(ORAL ARGUMENT NOT YET SCHEDULED)

Docket No:_____

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

In Re Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum

Petitioners.

_____

Petition for Writ of Mandamus

_____

PETITION OF

DELAWARE RIVERKEEPER NETWORK

_____

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re: Delaware Riverkeeper Network, et al.) Docket No. _____

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

As per Circuit Rules 21 and 28(a)(1)(A), the undersigned, on behalf of Delaware Riverkeeper Network, hereby state that as of the date of filing this petition, the following entities are parties, interveners, or amici in this Court in this and all related cases:

Petitioners: Delaware Riverkeeper Network

Respondent: The U.S. Federal Energy Regulatory Commission.

Parties who have appeared before the U.S. Federal Energy Regulatory Commission in respect to the rehearing request for the Order at issue herein are:

Petitioners: Delaware Riverkeeper Network.

Applicant: PennEast Pipeline Company L.L.C.

Parties who have appeared before the U.S. Federal Energy Regulatory Commission in respect to the Order at issue herein are:

Applicant: PennEast PipeLine Company L.L.C.

Rulings Under Review

This Petition challenges the Federal Energy Regulatory Commission's Order issued on January 19, 2018 for the PennEast Pipeline Company LLC, 162 FERC ¶ 61,053; AD358-463, the February 22, 2018, Order Granting Rehearing For Further Consideration; AD332, as well as the March 15, 2018, Order Granting Rehearing For Further Consideration; AD345.

Related Cases

This case has not been before this court previously.

- *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission, et al.*, U.S. Court of Appeals for the Third Circuit, Docket No. 17-5084 (Oral Argument held March 22, 2018)
- *Homeowners Against Land Takings v. Federal Energy Regulatory Commission*, U.S. Court of Appeals for the District of Columbia, Docket No. 18-1079 (Oral Argument not yet scheduled)

Respectfully submitted this 9th day of May, 2018.

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UNITED STATES COURT OF APPEALS

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RULE 26.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the Protection of the Delaware River, its tributaries, and the communities of its watershed. The Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 9th day of May, 2018.

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INTRODUCTION

Petitioners the Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum ("Petitioners") petition this Court to issue a writ of mandamus to compel the Federal Energy Regulatory Commission ("Commission") to grant or deny on the merits Petitioners' two requests for rehearing regarding the Commission's order granting a certificate of public convenience and necessity ("Certificate") to the PennEast Pipeline Company LLC's ("PennEast") for the PennEast pipeline project ("Project"). This Court has the authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651.

The Commission is the lead agency for the purposes of the environmental review and approval for interstate natural gas pipelines in the United States. PennEast Pipeline Company submitted an application to the Commission for the approval of the Project, and Petitioners intervened before the Commission memorializing their objections to Project through various comments, letters, expert reports, and three rehearing requests. Petitioners have in good faith followed each and every procedure outline in the Natural Gas Act ("Act") to obtain timely and meaningful judicial review of the Commission's orders, yet Petitioners have been repeatedly obstructed by the Commission at every turn.

Prior to filing a petition for review with the appropriate circuit court challenging any order of the Commission, an aggrieved party must first submit a

rehearing request to the Commission and the Commission must take final agency action by granting or denying the request on the merits. The Commission must take action pursuant to such requests within thirty-days. However, the Commission routinely indefinitely tolls such rehearing requests by "granting" them only for the purposes of further consideration.

While rehearing requests challenging the legal sufficiency of the Commission's orders are tolled, the process for the construction and operation of the pipeline continues. The Commission's certificate allows projects survey access to property, eminent domain proceedings to commence, and construction to begin. Indeed, in many instances projects will enter into service before the Commission takes any action on the merits of a rehearing request.

Here, the Commission has – yet again – issued multiple tolling orders obstructing timely judicial review of the Commission's approval of the PennEast Project. The Commission has not only tolled Petitioners' rehearing request with regard to the legal sufficiency of the Certificate, but the Commission has also tolled Petitioners' challenge to whether the Commission had the legal authority to issue such a tolling order. As such, Petitioners, and their members, have nowhere else to turn but this court.

Petitioners' members include several landowners whose property is now subject to eminent domain proceedings where the court will automatically

condemn their property based on a Certificate from the Commission that is factually and legally contested, but not subject to meaningful judicial review. One of Petitioners' members' property includes a working 137-acre farm that was accepted into New Jersey's Farmland Preservation program making it forever protected for agricultural use. *See* Kelly-Mackey Declaration; AD480-489. Now, PennEast seeks to bisect the property via condemnation with its pipeline along the entire length of the farm's acreage. *Id*. Another of Petitioners' members' property includes a complex interlocking set of wetlands, fens, marshes, streams, vernal pools, springs, and swales, which are conserved by four publicly-held conservation easements. *See* Heindel Declaration; AD490-496. The condemnation of these properties, resulting destruction of natural habitat, and violation of Petitioners' and Petitioners' members' concomitant constitutionally enshrined environmental rights violates due process and conflicts with the Commission's statutory and regulatory mandate to take final action and provide a meaningful opportunity for judicial review of its orders.

Petitioners respectfully request this Court to compel the Commission to comply with its statutory and regulatory mandates to issue an order that grants or denies the merits of Petitioners' rehearing requests.

JURISDICTION

Pursuant to the Natural Gas Act, this Court has jurisdiction to review an order issued by the Commission. 15 U.S.C. § 717r(b) (2012) ("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 United States Court of Appeals for the District of Columbia"). Petitioners intervened in the underlying administrative proceedings, and filed a timely request for a rehearing. Thus, they are a "party . . . aggrieved by an order issued by the Commission."

This Court is authorized to review the Commission's Certificate and Tolling Orders. *Town of Dedham v. Federal Energy Regulatory Commission*, 2015 WL 4274884, at *2 (D. Mass., July 15, 2015); *see also Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984) ("[W]here a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seek ing relief that might affect its future statutory power of review").

STATUTORY AND REGULATORY BACKGROUND

The Natural Gas Act, 15 U.S.C. §§ 717 *et seq*., regulates the transportation and sale of natural gas in interstate commerce. To construct and operate an interstate natural gas pipeline, a company must apply for a certificate of public convenience and necessity. 15 U.S.C. § 717f(d). In considering any application for

a certificate, the Commission is required to "comply with applicable schedules established by Federal law." *Id*. § 717n(c)(1)(B). Once a certificate is granted, "[a]ny person [who] is a party may apply for a rehearing within thirty days after the issuance of such order." *Id*. §§ 717f(e), 717r(a). "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." *Id*. § 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 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 . . . 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.

Id. § 717r(b). The Commission has interpreted this authority to "authorize[] the Secretary, or the Secretary's designee to . . . [t]oll the time for action on requests for rehearing." 18 C.F.R. § 375.302(v). A holder of a valid certificate of public convenience and necessity may acquire land through eminent domain. *Id*. § 717f(h).

The Administrative Procedure Act provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5

U.S.C. § 555(b). "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704. A reviewable agency action is defined, *inter alia*, as a "failure to act[,]" *id.* § 551(13), and if a legally required agency action is either "unlawfully withheld or unreasonably delayed" as a result of such a failure to act, an aggrieved party may ask a court to "compel" the agency to take that action. *Id.* § 706(1).

FACTUAL BACKGROUND

Petitioners are a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. *See* van Rossum Declaration at ¶ 3; AD464-465. In their efforts to protect and restore the watershed, Petitioners organize and implement stream, wetland, and habitat restorations; a volunteer monitoring program; educational programs; environmental advocacy initiatives; recreational activities; and environmental law enforcement efforts throughout the entire Delaware River Basin and the basin states. *Id*. at ¶ 4; AD465. Petitioners are a membership organization headquartered in Bristol, Pennsylvania, with more than 19,000 members with interests in the health and welfare of the Delaware River and its watershed. *Id*. at ¶ 7; AD466. Petitioners bring this action on behalf of the organization as part of the pursuit of its organizational mission, and on behalf its impacted members, the board, and staff.

Petitioners members live, own property, recreate, and work throughout the watershed, which includes areas affected by the Project, and will have their aesthetic, recreational, and property interests harmed as a result of construction and operational activity. *Id*. Petitioners and their members value the aesthetic qualities of their property and public parks, enjoying the scenery, wildlife, recreation opportunities, and undeveloped nature. Petitioners' members own property that has been, and will be, subject to eminent domain proceedings for the PennEast pipeline project. *Id*. at ¶ 10; AD469. Petitioners' members' bargaining position with PennEast for easement agreements has been, and is currently being, compromised as a result of the pressure and threat of eminent domain proceedings. The violations of law cause direct injury to the aesthetic, conservation, economic, recreational, scientific, educational, wildlife preservation, environmental, liberty, and property interests of the organization and its members. *Id*. at ¶ 10-24; AD469-477.

Maya van Rossum came to work for the Delaware Riverkeeper Network as its Executive Director in 1994, was appointed Delaware Riverkeeper, leader of the Delaware Riverkeeper Network, and is also a member. *Id*. at ¶ 10; AD469-470. Maya van Rossum as the Delaware Riverkeeper regularly visits the Delaware River and Delaware Estuary, including the areas affected by this pipeline project and others and has taken family, friends, members, and other interested people

onto the Delaware River and its tributaries to educate them and to share with them the aesthetic beauty of the river. *Id*.

PROCEDURAL BACKGROUND

PennEast pre-filed an application with the Commission in October of 2014, which was assigned docket number PF15-1. *See* PennEast Prefiling Application Exceprt; AD001. Petitioners reviewed PennEast's submissions and filed several substantive comments throughout the pre-filing process. PennEast later filed an application for a certificate of public convenience and necessity ("Certificate") from the Commission in September of 2015, which was assigned docket number CP15-558. *See* PennEast Application Excerpt; AD002. The Commission issued a Draft Environmental Impact Statement ("Draft Statement") on July 22, 2016, which included information showing the proposed project would require the destruction of a thousand acres of trees, many on steep slopes, and the crossing of hundreds of streams and wetlands with open cut trenches. *See* Draft Statement Excerpt; AD005. PennEast failed to identify any gas customers in the purported end markets and no market studies were included.

Petitioners submitted a lengthy comment on the Draft Statement showing that it failed to meet legal and policy requirements. Including detailed substantive comments, supported by several expert reports, that the Draft Statement failed to fulfill the Commission's legal obligations under the National Environmental Policy

Act, and that the Project does not serve a public purpose because PennEast failed to establish a need for the Project. *See* Petitioners' Comment Letter; AD025.

The Commission ignored or was otherwise non-responsive to many of the legal deficiencies identified in Petitioners' comments, and instead issued a Final Environmental Impact Statement on April 7, 2017. *See* Final Impact Statement Excerpt; AD105. On January 19, 2018, the Commission issued the Certificate to PennEast. *See* Certificate; AD358. The Certificate authorizes PennEast to automatically condemn properties, and within a month, the company had filed at least 150 eminent domain complaints in various federal courts, including complaints against Petitioners' members. *See* List of Condemnation Proceedings; AD497; *see also* Kelly-Mackey Condemnation Complaint; AD508.

In order to perfect their right to appeal the issuance of the Certificate, Petitioners timely filed a rehearing request ("First Rehearing Request") with the Commission on January 24, 2018. *See* First Rehearing Request; AD141 (First Rehearing Request).[1] Rather than responding to the merits of DRN's First Rehearing Request, the Commission chose to issue a tolling order ("First Tolling Order") on February 22, 2018. *See* First Tolling Order; AD332. Petitioners then submitted a second rehearing request ("Second Rehearing Request") on March 15,

[1] Petitioners also submitted a Motion for Stay to the Commission that has yet to be ruled upon by the Commission.

2018, challenging the lawfulness of the Commission's authority to issue the First Tolling Order. *See* Second Rehearing Request; AD334. On April 13, 2018, the Commission issued another tolling order ("Second Tolling Order"), thereby preventing Petitioners from filing a Petition for Review with the appropriate circuit court with regard to the lawfulness of the First Tolling Order. *See* Second Tolling Order; AD345. Petitioners submitted yet another rehearing request ("Third Rehearing Request"), challenging the Commission's authority to issue the Second Tolling Order. *See* Third Rehearing Request; AD347. To end this futile and obstructionist rehearing/tolling order merry-go-round, Petitioners filed this Petition for Mandamus on May 9, 2018.

ARGUMENT

I. Legal Standard

The All Writs Act provides that "the Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." 28 U.S.C. § 1651(a). The remedy of mandamus "is a drastic one, to be invoked only in extraordinary circumstances." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Only "exceptional circumstances amounting to a judicial 'usurpation of power'" will justify issuance of the writ. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289

(1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)); *see also In re Leeds*, 951 F.2d 1323, 1323 (D.C. Cir. 1991).

Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a circuit court may resolve claims of unreasonable delay in order to protect its future jurisdiction. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971).

Mandamus is available only if: "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)); *see also Banks v. Office of Senate Sergeant–At–Arms and Doorkeeper of the United States Senate*, 471 F.3d 1341, 1350 (D.C. Cir. 2006). The party seeking mandamus "has the burden of showing that 'its right to issuance of the writ is clear and indisputable.'" *Power v. Barnhart*, 292 F.3d at 784 (quoting *Northern States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997)). Where the Commission indefinitely tolls final agency action, the appropriate avenue of relief is to file a Petition under the All Writs Act. *See Town of Dedham*, 2015 WL 4274884, at *2; *see also Telecomms. Research & Action Ctr.*, 750 F.2d at 79; *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 538 (1st Cir. 1997) (explaining

that appellant "could have pursued a writ of mandamus from the court of appeals" when faced with "agency inaction").

A. There Is No Other Adequate Remedy Available To Petitioners And Their Members

The Commission has deliberately confined Petitioners to administrative limbo with no way to seek a remedy, except through this writ of mandamus. The Commission has failed to act on the merits of both Petitioners' rehearing request with regard to the Certificate, and Petitioners' rehearing requests challenging the First and Second Tolling Orders. Therefore, the Commission has not only blocked judicial review of the Certificate approval for the PennEast Project, but the Commission has also blocked Petitioners' ability to challenge the Commission's authority to obstruct or otherwise delay judicial review of that approval.

To obtain judicial review of a Commission Certificate an aggrieved party must first submit a request for rehearing. *See* 15 U.S.C. § 717r(b). The Commission then must "act" on the request before an aggrieved party may initiate a lawsuit in the appropriate circuit court. *Id.*; *see also Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying the requests for rehearing is the final, reviewable agency order).

However, the Commission habitually purports to "act[]" upon the requests for rehearing by issuing orders "granting" the request for rehearing solely for the purposes of "further consideration," as it has done here. *See* 18 C.F.R. § 385.713(f); AD332. The Commission has interpreted its authority to leave the time-period to make a decision undefined, and therefore, unlimited. 18 C.F.R. § 375.302(v). Therefore, the length of the "tolling orders" the Commission issues are, in practice, indefinite and often extend well beyond the time the Commission authorizes construction and even completion of a pipeline project. *See infra* at 14-15. The Commission itself has successfully recently argued to dismiss petitions for review filed in other circuit courts that were submitted prior to the Commission's issuance of a final order on the merits of the rehearing requests. *See, e.g.*, *Appalachian Voices, et al. v. FERC*, No. 18-1114 (4th Cir. Mar. 21, 2018); *Coalition to Reroute Nexus, et al. v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018).

Here, it is indisputable that Petitioners, in good faith, followed the exact procedures the Act proscribes by timely submitting a request for rehearing on the Commission's Certificate Order, the First Tolling Order, and the Second Tolling Order. The Commission has not issued an order on the merits of any of Petitioners' rehearing requests; instead, the Commission simply further tolled its final decisions. As such, neither DRN nor its members have an adequate remedy available to appeal the Commission's Certification of the PennEast project as they

have been denied the option to file a petition for review in the appropriate circuit court. *See also City of Glendale v. FERC*, No. 03-1261, 2004 U.S. App. LEXIS 1030 (D.C. Cir. Jan. 22, 2004) (dismissing a petition for review of a Commission order where a rehearing request was pending, and also holding that the issuance of tolling orders does not "effectively deny[] rehearing").

Petitioners' lack of an adequate remedy is further illustrated through the Commission's actions with regard to the Tennessee Gas Pipeline LLC's Orion pipeline Project. In that matter, the Delaware Riverkeeper Network submitted a rehearing request to the Commission on February 14, 2017, challenging the legal sufficiency of the certificate for that project. *See* Second Rehearing Request; AD341. On March 13, 2017, the Commission "granted" the rehearing request "for the limited purpose of further consideration." *Id*. In the six months that followed, the Commission issued numerous letter orders authorizing all construction activities to begin, while the rehearing requests remained tolled. *Id*. It was not until February of 2018, that the Commission finally denied the Delaware Riverkeeper Network's rehearing request, thereby opening the gate to an appeal in circuit court. However, by that time not only had "final grade" and "restoration activities" already largely been completed, but the Orion project had been put into service. *Id*. While the Delaware Riverkeeper Network has since submitted a petition for review with the D.C. Circuit Court of Appeals challenging the legal sufficiency of the

certificate, the Delaware Riverkeeper Network simply had no way of obtaining meaningful judicial review of the Commission's orders through the Act's appeals mechanism prior to the construction and operation of the Orion project. Petitioners are faced with a similar trajectory in the instant matter.

One might assume that an aggrieved party could challenge the legal sufficiency of the Certificate during the eminent domain process; however, that is not the case. The Act provides that any holder of a Commission certificate may acquire property "by the exercise of eminent domain in the district court." 15 U.S.C. § 717f(h); *E. Tenn. Nat'l Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004). Once a project applicant obtains a certificate from the Commission the project applicant has "the ability to obtain automatically the necessary right of way through eminent domain, with the **only open issue being the compensation the landowner defendant will receive in return for the easement**." *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Tp., York County, Pa., Located on Tax ID #£440002800150000000 Owned by Brown,* 768 F.3d 300, 304 (3d Cir. 2014) (emphasis added); *see also Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960, 973 (D.C. Cir. 2000).

The District Court's role in this context is narrowly limited to evaluating the scope of the certificate and ordering condemnation of property as authorized in the certificate. *See Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255, 262

(10th Cir. 1989) ("Judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues"). In other words, in the context of eminent domain proceedings, courts cannot and will not consider the factual and legal validity of the Certificate, including examining whether constitutional due process rights were violated pursuant to the Commission's review and appeals process. *See also Transcontinental Gas Pipe Line Company, LLC v. Permanent Easement for 2.14 Acres*, 2017 WL 3624250, at *5 (E.D. Pa., August 23, 2017) (specifically rejecting plaintiffs' due process claims against the Commission because the court "did not have jurisdiction to consider [plaintiffs'] **constitutional arguments**") (emphasis added). Indeed, courts have viewed such appeals as collateral challenges to an order of the Commission and prohibited. *Id*.

This lack of a meaningful opportunity for appeal is significant for a variety of reasons. For example, there have been at least two recent cases where circuit courts have found that the Commission's environmental review was deficient and unlawful, but because the Commission had issued tolling orders that prevented review until after construction had begun, the aggrieved parties' environmental and real property interests had already been harmed. *See, e.g.*, *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) (finding that the Commission unlawfully segmented its environmental review of four pipeline projects after the pipeline segments had been constructed); *Sierra Club v. Federal Energy*

Regulatory Commission, 867 F.3d 1357 (D.C. Cir. 2017) (finding that the Commission failed to perform an adequate analysis of greenhouse gas and climate change impacts after construction had commenced).[2] It is therefore here, and only here, where Petitioners and their members can obtain a remedy and meaningful relief regarding the Commission's issuance of the Certificate, the First Tolling Order, and the Second Tolling Order for the PennEast Project.

To summarize Petitioners' current position, if the Commission is allowed to continue acting as it has: 1) Petitioners cannot challenge the legal sufficiency of the Certificate through the Act's designated appeals mechanism because of the Commission's use of the First Tolling Order; 2) Petitioners cannot challenge the legal sufficiency of the Commission's First Tolling Order through the Act's appeals mechanism because of the Commission's use of the Second Tolling Order; 3) Petitioners' members are prohibited from challenging the legal sufficiency and constitutionality of the Certificate and the two tolling orders through the eminent domain court proceedings. As a result, Petitioners' and their members will have

[2] There are other examples of Commission-jurisdictional projects where irreparable environmental harms occurred and private property was condemned via a Commission certificate, yet the pipeline project was never constructed because other federal permits were denied. *See, e.g.*, https://stateimpact.npr.org/pennsylvania/2016/03/02/maple-syrup-trees-cut-to-make-way-for-the-constitution-pipeline/ (maple trees that were used in maple syrup business were cut down for a Commission-jurisdictional pipeline project which never received all of its federal permits, and was never built).

their constitutionally enshrined environmental property rights violated and their real property condemned based on an allegedly defective and unlawful Certificate, which has not been subject to any judicial review. Under these unique facts, a writ of Mandamus is appropriate.

B. The Commission Is Subject To A Non-Discretionary Duty To Act By Section 717r(a) Of The Natural Gas Act

There is no question that the Commission has a nondiscretionary duty to act on Petitioners' rehearing requests, and that duty to act must occur within thirty-days. The Commission's duty to act is codified in Section 717r(a) of the Act. Specifically, this provision states that:

> 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**.

15 U.S.C. § 717r(a) (emphasis added). This language is nondiscretionary, as it either requires the Commission to "act[]" on a rehearing request, or otherwise has the effect of final agency action via the Commission's choice not to act. *See* 5 U.S.C. § 551(13) (a "failure to act" is by definition an "agency action").

C. Petitioners Have A Clear Right To Relief

Petitioners have a clear right to relief for at least two separate, but equally forceful, reasons. First, the Commission's failure to grant or deny the rehearing requests on the merits violates Petitioners' due process rights. To the extent

Petitioners have demonstrated that they have no adequate remedy available because there was no opportunity for a hearing or judicial review at a meaningful time, *see supra* at 12-18, the Commission violates Petitioners' Fifth Amendment due process rights by failing to grant or deny the rehearing requests. The primary question remaining in this context is whether Petitioners have a liberty or property interest to sustain such a due process claim. As described below, Petitioners have this liberty and property interest.

Second, the Commission is required to comply with the nondiscretionary time requirements of Section 717(a), which identifies and authorizes only a limited number of ways in which the Commission may "act[]" pursuant to that section. *See* 15 U.S.C. 717(a). Here, the Commission took action outside of the proscribed methods of Section 717r(a) by issuing tolling orders that indefinitely obstruct the way in which Petitioners may vindicate their rights in court.

1. Petitioners Have A Clear Right To Relief Because The Commission's Tolling Orders Violate Petitioners' Due Process Rights

The Commission violates Petitioners' due process rights by delaying, for an unbound period, Petitioners' right to be heard at a meaningful time and place prior to the deprivation of their constitutionally protected environmental liberty and property interests, and their real property interests. An essential and well-recognized principle of due process is that a deprivation of life, liberty, or property

must "be **preceded by notice and opportunity for hearing** appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added); *see also Tioronda, LLC. v. New York*, 386 F.Supp.2d 342, 353 (S.D.N.Y. 2005) (holding the same in the context of an eminent domain proceeding).

Stating a claim for a procedural due process violation requires a showing that (1) an official has deprived the plaintiff (2) of liberty or property (3) without "providing appropriate procedural protections." *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009); *see also Mathews v. Eldridge*, 424 U.S. 319, 332, (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth . . . Amendment"). Liberty or property interests may either be located in the Constitution itself or "may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The second step, at a minimum, "requires . . . that the government provide notice and some kind of hearing before final deprivation of a property [or liberty] interest[s]." *Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991).

This process does not always need to be a formal hearing, but must provide an opportunity for adequate remedy prior to the deprivation. *See also Wilkinson*,

545 U.S at 224 ("A liberty interest having been established, we turn to the question of what process is due . . . [T]he requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands'") (internal citations omitted). The Supreme Court has repeatedly stated, "[a] fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal citation omitted). Petitioners can assert their property interest through two means. Petitioners have a liberty and property interest sufficient to sustain due process challenge via their environmental property and liberty rights conferred by the Pennsylvania Constitution, and through Petitioners' members' interests in real property.

Petitioners, in Pennsylvania, have a cognizable property and liberty interest in a healthy environment as conferred by Pennsylvania's Environmental Rights Amendment. Pennsylvania's Constitution is unique in recognizing the people's individual liberty and property rights to a clean and healthy environment. Specifically, Article I, Section 27 of the Pennsylvania Constitution states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. The decisions in *Robinson Township, Delaware Riverkeeper Network et al. v. Com.*, 83 A.3d 901 (Pa. 2013) (hereinafter "*Robinson II"*), and *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (hereinafter "*PEDF*"), make clear that the standards for Section 27 violations are set forth in the language of the provision itself, along with Pennsylvania trust law at the time of Section 27 enactment in 1971. *Robinson II*, 83 A.3d at 951-52, 953 (clause 1); 955-59 (public trust clauses) (plurality); *see also* plurality's application to Act 13 (public trust); *PEDF*, 161 A.3d at 931 (Pa. 2017); *see also id*. at 931-36. Indeed, the Pennsylvania Supreme Court has now struck down two laws based on the rights conferred to citizens under Section 27. Thus, the environmental rights codified in Section 27 confer an individual property and liberty interest sufficient to sustain a due process claim.

Due process rights as conferred through similar state constitutional environmental rights provisions are recognized in other states as well. For example, the Supreme Court of Hawai'i recently held that due process claims can be grounded in state constitutional environmental rights because the provisions provide a liberty and property interest. *See In re Application of Maui Electric Co., Ltd.*, 141 Haw. 249 (2017). In *In re Appliaction*, the Hawai'i Supreme Court held the Hawai'i Constitution guarantees each person "the right to a clean and healthful environment, as defined by laws relating to environmental quality." *Id*. at 253. The

Court recognized that the Hawai'i Constitution established a "substantive right guaranteed to each person" and that it is "a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process." *Id*. at 260-261. Because Petitioners' members include two people who live in Pennsylvania, the Pennsylvania Constitution provides a liberty and property interest sufficient to sustain a due process claim. *See* Declaration of van Rossum; AD464; Declaration of Heindel; AD490.

In addition to their environmental rights, Petitioners' members, in both states, also have real property that is subject to due process protection. *See U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (holding, that the Supreme Court's "precedents establish the general rule that individuals must receive notice and an opportunity to be heard **before** the Government deprives them of property") (emphasis added); *see also United States v. $8,850*, 461 U.S. 555, 562, n. 12 (1983); *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."*Mullane*, 339 U.S. at 313.

PennEast has filed over 150 condemnation cases in a number of district courts in New Jersey and Pennsylvania after the Commission issued PennEast's Certificate. *See* List of Condemnation Cases; AD497. Petitioners have included declarations from two members who have real property interests that are currently subject to condemnation actions by PennEast. *See* Kelly-Mackey Declaration; AD480; Heindel Declaration; AD490. Both members received condemnation proceeding notices stating that a complaint was filed "for the taking under the federal power of eminent domain pursuant to the Natural Gas Act" of their property roughly a month after PennEast obtained its Certificate. *See, e.g.*, Kelly-Mackey Condemnation Complaint; AD508.

The Commission has interpreted its duty to act pursuant to 15 U.S.C. § 717r(a), as authorizing the Deputy Secretary to issue tolling orders. *See* 18 C.F.R. § 375.302(v). This provision states that "[t]he Commission authorizes the Secretary, or the Secretary's designee to . . . [t]oll the time for action on requests for rehearing." 18 C.F.R. § 375.302(v). The authority to indefinitely toll an aggrieved party's ability to challenge the legal sufficiency of a certificate by which constitutionally protected rights are violated, or real property is otherwise taken, is a violation of Petitioners' due process rights. This is particularly true where the Commission takes over a year to deny rehearing requests for pipeline projects, *see supra* 14-15, by which time trees have been cut, trenches dug,

wetlands destroyed, property is taken, and the project is in full operation. There can be no question that by this belated time, an aggrieved party's opportunity for judicial review of the validity of the Certificate is no longer meaningful in the context their due process rights.

Now, because of the Commission's routine practice of "tolling" rehearing requests, the Commission indefinitely obstructs landowners such as Ms. Kelly-Mackey and Ms. Heindel from challenging the validity of the Certificate that the eminent domain court relies upon to issue judgments against them. Taking people's property and violating their constitutionally protected environmental property and liberty rights under such circumstances is a permanent injury that requires the immediate attention of this Court.[3]

2. Petitioners Have A Clear Right To Relief Because The Commission Failed To "Act[]" On Petitioners' Rehearing Requests As Required By The Natural Gas Act

Petitioners also have a clear right to relief because the Commission failed to act on Petitioners rehearing requests, as mandated by the language of the Act.

[3] Making a determination with respect to the public utility of an eminent domain action prior to allowing completion of the taking prevents a condemnor from taking "property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo v. City of New London*, 545 U.S. 469, 478 (2005); *see also id*. at 491 (Kennedy, J., concurring) ("A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits").

When interpreting agency mandates, courts have held that "[a]bsent ambiguity, our analysis also ends with the statutory language." *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013); *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("[W]e must presume that the statute says what it means."). Not only do Petitioners have a clear right to the relief they request based on the language contained in the Act, but by ignoring the plain meaning of the language the Commission violates at least two foundational canons of statutory interpretation. Furthermore, Congress in recognizing the deprivation at stake required that such actions received an expedited review in the statute. Lastly, courts have yet to review the lawfulness of tolling orders when environmental rights, real property, and the potential for permanent damage are at stake.

Petitioners have a clear right to the relief they request based on the language contained in the Act. The Commission's use of tolling orders to indefinitely obstruct timely appeals of Commission decisions is not the type of "act[]" that the Natural Gas Act intends or explicitly authorizes. The third sentence of section 717r(a) specifically enumerates **four types** of actions that the Commission may perform: "the Commission shall have power to **grant** or **deny** rehearing or to **abrogate** or **modify** its order without further hearing." 15 U.S.C. § 717r(a) (emphasis added). The fourth sentence of this section provides the allowable timeframe within which the enumerated actions may be taken: "[u]nless the

Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id*. The word "acts" in the fourth sentence plainly refers back to the four specific acts that Congress authorized in the third sentence, *i.e.*, grant, deny, abrogate, or modify. *Id*. Section 717r(a) is free of ambiguity and its plain language should be given full force and effect. *See UBS Ams. Inc.*, 712 F.3d at 141 ("In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning").To date, the Commission has not acted to "grant or deny" Petitioners' requests for rehearing, nor has it acted to "abrogate or modify its order."

The Commission violates at least two foundational semantic canons by interpreting Section 717r(a) as allowing for the issuance of tolling orders: (1) the omitted-case canon, *casus omissus pro omisso habendus est*, which represents "[t]he principle that a matter not covered is not covered," or in other words, that "[n]othing is to be added to what the text states or reasonably implies"; and (2) the negative-implication canon, *expressio unius est exclusion alterius*, that "[t]he expression of one thing implies the exclusion of others." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 93-100, 107-11 (2012); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.") (Brandeis, J.). Indeed, that Congress stopped short of authorizing delay tactics in the specified list of powers the Commission

"shall" have clearly demonstrates its intent to exclude those that are reasonably related. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 370 (2d Cir. 2006).

In interpreting statutes courts have long concluded that "we must presume that the statute says what it means." *See Devine*, 202 F.3d at 551. Therefore, the Commission cannot abandon the plain language of the statute and canons of interpretation by acting outside the universe of the specific actions authorized by Congress. When receiving rehearing requests, it must act, in accordance with the plain language mandate in the Act, through granting or denying the request on the merits or abrogating or modifying its order within the thirty-day statutory requirement. It does not have the power to toll these requests, much less to do so indefinitely, and particularly cannot do so when constitutional and fundamental liberty and personal property rights are at stake. Allowing unlimited time for further consideration, while simultaneously authorizing the condemnation of personal property and the environmental harm associated with construction activity, was simply not an option that Congress offered or contemplated in the Act.

Furthermore, Congress' intent that appeals of Commission orders be timely resolved, and not indefinitely obstructed, is further evinced by the requirements of Section 717r(d)(5), which provide that "[t]he Court shall set any action brought under this subsection for **expedited consideration**." 15 U.S.C. § 717r(d)(5)

(emphasis added). As such, it is clear that Congress intended on having prompt judicial resolution of appeals of Commission orders or actions. The Commission's own regulations also indicate that Congress intended to imbue this provision with a nondiscretionary and expedited effect. *See, e.g.*, 18 C.F.R. § 385.713(f) ("Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request **is denied**.") (emphasis added). The Commission's use of tolling orders therefore conflicts with the plain language of the statute, Congressional intent, the Commission's own regulations, and the due process rights of Petitioners.

The court decisions that have accepted the Commission's use of tolling orders are inapposite, as they have only done so in completely different and inapplicable factual contexts. *See, e.g.*, *California Co. v. Fed. Power Comm'n*, 411 F.2d 720 (D.C. Cir. 1969); *Gen. Am. Oil Co. of Texas v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969); *Kokajko v. FERC*, 837 F.2d 554 (1st Cir. 1988). Specifically, in each of these cases the Commission's use of tolling orders was only authorized where the plaintiffs asserted non-environmental or otherwise non-irreparable harm. For example, in both *California Co.*, 411 F.2d 720 (D.C. Cir. 1969) and *Gen. Am. Oil Co. of Texas v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969), the subject matter of the Commission's orders involved rate proceedings. Neither of these courts grappled with the issue of the impact a tolling

order has on state constitutional environmental property or liberty rights, or its impact on the automatic condemnation of personal real property without prior judicial review. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (finding harms to "aesthetic values and environmental resources" and "permanent loss of land to public access and enjoyment constituted irreparable injury"); *Peterson v. D.C. Lottery & Charitable Games Control Bd.*, 1994 U.S. Dist. LEXIS 10309, 1994 WL 413357, at *4 (D.D.C. July 28, 1994) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury"). The Supreme Court has specifically held that environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable."). Indeed, monetary compensation does not adequately address takings where there is a violation of due process. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005) (finding that "no amount of compensation" is sufficient where the government's action is "impermissible" such as by its "violat[ion] [of] due process"). Because the specific types of harms flowing from the Commission's failure to provide a

meaningful opportunity to be heard were not considered in the prior cases authorizing the Commission's use of tolling orders, they are inapposite.

Similarly, in *Kokajko* the relevant complaint only involved "unreasonable fees" charged by a utility for access to a particular water body. *Kokajko*, 837 F.2d at 525. Here, the court concluded that where "the present matter concerns economic regulation, and human health and welfare are not implicated," the action is not so "egregious that mandamus is warranted." *Kojak*, 837 F.2d at 526 (citing *Wellesley v. Fed. Energy Regulatory Com.*, 829 F.2d 275 (1st Cir. 1987)). These cases therefore stand for the limited proposition that agency delays may be more reasonable when the delay results in economic harm, not where the delay immediately results in violations of constitutionally protected rights and result in irreparable harm. *See Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951) ("Agency inaction can be as harmful as wrong action"); *NRDC v. Fox*, 93 F. Supp. 2d 531, 538 (S.D.N.Y. 2000) ("At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review"). None of the cases which have authorized the Commission's use of tolling orders involve a factual situation where the Commission issues a Certificate that automatically confers eminent domain powers and also allows construction activity to begin, while simultaneously blocking an aggrieved party from the opportunity of challenging the legal sufficiency of the Certificate in court.

The Commission's abuse of tolling orders is especially egregious in this context considering the narrow limitations on what the Commission must consider in the rehearing requests. Unlike other rehearing requests that the Commission may evaluate under different regulatory regimes, nothing new is, or can be, considered by the Commission in a rehearing request in a Section 7 natural gas pipeline project proceeding. *See No Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) (noting that the Commission "rejects requests for rehearing that raise issues not previously presented unless parties show that the request is 'based on matters not available for consideration . . . at the time of the . . . final decision.' 18 C.F.R. § 385.713(c)(3)"). Because the Commission has already heard every single exact contention raised by Petitioners, there is no credible reason to believe that the Commission cannot act within the thirty days as proscribed by the Act in granting or denying rehearing on the merits.

CONCLUSION

Petitioners have, in good faith, followed all the required avenues for redress of its injuries prior to respectfully petitioning this Court to grant a writ of mandamus. The Commission has refused to comply with its regulatory and congressional mandates, and constitutional responsibilities, thereby leaving Petitioners with no other choice than to seek alternative means to protect and preserve their rights through this writ. For the foregoing reasons, Petitioners

petition this court to issue a writ of mandamus directing the Commission to grant or deny Petitioners' rehearing requests on the merits, and provide any other relief that is just and equitable pursuant to the All Writs Act.

Respectfully submitted this 9th day of May 2018.

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because this petition contains 7,557 words.

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the requirements of Fed. R. App. P. 32(c)(2) because this petition has been prepared in proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

Dated: May 9, 2018

/s/ Aaron Stemplewicz

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 9th day of May 2018, filed the foregoing with the Court via the Court's CM/ECF system and served the foregoing upon all counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and/or through first class mail.

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