § 717r.

Like this Court recognized in *Bennett*, where the regulatory body "had not undertaken regulatory action that would yield a reviewable Commission order or rule, the petitioners would have had to challenge a Board rule at random or bet the farm by voluntarily including a sanction in order to trigger § 78y's mechanism for administrative and judicial review." 844 F.3d at 180 (quoting *Free Enterprise*, 561 U.S. at 490). For all of the reasons discussed above, FERC has not, and cannot, undertake action regarding the Landowners' challenges to section 717f(h) of the NGA, and thus the Landowners' claims cannot be subjected to the NGA's administrative review scheme. Likewise, there is no judicial review of the grant of the power of eminent domain.

2. FERC's Rehearing Process is Far From Meaningful: The Result is Preordained

Even if FERC could exercise jurisdiction and make findings that could be challenged in the Court of Appeals after exhausting administrative remedies under section 717r, FERC has unilaterally barred the doors to timely, meaningful judicial review. As detailed above, the NGA requires parties, before obtaining judicial review of any FERC order, to seek rehearing from the agency. 15 U.S.C. § 717r(a). Upon submission of a rehearing request, FERC may grant or deny the request or abrogate or modify its order, even without a hearing. *Id*. Congress commanded action within 30 days; otherwise, by operation of law, the request would be deemed denied and parties could proceed to the Court of Appeals. *Id.*

What has become common knowledge in the pipeline industry is that FERC administers the rehearing and review process in a manner designed to block access to the courts. Though Congress explicitly provided that FERC has 30 days to consider a petition for rehearing, FERC bypasses Congressional mandate by issuing an order that purports to grant a rehearing.[6]

[6] These orders are commonly referred to as "tolling orders" by practitioners in this area of the law.

But FERC's so-called "decision" granting a rehearing is a pretense: the order granting a rehearing is issued only "for the limited purpose of further consideration." *See* Order Granting Rehearing for Further Consideration, No. CP16-10, 20171213- 3061 (Dec. 13, 2017) (available at https://elibrary.ferc.gov/IDMWS/search/fercgensearch.asp).[7] But FERC does not actually engage in any "further consideration" or entertain any further submissions from interested parties. Instead, while the Landowners in this case wait to exhaust their administrative remedies, FERC authorizes the pipeline company to proceed with construction.[8]

An analysis conducted by Appalachian Mountain Advocates in support of its recently filed Petition for Extraordinary Writ to stay the order "granting" rehearing entered in the MVP matter, reveals that "FERC has used tolling orders in 99 percent of its gas pipeline orders in the last eight years to shield itself from timely judicial scrutiny." *See* Petition for Extraordinary Writ in *In re Appalachian Voices, et al.*,

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[7] FERC's purported "decision" provides in part: "In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained." *Id.*

[8] At the time of filing, FERC has granted MVP the right to proceed with certain construction of access roads and site preparation for compressor stations in West Virginia.

No. 18-1006, at p. 5 (D.C. Cir. Jan. 8, 2018); *see also* Exhibit G to Petition for Extraordinary Writ.

FERC's practices and procedures are an anathema to any reasonable notion of meaningful judicial review. Such delays raise the possibility that FERC can effectively render the instant challenge moot, or at least practically moot, by authorizing MVP to construct a $3.7 billion project while FERC sits on its decision regarding rehearing until the project is complete. Certainly, no entity, private or public, would place a $3.7 billion bet without some assurance from FERC that any meaningful challenge would not stop or delay construction and operation of a pipeline. The fact is that neither MVP, nor any other natural gas company, has to place a bet and take the risk. Instead, FERC has engineered a "solution" to the problem of being required to provide a route to meaningful judicial review. Under this system of Gordian knots, it is the Landowners here who are required to literally "bet the farm … before testing the validity of the law," a scenario that the Supreme Court has unambiguously held is not "a 'meaningful' avenue of relief." *Free Enterprise*, 561 U.S. at 490-91 (citing *Thunder Basin*, 510 U.S. at 212); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996).

3. The Landowners Cannot Obtain Relief in Condemnation Proceedings

It is also well-established that "the role of the district court in NGA eminent domain cases extends solely to examining the scope of the certificate and ordering the condemnation of property as authorized in that certificate." *Columbia Gas Transmission Corp. v. B.J. Props. New Mkt., LLC*, 2008 U.S. Dist. LEXIS 45305, at *6 (W.D. Va. June 9, 2008) (citing *Guardian Pipeline, LLC v. 295.49 Acres of Land*, 2008 U.S. Dist. LEXIS 35818 (E.D. Wis. 2008)); *Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 339 (D. N.H. 1998); *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence County, R.I.*, 749 F. Supp. 427, 430 (D. R.I. 1990) ("The District Court's role is to evaluate the scope of the certificate and to order condemnation of property as authorized in the certificate.")). The district court's jurisdiction in condemnation proceedings does not extend to any challenges to the NGA's transfer of the power of eminent domain under 15 U.S.C. § 717f(h). Therefore, the Landowners cannot have their current claims heard by a federal district court in the ongoing condemnation proceedings.

4. Conclusion

Even if section 717r could offer a path to relief (which it cannot), the Landowners in this action should not be forced to literally bet their farms, their homes, and their peace of mind. These Landowners did not seek to be regulated by some executive body in Washington, D.C. that is tasked with regulating the sale and transport of natural gas in interstate commerce. These Landowners are not seeking some congressionally-created right, benefit, or entitlement. Instead, these Landowners seek only their day in court in an effort to protect the fundamental constitutional right to be secure in their private property and be left alone. They have no other avenue of relief outside of the district court, much less any meaningful avenue of relief as required by *Thunder Basin*. Since "meaningful judicial review" is the "most important" aspect of the *Thunder Basin* inquiry, this Court's inquiry could focus entirely on this prong and ample evidence exists to reverse the district court. Nevertheless, a full *Thunder Basin* analysis confirms the same: the district court possesses subject matter jurisdiction here.

C. The Language, Structure, Purpose, and Legislative History of the NGA Did Not Implicitly Divest the District Court of Jurisdiction Over Foundational Constitutional Questions Posed by the Landowners

Though the Landowners lack any access to meaningful judicial review here, it is nevertheless clear that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case. As noted at the district court hearing repeatedly, the challenges lodged by the Landowners focus not on the policies, procedures, or analysis of some issue by FERC or even a decision by FERC, but instead center on extra-agency "root" constitutional issues that Congress never intended to be included in agency review. *See Free Enterprise*, 561 U.S. at 491 (stating that the petitioner's claims in *Thunder Basin* were "statutory; at root … they arose under the Mine Act….") (quoting *Thunder Basin*, 561 U.S. at 214-15) (internal quotations omitted)).

An important question for purposes of understanding and analyzing Congress' intent then, under both *Thunder Basin* and *Free Enterprise,* is whether the claims, statutory, constitutional, or otherwise arise under the statutory scheme. The majority in *Elgin* refused to draw a distinction between a challenge "on the ground that the statute requiring it is unconstitutional" versus a challenge based "on any other ground." *Elgin*, 567 U.S. 13. However, in *Elgin*, as well as in *Thunder Basin* and *Bennett*, the claims alleged by each of the plaintiffs "arose under" the statutory scheme, and were therefore "at root" within the statutory scheme by their very nature, even if the claims presented included constitutional issues. For example, in *Thunder Basin*, the Court stated that the petitioner's constitutional claims "turn on a question of statutory interpretation ***that can be meaningfully reviewed <u>under</u>*** the Mine Act." 501 U.S. at 216 (emphasis added). Put another way, the "only constitutional issue was a matter of timing" of the FERC rehearing. *Elgin*, 567 U.S. at 32 (Alito, J. dissenting).

However, in *Free Enterprise*, the Supreme Court found that the exclusive review provisions of 15 U.S.C. § 78y did not divest the district court of subject matter jurisdiction, in part, because the claims did not arise under the statutory scheme at issue. The Court noted that the "petitioners object to the Board's existence, not to any of its auditing standards." *Free Enterprise*, 561 U.S. 477, 490. Stated differently, the Court found it important that the petitioners' claims did not arise under the statutory scheme but outside of the statutory scheme altogether. And while the primary reason the Court in *Free Enterprise* found subject matter jurisdiction centered on the fact that the petitioners could not obtain meaningful judicial review, the fact that the challenge levied by the petitioners fell outside the statutory scheme itself was nevertheless an important additional factor weighing in favor of district court jurisdiction, just as it is here. *Id.* at 490-92.

Furthermore, the statutory scheme at issue in *Elgin* was starkly different than the NGA scheme at issue here and the scheme at issue in *Free Enterprise*. For example, the statutory scheme in *Elgin*, the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 *et seq*., was specifically created to "replace an outdated patchwork of statutes and rules that afforded employees the right to challenge employing agency actions in district courts across the country." *Elgin*, 567 U.S. at 14-15 (quoting *United States v. Fausto*, 484 U.S. 439, 444-45 (1988)). Permitting judicial review for "covered employees" outside of the statutory scheme created by Congress would create the same exact scenario Congress sought to avoid in passing the legislation, namely to rid the system of "inconsistent decision-making and duplicative judicial review." *Elgin*, 567 U.S. at 14.

Congress passed the CSRA in the wake of the Watergate scandal in order to dismantle the U.S. Civil Service Commission and replace it with three new agencies, the Office for Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority. *See* 92 Stat. 1111, *et seq.* The final version of the CSRA spans some 117 single-spaced pages and painstakingly outlines powers such as the Special Counsel's investigatory powers (§ 1206), and procedures for removal or suspension of an employee for "more than 14 days, reduction in grade or pay, or furlough for 30 days or less." *See* 92 Stat. 1134, *et seq.*; 5 U.S.C. § 7511, *et seq*. The detailed statutory scheme provides a host of options for review, depending on one's status, the action at issue, and which body or bodies may possess review power depending on one's status and the action at issue. *See, e.g.*, 5 U.S.C. §§ 7511, 7512, 7513, 7703.

The statutory scheme outlined by the NGA bears little, if any, resemblance to the nuanced and detailed procedures of the CSRA. And, unlike the CSRA, the NGA was not specifically designed to preclude piecemeal litigation by the thousands of federal employees in various jurisdictions; indeed, nothing in the NGA or its legislative history points to any intent by Congress to address similar concerns in the realm of regulating interstate natural gas companies. Instead, the NGA provides that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary and in the public interest." Natural Gas Act of 1938, 52 Stat. 821. Notably, the original NGA provided a statutory scheme for delayed judicial review, but the original NGA did not include a provision delegating the power of eminent domain. 52 Stat. 831-32 (section 19); 52 Stat. 825 (section 7(c)).

As the above discussion illustrates, the elaborate and massive statutory framework under the CSRA evinces Congress' clear intent to include in its scheme a whole host of claims that might potentially arise in the employment context, including constitutional claims. By contrast, the NGA evinces a statutory scheme that holds as its sole purpose regulation of the transportation and sale of natural gas in interstate commerce. The NGA's review provisions, as outlined in the original 1938 Act, provided an exclusive review system for "any party to a proceeding ***under this Act*** aggrieved by an order issued by the Commission...." 52 Stat. 831 (emphasis added).

It was not until 1947 that Congress saw fit to delegate the power of eminent domain ***automatically*** upon issuance of a Certificate. *See* 61 Stat. 459. Indeed, it is hard to imagine that Congress could have even contemplated that a party should bring a constitutional challenge to a delegation that had not yet occurred within the statutory scheme outlined in 1938 that remains unchanged to this day. And there is simply no evidence in the congressional record or otherwise indicating that when Congress amended the NGA in 1947 to include the current eminent domain provisions found at 15 U.S.C. § 717f(h), that Congress intended that a challenge to that delegation as overly broad should be heard as a challenge to a "proceeding *under this Act.*" Such a conclusion would make little practical sense, particularly where one can only seek review of a final order of the Commission, which is wholly separate and distinct from seeking judicial review of an overly broad congressional act committed in 1947.

It is also important that "none of the cases relied upon by defendants" or the district court for that matter, "presented the *precise* constitutional challenges that plaintiffs raise...." JA 538 (emphasis in original). This challenge is unique, not only among cases relating to the NGA, but to other statutory schemes, because the core of the Landowners' challenge arises under the delegation doctrine. *See, e.g.*, *Whitman v. American*

Trucking Association, 531 U.S. 457, 474-75 (2001) ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."). The distinctiveness of this case, particularly in the context of the NGA, is illustrated in the half dozen or so cases relied upon by the district court and the Appellees which define the contours of the sort of FERC action that falls within the statutory scheme envisioned by Congress in 1938 and in 1947. Furthermore, the NGA or NGA-like cases cited by the district court in section II.A. of its opinion, and which are discussed in detail below, do just the same: they define the contours of the sort of FERC action that falls within the statutory scheme envisioned by Congress, and reinforce the conclusion that the Landowners' claims do not "inhere" in some FERC action or "arise under" the exclusive review scheme. For all of the reasons described above and those that will be discussed below, the intent of Congress to divest the district court of jurisdiction over the challenges here is not "fairly discernible in the statutory scheme." The district court possesses subject matter jurisdiction under 28 U.S.C. § 1331.

1. Congress Never Envisioned the Landowners' Claims To Be Reviewed Within Section 717r

Though Congressional intent is lacking under the first step of the *Thunder Basin* framework, it is also apparent that the Landowners' claims are not of the type Congress intended to be reviewed within the statutory structure of the NGA. As discussed above, the structure and practice of FERC under the NGA "forecloses all meaningful judicial review," the most important factors under *Thunder Basin*. *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15. Second, the Landowners' claims are wholly collateral to the review provisions contained in section 717r. Finally, FERC offers no expertise on whether Congress set forth adequate intelligible principles when it amended the NGA to delegate the power of eminent domain in 1947. Likewise, FERC has no expertise to offer on the practical effect of its exercise of a power it never lawfully obtained.

D. The Landowners' Challenges Are Wholly Collateral to the Regulatory Review Scheme

For many of the reasons articulated above, it is clear that the Landowners' challenges are "wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15. To recap, FERC confesses that it does not have the power or jurisdiction to review challenges to Congress' delegation of the power of eminent domain under section 717f(h) or to even make any independent determination of whether to convey the power of eminent domain to a natural gas company. That is because the claims asserted by the Landowners in this action do not arise under or inhere in any controversy governed by the NGA's review provisions. Indeed, not only is judicial review unavailable to the Landowners under section 717r, FERC also bars the doors to the courthouse by sidestepping explicit instructions from Congress to make decisions on rehearings within 30 days. Each of these conclusions, as supported by the analysis above, equally and independently illustrate the fact that the Landowners' challenges here are wholly collateral to the regulatory review scheme envisioned in section 717r.

In its Memorandum Opinion, the district court hinged its analysis of the "wholly collateral" factor on the following quote from *Bennett*: "Claims are not wholly collateral when they are the vehicle by which [plaintiffs] seek to reverse agency action." JA 545; 188 F.3d 186-87. Notably, this Court also recognized in *Bennett* that "the reference point for determining whether a claim is 'wholly collateral' is not free from ambiguity." *Id.* at 187. As a result, this Court has noted that its reading of the factor "reduces the factor's independent significance." *Id.* Furthermore, this Court in *Bennett* also recognized a second reading of the "wholly collateral" factor, namely "whether a claim is wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 186 (citing *Elgin*, 567 U.S. at 15). Though the district court opted for the first reading in *Bennett*, under either reading, the Landowners' claims are "wholly collateral" in nature.

In its opinion, the district court contends that the Landowners here conceded that their goal was to reverse FERC's action of granting the Certificate for MVP: "plaintiffs admitted as much at argument, in that they conceded that if they were successful on their constitutional claims, the FERC order would be invalidated, at least insofar as it conveyed to MVP eminent domain authority." JA 545. While the Landowners did in fact argue "that a natural consequence may be to invalidate that part of the order where eminent domain automatically conveys," the Landowners' position is clear that "the original delegation itself is invalid; so the consequences of that are the actions subsequent are also invalid" but "[it] wouldn't necessarily mean that the Commission's order as a whole is invalid because there's … 160-some pages of information of different parts of FERC's competence here, but the provisions of eminent domain that were conveyed without any intelligible principles would be invalid, yes, one part of that order." JA 519-520.

The district court's application of the "wholly collateral" standard in this case, however, highlights the problem with such a narrow reading of *Thunder Basin* and its progeny. Under the limited reading employed in *Bennett*, any challenge at all that has the *effect* of invalidating some agency action could never be wholly collateral. This makes little practical sense on the facts before the Court at present, and given the facts of *Bennett*, likely explains why the Court opted to treat this prong of the analysis as if it were identical to a collateral attack on a judgment. In *Bennett*, the plaintiff did "seek to affect the merits of the SEC proceeding" because "her true concern [wa]s a sanction." *Bennett*, 844 F.3d 184, n.8. Bennett sought to avoid responsibility and a sanction for misdeeds; whereas here, the Landowners proactively seek to enforce their constitutionally recognized and sacred right to private property. A potential effect of enforcing a constitutional right (*e.g.*, invalidation of the automatic grant of eminent domain under the NGA to FERC and then to MVP in this case) should not drive the jurisdictional analysis. Indeed, this Court recognizes that fact in *Bennett* by reducing the independent significance of the "wholly collateral" prong. *Id.* at 187.

The better reading of *Thunder Basin* and its progeny is that this element asks "whether a claim is wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 186 (citing *Elgin*, 567 U.S. at 15). That reading of *Thunder Basis* is borne out by examining the factual situation present here and the situations in *Free Enterprise, Mathews v. Eldridge*, *McNairy v. Haitian Refugee Center, Inc.*, and *Kreschollek*. For example, in *Free Enterprise*, the plaintiffs were not required to pursue their constitutional claims through the very body which they claimed should not even exist. 561 U.S. at 490-91. In *Mathews*, the Supreme Court held that a constitutional challenge to an administrative process could be brought in federal district court even where the plaintiff was still required to proceed through the administrative process to reclaim a benefit that had been stripped away. 424 U.S. at 327-332. The Court in *McNairy* similarly found that challenges to an administrative process in general, as opposed to an action seeking "review on the merits of a denial of a particular application," did not divest a district court of general federal-question jurisdiction. 498 U.S. at 494. Finally, in *Kreschollek*, the Third Circuit found that "Kreschollek's attempt to seek a declaration of his right to a pretermination hearing is in no way inimical to the purpose of the [Longshoreman] Act and its amendments." 78 F.3d at 874.

Under any reading of "wholly collateral," the Landowners' claims here qualify as such. Undoubtedly, the Landowners are generally aggrieved by the Certificate FERC issued to MVP, but the Landowners and the various community organizations to which they belong continued to submit to FERC what is FERC's for decision and maintain that subject matter jurisdiction of their current constitutional claims lies in the district court, regardless of any ancillary impact that the court's ruling could have on MVP's or any other natural gas company's power of eminent domain under a Certificate. The letter and spirit of the *Thunder Basin* line of cases commands that the Landowners' claims here be viewed as wholly collateral to the statutory review scheme of the NGA.

E. The District Court Correctly Found, and MVP and FERC Admit, that the Landowners' Claims Fall Well Outside of FERC's Experience and Expertise

The final factor to analyze under the second prong of the *Thunder Basin* framework focuses on whether the claims at issue fall within the particular expertise and experience of FERC. First, the district court correctly found that "FERC does not have expertise in ruling on constitutional questions, nor could it rule on whether authority was unconstitutionally delegated to it." JA 545-546. Second, FERC conceded at the motions hearing and in the MVP Certificate that it could not and would not analyze, evaluate, or pass judgment on the Landowners' claims in this case because FERC is not an Article III court. *See* JA 480-481; JA 357. MVP admitted the same. JA 498. There is no dispute that the third and final factor supports the Landowners' position that the district court possesses subject matter jurisdiction in this case.

F. Conclusion

Application of the *Thunder Basin* framework leads to one conclusion: that subject matter jurisdiction lies in the district court because Congress did not impliedly divest the district court of jurisdiction by enacting the so-called "exclusive" review provision of the NGA. Critically, the most important factor of the *Thunder Basin* analysis, meaningful judicial review, weighs heavily in favor of the Landowners. In this case, FERC cannot adjudicate the Landowners' claims, and FERC then locks the courthouse doors by sitting on petitions for rehearing until after the pipeline is built. Standing alone, the fact that the Landowners will never obtain meaningful judicial review is enough to reverse the district court's dismissal, but taken as a whole, the *Thunder Basin* factors overwhelmingly favor the Landowners.

The Landowners' claims are wholly collateral to the FERC process, and even if the Landowners succeed on the merits, the relief sought is limited to declaratory and injunctive relief only on the grant of eminent domain. The district court, FERC, and MVP all concede that FERC's expertise does not offer any assistance with the Landowners' claims, and review of the NGA and its implementation by courts firmly establishes that Congress never intended for the Landowners' claims to fall within section 717r. The district court possesses subject matter jurisdiction, and the case should be remanded to proceed on its merits.

II. THE DISTRICT COURT'S ANALYSIS WAS FUNDAMENTALLY FLAWED BECAUSE THE DISTRICT COURT MISUNDERSTOOD THE NATURE OF THE LANDOWNERS' CLAIMS AND THE SCOPE OF THE NGA'S "EXCLUSIVE" REVIEW SCHEME

A. The Landowners' Claims Do Not Inhere In or Arise Out of the NGA

In its Memorandum Opinion, the district court misapplied the applicable standard where there is a question as to whether Congress implicitly excised certain claims from judicial review under 28 U.S.C. § 1331. JA 535-540. Where there is no express jurisdictional bar imposed by Congress in a regulatory scheme, courts have been directed to apply the *Thunder Basin* analysis to determine whether Congress implicitly divested a district court of jurisdiction. Here, the district court focused on a host of NGA and NGA-like cases ostensibly in support of the proposition that the Landowners' claims in this case either "inhere" in the controversy or are not "wholly collateral" to the issues before FERC. While these questions properly arise in the context of a *Thunder Basin* analysis, the district court extracted statements from these cases without conducting a robust analysis within the proper framework. Indeed, when the cases cited by the district court are analyzed fully within the facts of the particular case and weighed appropriately within the *Thunder Basin* framework, it is clear that the Landowners' claims in this case are not the sort of claims Congress intended to be heard within the NGA's regulatory review scheme. Without exception, the cases relied upon by the district court illustrate that the

Landowners' claims here are not the sort of claims that Congress implicitly sought to channel through administrative review under FERC. And while these cases are discussed separately in the first prong of the *Thunder Basin* framework, the analysis within this section of the Landowners' arguments bolsters the fact that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case.

1. The "Exclusive" Review Provisions of the NGA Do Not Apply to the Landowners' Claims

In its Memorandum Opinion, the district court pointed to several cases for the proposition that section 717r of the NGA is an expansive and exclusive review scheme. JA 536. That proposition is not wrong *per se*, but it is an oversimplification of the statutory scheme as it applies here.

The district court first cited *Consolidated Gas Supply Corp v. Federal Energy Regulatory Commission*, 611 F.2d 951 (4th Cir. 1979), where the Fourth Circuit reversed the district court's exercise of jurisdiction and grant of injunctive relief in favor of Consolidated Gas. In this pre-*Thunder Basin* case, Consolidated Gas sought injunctive relief related to a show cause order issued by FERC regarding volumetric limitations imposed during a national natural gas shortage. Unlike the constitutional challenges to Congress' delegation of the power of eminent domain at issue in the present case, Consolidated Gas sought judicial review in the district court on issues that it admitted fell squarely within the expertise of FERC and section 717r's review provisions. Specifically, Consolidated Gas stated that its action sought to "preserve this Court's jurisdiction over the issues on appeal … as a protective measure." *Id.* at 975. Unlike the situation in *Consolidated Gas*, the Landowners here have brought challenges to a Congressional action, not to an action of FERC limited to, or dependent upon, a particular FERC order. Accordingly, *Consolidated Gas* offers little insight into the issue of implicit divestment of jurisdiction on collateral constitutional claims addressed nearly two decades later by the Supreme Court in *Thunder Basin*.

Some four decades prior to the *Thunder Basin* decision, the Supreme Court decided *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), another case the district court cited here. In *City of Tacoma*, the Supreme Court analyzed the interplay between federal preemption and licensing of a power plant under the Federal Power Act. The case focused on whether a federal license to construct and operate a power plant granted to the City of Tacoma under the Federal Power Act, as well as the conferral of the federal power of eminent domain, gave the City power to take a state-owned fish hatchery when state law was silent on the issue. *Id.* at 333. In effect, the issue brought to the federal district court centered on whether the Federal Power Commission had lawfully performed its functions in granting the license to the City of Tacoma. *Id.* at 337. The Taxpayers of Tacoma contended that state law had not been adequately considered by the Federal Power Commission in evaluating the City's license application. In finding that the district court did not possess jurisdiction, the Supreme Court stated that the statutory scheme at issue "necessarily precluded *de novo* litigation between the parties of all issues *inhering* in the controversy…." *Id.* at 336 (emphasis added).

In *City of Tacoma*, the challenge mounted by the plaintiffs inhered in the controversy in the most direct manner conceivable; it directly challenged the internal decision-making process of the Federal Power Commission. Thus, it comes as no surprise that the Supreme Court found that Congress, so long as it is "acting within its constitutional powers," may establish an administrative review scheme where access to the courts is delayed. *Id.* But, the Court in *City of Tacoma* expressly limited its analysis to the timing of ultimate "judicial review of administrative orders" within an applicable statutory scheme and did not consider, much less address, an issue that was not before the court: whether a challenge to the Congressional act of delegation as overly broad inheres in a controversy centered only on a challenge to a particular administrative order. *Id.*

As discussed in more detail above, nothing about the Landowners' challenges inhere in a controversy about how FERC made its determinations in granting MVP, or any other natural gas company, a Certificate. Indeed, the Landowners here challenge the notion that Congress was properly "acting within its constitutional powers" in the first place, not whether FERC properly applied its own policies and standards in issuing a Certification to MVP. Accordingly, *City of Tacoma*, read fully and in its proper context, does not stand for the proposition that the Landowners' challenge inheres in some administrative controversy, but reinforces that the Landowners' challenge falls far outside FERC's administrative process and exclusive judicial review procedures set forth in the NGA.

The same holds true for the district court's reliance on *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989). In another pre-*Thunder Basin* non-binding case, the issue before that court was whether a state court injunction granted in favor of Oklahoma City under state law could lawfully issue where FERC determined that the project fell within FERC's jurisdiction as an interstate project and was subject to the NGA's judicial review procedures. At its very core, the ruling in *Williams* centered on whether the project was interstate or intrastate, a question that fell squarely within FERC's regulatory scheme and the exclusive jurisdiction procedures under the NGA. Whether a natural gas project is interstate or intrastate is a factual question to be decided during the FERC application process, and FERC is free to exercise its discretion in making a finding on this point, a type of discretion that does not translate to the issue of eminent domain.

The Tenth Circuit's opinion found that a state court injunction proceeding to challenge FERC's finding was an impermissible collateral challenge to the FERC process, not because *all* issues necessarily inhere in a controversy with FERC (a conclusion that would be absurd on its face), but because factual determinations about the nature of the project as interstate were properly within the scope of FERC's lawful powers. Accordingly, the challenge at issue, though brought as a collateral challenge in state court, fell within the regulatory regime outlined by the NGA, had been challenged within the administrative process itself, and therefore jurisdiction outside of the exclusive review provisions of the NGA could not be maintained. Much like the Supreme Court's dicta in *City of Tacoma*, the language cited and relied upon by the district court from *Williams* is limited to issues arising within, or inhering, in a controversy raised within the FERC process itself. Such language should not, and cannot, be read to apply to the issue before this Court, whether a challenge to a Congressional act as overly broad falls outside section 717r of the NGA.

There can be no doubt that section 717r of the NGA generally applies to all issues inhering in, or arising under FERC's regulatory process. But even where an issue inheres in the controversy, *Thunder Basin* instructs that other factors may weigh against divesting a district court of jurisdiction. Though the cases discussed above offer some insight into the genesis of the *Thunder Basin* framework discussed in detail above and what it means for an issue to inhere in a FERC controversy, the cases do not address the situation before this Court and must be viewed in their appropriate context.

2. The Cases Cited by the District Court Demonstrate that the Landowners' Claims Do Not Inhere in a FERC Order

The district court cites several non-binding cases for the proposition that the Landowners' claims here "inhere" in a FERC order, the MVP Certificate. These cases include *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602 (6th Cir. 2010), *Maine Council of Atlantic Salmon Federation v. National Marine Fisheries Service*, 858 F.3d 690 (1st Cir. 2017), *Hunter v. FERC*, 569 F. Supp. 2d 12 (D.D.C. 2008), *Pub. Util. Dist. No. 1 v. FERC*, 270 F. Supp. 2d 1 (D.D.C. 2003), *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 U.S. Dist. LEXIS 91944 (D. Mass. July 15, 2015). Notably, none of these cases apply a *Thunder Basin* framework, and each of the cases ostensibly makes a finding that the issue or controversy arises under the NGA or inheres in a controversy that falls squarely within FERC's ambit.

First, the district court points to *Am. Energy Corp.* for the proposition that "exclusive means exclusive" under section 717r of the NGA. But the Sixth Circuit recognized that the claims brought by American Energy stemmed from "the brief that FERC did not adequately consider the safety risks and business interruptions that the coal companies would face from the pipeline...." *Am. Energy Corp.*, 622 F.3d at 605. Questions arising from or inhering in the statutory realm covered by the NGA and FERC's own rules are challenges that fall within the exclusive review provisions of 717r. The Sixth Circuit noted that not only did FERC address American Energy's specific complaints within the FERC certification process itself, but also at the rehearing and at the time of the court's opinion, the same issues were on appeal to the D.C. Circuit. *Id.* at 605-606. Put simply, American Energy did not levy any challenges that were not ordinarily subject to FERC review and consideration, much less any challenge that remotely compares to a challenge to an overly broad Congressional delegation of power under the NGA.

Similarly, in *Maine Council*, the Appellants complained of FERC's issuance of a Certificate for a power plant where the Appellants did not agree with

FERC's view of biological opinions issued from the Fisheries Service under the Endangered Species Act. *Maine Council*, 858 F.3d at 692. As the First Circuit rightly pointed out, the biological opinions "were by any measure inherent in the statutory process for consideration of the license modifications." *Id.* at 693 (internal quotations omitted). There can be little doubt that issues surrounding whether FERC properly analyzed biological opinions in assessing the environmental impact of a project fall squarely within the statutory scheme envisioned by Congress in enacting the NGA.

Third, in *Hunter v. FERC*, the D.C. district court found that it lacked subject matter jurisdiction where the Plaintiff "concede[d], in essence, that judicial review of a FERC order must be brought in the circuit courts," but nevertheless challenged a FERC Order to Show Cause in district court instead of before FERC. *Hunter*, 569 F. Supp. 2d at 15. The court in *Hunter* also found that "Hunter essentially seeks to challenge FERC's interpretation and application of its anti-manipulation enforcement authority as opposed to challenging that it is disregarding a statutory mandate." *Id.* at 16. Hunter's claim was "so intertwined" with FERC's Order to Show Cause because the key allegation made by Hunter was that FERC had misapplied and exceeded the bounds of its own intra-agency rules. Hunter's challenge, then, was not a challenge to congressional action or to some applicable constitutional standard, but to FERC's internal actions and decision-making processes, and provides support only for the notion that a challenge to FERC's implementation of its own procedures and policies is properly brought pursuant to the exclusive judicial review mechanisms unique to the type of order.

Likewise, *Pub. Util. Dist. No. 1 v. FERC* provides nothing new or helpful to the issues before this Court. In that case, the district court declined jurisdiction where the plaintiff sought "review of the FERC's April 23, 2003 Order denying the plaintiff's request that Chairman Wood and Commissioner Brownell recuse themselves from further consideration of the plaintiff's case." *Pub. Util. Dist. No. 1*, 270 F. Supp. 2d at 4. The plaintiff's challenge centered on alleged violations of FERC's regulations by two commissioners, a matter that is routinely and appropriately before FERC to decide, much like district courts are competent in the first instance to handle recusal motions and determinations of jurisdiction. *Id.* at 9. Like the other cases cited by the district court, *Pub. Util. Dist. No. 1* dealt with a challenge to some decision-making process of FERC and not an extra-agency constitutional challenge like the case here.

Fifth, the district court points to *Town of Dedham v. FERC* as yet another example where a district court declined to exercise subject matter jurisdiction "even in cases where the challenge is not a direct challenge to the order." JA 537.[9] Much like the cases discussed above, however, the court in *Town of Dedham* determined that it lacked subject matter jurisdiction because the Town was challenging FERC's decision

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[9] Though the district court did not analyze *Town of Dedham* in the context of *Thunder Basin*, it appears that the district court cites *Town of Dedham* in relation to the "wholly collateral" element of the *Thunder Basin* framework.

granting a pipeline company a Notice to Proceed with construction on certain segments of the line. 2015 U.S. Dist. LEXIS 91993, at *5. The question of whether FERC properly or improperly issued a Notice to Proceed, however, derives from the application of internal FERC rules and procedures which fall within the purview of section 717r of the NGA. According to the district court, the Town's immediate relief could be sought under the All Writs Act in the Court of Appeals in anticipation of future jurisdiction by the Court of Appeals under the review provisions in section 717r of the NGA. *Id.* Again, no decision by FERC is at issue in this case, and *Town of Dedham* is of limited value here.

Finally, the district court references two cases that involve "constitutional (or like) challenges where the courts held they lacked jurisdiction due to the NGA's judicial review provision." JA 539. *See e.g., Adorers of the Blood of Christ v. FERC*, No. 17-cv-3163, 2017 U.S. Dist. LEXIS 161721 (E.D. Pa. September 28, 2017); *Adorers of the Blood of Christ v. FERC*, No. 17-3163, 2017 U.S. App. LEXIS 25215 (3d Cir. 2017);[10] *Lovelace v. United States*, No. 1:15-cv-30131-MAP, 2016 U.S. Dist. LEXIS 192225 (D. Mass. Feb. 18, 2016).

Though the district court characterized *Adorers* as presenting a constitutional (or like) challenge, the plaintiffs in that case claimed that the FERC order at

[10] The Third Circuit did not consider an appeal on the merits; rather, the Adorers moved the Third Circuit to enter an injunction pending appeal. The Third Circuit denied the motion "[f]or essentially the reasons given by the District Court in dismissing Appellants' claims for lack of jurisdiction…." 2017 U.S. App. LEXIS 25215, at *2.

issue violated a statute, the Religious Freedom Restoration Act, 41 U.S.C. §§ 2000bb, *et seq*. The plaintiffs in *Adorers*, a religious order of Roman Catholic women, invoked a statute that conveyed a "claim or defense in a judicial proceeding," the applicability of which rightly could have been debated and analyzed within the applicable FERC proceedings. *Adorers*, 2017 U.S. Dist. LEXIS 161721, at *5-6. Indeed, "[d]isputes as to the propriety of FERC's proceedings, findings, orders, or reasoning, must be brought to FERC by way of request for rehearing." *Steckman Ridge GP, LLC v. Exclusive Natural Gas Storage Easement Beneath 11.078 Acres*, 2008 U.S. Dist. LEXIS 71302, *11 (W.D. Pa. Sept. 19, 2008) (addressing challenges to a FERC order in the context of condemnation proceedings). The district court in *Adorers* ultimately found that FERC could have considered, analyzed, and addressed the plaintiffs' statutory claims within the FERC process, thus the claims "inhere in the controversy" and were subject to the NGA's review procedures. *Adorers*, 2017 U.S. Dist. LEXIS 161721, at *12.

The district court also pointed to *Lovelace v. United States* as an example of a challenge to an impending FERC decision that involved a Fifth Amendment takings claim. 2016 U.S. Dist. LEXIS 192225 (D. Mass. Feb. 18, 2016). In *Lovelace*, the plaintiffs' main argument centered on whether the proposed pipeline, which had not yet been certificated, was primarily being built for export, and hence for a non-public use under the Fifth Amendment. *See* Transcript of Hearing, p. 21, ECF Doc. 39 in Case No. 3:15-cv-30131-MAP. At the hearing on jurisdiction, among other issues, the plaintiffs effectively requested the district court to dismiss its action so it could complain to FERC, which had yet to respond to the plaintiffs' concerns about exportation of gas: "with that document in hand I go to FERC and I say I'm raising the issue here… Then I can go to the First Circuit Court of Appeals and say we raised the issue and Judge Ponsor threw us out saying this, you didn't raise the proper issue and then I can take it back to FERC." Transcript at p. 26.

Importantly, Judge Ponsor remarked that "I think that the Natural Gas Act *absolutely strips judges* in my position of *any ability under any theory* to get involved in the process of determining whether a natural gas pipeline is going to be built and if so, where and how." Transcript, p. 27 (emphasis added). This blanket statement, coupled with the district court's lack of any reference to the *Thunder Basin* framework, is instructive. Though styled as a constitutional challenge, the plaintiffs' claims focused on the issue of where gas was to be shipped, a question well within the structure and expertise of FERC to answer. The clear issue that had yet to be addressed by FERC in *Lovelace* was where gas might be shipped and for what purposes, not whether Congress' original delegation of the power of eminent domain was overly broad in the first place. *Lovelace* simply does not help the analysis here.

It bears reemphasis that "none of the cases relied upon by defendants" or the district court for that matter, "presented the *precise* constitutional challenges that plaintiffs raise…." JA 538 (emphasis in original). And while each case discussed above assists with exploring the contours of the NGA, none of the cases offer real guidance on the question of whether the NGA implicitly divests the district court of § 1331 jurisdiction where the plaintiffs challenge a Congressional act. Instead, the cases discussed above reinforce that the Landowners' challenges here are unique, not within the statutory purpose of the NGA's review provisions, and are wholly collateral to the issues inhering in the FERC order and process at issue. Jurisdiction was proper in the district court.

CONCLUSION STATING PRECISE RELIEF SOUGHT

For all of the foregoing reasons, the Landowners respectfully request this Court reverse the judgment of the district court holding that it lacked subject matter jurisdiction under 28 U.S.C. § 1331 and dismissing Counts I-III of the Landowners' Complaint, and remand this case to the district court for further proceedings.

Respectfully submitted,

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<u>REQUEST FOR ORAL ARGUMENT</u>

The Appellant requests leave to present oral argument in support of its position.

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[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX L

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 18-1042

[Filed March 6, 2018]

ORUS ASHBY BERKLEY, *et al.*,	)
	)
Plaintiffs - Appellants,	)
	)
v.	)
	)
MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,	)
	)
Defendants - Appellees.	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

JOINT REPLY BRIEF OF APPELLANTS

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[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

ARGUMENT

Defendants MVP and FERC adopt the district court's reasoning that the Landowners' standing arguments defeat their ability to raise a constitutional challenge.[1] In other words, because the Landowners have standing, the district court concluded that they cannot assert a "facial" challenge. According to MVP's and FERC's reading of the district court's opinion, such a challenge is concerned with an "abstract" constitutional violation but because the Landowners have asserted that they have standing, i.e., they have demonstrated an injury-in-fact that is concrete and particularized to them and their particular parcels of land, they cannot then simultaneously claim to be concerned with an abstract or facial constitutional issue. And since they are not concerned solely with an abstract facial issue but, rather, with a particularized injury-in-fact to their own properties, they clearly are not able to raise a facial challenge and thus the Court has no subject matter jurisdiction. This reasoning is

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[1] *See* Brief of Appellee Mountain Valley Pipeline, Doc. 34 at 12 of 42 ("As the district court stated in its memorandum opinion, 'plaintiffs' own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by MVP's proposed pipeline") (citing Joint Appendix ("JA") 539); *see also* Brief for Defendants-Appellees FERC, Doc. 33-1 at 16-17 of 35 ("As the district court correctly recognized, Landowners' Complaint and arguments demonstrate that they are challenging Mountain Valley's ability to exercise eminent domain authority under a FERC issued certificate order. That is, Landowners are not just concerned with an abstract constitutional violation, but with the impact of the FERC-authorized Mountain Valley pipeline on their land.").

fundamentally flawed. The district court—as well as MVP and FERC—has erred.

Instead, the law ***requires*** plaintiffs to assert standing ***in order to*** raise a constitutional challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that plaintiffs asserting a constitutional challenge ***must*** establish the "constitutional minimum" elements of an injury-in-fact that is "concrete" and "particularized," "actual" or "imminent," "'not conjectural or hypothetical,'" causally connected, and likely to be redressed by the court).

If the Fourth Circuit were to adopt the district court's reasoning, no plaintiff could ever bring a constitutional challenge. There would be no route to do so: the plaintiff would have to choose between *not* proving standing (in which case they would be dismissed for lack of standing) or proving standing (in which case they would be dismissed, on the district court's reasoning, for proving standing and somehow defeating their own challenge). The reasoning is clearly erroneous and contrary to a fundamental principle of constitutional law.

Standing does not defeat a constitutional challenge. It is instead an indisputable ***prerequisite*** of raising that challenge in the first place. The fact that the Landowners here have demonstrated an injury-in-fact that is concrete and particularized to them does not undermine their challenge, but bolsters it.

Had the Landowners *not* alleged an injury-in-fact, they would not have standing to raise the challenge. Courts across the country consistently dismiss such constitutional challenges for lack of standing where plaintiffs do not have injuries-in-fact, i.e., where they only bring what the district court in the case at bar called "abstract" challenges but have no concrete injury themselves. *See, e.g.*, *Toghill v. Clarke*, 877 F.3d 547, 552 (4th Cir. 2017) (*quoting County Court v. Allen*, 442 U.S. 140, 154-55 (1979)) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.")); *see also McDonald v. Commonwealth*, 48 Va. App. 325 (Va. Ct. App. 2006); *Metrolina Family Practice Group, P.A. v. Sullivan,* 1991 U.S. App. LEXIS 4727 (4th Cir. 1991) (holding in part that plaintiff doctors—who brought facial constitutional challenges to Medicare Part B—did not "assert the rights of others" but rather alleged that they "suffered 'injury in fact' as a result of being regulated by the federal government" and therefore had standing to challenge the Medicare provisions); *see also ACLU of New Mexico v. City of Albuquerque*, 142 N.M. 259, 265 (Ct. App. N.M. 2007) (dismissing plaintiffs' facial challenge that an ordinance is overbroad because plaintiffs did not prove they suffered an injury-in-fact or faced an imminent threat of injury: "In order to advance a facial challenge, Plaintiffs are required to meet the traditional requirements for standing . . . Plaintiffs have failed to demonstrate that they have suffered an injury in fact or experienced the imminent threat of an injury. Therefore, Plaintiffs have not met the standing requirements needed to mount a facial challenge to the Ordinance.").

On a final note, proof of standing (i.e., injury-in-fact to particular parcels of land) does not mean that the Landowners are concerned only with the effect of the statute and FERC's Certificate on their particular land and none other (a line of reasoning Defendants adopt as an attempt to sidestep jurisdiction by claiming the Landowners have no genuine constitutional concerns); rather, the injury-in-fact to the Landowners' land is the factual basis that allows the Landowners to raise their constitutional challenge in the first place. The injury-in-fact is merely a natural and probable *consequence* of the obvious problems with the statute. Its existence does not defeat the ability to raise a constitutional challenge but, rather, necessitates it. Put simply, it is not possible for a plaintiff to raise a constitutional challenge without first demonstrating an injury-in-fact.

Furthermore, as to Defendant MVP's assertion that the Landowners are "walk[ing] back their claims" and have only now, on appeal, challenged a "Congressional act" but beforehand allegedly only challenged a "pipeline project,"[2] such allegations are baseless. It is indisputable that Landowners' very first pleadings immediately raised a constitutional challenge to the *delegation* of power from Congress to FERC via the Natural Gas Act ("NGA"). The Landowners not only asserted the "delegation" challenge in the substantive counts plead, but also provided a detailed and lengthy legal analysis and comparison to other delegation cases previously brought before the Supreme Court,[3] all of

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[2] Brief of Appellee Mountain Valley Pipeline, Doc. 34 at 12 of 42.

[3] Plaintiffs' Memorandum of Law, Doc. 5 at 18-35 of 42, explaining restrictions on Congressional delegations of power and citing

which were appropriately decided upon *on the merits* since the Court was—and still is—the only entity with subject matter jurisdiction to decide overly broad delegations of power by Congress. The Defendants' present attempt to defeat subject matter jurisdiction over a Congressional act by mischaracterizing on appeal the Landowners' initial constitutional challenge is contradicted by the pleadings on record.

As to the Defendants' interpretations of *Thunder Basin*, the Landowners re-assert their position in the Opening Brief: there is no meaningful review by an administrative agency for constitutional challenges to Congressional delegations of power. Congress did not—and could not—divest the district court of jurisdiction over such challenges. The Landowners' claims are therefore "wholly collateral" to the agency's proceedings and, as repeatedly conceded by Defendant FERC on oral argument and again in FERC's Response, neither MVP nor FERC could have the expertise to decide constitutional questions about Congressional acts.[4] MVP's and FERC's arguments

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delegation case law including but not limited to: *J.W. Hampton. Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Clinton v. City of NYC*, 524 U.S. 417 (1998); *United States v. Chicago. M.. St. P. gt P.R. Co.*, 282 U.S. 311, 324 (1931); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *A.L.A. Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[4] *See* Brief for Defendants-Appellees FERC Doc. 33-1 at 13 of 35 ("While observing that it is for the courts to determine the constitutionality of the Natural Gas Act's eminent domain provisions . . .). Note that the Landowners did not assert that Defendant FERC did not follow its own procedures but, rather,

about the application of the *Thunder Basin* standard do nothing to undermine or challenge the Landowners' arguments on these points. Accordingly, the Landowners stand on their arguments in their Opening Brief.

In short, the district court has erred, not only in the method of its analysis but in reaching the conclusion that it lacks subject matter jurisdiction. The Landowners' standing does not defeat their constitutional challenge but, rather, qualifies these Landowners as the most appropriate persons to bring such a challenge. The decision must be reversed.

As requested by motion and in their Opening Brief, the Landowners respectfully request expedited oral argument before irreversible harm occurs to their respective properties.

Respectfully submitted,

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that the entire framework is fundamentally flawed because the delegation of power by Congress to FERC was overly broad and thus allowed FERC to create the unconstitutional framework in the first place. Such a delegation challenge is first and foremost a challenge to the congressional act that delegated the power to the agency and not simply a challenge to an agency order itself.

JR.; EDITH FERN ECHOLS; GEORGE LEE JONES; ROBERT WAYNE MORGAN; PATRICIA ANN MORGAN; MARGARET MCGRAW SLAYTON LIVING TRUST; THOMAS TRIPLETT; BONNIE B. TRIPLETT

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[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]