

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 MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Niskanen Center respectfully moves for summary judgment in this case under the Freedom of Information Act, 5 U.S.C. § 552. In support of this motion and Plaintiff’s Opposition to the Defendant’s Motion for Summary Judgment, Plaintiff submits the attached memorandum of law, a Statement of Material Facts As to Which There Is No Genuine Issue, and a response to Defendant’s statement of material facts.

DATED: January 19, 2019

Respectfully submitted,

/s/ Megan C. Gibson

Megan C. Gibson

DC Bar No. 1021191

David Bookbinder

DC Bar No. 455525

NISKANEN CENTER

820 First Street, NE

Suite 675

Washington, DC 20002

(202) 899-1172

mgibson@niskanencenter.org

dbookbinder@niskanencenter.org

Counsel for Plaintiff

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 MEMORANDUM IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Megan C. Gibson
DC Bar No. 1021191
David Bookbinder
DC Bar No. 455525
NISKANEN CENTER
820 First Street, NE
Suite 675
Washington, DC 20002
(202) 899-1172
mgibson@niskanencenter.org
dbookbinder@niskanencenter.org

Counsel for Plaintiff

RULE 26.1 DISCLOSURE STATEMENT

The Niskanen Center is a 501(c)(3) think tank and advocacy organization; it has no parent company, and no publicly-held company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

Rule 26.1 Statement	i
Table of Contents.....	ii
Table of Authorities.....	iv
Glossary of terms.....	viii
INTRODUCTION	1
STATEMENT OF FACTS.....	2
LEGAL CONTEXT AND FACTUAL BACKGROUND.....	3
A. THE FREEDOM OF INFORMATION ACT	3
B. THE COMMISSION’S DUTIES	4
C. NISKANEN’S FOIA REQUEST	6
D. FERC’S SUPPORT FOR MOTION FOR SUMMARY JUDGMENT.....	8
ARGUMENT	9
I. FERC HAS NOT SATISFIED ITS BURDEN TO DEMONSTRATE THAT THE MATERIAL WITHHELD PURSUANT TO EXEMPTION 6 IS EXEMPT FROM DISCLOSURE.....	10
A. With Regard to the Materials Withheld on Exemption 6 Grounds, FERC Has Not Even Satisfied Its Obligation to Provide the Court with a Declaration and/or a <i>Vaughn</i> Index Meeting Basic Legal Requirements.....	10
B. FERC Has Not, and Cannot, Satisfy Its Burden to Establish that Information Has been Properly Withheld Under Exemption 6.....	12
1. A Substantial Privacy Interest Does Not Exist in the Withheld Name and Address Information in the Landowner Lists.....	13

2. The Substantial Public Interest Outweighs any Private Interest.....	14
3. Even if Any of the Information Is Subject to Exemption 6, FERC Has Not Demonstrated that All Segregable Non-Exempt Information Has Been Disclosed.	20
II. FERC HAS NOT SATISFIED ITS SUMMARY JUDGMENT BURDEN DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Am. Civil Liberties Union v. U.S. Dep’t of Justice</i> , 750 F.3d 927 (D.C. Cir. 2014).....	3
<i>Am. Immigration Council v. U.S. Dep’t of Homeland Security</i> , 950 F. Supp. 2d 221 (D.D.C. 2013).....	10, 11, 12, 23, 24
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	24
<i>Armstrong v. Exec. Office of the President</i> , 97 F.3d 575 (D.C. Cir. 1996).....	14
<i>Beyenne v. Coleman Sec. Servs., Inc.</i> , 854 F.2d 1179, 1181 (9th Cir. 1988).....	23
<i>Bortell v. Eli Lilly & Co.</i> , 406 F. Supp. 2d 1, 11 (D.D.C. 2005).....	23
<i>Campbell v. U.S. Dep’t of Justice</i> , 164 F.3d 20 (D.C. Cir. 1998).....	11
<i>Carter v. U.S. Dep’t of Commerce</i> , 830 F.2d 388 (D.C. Cir. 1987).....	12
<i>Casa De Md., Inc. v. United States Dep’t of Homeland Sec.</i> , 409 Fed. Appx. 697 (4th Cir. 2011).....	13
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	24
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	3
<i>Dep’t of Air Force v. Rose</i> , 425 U.S. 352 (1976).....	3

Dep't of Justice v. Julian,
486 U.S. 1 (1988)..... 3

Dep't of Justice v. Reporters Comm. for Freedom of the Press,
489 U.S. 749 (1989)..... 3, 4, 9, 13

DiBacco v. U.S. Army,
795 F.3d 178 (D.C. Cir. 2015) 3

Elliott v. U.S. Dep't of Agric.,
596 F.3d 842 (D.C. Cir. 2010) 20

Gilman v. U.S. Dep't of Homeland Sec.,
32 F. Supp. 3d 1 (D.D.C. 2014)..... 13, 14, 18, 19, 20

Holcomb v. Powell,
433 F.3d 889 (D.C. Cir. 2006). 24

Judicial Watch, Inc. v. FDA,
449 F.3d 141 (D.C. Cir. 2006)..... 12

Milner v. U.S. Dep't of Navy,
562 U.S. 562 (2011)..... 3

Morley v. CIA,
508 F.3d 1108 (D.C. Cir. 2007)..... 18

Mullane v. Central Hanover Trust Co.,
339 U.S. 306 (1950)..... 15

National Ass'n of Retired Fed. Emps. v. Horner,
879 F.2d 873 (D.C. Cir. 1989)..... 20

New Orleans Workers' Ctr. for Racial Justice v. U.S. Immigration & Customs Enf't,
2019 U.S. Dist. LEXIS 33659 (D.D.C. Mar. 4, 2019)..... 14

Odland v. FERC,
34 F. Supp. 3d 3 (D.D.C) 18, 19

Public Citizen Health Research Group v. Food & Drug Administration,
185 F.3d 898 (D.C. Cir. 1999)..... 4, 25

Riverkeeper v. FERC,
650 F. Supp. 2d 1121 (D. Or. 2009)..... 13, 14, 18

Scott v. Harris,
550 U.S. 372, 380 (2007)..... 24

Stolt-Nielsen Transp. Grp. Ltd. v. United States,
534 F.3d 728 (D.C. Cir. 2008)..... 20

U.S. Dep’t of State v. Ray,
502 U.S. 164 (1991)..... 13, 25

U.S. v. James Daniel Good Real Prop.,
510 U.S. 43, 53 (1993)..... 15

Wisdom v. U.S. Tr. Program,
232 F. Supp. 3d 97 (D.D.C. 2017)..... 24, 25

Statutes

5 U.S.C. § 552..... 1, 7

5 U.S.C. § 552(a)(3)(A)(ii)..... 3

5 U.S.C. § 552(a)(4)(B) 3, 23, 25

5 U.S.C. § 552(a)(6)(A)(ii)..... 7

5 U.S.C. § 552(b)..... 21

5 U.S.C. § 552(b)(6)..... 2, 7, 12

15 U.S.C. § 717r(a)..... 15, 16

15 U.S.C. § 717r(b)..... 15

15 USC § 717f(h)..... 1

Regulations

18 C.F.R. 157.6(d)..... 1

18 C.F.R. 157.6(d)(2)..... 4

18 CFR 157.6(d)(3)..... 5, 16, 17

18 CFR 157.6(d)(5)..... 6

18 C.F.R. 157.21(d) 1

18 C.F.R. 157.21(f)(3) 1

18 CFR 388.108..... 7

Constitutional Provisions

U.S. Const. Amend. V..... 2

Orders

Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042 (October 13, 2017) 8

GLOSSARY OF TERMS

ACP	Atlantic Coast Pipeline
DEIS	Draft Environmental Impact Statement
Certificate	Certificate of Public Convenience and Necessity
FERC	Federal Energy Regulatory Commission
FOIA	Freedom of Information Act

INTRODUCTION

This Freedom of Information Act (“FOIA” or “ACT”), 5 U.S.C. § 522, case concerns records submitted, pursuant to 18 CFR 157.6(d) to the Federal Energy Regulatory Commission (“FERC”) by the Atlantic Coast Pipeline (“ACP”). ACP submitted these records as part of its application to FERC for a Certificate of Public Convenience and Necessity (“Certificate”), which would allow ACP to construct and operate a natural gas pipeline across West Virginia, Virginia, and North Carolina.

Certificate holders under the Natural Gas Act have extraordinary powers, including the ability to exercise federal eminent domain authority to take private land from unwilling sellers for pipeline projects. *See* 15 U.S.C. §717f(h). Although FERC is the federal agency granting this extraordinary authority to seize people’s property, FERC has delegated to Certificate applicants its Constitutional responsibility to provide adequate notice of its proceeding, the potential impact the proceeding could have on landowners, and what rights landowners have. *See* 18 CFR 157.21(d).

Certificate applicants must provide such notice, and then must submit the names and addresses of the landowners it has so notified to FERC. *Id.*; *See also* 18 CFR

157.21(f)(3).¹

¹ “(f) Upon the Director's issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must: (3) Within 14 days, contact all stakeholders not already informed about the project, including all affected landowners as defined in paragraph § 157.6(d)(2) of this section.” 18 CFR 157.21(f)(3).

In ACP's Certificate proceedings, ACP compiled lists of the landowners to whom it claimed to have provided notice of its Certificate application (the "landowner lists"), and submitted these to FERC. In order to confirm that FERC is discharging its Fifth Amendment Due Process responsibility to send adequate notice to landowners of the threat they face, Plaintiff Niskanen Center, a 501(c)(3) non-profit think tank, requested the ACP landowner lists under FOIA. FERC, however, is withholding them on the spurious grounds that they contain "information" protected from disclosure under FOIA exemption 6. 5 USC § 552(b)(6). FERC should be compelled to disclose these records because the public has a significant interest in obtaining and analyzing them in order to ensure that FERC (or ACP, acting as FERC's agent) has fulfilled its constitutional responsibility.

Accordingly, as explained further below, given the substantial public interest at stake, and because FERC has not satisfied its burden to support its exemption 6 claims, FERC's motion for summary judgment should be denied and Niskanen's motion for summary judgment should be granted.

STATEMENT OF FACTS

Niskanen incorporates herein the attached Plaintiff's Statement of Material Facts to Which There is No Genuine Issue and Response to Defendant's Statement of Material Facts.

LEGAL CONTEXT AND FACTUAL BACKGROUND

A. THE FREEDOM OF INFORMATION ACT

Congress enacted FOIA in order “to open agency action to the light of public scrutiny,” *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 750 F.3d 927, 929 (D.C. Cir. 2014) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976)), and to “promote the broad disclosure of Government records by generally requiring federal agencies to make their records available to the public on request.” *DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015) (citing *Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988)). Since the “basic objective of the Act is disclosure,” *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 (1979), the nine statutory exemptions from disclosure “are explicitly made exclusive and must be narrowly construed.” *Milner v. U.S. Dep’t of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks and citations omitted). “[I]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Rose*, 425 U.S. at 361.

The Act requires each federal agency to make non-exempt records “promptly available to any person” upon request, 5 U.S.C. § 552(a)(3)(A)(ii), and vests jurisdiction in the district courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). The agency wishing to withhold a requested record has the burden of proving that the record is exempt, and the Court must decide the matter *de novo*. *Id.*; *see also Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749,

755 (1989). Therefore, when an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *Id.*; see also, e.g., *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (finding summary judgment for the requester to be appropriate because the agency’s “[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency’s decision to withhold requested documents”).

B. THE COMMISSION’S DUTIES

FERC delegates to Certificate applicants the obligation of providing “affected landowners”² with relevant information about the Certificate process (hereafter, the “notice”).

The notice shall include:

² All affected landowners include owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice whose property:

- (i) Is directly affected (i.e., crossed or used) by the proposed activity, including all facility sites (including compressor stations, well sites, and all above-ground facilities), rights of way, access roads, pipe and contractor yards, and temporary workspace;
- (ii) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of the proposed construction work area;
- (iii) Is within one-half mile of proposed compressors or their enclosures or LNG facilities; or
- (iv) Is within the area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone.” 18 CFR 157.6(d)(2).

- i. The docket number of the filing;
- ii. The most recent edition of the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners. Except: pipelines are not required to include the pamphlet in notifications of abandonments or in the published newspaper notice. Instead, they should provide the title of the pamphlet and indicate its availability at the Commission's Internet address;
- iii. A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;
- iv. A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;
- v. A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and
- vi. Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in § 157.10.
- vii. A copy of the Commission's notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission's information sheet on how to intervene in Commission proceedings. Except: pipelines are not required to include the notice of application and information sheet in the published newspaper notice. Instead, the newspaper notice should indicate that a separate notice is to be mailed to affected landowners and governmental entities.

18 CFR. 157.6(d)(3).

The landowner lists were supposed to be used to provide every affected landowner with constitutionally adequate notice. ACP compiled the lists and filed

them with FERC in order to show that notice was sent. *See* 18 CFR. 157.6(d)(5).

However, there is nothing in the record here, or in FERC's administrative record for the ACP Certificate, to indicate that FERC has taken any steps whatsoever to verify either that the landowner lists include all of the "affected landowners" or that ACP provided the required notice to all of the landowners who are listed. In fact, as discussed further below, there is significant evidence that FERC failed in its duty (through ACP) to send notice.

C. NISKANEN'S FOIA REQUEST

By letter dated October 29, 2018, the Niskanen Center sought "*any and all* records and information in FERC's possession or control in relation to private landowners identified by the Atlantic Coast Pipeline ("ACP") in Docket No. CP15-554, specifically the following landowner lists:

- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20160629 5197 on June 29, 2016;
- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20160412 5248 on April 12, 2016.
- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20151112 5341 on November 12, 2015
- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20151016 5227 on October 16, 2015."

ECF 11-3; Landowner FOIA Request (emphasis added); Defendant's Exhibit ("Def. Ex.") A, incorporated by reference.

On November 14, 2018, undersigned counsel received FERC's response to the request via 2 e-mails. ECF 11-4, FERC's FOIA Response; Def. Ex. B, incorporated

by reference.³ While the Response disclosed commercial and government entities' information, the Response noted that FERC redacted all private landowner information "pursuant to FOIA Exemption 6." *Id.* Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6).

Because FERC redacted all of the potentially responsive information in the Response, Niskanen filed an administrative appeal on December 18, 2018, pursuant to 5 U.S.C. § 552 and 18 CFR 388.108. ECF 11-5; Def. Ex. C. *See* Declaration of Megan C. Gibson at ¶ 4 (Pl. Exhibit 1). Niskanen noted in the appeal that beyond FERC's reproduction of the previously released, redacted landowner lists, FERC neglected to provide at least one other known ACP Landowner List Information on the docket, and that "[t]here may be other landowner lists that were not disclosed."

In a phone conversation on January 9, 2019, FERC attorney Michael Watson stated to Niskanen's counsel that FERC's position is that FERC considered its November 14, 2018 response to be a non-response, as it did not go through the 'correct bureaucratic channels' within the agency. Pl. Ex. 1 at ¶ 5. Consequently, by its own representation, it was FERC's position that FERC *never* responded to Niskanen's initial FOIA Request. *See* Pl. Ex. 1 at ¶ 5. Niskanen filed this lawsuit on January 18, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(ii); Pl. Ex. 1 at ¶ 6.

³ No FERC FOIA number was assigned to Niskanen's FOIA request. *See* ECF 11-4.

By letter dated February 1, 2019, FERC provided its determination of Niskanen's appeal. ECF No. 11-6; Def. Ex. D, incorporated by reference. FERC stated that "to overcome FOIA Exemption 6, it must be demonstrated that the public interest in the disclosure of the information outweighs the substantial privacy interest of the landowners. [...] In this instance, I find that this balance favors protecting the significant privacy interest of the landowners." *Id.* at 5. FERC further noted that it believed that it had met its notice requirements, and stated that "in any event, a FOIA request is not the appropriate forum for challenging the adequacy of notice required in a Commission proceeding [and] such an argument should be raised in the proceeding itself." *Id.* at 3. FERC offered no additional explanation as to why or how a landowner should or could assert their rights in a FERC proceeding if ACP never sent them notice, merely reasserting this point later in its letter: "If you believe a more expansive notice is needed, you may raise that issue in the proceeding." *Id.* at 5. FERC failed to acknowledge that it granted ACP a Certificate on October 13, 2017 (161 FERC ¶ 61,042), and that there currently is no ongoing proceeding or procedural mechanism for a landowner to seek relief before FERC. FERC also completely failed to address the significant public interest issues raised by Niskanen.

D. FERC'S SUPPORT FOR MOTION FOR SUMMARY JUDGMENT

In an effort to satisfy its burden to justify the Exemption 6 withholdings at issue, as well as to establish that FERC produced all segregable, non-exempt material in the FERC record, FERC has submitted a Declaration from FERC's Director of

External Affairs Leonard M. Tao (“Tao Declaration”), ECF No. 11-2, and ‘Defendant’s Statement of Material Facts to Which there is No Genuine Issue’ (“Defendant’s Statement”), ECF No. 11-1. The Declaration does not describe what the requested documents are, relies on hearsay, and contains no support or justification for asserting Exemption 6 beyond purely conclusory statements, such as, “OEA staff indicated that the names, personal addresses, and other personal information of private citizens were withheld pursuant to FOIA Exemption 6.” ECF No. 11-2 at ¶ 6; *See also id.* at ¶¶ 7, 9. Tao’s Declaration and Defendant’s Statement further misstate the substance of Niskanen’s FOIA request and appeal, and fail to address the public interest issues raised, as discussed in greater detail below.

ARGUMENT

FERC has not remotely satisfied its burden to justify its Exemption 6 withholding, and Tao’s Declaration does not meet the most rudimentary standards imposed by Circuit precedent. The public has an overriding interest (and a right under FOIA) to glean as much information as possible regarding the constitutionally-required notice processes of a federal agency that has the authority to give private companies the right to take private land from American landowners. Indeed, such information goes to the heart of why FOIA was enacted. *See Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (explaining that the FOIA’s central purpose “focuses on the citizens’ right to be informed about ‘what their government is up to’”). FERC’s delegation of its constitutional duty of providing

landowners notice of their rights to ACP, which has every incentive not to provide such notice, is naturally rife with problems. When FERC fails to send notice to a landowner, that individual has lost their due process rights, and no means in which to seek judicial relief from FERC's decision. Consequently, under the circumstances here, FERC's motion for summary judgment must be denied and Niskanen's motion must be granted.

I. FERC HAS NOT SATISFIED ITS BURDEN TO DEMONSTRATE THAT THE MATERIAL WITHHELD PURSUANT TO EXEMPTION 6 IS EXEMPT FROM DISCLOSURE

A. With Regard to the Materials Withheld on Exemption 6 Grounds, FERC Has Not Even Satisfied Its Obligation to Provide the Court with a Declaration and/or a *Vaughn* Index Meeting Basic Legal Requirements.

FERC's Exemption 6 withholdings suffer from an overarching threshold flaw: they do not satisfy Circuit precedents for how federal agencies must meet their burdens under FOIA, and they do not even satisfy the requirements under the Federal Rules of Civil Procedure for parties moving for summary judgment.

As this Court has explained, in light of FOIA's "objective of affording the public maximum access to most government records," in order for an agency to meet its "burden of demonstrating that at least one exemption applies," and to "assist a court in its *de novo* review of the withholdings and to allow the party seeking access to documents to engage in effective advocacy, the government must furnish 'detailed and specific information demonstrating that material withheld is logically within the domain of the exemption claimed.'" *Am. Immigration Council v. U.S. Dep't of*

Homeland Security, 950 F. Supp. 2d 221, 235 (D.D.C. 2013) (Boasberg, J.) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998)); other internal quotations omitted). Consequently, “[t]ime and 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,” *Am. Immigration Council*, 950 F. Supp. 2d at 235, or that merely offer “vague” rationalizations for withholding. *Campbell*, 164 F.3d at 30.

Here, FERC provides no “justification” for withholding the requested materials, and the slim argument proffered is nothing more than a boilerplate assertion that the documents were withheld pursuant to Exemption 6, without providing any explanation, e.g., how, or any other information that might permit the Court to conclude that Exemption 6 has been properly invoked and upheld here. *See* ECF No. 11-2 at ¶¶ 6, 9; 11-1 at ¶¶ 2, 4. The Tao Declaration merely says that “the names, personal addresses, and other personal information of private citizens were withheld pursuant to FOIA Exemption 6,” ECF No. 11-2 at ¶ 6.

FERC also fails to offer any real evidence or discussion on the balancing test of weighing individual privacy interests against the public interest in its Declaration, at least nothing beyond a citation to FERC’s appeal decision. ECF No. 11-2 at ¶ 9. As discussed further below, FERC’s Brief and appeal decision fail to address the significant public interest issues raised by Niskanen in favor of disclosure, and fail to even acknowledge that there is existing, publicly-available evidence of FERC’s

failures to send notices to affected landowners. FERC also fails to say anything about what the bad consequences to landowners would be if disclosure of the lists were made.

In sum, this is the quintessential case in which FERC is relying on “generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards.” *Am. Immigration Council*, 950 F. 2d at 236. Consequently, under these circumstances, the Court could properly reject FERC’s showing at the threshold, without even applying the specific standards that must be met for an Exemption 6 withholding.

B. FERC Has Not, and Cannot, Satisfy Its Burden to Establish that Information Has been Properly Withheld Under Exemption 6.

“As a threshold matter, the Court must determine whether the withheld information constitutes “similar files” to “personnel and medical files” that are subject to exemption 6. 5 U.S.C. § 552(b)(6). *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (“similar files” encompasses “not just files, but also bits of personal information, such as names and addresses, the release of which would ‘create[] a palpable threat to privacy.’”) (quoting *Carter v. U.S. Dep’t of Commerce*, 830 F.2d 388, 391, 265 U.S. App. D.C. 240 (D.C. Cir. 1987)). Niskanen does not dispute that the requested information-names and addresses-is potentially a “similar file,” as the lists include some basic personal information of the landowners.

The next, and far more relevant question is whether the requested information implicates a substantial privacy interest and, if so, whether release of the information would be "clearly unwarranted" in view of the public interest in the requested documents. *Gilman v. U.S. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 11 (D.D.C. 2014).

1. A Substantial Privacy Interest Does Not Exist in the Withheld Name and Address Information in the Landowner Lists.

For the application of Exemption 6, the Courts employ "an approach that weighs individual privacy interests against the public interest in disclosure." *Casa De Md., Inc. v. United States Dep't of Homeland Sec.*, 409 Fed. Appx. 697, 700 (4th Cir. 2011) (citing to *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *Rose*, 425 U.S. at 373). The mere disclosure of requested lists of landowners' names and addresses is not "inherently and always a significant threat to the privacy of the individuals on the list." *Riverkeeper v. FERC*, 650 F. Supp. 2d 1121, 1127-1128 (D. Or. 2009) (citing *United States Dept. of State v. Ray*, 502 U.S. 164, 177 n. 12 (1991)). Whether disclosure of a list of names is a minimal or significant threat to privacy depends upon the "characteristics revealed by virtue of being on the particular list, and the consequences likely to ensue." *Id.* (internal quotations and citation omitted). Here, none of the landowners chose to be on the requested lists; they were put there by ACP. A landowner's name being on one of the lists does not reveal any significant personal matters, financial information, beliefs, or characteristics, it merely reveals that ACP is seeking to take their land. Further, FERC categorically ruling that *all* landowner lists,

no matter what, are subject to exemption 6 is invalid, especially when FERC fails to consider any facts weighing in favor of public disclosure. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) (finding a categorical rule forbidding disclosure, in response to a FOIA request, of the names of lower-level FBI agents in all activities to be invalid, and that the privacy interest at stake varies depending on the context in which it is asserted.).

Aside from vague references to exposing “the landowners to an unwanted invasion of privacy” (ECF 11, Def. Brief at 4-5), FERC fails to articulate that the threat to landowners’ privacy is real rather than speculative. *See 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.”)(citations omitted); *Riverkeeper*, 650 F. Supp. 2d at 1129 (finding that agency failed to establish sufficient privacy interest in mailing list of landowners on the path of proposed pipeline in part because "the names and addresses themselves [did not] reveal private decisions of those individuals" and agency had released names on similar lists in the past); *Cf. Gilman* at 11-12 (noting that where there was: a justified and articulable risk of media harassment in high-profile case that received extensive national, international, state, and local press coverage, and inherent risk of disclosing some of the property owner’s financial information, opinions, or the substance of the

conversations with the agency, implicates substantial privacy interest). Consequently, FERC's Exemption 6 withholdings in this case are not justified.

2. The Substantial Public Interest Outweighs any Private Interest.

The importance of providing adequate notice to landowners of the threat to their land cannot be overstated. FERC's failure to provide notice to landowners denies them of their statutory right, under the Natural Gas Act, to have FERC reconsider its decision to deprive them of their properties (15 U.S.C. § 717r(a)), and denies the landowners their statutory and Constitutional right to seek judicial review of FERC's decision. *Id.*; 15 U.S.C. § 717r(b). In other words, FERC's failure to provide notice is a blatant violation of the Due Process Clause, which provides that no person "shall be deprived of life, liberty or property, without due process of law." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (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."); *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.").

Judicial review of a FERC decision under the Natural Gas Act approving a Certificate for a natural gas pipeline is governed by 15 U.S.C. § 717r(a), which provides that, "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the

Commission for a rehearing thereon.” And, in order to apply for such rehearing, the applicant must already be a party to the certificate proceeding: “Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order.” *Id.*

Thus, in order to eventually be able to seek judicial review of a FERC Certificate decision, the Natural Gas Act requires that a landowner have been a party to the Certificate proceeding via a filed, formal intervention in that proceeding. Intervention to become a party in FERC proceedings is limited as a right to certain number of days after the initial Notice of Application for a pipeline is published.

FERC’s Notice of Application for the ACP project was published on October 2, 2015, signifying its acceptance of the ACP’s application filing. In the FERC’s Notice of Application, it stated the deadline for intervention in the ACP proceedings (including for intervention for affected landowners) was by 5:00pm on October 23, 2015, or 21 days after the initial publication. FERC’s published a Notice of Amendment to Application on March 22, 2016, wherein the deadline to intervene was extended to April 12, 2016. If FERC (through ACP) fails to send a landowner such notices (including the other required documents under 18 CFR 157.6(d)(3), *see supra* at 4-5) informing them of the proceedings and of the absolute necessity of intervention to become a party by a certain date to preserve their rights, and consequently that

landowner does not intervene in the FERC proceeding, *that landowner cannot request a rehearing of a FERC order or decision, and cannot seek judicial review of the FERC order or decision.*

The public interest in this case is substantial because Niskanen seeks to shed light on whether FERC is complying with its duty to send such notice to all affected landowners. *See* 18 C.F.R. 157.6(d)(3). There is already evidence that it has not. As noted in Niskanen's administrative appeal, even a cursory examination of the public record reveals a blatant failure to identify and send notice to all affected landowners, as required by statute. ECF 11-5 at 3-4. Of the 77 landowners unfortunate enough to have ACP planning to put its right-of-way within 50 feet of their homes, FERC and ACP were missing nearly 17% of their addresses. Obviously, notice was never sent to any of these landowners. This snapshot of the innerworkings of FERC and their failure to uphold its statutorily-mandated duties is deeply disturbing. For example, neither FERC nor ACP ever sent affected landowner Pauline White any notice of ACP's intention to take her land, of the FERC proceedings, or of her rights until ACP sent her an offer letter in April of 2019. *See* Pl. Ex. 2, Declaration of Pauline White, ¶ 4. Such a failure obviously has dramatic implications for landowners such as Ms. White, including her ability to ever challenge the FERC decision either at the administrative or judicial level.

In other words, as a result of FERC's failure to ensure that its agent provided all landowners with the required notice, landowners such as Ms. White have no due

process or procedural mechanism in which to seek relief. *See, e.g.* P. White Declaration ¶¶ 4-9. "Exemption 6's requirement that disclosure be 'clearly unwarranted' instructs us to 'tilt the balance (of disclosure interests against privacy interest) in favor of disclosure.'" *Gilman v. U.S. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 10 (D.D.C. 2014) (quoting *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007)). Here, disclosure is warranted and in the public interest as it would reveal whether FERC has complied (through its delegation of duty to ACP) with its public notice mandate. *See Riverkeeper*, 650 F. Supp. 2d at 1130.

"Disclosure of the mailing lists will 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." *Riverkeeper*, 650 F. Supp. 2d at 1130 (finding in similar case that FERC's evidence does not support the existence of a "clearly unwarranted invasion of privacy" and that FERC failed to meet its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its statutory duties governing notice). Thus, much like in *Riverkeeper*, whether FERC provided adequate notice to all of the affected landowners is an ongoing and open question "that can only be answered by public disclosure of the mailing list." *Id.*

FERC's argument relies almost exclusively on *Odland v. FERC*, 34 F. Supp. 3d 3, 21 (D.D.C.). *See* Def. Mem at 5-6; ECF 11-6 at 4. The ruling in *Odland* is inapposite

here, because in that case, “Plaintiffs [did] not seek landowner names and addresses in order to shed light on whether FERC *sent* notice; instead, Plaintiffs [sought] to determine whether notice was *received*.” *Odland*, 34 F. Supp. at 10, 22 (emphasis in original). This argument is also immaterial because *nowhere* in FERC’s brief or appeal decision does FERC make the argument that Niskanen is seeking to figure out whether notice was received by landowners affected by ACP; FERC merely cites to the *Odland* case in general support of its position. *See* Def. Ex. at 4; Def. Brief at 6. Even if FERC did make such an argument, in contrast to *Odland*, here Niskanen seeks to shed light on whether FERC *sent* the notice to all potentially affected landowners.

The Court also found in *Odland* that because the plaintiffs did not make an argument or showing that the release of the landowners’ names and addresses would shed light on the inner workings of FERC, there was no matter of public interest at issue, and consequently upheld FERC’s application of Exemption 6. Here, in contrast, Niskanen has demonstrated considerable public interest in landowners’ due process rights, and in ensuring that FERC is abiding by its constitutionally and statutorily-mandated duties to send landowners adequate notice of their rights in proceedings that very well may take their property away. Additionally, there are “possibly multiple examples of lack of notice to landowners”. *See* Def. Brief at 6 (noting facts of *Columbia Riverkeeper*).

In *Gilman*, decided 13 days prior to *Odland*, this Court found that public interests 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 CBMP’s planning and construction of a wall. *Gilman*, 32 F. Supp. 3d at 11. Similar to the Defendant in *Gilman*, FERC here cites to *Horner* to make the “unremarkable observation that ‘even a modest privacy interest outweighs nothing every time.’” *Id.* at 14; Def. Mem at 5 (citing *National Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)). *Horner* holding does not, as FERC attempts to assert, foreclose any request that “indirectly reveals information about the operations of a government agency through the disclosure of private information. Contrary to [FERC’s] argument, the public interest in this case is significant and does not amount to ‘nothing.’” *Gilman v. U.S. Dep’t of Homeland Sec.*, 32 F. Supp. 3d 1, 14 (D.D.C. 2014).

Consequently, FERC’s motion for summary judgment should be denied and Niskanen’s motion for summary judgment should be granted.

3. Even if Any of the Information Is Subject to Exemption 6, FERC Has Not Demonstrated that All Segregable Non-Exempt Information Has Been Disclosed.

A reviewing court has an “affirmative duty” to determine whether the agency has produced all segregable, non-exempt information contained in an agency record. *Elliott v. U.S. Dep’t of Agric.*, 596 F.3d 842, 851 (D.C. Cir. 2010); *see also Stott-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (“[B]efore approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.”) (internal quotation

omitted); 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”). Even if any of the information is subject to Exemption 6, FERC has failed to demonstrate that all segregable non-exempt information has been disclosed. For example, in Tao’s Declaration, FERC notes that there was a “line-by-line review” to identify material exempt from disclosure. However, FERC did not state whether or not that it took into consideration any landowners who “waived” this exemption, including the numerous landowners who publicly commented with their address and contact information available on the FERC docket. FERC should at the very least be required to provide the segregable, non-exempt landowner information.

II. FERC HAS NOT SATISFIED ITS SUMMARY JUDGMENT BURDEN DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT

The Tao Declaration and Defendant’s Statement both fail to establish the absence of a genuine dispute of material facts as required under FRCP 56; and both mischaracterize Niskanen’s original FOIA request and subsequent administrative appeal, mischaracterizations that are quickly remedied upon simple examination of the request and appeal documents themselves.

In paragraph 1 of Defendant’s Statement and paragraph 5 of Tao’s Declaration, FERC incorrectly states Niskanen’s Request as being only for “four landowner lists,” (ECF 11-1 at 1, Defendant’s Statement) when in fact, the request was for the four lists

identified by Niskanen in searching FERC's docket, as well as "any and all record and information in FERC's possession or control in relation to private landowners identified by the Atlantic Coast Pipeline ("ACP") in Docket No. CP15-554 [...]." ECF 11-5 at 1; Def. Ex. C, incorporated by reference.

In paragraph 3 of Defendant's Statement and paragraph 8 of Tao's Declaration, FERC incorrectly states the arguments made in Niskanen's administrative appeal, namely mischaracterizing Niskanen's reasons for the requested information "because FERC allegedly failed to adequately notify landowners as required by law." ECF 11-1 at ¶ 3, 11-2 at ¶ 8. This was not and is not the basis for Niskanen's request or subsequent challenge. Niskanen made this request as it will shed some much-needed light on whether FERC is abiding by its constitutional and statutory duty to send notice to all affected landowners. Niskanen specifically noted evidence that exists in FERC's own documents that notice was not sent to all of the affected landowners:

Neither ACP nor FERC sent out the required notice to all of the affected landowners. This is due in large part because of a lack of proper oversight by FERC in the execution of its statutorily-mandated duties.

For example, in FERC's Final EIS, 77 landowners are identified wherein the requested right of way would be within 50 feet of their home. Of those 77 landowners, there are at least 13 homes listed with "unavailable physical addresses."⁴ If FERC or ACP could not even figure out their addresses, those 13 landowners certainly did not receive constitutionally adequate notice of the project or of ACP's intent to take their land.

ECF 11-5 at 3-4. (emphasis added).

FERC fails in both its Declaration and Statement to even acknowledge, let alone address, the identification of at least 13 landowners to whom neither FERC nor ACP apparently ever sent the required notice to, despite there being engineering drawings of each of the 13 landowners' homes included in FERC's public docket. *Id.* See also Pl. Ex. 2, Landowner Pauline C. White's Declaration ¶¶ 4, 9. FERC failed to address and ignored these pertinent facts.

In addition, it is unclear which paragraphs in the Tao Declaration are from other individuals or documents versus Tao's own personal knowledge. The Tao Declaration states that the "following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge *and on information supplied to me by employees under my supervision and employees in other FERC offices.*" ECF 11-2, Tao's Declaration at ¶ 1 (emphasis added). "[I]t is 'well-settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1, 11 (D.D.C. 2005). (citing *Beyenne v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). There is no way to distinguish admissible evidence versus potentially inadmissible evidence in the Tao Declaration, and there is no indication as to where various pieces of alleged information came from. Consequently, the Tao Declaration should be disregarded.

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Am. Immigration Council*, 950 F. Supp. 2d at 228;

see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). FERC has failed to meet its “burden of demonstrating the absence of a genuine issue of material fact” and that it is entitled to judgment as a matter of law. *See Am. Immigration Council*, 950 F. Supp. 2d at 228-229; *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, there is a genuine dispute of material fact as to the very reasons underlying Niskanen’s challenge to FERC’s withholding of the documents under Exemption 6.

This fact is ‘material’ as “it is capable of affecting the substantive outcome of the litigation.” *Am. Immigration Council*, 950 F. Supp. 2d at 228; *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. There is a “genuine” dispute in this case as there is clear evidence that a reasonable jury could return a verdict for the nonmoving party, Niskanen. *Am. Immigration Council v. U.S. Dep’t of Homeland Security*, 950 F. Supp. 2d 221, 228 (D.D.C. 2013); *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. Accordingly, FERC’s Motion for Summary Judgment should be denied, and Niskanen’s Motion granted.

CONCLUSION

“Consistent with [FOIA’s] statutory mandate, federal courts have jurisdiction to order the production of records that an agency improperly withholds.” *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d at 112; *AIC*, 950 F. Supp. 2d at 235 (“[T]he reviewing court must bear in mind that FOIA mandates a ‘strong presumption in favor of disclosure’” and “[t]his Court, accordingly, can compel the release of any

records that do not satisfy the requirements of at least one exemption”) (quoting *Raj*, 502 U.S. at 173). Thus, to avoid such relief and “satisfy FOIA, an agency must demonstrate both that it adequately searched for responsive records and that it turned over all such records not subject to a specific exemption.” *Wisdom*, 232 F. Supp. 3d at 113.

Here, FERC has not demonstrated that the materials withheld pursuant to Exemption 6 have been properly withheld. Therefore, when an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *See* 5 U.S.C. § 552(a)(4)(B); *see also*, *e.g.*, *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (finding summary judgment for the requester to be appropriate because the agency’s “[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency’s decision to withhold requested documents”). As relief, as set forth in the accompanying Proposed Order, Niskanen respectfully requests that the Court order that FERC promptly disclose the material withheld on Exemption 6 grounds.

DATED: July 19, 2019

Respectfully submitted,

/s/ Megan C. Gibson
Megan C. Gibson
DC Bar No. 1021191
David Bookbinder
DC Bar No. 455525
NISKANEN CENTER
820 First Street, NE
Suite 675
Washington, DC 20002
(202) 899-1172
mgibson@niskanencenter.org
dbookbinder@niskanencenter.org

Counsel for Plaintiff

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

NISKANEN CENTER)	
)	
Plaintiff,)	
)	Civil Action No. 19-0125 (JEB)
v.)	
)	
FEDERAL ENERGY REGULATORY COMMISSION)	
)	
Defendant.)	
)	
)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE AND
RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 7.1(h), Plaintiff Niskanen Center (“Niskanen”) submits this statement of material facts as to which there is no genuine issue. Plaintiff is also submitting a response to those facts included in Defendant’s statement of material facts that are relevant to the issues that remain in this case.¹

¹ As Niskanen explains in its accompanying memorandum at 21-24, both Defendant’s Statement of material facts and Tao’s Declaration fail to establish the absence of a genuine dispute of material facts as required under FRCP 56; and both mischaracterize Niskanen’s original FOIA request and subsequent administrative appeal, mischaracterizations that are quickly remedied upon simple examination of the request and appeal documents themselves.

**A. Niskanen’s Statement of Material Facts As to Which
There is no Genuine Issue**

1. The Atlantic Coast Pipeline (“ACP”) applied to the Federal Energy Regulatory Commission (“FERC”) for a Certificate of Public Convenience and Necessity in September of 2015, which would allow ACP to construct and operate a natural gas pipeline across West Virginia, Virginia, and North Carolina.

2. Certificate holders under the Natural Gas Act have extraordinary powers, including the ability to exercise federal eminent domain authority to take private land from unwilling sellers for pipeline projects. *See* 15 U.S.C. §717f(h).

3. FERC has delegated to Certificate applicants its Constitutional responsibility to provide adequate notice of its proceeding, the potential impact this could have on landowners, and what rights landowners have. *See* 18 CFR 157.21(d).

4. Certificate applicants must provide such notice, and then must submit the names and basic contact information of the landowners it has so notified to FERC. 18 CFR 157.21(d); *See also* 18 CFR 157.21(f)(3).

5. In the case of the ACP, FERC delegated its notice duty to ACP.

6. FERC’s Notice of Application for the ACP project was published on October 2, 2015, signifying its acceptance of the ACP’s application filing.

7. In the FERC’s Notice of Application, it stated the deadline for intervention in the ACP proceedings (including for intervention for affected landowners) was by 5:00pm on October 23, 2015.

8. FERC's published a Notice of Amendment to Application on March 22, 2016, wherein the deadline to intervene was extended to April 12, 2016.

9. If a landowner misses the given deadline for intervention in a FERC proceeding, it is FERC's discretion whether or not to permit any late interventions.

10. If a landowner does not intervene in the FERC proceeding, that landowner cannot request a rehearing of a FERC order or decision, and cannot seek judicial review of the FERC order or decision.

11. FERC's Final Environmental Impact Statement was made publicly available in July of 2017.

12. In the Final Environmental Impact Statement, FERC had drawings of at least 13 landowners whose homes would be within 50 feet of the right-of-way wherein the properties' addresses were marked as 'unavailable.'

13. By letter dated October 29, 2018, the Niskanen Center submitted a Freedom of Information ACT ("FOIA") request to FERC seeking "any and all records and information in FERC's possession or control in relation to private landowners identified by the Atlantic Coast Pipeline ("ACP") in Docket No. CP15-554, specifically the following landowner lists:

- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20160629 5197 on June 29, 2016;
- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20160412 5248 on April 12, 2016.
- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20151112 5341 on November 12, 2015

- Landowner List Information of Atlantic Coast Pipeline, LLC, et al., under CP15-554, et al., Submittal 20151016 5227 on October 16, 2015.”

14. On November 14, 2018, Niskanen received a response to the request via 2 e-mails from FERC’s FOIA Public Liaison, Toyia Johnson. No number was assigned to the Niskanen Center’s FOIA request. In FERC’s response, Ms. Johnson noted that the landowner lists had been previously requested and released, but that all of the requested [private] landowner information was redacted “pursuant to FOIA Exemption 6.”

15. On December 18, 2018, Niskanen appealed FERC’s denial of Niskanen’s October 29, 2018 FOIA request. In its appeal, Niskanen noted that FERC and ACP failed to send out the required notice to all of the affected landowners. Niskanen gave the example of at least 13 landowners identified in FERC’s Final EIS who neither FERC nor ACP sent notice to. Niskanen further noted that all of the 13 landowners would have the ACP’s right-of-way within 50 feet of their home. Niskanen noted in its appeal in part its reason for the request, though it is not required to do so. The reason being that the disclosure of the mailing lists would shed light on FERC’s performance of its duty to send every affected landowner adequate notice.

16. In a phone conversation on January 9, 2019, FERC attorney Michael Watson stated to Plaintiff’s counsel Megan C. Gibson that FERC’s position is that

FERC considers the Response a non-response, as it did not go through the correct bureaucratic channels within the agency.

B. Niskanen's Response to Defendant's Statement of Material Facts

1. Plaintiff admits that a request was submitted on October 29, 2018, but disputes that the request was only for four landowner lists. *See* Plaintiff's Memorandum and Opposition at 21-22.

2. Plaintiff admits that FERC sent Plaintiff a response via e-mail on November 14, 2018, and that FERC attached, with all individual landowners' information redacted, Submittal numbers 20151030-5364; 20151112 5341; 20160506-5207; 20160617-5152; 20160412-5248; 20160216-5312; 20151016-5227; and 20150918-5213. Plaintiff denies that FERC provided ACP Submittal Number 20160629 5197, as that was not provided until Plaintiff noted its absence (and potential other absences) in its appeal. *See* ECF 11-5 at footnote 1. Plaintiff cannot admit or deny as to why FERC did not provide a tracking number to Niskanen's request or the responsive materials.

3. Plaintiff admits that it filed a FOIA appeal of FERC's Response with FERC on December 18, 2018, but disputes the remainder of the paragraph as a misrepresentation of Plaintiff's reasons for the request and the subsequent appeal. *See* Plaintiff's Memorandum and Opposition at 22-23.

4. Admitted.

DATED: July 19, 2019

Respectfully submitted,

/s/ Megan C. Gibson

Megan C. Gibson
DC Bar No. 1021191
David Bookbinder
DC Bar No. 455525
NISKANEN CENTER
820 First Street, NE
Suite 675
Washington, DC 20002
(202) 899-1172
mgibson@niskanencenter.org
dbookbinder@niskanencenter.org

Counsel for Plaintiff