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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON**  
**MEDFORD DIVISION**

**DEB EVANS, et.al.**

**No. 1:19-cv-00766-CL**

**Plaintiffs,**

**v.**

**FEDERAL ENERGY  
REGULATORY COMMISSION,**

**Defendant.**

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**PLAINTIFFS' REPLY IN SUPPORT OF  
THEIR MOTION FOR SUMMARY JUDGEMENT**

Plaintiffs submit the following Reply in support of their Motion for Summary Judgment (ECF 18). Because Defendant Federal Energy Regulatory Commission ("FERC") has failed to meet its burden of proof to show Exemption 6 applies to the unredacted landowner lists, and because of the significant public interest in disclosure of these lists, Plaintiffs respectfully request this Court grant summary judgment in their favor and order FERC to disclose all material previously withheld on Exemption 6 grounds.

## ARGUMENT

FERC's Response to Plaintiffs' Motion for Summary Judgment (ECF 25)<sup>1</sup> does not support its Exemption 6 withholding argument or address four fundamental problems.

First, FERC attempts to ignore its Constitutional duty to ensure landowners have proper notice of the potential taking of their lands. Second, FERC does not address the very significant public interest in seeing whether FERC complied with that Fifth Amendment due process duty. Third, FERC merely parrots established legal standards in its arguments without providing any factual support. Fourth, FERC fails to address the deficiencies in the factual assertions it does make.

### **I. FERC improperly attempts to shift its Constitutional and statutory obligations onto a private pipeline corporation**

Incredibly, FERC attempts to allege it has *no* duty to ensure all affected landowners are receiving proper notice. FERC disputes that it has a Constitutional obligation under the Fifth Amendment to provide adequate notice of its proceedings, the potential impact this could have on landowners, and what rights landowners have. FERC's Reply at 3. In disputing it has this Constitutional obligation, FERC points to the fact that under its own regulation, 18 C.F.R. § 157.6(d), Pacific Connector Gas Pipeline ("PCP") was obligated to notify the affected landowners. FERC's Reply at 3, 6.

However, as more fully described in Plaintiffs' Motion for Summary Judgment, FERC does have a Constitutional duty to ensure proper notice is being given to landowners. *See* Plaintiffs' Motion for Summary Judgment at 25–29. FERC's failure to ensure landowners receive notice denies these landowners of their statutory right, under the Natural Gas Act, to have FERC

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<sup>1</sup> FERC's Reply in support of its Motion for Summary Judgment (ECF 26) simply incorporates all facts and arguments from its Response to Plaintiffs' Motion for Summary Judgment.

reconsider its decision to deprive them of their properties. 15 U.S.C. § 717r(a). Further, without this notice, landowners are also incapable of asserting their statutory and Constitutional right to seek judicial review of FERC's decision. *Id.*; 15 U.S.C. § 717r(b). Depriving landowners of both their right to their property and the right to challenge that taking of their property is a clear violation of the Due Process Clause. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)("[landowner's] right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance."); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.").

Clearly, FERC has a Fifth Amendment duty to ensure landowners receive notice that protects their right to challenge the taking of their property. FERC cannot simply wash its hands of this duty by delegating the obligation to provide notice to a private corporation that has every interest in preventing landowners from asserting their rights. It is this potential Due Process violation that makes disclosure of these landowner lists so important to the public interest.

## **II. FERC ignores the significant public interest in the landowner lists**

The second fundamental problem that FERC does not address in its Response is the significant public interest in seeing whether FERC complied with its Fifth Amendment Due Process duty to provide landowners with notice of the imminent threat to their property and of their rights to participate in the administrative process that may result in that property being taken. *See* Plaintiffs' Motion for Summary Judgment at 12. The public has a right to know how – and how well – FERC discharges its Constitutional responsibility.

FERC attempts to distract from this question by alleging that the legal issues before the Court do not include Due Process considerations, FERC's statutory or Constitutional responsibilities to send notice to landowners, statutory or Constitutional rights of landowners to seek judicial review of FERC's decision, or eminent domain issues. FERC's Response at 8. However, these considerations are essential to the public interest analysis. Without proper notice to landowners, these individuals lose their right to challenge FERC's action and the taking of their private land for private, corporate use. When agency action affects constitutional rights the need for transparency and accountability increases greatly. It is exactly because Due Process rights are being implicated that the public has a significant interest in overseeing FERC's action.

Moreover, FERC itself has *no* oversight mechanism to ensure that pipeline companies are sending this notice to landowners. As discussed in Plaintiffs' Motion for Summary Judgment, FERC's response to another recent FOIA request shows it has no policies, practices, or procedures in place to ensure certificate applicant pipelines have sent notice to all affected landowners. Plaintiffs' Motion for Summary Judgment at 27. FERC did not respond to this gross lack of oversight in its Response. This lack of internal oversight underscores the need for public oversight, thus increasing the public interest in obtaining these landowner lists.

FERC alleges that releasing the names and address of the individual landowners would not show how FERC works. FERC's Response at 6. However, *Columbia Riverkeeper* has already held that these lists do in fact show FERC's inner workings. *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121 (D. Or. 2009). Like the plaintiffs in *Columbia Riverkeeper*, Plaintiffs here are seeking landowner lists in order to "shed light on FERC's performance of its duties, because disclosure enables the public to review whether FERC complied with its public notice mandate, to oversee FERC's procedures, and to ensure that all affected landowners are on the mailing list."

*Columbia Riverkeeper*, 650 F. Supp. 2d at 1130. FERC itself even conceded that “disclosure of the mailing list would shed light on FERC’s activities.” *Id.* The court found that FERC had “not carried its burden of proving the withheld materials are exempt from disclosure” because “[t]he evidence does not support the existence of a ‘clearly unwarranted invasion of privacy.’” *Id.* Further, FERC had not “carried its burden of proving that the information sought by plaintiffs would not shed light on FERC’s performance of its statutory duties governing notice.” *Id.*

The District Court for the District of Columbia recently decided a similar FOIA request for FERC’s landowner lists for the Atlantic Coastline Pipeline (ACP) project. *Niskanen Ctr. v. Fed. Energy Regulatory Comm’n*, No. CV 19-125 (JEB), 2020 WL 224515 (D.D.C. Jan. 15, 2020). The court there agreed that there was a legitimate public interest in “whether [FERC] is ensuring that ACP is properly notifying affected landowners of the construction of a pipeline through their properties.” *Niskanen Ctr.*, 2020 WL 224515, at \*4.<sup>2</sup>

Plaintiffs here want the same type of landowner lists as in *Columbia Riverkeeper* for the same purpose: to determine if FERC is complying with its statutory duties governing notice. FERC fails to address this important public interest. This Court should follow *Columbia Riverkeeper*’s precedent and order FERC to disclose unredacted lists of landowners’ names and addresses.

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<sup>2</sup> This court limited the information FERC must disclose to landowner initials and street names, reasoning that this information would be sufficient to determine if proper notice was sent to all affected landowners. *Niskanen Ctr.*, 2020 WL 224515, at \*4. *Niskanen* will be appealing this decision because it is an inadequate solution. It is difficult and time consuming, if not impossible, to accurately determine this from just initials and street names. Some streets are miles long, and many people have the same initials; if there are two people with initials “AB” on street X, and only one of whom was in the purposed path of the pipeline, Plaintiffs would be unable to determine if PCP sent the notice to the correct landowner. This Court should instead follow *Columbia Riverkeeper*’s rationale and grant Plaintiffs the landowner lists with full names and street addresses.

### **III. FERC just parrots established legal standards**

The third fundamental problem with FERC's arguments is that its justification for withholding these lists on privacy grounds is nothing more than the "generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards" initially given in its Motion for Summary Judgment. *See Am. Immigration Council v. U.S. Dep't of Homeland Security*, 950 F. Supp. 2d 221, 235 (D.D.C. 2013) ("[t]ime and time again, courts in this Circuit have stressed that the government cannot justify its withholdings on the basis of summary statements that merely reiterate legal standards"). FERC fails to provide any explanation as to what specific, adverse consequences landowners will face if PCP's lists are disclosed to Niskanen and fails again to articulate any threat to landowners' privacy that is real rather than purely speculative. *See Am. Immigration Council* at 236; *New Orleans Workers' Ctr. for Racial Justice v. U.S. Immigration & Customs Enf't*, 2019 U.S. Dist. LEXIS 33659 \*79 (D.D.C. Mar. 4, 2019) (finding that "[t]o justify [its] Exemption 6 withholdings, the defendant[] must show that the threat to employees' privacy is real rather than speculative. [...] The Court cannot conclude that the defendant has done that here.").

Because FERC cannot and does not point to real injuries that would result from disclosure of the landowner lists, FERC has failed to meet its burden in showing these lists are protected by Exemption 6.

### **IV. FERC continues to rely on unsupported and inadmissible factual contentions**

The fourth fundamental problem with FERC's arguments is that it fails to adequately support its factual contentions. First, FERC alleges that landowners were notified through "different mailings." FERC's Response at 6. However, FERC provides no admissible evidence that would allow Plaintiffs or this Court to determine whether these mailing lists included all

affected landowners or that such notice included notice of the need to intervene in order to preserve the rights to rehearing and judicial review. This is the exact issue Plaintiffs are seeking to determine with the present FOIA request.

Second, FERC fails to adequately address the deficiencies in its Declarations. While admitting that Declarations need to be “made on personal knowledge,” FERC does not address the fact that none of Declarations state they are based on the affiants’ “personal knowledge.” FERC’s Response at 7. The facts referenced in these Declarations could have come from many different sources, including inadmissible hearsay. Because the Declarations are deficient on their face, this Court should exclude them from the record. Without admissible Declarations, FERC has no support for its allegations that proper notice was given to all affected landowners.

### **CONCLUSION**

FERC continues to ignore the pertinent public interest in disclosure and continues to rely on unsupported facts to justify withholding the landowner lists on Exemption 6 grounds. These lists would shed important insight into the inner workings of FERC and whether proper notice is being given to landowners. For the reasons set forth above, and based upon the entire record herein,

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Niskanen respectfully requests that Plaintiffs' Motion for Summary Judgment (ECF 18) be granted and Defendant's Motion for Summary Judgment (ECF 13) be denied.

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Respectfully Submitted,

/s/ Tonia L Moro

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