

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NISKANEN CENTER,)
)
 Plaintiff,)
)
 v.)
)
 FEDERAL ENERGY)
 REGULATORY COMMISSION,)
)
 Defendant.)
)
 _____)

Civil Action No. 19-0125 (JEB)

**PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND REPLY**

Argument

**FERC AGAIN FAILS TO SATISFY ITS BURDEN TO JUSTIFY ITS
EXEMPTION 6 WITHHOLDING**

In its Opposition to Plaintiff’s Motion for Summary Judgment and Reply (“FERC’s Reply”), FERC once again fails to support its Exemption 6 withholding and to address the two fundamental problems with its argument.

First, there is a *very* 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* Plaintiff’s Motion for Summary Judgment and Opposition to Defendant’s Motion for Summary

Judgment (“Niskanen’s Motion”) at 17-18, 22-23; *Gilman v. U.S. Dep’t of Homeland Sec.*, 32 F. Supp. 3d 1, 11 (D.D.C. 2014) (finding the public interest in disclosure outweighed privacy interests where the names and addresses of landowners in the vicinity of construction of U.S.-Mexico border wall would “shed light” on [the federal agency’s] planning and construction of a wall). The public has a right to know how – and how well --FERC discharges its constitutional responsibility, especially given the evidence (which FERC does not dispute) that *at least* 14 landowners were *never* sent notice. *Id.*

Moreover, it now appears that FERC itself has *no* oversight mechanisms to ensure that pipeline companies are sending this notice to landowners. Niskanen recently sent a FOIA request to FERC for “any FERC policies, practices, or procedures in place to ensure that certificate applicant pipeline companies have sent notice to all affected landowners”. *Exhibit 1*, FERC’s August 21, 2019 Response to Niskanen’s FOIA Request. FERC’s response was that, “A search of the Commission’s non-public files identified no documents responsive to this request”. *Id.* at 2. The fact that people’s land might be taken through FERC’s proceedings is in itself an injury that warrants significant oversight of FERC’s delegated notice activities. *See City of Oberlin v. FERC*, 2019 U.S. App. LEXIS 26913, D.C. Cir. 2019) (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1365 (D.C. Cir. 2017) (finding that Landowners are "forced to choose between selling to a FERC-certified developer and undergoing eminent domain proceedings, ‘are aggrieved’ within the meaning of the

[Natural Gas] Act.")). This is grossly exacerbated by the fact that FERC does not bother to oversee what its delegates are doing.¹

The second fundamental problem with FERC's argument 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 ACP'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

¹ FERC disputes it delegates its duty pursuant to 18 C.F.R. 157.6(d) to put affected landowners on notice. (See Defendant's Response to Plaintiff's Statement of Undisputed Material Facts at ¶¶ 3 and 5). While presumably FERC is not denying that it has a Fifth Amendment obligation to provide this notice, it affirms that that it requires pipeline companies, pursuant to 18 C.F.R. 157.6(d), "make a good faith effort to notify all affected landowners [...]."

speculative. [...] The Court cannot conclude that the defendant has done that here.”); Niskanen’s Motion at 11-12; 14-15.

Ironically, FERC seems completely unaware that its recitation of imagined injuries resulting from this disclosure (which “could lead directly to intrusion, solicitations, and encroachment of their private residences”, and “would be highly disruptive to the lives of thousands of individual landowners”; FERC’s Reply at 3) describes perfectly what actually happens to these landowners when ACP marches on to their land and cuts a 150’-wide swathe through their property. Yet FERC is remarkably unconcerned about providing notice to these landowners of that rather ‘disruptive encroachment’.

Remarkably, FERC attempts finally to justify its failure to provide landowners with the required notice, in two ways. First (and without any evidence), FERC says that a majority of landowners “who happen to live near a proposed pipeline do not take any affirmative action for or against the pipeline” (FERC Reply at 3). Aside from the obvious fact that this does not relieve the government of its obligation to provide notice to landowners, FERC again fails to recognize the irony of saying that many landowners do not participate in the administrative process when that might well be because they were never sent notice of how or when to do so.

Second, FERC points to “the extensive public process” that *subsequently* took place in connection with ACP’s application, noting that “the mailing list” for the notice of intent to prepare an environmental impact statement and notice of public

scoping meetings included “all affected landowners”. FERC’s Reply at 3-4. First, it is unclear where the FERC’s quote referencing the “mailing list” comes from, as it is not in the citation offered by FERC in the “Notice of intent” pre-filing document.²

Second, to the extent that this quote exists anywhere in FERC’s ACP record, it is irrelevant because “mailing list” of landowners is precisely the list provided by ACP, which did not have *at least* 14 landowners on it (which, again, FERC does not dispute).³

CONCLUSION

There is already significant evidence that FERC failed to abide by its constitutional and statutory duty to send notice to all landowners whose property might be taken by ACP, and the release of the requested lists will shed some much-needed light on the extent to which FERC has failed to meet these obligations.

For the reasons set forth above and based upon the entire record herein, Niskanen respectfully requests that Plaintiff’s Motion for Summary Judgment be granted and Defendant’s Motion for Summary Judgment be denied.

² The Notice of intent to prepare an Environmental Impact Statement for the Planned Supply Header Project and Atlantic Coast Pipeline Project, and Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings (NOI) under PF15-5 and PF15- 6 was filed in the pre-filing docket on February 27, 2015, not February 27, 2017, which is before ACP even filed its Application for a Certificate, or the landowner lists at issues in this case, in FERC docket CP15-554.

³ FERC’s Reply, like its Motion for Summary Judgment, relies almost exclusively on the discussion of the corresponding public record in *Odland v. FERC*, 34 F. Supp. 3d 3 (D.D.C). FERC Reply at 3-4. As explained in detail in Niskanen’s Motion, *Odland* is inapposite here. Niskanen’s Motion at 18-20.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2019, I have served the foregoing document upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Respectfully submitted,

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