

No. 19-1039

IN THE

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC, *Petitioner*,

v.

STATE OF NEW JERSEY, ET AL., *Respondents*.

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

**BRIEF OF THE INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA, AMERICAN GAS
ASSOCIATION, AND AMERICAN PETROLEUM
INSTITUTE AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

These *amici curiae* (“Industry *Amici*”) represent infrastructure that is vital to the Nation, including the natural gas industry, interstate pipeline companies, and companies dependent on interstate pipelines to deliver natural gas across the country.

The Interstate Natural Gas Association of America (“INGAA”) represents virtually all interstate natural gas pipeline companies in the United States. INGAA members transport natural gas through a network of over 200,000 miles of interstate pipelines and storage facilities.² Founded seventy-five years ago, INGAA’s mission is to advance the use of natural gas for the benefit of the environment and the consuming public. INGAA frequently comments in the rulemaking process and other activities of the principal federal regulators.

The American Gas Association (“AGA”) represents local distribution companies that deliver natural gas. There are more than 76 million retail residential, commercial, government, industrial, and electric generation natural gas customers in the

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from the *amici curiae* and their members, and their counsel, made any monetary contribution toward the brief’s preparation and submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* further certify that counsel of record for all parties provided written consent for *amici curiae* to file this brief.

² See INGAA, *Pipeline Fun Facts*, <https://www.ingaa.org/Pipelines101/Economics/25811/PipelineFunFacts.aspx> (last viewed Mar. 3, 2021).

United States, and 95% of those customers receive their gas from AGA's members.³ AGA's members are obligated, in accordance with applicable state law and regulatory requirements, to distribute natural gas transported by interstate pipelines to these customers, and they develop detailed long-term supply and transportation plans to ensure that they can reliably meet the Nation's energy requirements. Acquiring necessary pipeline capacity is a critical part of how these companies fulfill their obligation to serve.

The American Petroleum Institute ("API") represents all segments of the oil and gas industry, and its nearly 600 members produce, process, and distribute most of the Nation's energy. The industry supports more than 10 million jobs in the United States. Since 1919, API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.⁴

Industry *Amici* submit this brief on the merits to bring to the attention of the Court the serious threat that the Third Circuit's rule would pose to both the continued development and operation of federally approved interstate natural gas pipeline infrastructure, and the ability of the natural gas industry to ensure reliable consumer access to natural gas at affordable prices.

³ See AGA, *Picture the Potential*, <https://www.aga.org/news/news-releases/picture-the-potential-the-2021-aga-playbook/> (last viewed Mar. 3, 2021).

⁴ See API, *About API*, <https://www.api.org/about> (last viewed Mar. 3, 2021).

SUMMARY OF THE ARGUMENT

The Third Circuit’s rule—immunizing the States from congressionally authorized § 717f(h) actions—is not only incorrect, it is impractical. Congress recognized long ago that the natural gas industry is vital to the Nation. Consequently, Congress enacted the Natural Gas Act (“NGA”) to ensure that, subject to federal review, approval, and oversight, the industry could meet nationwide consumer demand for natural gas at affordable prices. The Third Circuit’s rule would undercut not just that statutory framework, but also the development and operation of critical natural gas infrastructure nationwide. While the Third Circuit essentially would give each State the discretionary power to “veto” a federally approved interstate natural gas pipeline project, Congress in 1947 specifically amended the NGA to eliminate any such State veto power, and to avoid the disruptive impact that a State—acting in its own self-interest—could have on the Nation’s natural gas supply. In so doing, Congress still left ample opportunity for the States and other stakeholders to participate in the federal review and approval process for any interstate natural gas pipeline infrastructure. Accordingly, to avoid the serious practical consequences that would result for the development and operation of the Nation’s natural gas infrastructure, this Court should reject the Third Circuit’s brand-new rule, which would seem to grant the States unconstrained veto power over interstate pipeline projects.

ARGUMENT

I. Immunizing the States from congressionally authorized § 717f(h) actions would have serious practical consequences for the Nation's natural gas infrastructure and supply.

The Third Circuit's rule—immunizing the States from congressionally authorized § 717f(h) actions—would have serious practical consequences for the Nation's natural gas infrastructure and supply. The stability of the natural gas industry is critical to the Nation, as Congress recognized more than eighty years ago in enacting the NGA. Even though increasing consumer demand for natural gas requires new interstate transportation capacity, the States would have something akin to an absolute veto over federally approved interstate pipeline projects. That new State-veto power at a minimum would push the natural gas industry into grave uncertainty, and at worst would halt needed infrastructure development (and operation).

A. A robust natural gas industry is vital to the Nation, and increasing consumer demand requires new interstate transportation capacity.

A robust natural gas industry is vital to the Nation and to meeting consumers' increasing energy needs. Domestic energy companies already project potential challenges in meeting peak demand during winter months, and have assessed their current and planned future transportation capacity as insufficient

to meet forecast demand.⁵ As just one example of a concerning forecast in just one area of New York, National Grid assesses for Brooklyn, Queens, Staten Island, and Long Island “a gap between expected demand and capacity of supply that grows to a range of 265–415 MDth/day by 2032-2035.”⁶

In particular with respect to natural gas, for each of the past 14 years, the Nation’s consumption of natural gas has risen, and in 2019 the amount of natural gas consumed was nearly 50% higher than in 2006.⁷ Today, natural gas meets more than 30% of the Nation’s energy needs.⁸ And, right now, there are approximately 300,000 miles of natural gas pipelines that connect suppliers to consumers nationwide.⁹

⁵ See, e.g., National Grid, *Natural Gas Long-Term Capacity Report for Brooklyn, Queens, Staten Island and Long Island* (“National Grid Report”) (Feb. 2020) at 9, available at https://millawesome.s3.amazonaws.com/Downstate_NY_Long-Term_Natural_Gas_Capacity_Report_February_24_2020.pdf.

⁶ See *id.* at 9. An MDth is a thermal unit of measurement that stands for a thousand dekatherms. A single dekatherm is roughly energy equivalent of a thousand cubic feet of natural gas. See U.S. Energy Info. Admin., *Frequently Asked Questions* <https://www.eia.gov/tools/faqs/faq.php?id=45&t=8> (last viewed Mar. 3, 2021).

⁷ See U.S. Energy Info. Admin., *U.S. Natural Gas Total Consumption*, <https://www.eia.gov/dnav/ng/hist/n9140us2a.htm> (last viewed Mar. 3, 2021).

⁸ See AGA, *U.S. Sets New Two-Day Record for Natural Gas Delivery*, <https://www.aga.org/news/news-releases/u.s.-sets-new-two-day-record-for-natural-gas-delivery> (Feb. 16, 2021).

⁹ INGAA, *Pipelines 101*, <https://www.ingaa.org/Pipelines101.aspx> (last viewed Mar. 3,

Interstate (as opposed to *intrastate*) natural gas pipelines pass through all of the lower forty-eight states. And those *interstate* pipelines account for 71% of the natural gas mainline transmission mileage in the Nation.¹⁰ All but six of the lower forty-eight states are served almost entirely by those *interstate* pipelines.¹¹

177 million Americans use natural gas to heat their homes, warm their water, and cook their food.¹² Natural gas is an efficient energy source for water heaters, vehicles, laundry, kitchen, heating, lighting, and outdoor living spaces.¹³ In addition, there are more than 5.4 million commercial sector customers in the Nation that consume natural gas energy—including schools, stores, hotels, restaurants, and hospitals—mostly for space and water heating.¹⁴ And, as of 2019, natural gas supplies 38% of the Nation’s utility-scale electricity generation.¹⁵ In the industrial

2021).

¹⁰ U.S. Energy Info. Admin., *Interstate Natural Gas Pipeline Segment*, https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/interstate.html (last viewed Mar. 3, 2021).

¹¹ U.S. Energy Info. Admin., *U.S. Natural Gas Pipeline Network, 2009*, https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/ngpipelines_map.html (last viewed Mar. 3, 2021).

¹² AGA, *Learn About Natural Gas*, <https://www.aga.org/natural-gas> (last viewed Mar. 3, 2021).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. Energy Info. Admin., “Natural gas explained,” <https://www.eia.gov/energyexplained/natural-gas/use-of->

sector, natural gas supplies one-third of the total energy consumption, and also serves as a raw material for the production of chemicals, fertilizer, and hydrogen.¹⁶

Recently, when parts of the Nation saw extreme cold weather in February 2021, the Nation set a new two-day record for natural gas delivery.¹⁷ 151.7 billion cubic feet (“Bcf”) of natural gas were delivered on February 14, and 149.8 Bcf were delivered on February 15.¹⁸ That made February 14 the second-highest delivery day *ever*, and set the record for the largest demand for a two-day period in the Nation’s history.¹⁹

Furthermore, the Nation’s increasing reliance on natural gas to meet energy needs requires new interstate transportation capacity. Approximately 1,200 additional miles of natural gas pipeline are planned for every year until 2035 to supply consumer needs.²⁰ In recent years, the “Shale Revolution” (including developments in hydraulic fracturing and horizontal drilling) has made domestic natural gas abundant and affordable.²¹ That increased supply

natural-gas.php (last viewed Mar. 3, 2021).

¹⁶ *Id.*

¹⁷ *See* n.8, *supra*.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ INGAA, <https://www.ingaa.org/Pipelines101/25348.aspx> (last viewed Mar. 3, 2021).

²¹ INGAA, *The Role of Natural Gas in the Transition to a Lower-Carbon Economy*, at pp. 2-4.

also has created the need for more pipeline infrastructure.²²

Overlooking for the moment the Third Circuit's rule, and the potential revolutionary change to the legal regime that governs the natural gas industry in this Nation, the abundance of natural gas is expected to keep prices low and stable for many decades into the future.²³ And, for the next decade and beyond, domestic natural gas supplies are expected to be sufficient to meet growth in demand across all sectors.²⁴ But, if the natural gas industry were to become wracked by upheaval and uncertainty, the gap between supply and demand would be virtually guaranteed to grow.

In this regard, the facts of this case are illustrative. The relevant federal agency, the Federal Energy Regulatory Commission ("FERC"), approved Petitioner PennEast Pipeline Company's natural gas pipeline project primarily because of *existing* demand for natural gas, placing less emphasis on forecast demand.²⁵ Before even applying for FERC approval, PennEast already had entered into long-term, firm precedent agreements with twelve shippers for

<https://www.ingaa.org/File.aspx?id=36501> (last viewed Mar. 3, 2021).

²² See n.9, *supra*.

²³ See n.12, *supra*.

²⁴ *Id.*

²⁵ See J.A. 51, ¶ 29.

approximately 90% of the pipeline’s total capacity of approximately 1,107 MDth/day.²⁶

Without more, New Jersey Respondents’ decision to veto this one FERC-approved interstate natural gas pipeline project creates a practical problem. There is a demand for natural gas that, without the PennEast pipeline, the industry otherwise will need to meet. But it appears that New Jersey will attempt to thwart any industry attempt to do so with any pipeline that would cross its borders, and the Third Circuit has equipped New Jersey with a tool to do just that. Respondents’ decision could impact natural gas consumers not only in New Jersey, but also in New York and the New England region, which typically are served by interstate pipelines through New Jersey.

B. In enacting (and then amending) the NGA, Congress sought to ensure reliable consumer access to natural gas supply at affordable prices.

Congress enacted the NGA in 1938, recognizing that a robust natural gas industry is critical to the Nation, and that in this respect an individual State’s own self-interest sometimes must yield to the national “public interest.”²⁷ Congress empowered a federal agency—now FERC—with “exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.”²⁸ FERC’s “principal

²⁶ See *id.* at ¶¶ 1, 28.

²⁷ See 15 U.S.C. § 717(a).

²⁸ J.A. 396, ¶ 32 (citing *Schneidewind*, 485 U.S. at 300-01 (citing

obligation under the NGA is to ‘encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.’²⁹

Then in 1947, Congress amended the NGA to delegate the federal eminent domain power to natural gas companies that construct interstate pipeline infrastructure—subject to FERC review, approval, and oversight. *See infra* Part II. As FERC has explained, “[t]he power of eminent domain conferred” by the NGA in 15 U.S.C. § 717f(h) “is a necessary part of the statutory scheme to regulate the transportation and sale of natural gas in interstate commerce.”³⁰

A natural gas company that seeks to construct interstate pipeline infrastructure must undertake a years-long administrative process and apply to FERC for a “certificate of public convenience and necessity” for the project. FERC issues such a certificate only after a very thorough agency review, evaluation, and approval of a natural gas company’s proposed project. In deciding whether to issue a certificate, FERC

N. Nat. Gas Co., 372 U.S. at 89)); *see also* 15 U.S.C. § 717(b).

²⁹ J.A. 395, ¶ 30 (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669-70 (1976); accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. at 669-70); *see, e.g., Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,743, 61,751 (1999) (Certificate Policy Statement), *clarified on other grounds*, 90 FERC ¶ 61,128, *further clarified on other grounds*, 92 FERC ¶ 61,094 (2000)).

³⁰ J.A. 236, ¶ 29 (citing *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950) and *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485, 487-88 (W.D.S.C. 1950)).

considers extensive information relating to the proposed project, including existing natural gas market impacts, potential adverse impacts on affected landowners and communities, environmental and economic impacts, and comments and arguments from numerous stakeholders—including the States (*see infra* Part III).³¹ FERC also considers the extent to which it will be necessary for the natural gas company to use eminent domain to place the pipeline into service.³²

Significantly, a natural gas company can exercise the federal eminent domain power only if that company (1) holds a FERC certificate for the proposed interstate pipeline project, and (2) is unable to acquire by contract the property interests necessary to complete the federally approved project.³³

C. Embracing the Third Circuit’s rule essentially would give the States an absolute veto over planned (and even existing) FERC-approved interstate natural gas pipeline infrastructure.

Notwithstanding this decades-old statutory framework, under the Third Circuit’s rule, the States essentially would have an absolute veto over planned (and even existing) FERC-approved interstate natural

³¹ *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

³² *See* 88 FERC ¶ 61,227, at 61,737 (1999).

³³ *See* 15 U.S.C. § 717f(h).

gas pipeline infrastructure. This brand-new State veto power over FERC-approved natural gas pipelines would be seemingly limitless. There are no legal standards or criteria for when or how the States might be able to wield this power.

The Third Circuit's rule apparently would allow the States to escape the federal eminent domain power that Congress has delegated to FERC certificate holders. Under that rule, a State could exercise its new, unreviewable veto power over the pipeline route even *after* the natural gas company and stakeholders (including the State itself) have spent years trying to reach an agreeable pipeline route—and even *after* FERC has issued a certificate, approving a given project and its proposed route.

There appears to be no requirement that a State even own in fee the property that it seeks to immunize from condemnation. A State could forever immunize any property from congressionally authorized condemnation, so long as the State—or any subdivision of the State—has any kind of property interest. And a State could do so forever, so long as that property interest endured in perpetuity.

Even private landowners, upon learning of a proposed (or federally approved) interstate natural gas pipeline project, could permanently immunize more and larger parcels of privately-owned property from condemnation. Private landowners simply could sell a parcel to the State, or convey to the State an inexpensive, easy-to-transfer conservation, agricultural, or other easement interest in the property.

The property interests at issue here show the breadth of the Third Circuit’s rule. New Jersey Respondents “claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation.”³⁴ But Respondents “hold[] fee simple ownership interests in only two of those parcels,” and “non-possessory property interests” in the other forty parcels, including recreational, conservation, or agricultural easement interests, and “restrictive covenants mandating under state law a particular land use.”³⁵ Some of these non-possessory interests relate to only part of the property parcel.³⁶ Nevertheless, according to the Third Circuit, those interests were sufficient for Respondents to stop the FERC-approved project and compel re-routing—if re-routing even might be possible.

Moreover, the actions of New Jersey Respondents demonstrate just how each and every State could establish and enlarge its new veto power over federally approved interstate natural gas pipeline projects. In light of New Jersey’s recent push to acquire property interests in privately-owned land, Respondents claim property interests in approximately 15% of the land in New Jersey.³⁷ Specifically, pursuant to New Jersey’s “Green Acres Program” and farmland programs, New Jersey has acquired interests in over 650,000 acres of land, and as part of the actions of the State Agriculture

³⁴ J.A. 365, ¶ 3, 462 ¶ 5.

³⁵ J.A. 365, ¶ 3.

³⁶ *Id.*

³⁷ J.A. 429, ¶ 60.

Development Committee, New Jersey has acquired interests in over 200,000 acres of farmland.³⁸ As a result, Respondents currently claim property interests in more than 1,300 square miles of land, and that figure does not include lands that New Jersey owns in fee, such as state forests, state parks, and the bottoms of all navigable waterbodies.³⁹

Make no mistake, under the Third Circuit’s rule, New Jersey’s “no build” zone—and similar zones of prohibition in other States—quickly would grow.⁴⁰ That is because the States and private landowners seemingly could immunize their property from congressionally authorized § 717f(h) actions with little effort.

For example, the applications to sell or donate a property interest to New Jersey’s Green Acres Program are two-page PDFs that are available online.⁴¹ In two pages, any private landowner easily can sell a property to New Jersey, or convey to New Jersey an inexpensive conservation easement interest in the property. And, to encourage such sales and transfers, the Green Acres Program touts numerous

³⁸ See Joint App’x 108, *In re: PennEast Pipeline Company, LLC* (3rd Cir. 2019).

³⁹ J.A. 429, ¶ 60 n.228.

⁴⁰ Nancy A. McLaughlin, *PERPETUAL CONSERVATION EASEMENTS IN THE 21ST CENTURY*, UTAH L.R. 687, 687 (2013).

⁴¹ See NJ DEP, *Green Acres Program*, https://www.nj.gov/dep/greenacres/pdf/offer_5_2020.pdf; https://www.nj.gov/dep/greenacres/pdf/donation_7_2010.pdf (last viewed Mar. 3, 2021).

financial and other “benefits” of selling property interests to New Jersey.⁴²

So, while there are numerous proposed and existing interstate natural gas pipeline projects elsewhere in the region (which includes substantial portions of the “Marcellus Shale,” found beneath approximately 60% of Pennsylvania’s total land mass),⁴³ any such project would have to overcome the sizable “no build” zone that New Jersey could create with its new veto power. That “no build” barrier could be insurmountable not only because the prohibited 1,300 square miles would be dispersed in numerous parcels scattered across New Jersey, but also because New Jersey could attempt to add to its property interests at any time.

Nationwide, since 2015, FERC has approved 242 major natural gas pipeline projects (totaling 5,587.46 miles of pipeline).⁴⁴ As of the date of filing, FERC has an additional 21 such projects pending review (totaling 493.49 miles of pipeline).⁴⁵ The Third

⁴² See NJ DEP, *Green Acres Program: The Benefits of Leaving a Legacy ... Selling Your Land to Green Acres*, <https://www.nj.gov/dep/greenacres/whysell.html> (last viewed Mar. 3, 2021).

⁴³ Marcellus Shale Coalition, *Marcellus and Utica Shale Formation Map*, <https://marcelluscoalition.org/pa-map/> (last viewed Mar. 3, 2021).

⁴⁴ FERC, *Approved Major Pipeline Projects*, <https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-1997-present> (last viewed Mar. 3, 2021).

⁴⁵ FERC, *Major Pipeline Projects Pending*, <https://www.ferc.gov/industries-data/natural-gas/major-pipeline-projects-pending> (last viewed Mar. 3, 2021).

Circuit's rule would seem to allow any affected State to block any of these pipelines by acquiring a property interest and asserting a defense to a § 717f(h) action.

Importantly, nothing in the Third Circuit's rule appears to limit the States' new veto power to *planned* interstate natural gas pipeline projects, like the PennEast project at issue here. Rather, the States could disrupt the operation of *existing* infrastructure by refusing to renew previously granted easements, crossing permits, or right of way licenses necessary for a pipeline to operate.

In addition, the Third Circuit's rule appears to leave FERC certificate holders with no legal recourse. There is no veto "override." Once a State exercises its veto power, that decision would be final—even after years of planning (or operations) with respect to interstate natural gas pipeline infrastructure that would involve one or more other States, and even after years of federal review for a planned pipeline (or oversight of an existing pipeline).

The only limit on the States' new veto power over interstate natural gas pipeline projects would seem to be each State's own policy agenda. And that is no limit at all. Overnight, a change in state administration or representation could turn support for a pipeline into opposition—indeed, that is exactly what happened with respect to the PennEast project.⁴⁶ Natural gas companies and FERC forever

⁴⁶ PoliticoPro, *Murphy Will Review PennEast In Connection to Energy Master Plan* (Jan. 21, 2018) (available for subscribers at <https://subscriber.politicopro.com/states/new-jersey/story/2018/01/21/murphy-will-review-penneast-in->

would be subject to the vagaries of each State's own policy whims and desires.

D. Prohibiting FERC certificate holders from proceeding with congressionally authorized § 717f(h) actions would result in grave uncertainty for the Nation's natural gas industry and supply.

A rule prohibiting FERC certificate holders from proceeding with congressionally authorized § 717f(h) actions would result in grave uncertainty for the Nation's natural gas industry and supply. In Industry *Amici's* experience, federally approved interstate natural gas pipeline projects take many years to study, design, permit, and build. A natural gas pipeline company must invest millions of dollars before construction even begins on a pipeline project.

Among other things, this process includes extensive environmental analyses and reviews, and consultation with numerous stakeholders and landowners—including the States. This process typically begins at least a year before FERC initiates its “pre-filing” process, which comes before the company even files its application with FERC for a certificate.

But, under the Third Circuit's rule, uncertainty would threaten all stages of project planning, development, and even operations thereafter. No natural gas pipeline company could plan, execute, or

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operate with any confidence on any interstate natural gas pipeline project. As explained above, an affected State could exercise its veto power at any time, and for any reason—or for no reason at all. Consequently, natural gas pipeline companies and FERC never would know whether or how much difficulty in pipeline infrastructure development or operation may lie ahead.

Rendering *federally approved* interstate natural gas infrastructure vulnerable to the States' unconstrained and unpredictable veto would mean that many (federally approved) pipeline projects may not be completed, and that even existing (federally approved) infrastructure no longer may be operable. At best, this inestimable uncertainty and risk will somehow be priced into project financing for such infrastructure. Natural gas pipeline companies likely would pass-on those increased costs to consumers.⁴⁷ The Third Circuit's rule would adversely affect even projects that natural gas pipeline companies entirely self-finance, as constant uncertainty in project planning would make such projects more expensive and difficult.

At worst, the Third Circuit's rule would foreclose the development and operation of federally approved interstate natural gas pipeline infrastructure—if natural gas pipeline companies are unable to re-route around state property interests. A

⁴⁷ See U.S. Energy Info. Admin., *Natural gas explained: Natural gas prices*, <https://www.eia.gov/energyexplained/natural-gas/prices.php> (explaining that “[t]ransmission and distribution costs” are one of the two main components of gas prices) (last viewed Mar. 3, 2021).

doomsday warning about residential, commercial, and industrial shortages of natural gas may sound like hyperbole, but such shortages are not farfetched. In fact, as explained below (*see infra* Part II), the historical record demonstrates that the possibility is very real.

The hypothetical possibility of re-routing an interstate natural gas pipeline to avoid state property interests does not provide a ready solution. In Industry *Amici*'s experience, most federally approved interstate natural gas pipeline projects cross some state property interests. In some States, *all* federally approved interstate natural gas pipeline projects developed by a particular company cross state property interests.⁴⁸ Virtually all of the States have numerous state highways and roadways that cross the State both north to south and east to west. Virtually all of the States have numerous streams and creeks in which the State owns the riverbed or other submerged land. Often, rivers form the borders between the States. These roads and waterbodies could become uncrossable blockades to interstate natural gas infrastructure.

Conservation easements are another tool that the States could use to block pipelines. As of 2013, these interests cover an estimated 40 million acres

⁴⁸ *See Columbia Gas Transmission, LLC v. 0.12 Acres*, No. 1:19-cv-01444-GLR (D. Md.), Doc. 38 at 6 (pipeline's pleading stating that "every single one" of its FERC-regulated interstate pipeline projects in North America, which together transport gas through nearly 10,000 miles of pipeline in ten States, crosses and/or collocates with state-owned property or property interests).

throughout the Nation.⁴⁹ According to the National Conservation Easement Database, state and local government entities currently possess an estimated 20.34 million acres' worth of those conservation easements.⁵⁰ Under the Third Circuit's rule, those easements are already bases for the States to attempt to block a natural gas pipeline's development. An additional 14.7 million acres' worth of easements are currently held by nonprofit organizations, chiefly land trust and conservation organizations.⁵¹ As explained above, nothing prevents the States or (subdivisions of the States) from purchasing or receiving those conservation easements at any point, and attempting to block a pipeline developer or operator.

Indeed, under the Third Circuit's rule, a State could transform each and every one of its roadways, waterways, and conservation easements (or similar property interests) into an insurmountable barrier to the development of interstate natural gas infrastructure. And, by acquiring additional easements and other property interests, a State could compel an endless number of re-routes. Alternatively, a State simply could acquire enough property interests—or even a thin but strategically located “strip” of adjoining easements—to block any and all proposed re-routing. The effects would be to frustrate interstate commerce, and in so doing to deprive

⁴⁹ McLaughlin, PERPETUAL CONSERVATION EASEMENTS IN THE 21ST CENTURY, *supra*, at 687.

⁵⁰ National Conservation Easement Database, <https://www.conservationaleasement.us/completeness/> (last viewed Mar. 3, 2021).

⁵¹ *Id.*

customers in one or more other States of needed natural gas.

The facts of this case illustrate how a State could force a natural gas company to re-route a proposed project after both industry and federal representatives have put many years—and significant expense—into developing a pipeline route for federal review and approval. A quick glance at one of New Jersey’s county-level maps shows the vast scope of the property interests that the State has amassed through one of its farmland programs. If the State were empowered to use those property interests to veto the development of an interstate natural gas pipeline (as it has done in this case), it would be extremely difficult and likely impracticable for a natural gas pipeline company to re-route the pipeline in order to avoid those parcels.⁵² Assuming that a re-route even would be possible (and that New Jersey made no attempt to further enlarge its property interests), just to get through this one New Jersey county would require tangling what would have been a straight line into a snarled shoestring.

In this regard, the Third Circuit’s proposed “work-around”—whereby an “accountable federal official” would “file the necessary condemnation actions”—ignores reality. *In re PennEast Pipeline Company, LLC*, 938 F.3d 96, 113 (3d Cir. 2019). Under § 717f(h), only the FERC certificate holder can file the action condemning the property, not FERC nor

⁵² See Hunterdon County Map, *available at* <https://www.nj.gov/agriculture/sadc/farmpreserve/progress/map/s/maphunco.pdf> (last viewed Mar. 3, 2021).

any other federal agency or official. In any event, Congress already has made FERC the “accountable federal official” for every interstate natural gas pipeline project (*see id.*), and the “accountable federal” *action* is FERC’s issuance of the certificate to the interested natural gas company. That certificate follows only from FERC’s broad-ranging federal review and approval process, in which the States participate. *See infra* Part III.

II. Congress specifically amended the NGA to delegate the federal eminent domain power to FERC certificate holders, and to deprive the States of any freestanding veto over FERC-approved interstate natural gas pipeline infrastructure.

To better protect the national “public interest” in the natural gas industry, Congress specifically amended the NGA to delegate the federal eminent domain power to FERC certificate holders, and to deprive the States of any freestanding veto over FERC-approved interstate natural gas pipeline infrastructure. *See* 15 U.S.C. § 717(a).

The concerns that Industry *Amici* bring to the Court’s attention in this case are strikingly similar to the concerns that animated Congress almost eighty years ago to amend the NGA in 1947. As noted above, it was at that time that Congress delegated the federal eminent domain power to natural gas companies—subject to the requisite federal review, approval, and oversight. *See* 61 Stat. 459 (1947).

According to a well-developed legislative history, in the period leading up to the amendment of

the NGA (from 1938 to 1947), disparate state law provisions relating to interstate natural gas pipelines posed problems for the development of much needed interstate infrastructure. *See* S. REP. 80-429 at 2-3 (1947). Multiple States would not grant the right of eminent domain to natural gas companies constructing pipelines that crossed their properties, but that did not distribute natural gas in those States. In other States, state law expressly denied the right of eminent domain to federally approved interstate natural gas pipelines. *See id.* In short, natural gas companies constructing federally approved interstate pipelines lacked any mechanism to exercise eminent domain authority in numerous States, and those States consequently were able to block construction on certain properties.

The expressly stated purpose of the amendment to the NGA—which delegated the federal eminent domain power to those natural gas companies constructing federally approved pipelines—was to “correct this deficiency and omission” in the Act. *See id.* at 3.

Extensive congressional hearings established that Congress’s omission of an eminent domain delegation from the NGA had led to very serious problems.⁵³ At that time, because 94% of the country’s natural gas reserves were located in four contiguous

⁵³ *See Amendments to the Natural Gas Act: Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce, 80th Cong. (1947) (“Congressional Hearings”); see also Alexandra B. Klass & Danielle Meinhardt, Transporting Oil and Gas: U.S. Infrastructure Challenges, 100 IOWA L. REV. 947, 996-98 (2015).*

States (Kansas, Oklahoma, Texas, and Louisiana), most natural gas had to be transported across many States to supply heat and energy to the country's most densely populated areas (such as New York and New Jersey).⁵⁴

Because the natural gas pipeline companies could not exercise the federal eminent domain power, and there was no arm of the federal government that condemned land to build natural gas infrastructure, natural gas often simply could not get to where it was needed. Citizens and businesses across the Nation suffered serious consequences as a result.

The congressional record is replete with examples of natural gas shortages. For example, as part of those same congressional hearings, the governor of Kentucky submitted a statement that described natural gas shortages during winter that caused that State to limit the availability of natural gas for heat and for industrial purposes.⁵⁵

A similar statement from the governor of West Virginia addressed industrial shutdowns that left citizens out of work.⁵⁶

Members of Congress from States with natural gas shortages voiced support for the eminent domain delegation because it would facilitate the

⁵⁴ See Congressional Hearings, *supra* n.53, at 544 (statement of David T. Searls, Texas Eastern Transmission Corp.).

⁵⁵ See *id.* at 46-48.

⁵⁶ See *id.*

transportation of much needed gas to consumer citizens and businesses in their States.⁵⁷

Not only that, but other testimony during those same congressional hearings expressly called attention to a countervailing concern that also is at issue in this case—namely, that if the proposed eminent domain delegation provision became law, then natural gas pipeline companies could use the federal eminent domain power to condemn state property.⁵⁸

Nevertheless, the eminent domain delegation amendment passed both the House and Senate as it was written, with no exception or limitation restricting any federal-delegee natural gas pipeline company from condemning state property under any circumstance. *See* 15 U.S.C. § 717f(h).

Indeed, the Senate Report for that amendment concluded that it would “defeat[] the very objectives of the [NGA]”—including FERC’s “exclusive jurisdiction” to “regulate the transportation of natural gas in interstate commerce”—if the States were permitted to “nullif[y]” federal approval of an interstate natural gas pipeline by frustrating the exercise of the federal eminent domain power within their borders. *See* S. Rep. 80-429 at 3-4.

If past is prologue, then we already know that giving the States an unconstrained veto over federally

⁵⁷ *See id.* at 622 (statement of Rep. Carson of Ohio).

⁵⁸ *See id.* at 611 (House committee hearing); *id.* at 105 (Senate committee hearing).

approved interstate natural gas pipeline projects will cause serious practical problems. Regardless, we know that Congress already has taken affirmative, deliberate steps to correct and avoid those problems—the very problems that the Third Circuit’s rule threatens to revive. Congress should not have to fix these same problems for the second time, almost eighty years later.

III. Permitting FERC certificate holders to continue to proceed with congressionally authorized § 717f(h) actions would not leave the States (or other stakeholders) without a voice in the federal review and approval process for interstate natural gas pipeline infrastructure.

A rule confirming that FERC certificate holders can continue to proceed with congressionally authorized § 717f(h) actions would not leave the States (or other stakeholders) without a voice in the federal review and approval process for interstate natural gas pipeline infrastructure. As noted above, the NGA provides the States with a role—but not an unconstrained veto—in the development and operation of interstate natural gas infrastructure.

After determining that there is sufficient demand for a pipeline project, a natural gas pipeline company considers extensive information about where to site new infrastructure, much of which is also ultimately considered and reviewed by FERC during the application process. These considerations include, among other things, locations of available connections to existing pipelines, existing rights of way, terrain, waterbodies, population density, environmental

justice concerns, potential environmental impacts, constructability, existing utility corridors, cemeteries, tribal interests, and areas of historical and cultural significance.

Critically, the States and other stakeholders (including landowners, private citizens, and private and public organizations) participate in that federal review and approval process at multiple points before FERC approves an interstate natural gas pipeline project, and before the natural gas pipeline company becomes a federal delegee of the eminent domain power.⁵⁹ In fact, the States and other stakeholders have rights in the planning process prior to, during, and after construction, and their input plays a major role in the decision-making process when determining the eventual route of a new pipeline.⁶⁰ The States and other stakeholders participate in the federal review and approval process even *before* a natural gas pipeline company applies to FERC for a certificate of public convenience and necessity. And, after a company applies for a FERC certificate, the States and stakeholders again have ample opportunity to be heard on the proposed pipeline. Where FERC cannot

⁵⁹ See FERC, *Process for Natural Gas Certificates*, <https://www.ferc.gov/sites/default/files/2020-04/FERCNaturalGasCertificateProcess.pdf> (last viewed Mar. 3, 2021) (flow chart explaining process and identifying opportunities for public input).

⁶⁰ INGAA, *Pipelines 101*, <https://www.ingaa.org/Pipelines101.aspx> (last viewed Mar. 3, 2021).

resolve material issues of disputed fact, FERC even can hold an evidentiary, trial-type hearing.⁶¹

In this case, numerous New Jersey government entities participated extensively in the FERC review and approval process.⁶² In Industry *Amici*'s experience, state and local government entities and other stakeholders participate in the FERC review and approval process for virtually every proposed interstate natural gas pipeline project, just as the New Jersey governmental entities and other stakeholders did with regard to the PennEast project.

Indeed, the many opportunities that federal law affords to the States (and other stakeholders) to participate in FERC's review and approval process may explain why for the past seventy-plus years this Court has not been asked to address the issue in this case. For instance, New Jersey historically has

⁶¹ See, e.g., *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, 61,923 (2012).

⁶² See, e.g., Letter from John Gray, Deputy Chief of Staff, DEP, to Kimberly Bose, Secretary, FERC (Dec. 20, 2016) (on file FERC Docket No. CP15-558); Letter from Michael Catania, Chair, N.J. Nat. Lands Tr., to Kimberly Bose, Secretary, FERC (Feb. 9, 2018) (on file FERC Docket No. CP15-558); Comments of the N.J. Div. of Rate Counsel, FERC Docket No. CP15-558 (Sept. 12, 2016); Letter from Katherine Marcopul, Deputy State Historic Pres. Officer, N.J. Historic Pres. Office, to Kimberly Bose, Secretary, FERC (April 11, 2019) (on file FERC Docket No. CP15-558); Letter from Margaret Nordstrom, Exec. Dir., N.J. Highlands Water Prot. and Planning Council, to Kimberly Bose, Secretary, FERC (August 23, 2016) (on file FERC Docket No. CP15-558); Letter from Susan Payne, Exec. Dir., Agric. Dev. Comm., to Kimberly Bose, Secretary, FERC (May 31, 2017) (on file FERC Docket No. CP15-558).

acknowledged that natural gas companies have the authority under the NGA to exercise the federal eminent domain power to condemn lands in which New Jersey has a property interest.⁶³ New Jersey's recognition of Congress's eminent domain delegation dates as far back as the early 1950s, and continued up until this case.⁶⁴ In that time, New Jersey governmental entities routinely contracted for FERC certificate holders to access lands in which the State had a property interest, or allowed "friendly" § 717f(h) actions to proceed without objection (where state law did not allow the relevant state agency to contract for the sale of a property interest).⁶⁵

⁶³ See Ex. A to Br. of Industry *Amici*, No. 19-1232 (3rd. Cir. May 15, 2019) (2008 lease agreement between New Jersey Department of Environmental Protection ("DEP") and federally approved interstate pipeline company reciting that it was executed because 50-year right-of-way agreement executed prior to condemnation had expired); Letter from Ruth Foster, Acting Dir., NJ DEP, to Kimberly Bose, Secretary, FERC (July 25, 2018) ("Foster Letter") (on file FERC Docket No. PL18-1-000, acknowledging to FERC that FERC certificate holders may condemn land in which New Jersey has a property interest and urging FERC to take measures to reduce the impact of condemnation on New Jersey's land preservation efforts).

⁶⁴ See Ex. A to Br. of Industry *Amici*, No. 19-1232 (3rd. Cir. May 15, 2019); Foster Letter, *supra* n.63.

⁶⁵ See, e.g., *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipeline Co. v. 2.705 Acres of Land*, No. 3:15-cv-00397 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipe Line Co. v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013) (examples of "friendly" condemnation orders involving New Jersey governmental entities).

Here, FERC issued the relevant certificate for the PennEast project in January 2018.⁶⁶ But the federal review and approval process for that certificate began more than three years earlier in October 2014.⁶⁷

New Jersey officials and other stakeholders participated in every step of that process. For example, before even applying for the certificate, PennEast had “participated in the pre-filing process,” and had “held over 200 meetings with public officials, as well as 15 ‘informational sessions’ for impacted landowners.”⁶⁸

PennEast applied for a FERC certificate in September 2015, and FERC published notice of that application in the Federal Register in October 2015.⁶⁹ At that point, “[n]umerous entities, landowners, individuals, and New Jersey State representatives filed protests and adverse comments.”⁷⁰

With respect to FERC’s environmental analysis of the PennEast project, the pre-filing environmental review began in October 2014.⁷¹ In January 2015, FERC issued notice of its intent to prepare an Environmental Impact Statement (“EIS”) for the proposed project, and that notice was published in the

⁶⁶ J.A. 35.

⁶⁷ J.A. 88, ¶ 93.

⁶⁸ J.A. 59, ¶ 39.

⁶⁹ J.A. 40, ¶ 10.

⁷⁰ *Id.*, ¶ 11.

⁷¹ J.A. 88, ¶ 93.

Federal Register in February 2015.⁷² That notice also was “sent to more than 4,300 interested entities,” including representatives of state, federal, and local agencies, elected officials, environmental and public interest groups, Native American tribes, potentially affected landowners, concerned citizens, and local libraries and newspapers.⁷³

As a result, “more than 6,000 letters were filed providing comments about the project,” and “250 speakers provided verbal comments about the project” at the public meetings that followed.⁷⁴

Again, the facts of this case are illustrative. Following comments and feedback from those state officials, landowners, agencies, and municipalities, PennEast incorporated seventy route variations into the proposed route.⁷⁵ PennEast made these variations to mitigate or avoid environmental concerns, and to address the concerns of those state officials, landowners, agencies, and municipalities. Those seventy route variations totaled 68.4 miles, more than half of the originally planned length of the pipeline.⁷⁶ Thus, with a legitimate expectation that it could rely on the certainty and finality of the federal review and approval process, PennEast made significant changes to the pipeline route to accommodate the concerns

⁷² J.A. 40, ¶ 10.

⁷³ J.A. 88, ¶ 93.

⁷⁴ *Id.*

⁷⁵ J.A. 59, ¶ 39.

⁷⁶ J.A. 35, ¶ 1, 185, ¶ 211.

expressed by affected government entities and persons.

In addition, the NGA provides that—even *after* FERC issues a certificate—the States and other stakeholders can “apply for a rehearing” with FERC.⁷⁷ And, as the Government recognized in its *amicus* brief at the petition stage, the States and other stakeholders can “obtain a review” of FERC’s certificate in the D.C. Circuit, or in the federal circuit court wherein the relevant natural gas company has its principal place of business.⁷⁸

Again, that is precisely what New Jersey Respondents did in this case. Respondents challenged the FERC certificate issued to PennEast on rehearing and in the D.C. Circuit.⁷⁹

Moreover, it is important to understand where and how Congress’s delegation of the federal eminent domain power—and any congressionally authorized § 717f(h) action—fits in the context of this years-long process of federal review and approval. A natural gas pipeline company can exercise that delegated federal eminent domain power to acquire only those property interests that FERC specifically reviewed and determined to be necessary for the project.⁸⁰ That statutory framework makes good practical sense.

⁷⁷ 15 U.S.C. § 717r(a).

⁷⁸ 15 U.S.C. § 717r(b).

⁷⁹ See J.A. 212.

⁸⁰ See *id.*; see also *Columbia Gas Trans., LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa.*, 768 F.3d 300, 304 (3d Cir. 2014).

FERC focuses its experience and expertise on whether the proposed interstate natural gas project serves public convenience and need, and on analyzing the proposed pipeline route. Then, with FERC approval, the certificate holder negotiates to acquire the property rights for the project, and files a § 717f(h) action only when necessary.

In the § 717f(h) action, the natural gas pipeline company must establish—typically in a motion for partial summary judgment—that the company meets the statutory requirements to condemn under § 717f(h)—*viz.*, that it holds a FERC certificate for the proposed pipeline project, and that it has been unable to acquire by contract the necessary property interest. The court then oversees adjudication as to the price that the company will pay for the property. Practically speaking, that's it. The § 717f(h) action simply effectuates FERC's prior determination that the proposed pipeline project will serve the public convenience and need, executes on FERC's prior approval of the proposed pipeline route, and ensures that the property owner gets paid.

CONCLUSION

For the reasons stated above, this Court should reverse the Third Circuit. Consistent with Congress's delegation of the federal eminent domain power in the NGA, this Court should confirm that FERC certificate holders can continue to proceed with congressionally authorized § 717f(h) actions.

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