NISKANEN CENTER

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Federal Energy Regulatory Commission
Secretary of the Commission
888 First Street, NE
Washington, DC 20426.

Docket No. PL18–1–000

The Niskanen Center submits these comments in response to the Commission's April 25, 2018, Notice of Inquiry (83 FR 18020). Niskanen is a 501(c)(3) libertarian think tank with strong interests in free markets and in protecting Americans' property rights. It is a fundamental matter of justice – and a foundational belief among libertarians – that government should forcibly take private property only as a measure of last resort, when truly for public use, and must compensate the property owners sufficient to render them indifferent to the taking. (Niskanen notes in passing that the Commission's Policy Statement appears to acknowledge that court-determined "just compensation" is insufficient to make landowners indifferent to the taking of their property: "Even though the compensation received in such a proceeding is deemed legally adequate, the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits." 90 FERC ¶ 61,128, p. 19.)

LANDOWNER INTERESTS

The Notice of Inquiry posed questions on a number of issues related to eminent domain. One (No. B4; 83 FR at 18031) was:

> Does the Commission's current certificate process adequately take landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

There are several steps that FERC can implement to "better take landowner interests into account and encourage landowner participation in the process". These comments address three issues relevant to landowner interests in the certificate process: (1) Commission notice practices that violate the Fifth Amendment's Due Process Clause; (2) the Commission's use of tolling orders that violate the Due Process Clause; and (3) the Commission's use of conditioned certificates that violate the Fifth Amendment's Takings Clause.

I. FERC'S NOTICE PRACTICES CONCERNING INTERVENTION IN FERC'S CERTIFICATE PROCESS VIOLATE THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

The Due Process Clause provides that no person "shall be deprived of life, liberty or property, without due process of law." FERC's notice practices violate this in at least three ways: inadequate notice to landowners that they must intervene in certificate proceedings in order to preserve their rights to judicial review; arbitrarily short times to intervene; and inconsistent and confusing information about intervention requirements. Collectively, these practices are so egregious as to create the impression that FERC has designed a system to intentionally deprive landowners of their rights to judicial review of the Commission's actions.

A. The Natural Gas Act Requires Intervention in the Certificate Process in Order to Obtain Judicial Review of a Certificate Decision.

Judicial review of a FERC decision under the Natural Gas Act approving a Certificate of Public Convenience and Necessity ("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*. (emphasis added.)

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. This structure "reflects the policy that a party must exhaust its administrative remedies before seeking judicial review." *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 (1955).

So Congress decided, and courts have repeatedly upheld this requirement: "As we have said, 'the presentation of a ground of objection in an application for rehearing by the Commission is an indispensable prerequisite to the exercise of power of judicial review of the order on such ground.'" *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1320 (10th Cir. 2004) *quoting Pan Am. Petroleum Corp. v. Fed. Power Comm'n*, 268 F.2d 827, 830 (10th Cir. 1959); "The party seeking review must raise its objections in its

own application for rehearing to the Commission." *Process Gas Consumers Group v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990).

As described below, the problem – which rises to Constitutional levels – is that FERC's unvarying practice is to make intervention by affected landowners as difficult as possible. FERC does not give affected landowners adequate notice that they must intervene in order to get judicial review of FERC's Certificate decision and, if landowners somehow do become aware of this, they then have to overcome FERC's other barriers to intervention: an arbitrarily short period of time to intervene (as little as 13 days), and inconsistent and confusing information that misleadingly emphasizes the logistical difficulties of filing a motion to intervene. To make matters even worse, FERC takes no cognizance of the fact that many pipelines are built in areas of tremendous poverty and with populations where as little as a quarter of the adults have a high school education.

B. FERC's Notice Practices Concerning Intervention Violate the Due Process Clause by Depriving Landowners of their Right to Judicial Review.

1. FERC's Notice Practices Provide Inadequate Notice of the Requirement that Landowners Must Intervene in the Certificate Process in Order to be Able to Obtain Judicial Review of FERC's Certificate Decision.

FERC delegates to Certificate applicants the job of providing "affected landowners"[1] with relevant information about the Certificate process (hereafter, the "landowner notice letter"):

[1] "All affected landowners includes 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;

> The notice shall include:
> (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 C.F.R. 157.6(d)(3). Nowhere in this regulation is the applicant required to inform affected landowners *that they must intervene in the Certificate process in order to preserve their rights to judicial review*. In fact, the only mention of intervention in this

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(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).

regulation comes in subparagraph (d)(3)(vii), which provides that the landowner notice letter include, “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.” (The Commission’s notice of application is referred to hereafter as “the NOA”.)

Unfortunately, neither the requirement that the landowner notice letter include the NOA, nor “the most recent edition of the Commission’s pamphlet that explains the Commission’s certificate process and addresses the basic concerns of landowners” (subparagraph (d)(3)(ii)), nor FERC’s “information sheet on how to intervene in Commission proceedings”, remedy this problem. Moreover, even aside from the fact that each of these three documents contains inconsistent and contradictory information about the intervention process (as descried below) the mere fact that an affected landowner is confronted with three separate documents that each purport to deal with intervention makes the intervention process significantly more difficult than necessary.

Niskanen has reviewed the NOAs FERC has issued in 2018 for pipeline construction projects under section 7(c) of the Natural Gas Act.[2] Each one contains just a single sentence on the need for landowners to intervene in the Certificate proceeding in order to obtain judicial review of FERC’s Certificate order: “Only parties to the proceeding can ask for court review of Commission orders in the proceeding.”

[2] These NOAs are for: Cheyenne Connector, LLC (83 FR 12747; March 23, 2018); Rockies Express Pipeline LLC (83 FR 12750; March 23, 2018); Transcontinental Gas Pipe Line Company, LLC (83 FR 18836; April 30, 2018); and Natural Gas Pipeline Company of America LLC (83 FR 26275; June 6, 2018).

Niskanen also picked NOAs for four other section 7(c) pipeline construction projects randomly from the Federal Register.[3] Each one of these NOAs followed the exact same format: affected landowners' only hint as to how they can safeguard their Due Process rights to judicial review of the Commission's Certificate order is a single cryptic sentence in a 4-page, single-spaced document.[4]

Unfortunately, neither of the two FERC documents that the pipeline company is required to include in its landowner notice letter remedy this problem.

The first is "the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners" (18 CFR 157(d)(6)(ii)). Niskanen believes that this refers to *An Interstate Natural Gas Facility on My Land? What do I Need to Know?*[5] Again, only a single sentence – in a 32-page document – describes how landowners who intervene can preserve their Due Process rights to appeal the Commission's Certificate decision: "You will also be able to file briefs, appear at hearings and be heard by the courts if you choose to appeal the Commission's final ruling." *Id.* at p. 5. This is hardly calculated to adequately inform recipients of the need to intervene in order to preserve their rights to judicial review.

Equally uninformative is FERC's "information sheet on how to intervene in Commission proceedings" (https://www.ferc.gov/resources/guides/how-to/intervene.asp;

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[3] Niskanen chose the first four results using the "Relevance" option for displaying the Federal Register search results that did not include any of the 2018 NOAs. These NOAs are for: DTE Midstream Appalachia, LLC (82 FR 22537; May 16, 2017); Eastern Shore Natural Gas Company (82 FR 5564; January 18, 2017); Eastern Shore Natural Gas Company (again) (80 FR 34402; June 16, 2015); Southern Natural Gas Company LLC (79 FR 35341; June 20, 2014).

[4] That is the form of the NOAs form as they are issued by FERC and included in the landowner notice letter, not as the NOAs appear in the Federal Register.

[5] Available at https://www.ferc.gov/resources/guides/gas/gas.pdf; last visited July 22, 2018.

last visited on July 24, 2018), which contains the single sentence, “Intervenors becomes *[sic]* participants in a proceeding and have the right to request rehearing of Commission orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal.” Like the one sentence in FERC’s pamphlet, this sentence does not even hint that intervention is the *only* means of preserving the right to judicial review.

As discussed in section 4, below, on its own and in conjunction with the other notice practices discussed herein, this failure to adequately inform affected landowners of how they must secure their rights to judicial review violates the Due Process Clause.

2. FERC Imposes Arbitrarily Short Deadlines to Intervene in Certificate Proceedings.

Unusually for federal agency proceedings, FERC has not established a regulatory deadline for intervention in the Certificate process. This means that for each Certificate proceeding, FERC simply picks a date; the only Commission description of its procedure in choosing intervention deadlines Niskanen could find comes from *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?,* p. 6: “You must normally file for intervenor status within 21 days of our notice of the application in the Federal Register[.]”

Unfortunately, this is not only not correct, it is affirmatively misleading.

Of the four 2018 pipeline NOAs, the Cheyenne Connector NOA was dated March 19, appeared in the Federal Register on March 23, and had an intervention deadline of April 9, (17 days later); the Rockies Express NOA was dated March 19, appeared in the Federal Register on March 23, and had an intervention deadline of April 9 (17 days later); the Transcontinental NOA was dated April 24, appeared in the Federal Register on April 30, and had an intervention deadline of May 24 (24 days later); and the Natural

Gas Pipeline Company NOA was dated May 31, 2018, appeared in the Federal Register on June 6, and had an intervention deadline of June 21 (15 days later).

Of the four random pipeline NOAs, the DTE Midstream Appalachia NOA was dated May 9, 2017, appeared in the Federal Register on May 16, and had an intervention deadline of May 30 (14 days later); the 2017 Eastern Shore Natural Gas NOA was dated January 11, 2017; appeared in the Federal Register on January 18, and had an intervention deadline of February 1 (14 days later); the 2015 Eastern Shore Natural Gas NOA was dated June 8, 2015, appeared in the Federal Register on June 16, and had an intervention deadline of June 29 (13 days later); and the Southern Natural Gas NOA was dated June 13, 2015, appeared in the Federal Register on June 20, and had an intervention deadline of July 7 (17 days later).

Contrary to the Commission's own statement that affected landowners "must normally file for intervenor status within 21 days of our notice of the application in the Federal Register", with one exception it appears that FERC's completely *ad hoc* practice is to give landowners 21 days *from the date of the NOA* to file for intervention. The actual time between Federal Register publication and the intervention deadline was between 13 and 17 days, with the one outlier of 24 days. Nor does FERC ever explain why it has chosen the particular deadline in each instance.

The only alternative way for landowners to discover what the intervention deadline is, is via the applicant's notice letter, which must contain a copy of the NOA. 18 CFR 157.6(d)(vii). The applicant's notice letter itself must be sent "By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application". 18 CFR 157.6(d)(1)(i). This means, that if the Commission

issues the NOA on Wednesday, Thursday, or Friday, the applicant has 5 days to mail the letter. Assuming (as does Rule 6(d) of the Federal Rules of Civil Procedure) that first class mail takes up to three days for delivery, the recipient may then have just 13 days to file an intervention motion with FERC.

In sum, it appears that in general, FERC's practice is to give landowners between 13 and 17 days to file a motion to intervene in a Certificate proceeding. As discussed below in Section 4, both on its own and in conjunction with FERC's other notice practices described herein, this amount of time violates affected landowners' Due Process rights.

3. FERC Disseminates Incomplete, Inconsistent and Confusing Information About Intervention Requirements.

FERC's current practices make it virtually impossible for affected landowners to figure out how they are supposed to intervene, in two separate ways: the mechanics of intervention, and what information a motion to intervene requires.

(i) FERC's information on the mechanics of intervention.

FERC provides grossly inconsistent and contradictory information as to the mechanics of intervention.

Each of the NOAs Niskanen reviewed states, "A party *must* submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party." (Emphases added.) But each of those NOAs then states, "The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at http://www.ferc.gov." So, what FERC says intervenors "must" do is then contradicted later on the same page.

Second, FERC has *three different sets* (or four, depending how you count) of requirements for paper intervention. In fact, seven of the eight NOAs Niskanen reviewed contain two separate and inconsistent sets of requirements for paper intervention; as noted above, the first is to file an original and 7 copies with FERC, and serve a copy on the applicant and "every other party" (which can number in the hundreds.)[6] The second is, in six of these seven NOAs, "Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy regulatory [*sic*] Commission, 888 First Street, NE, Washington, DC 20426." The other NOA with two sets of intervention requirements (Southern Natural Gas, 79 FR 35341), is even more bizarre: in addition to the "original and seven copies", etc., it provides that "Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy regulatory [*sic*] Commission". 79 FR at 35342.

FERC's Information Sheet then gives *yet another* version of this: "Persons unable to file electronically should send an original and three copies of the motion to intervene by overnight services to [FERC]", and that "Motions to intervene must be served on the applicant. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding."

In sum, FERC informs affected landowners that paper intervention variously requires:

> (1) Filing an original and 7 copies with FERC, and serving the applicant and all other parties;

[6] Only the Transcontinental NOA (88 FR 18836) had a single description of how to do a paper intervention.

(2) Filing an original and 5 copies with FERC (or an original and 14 copies) with no mention of service on the applicant or any other party; or
(3) Filing an original and 3 copies with FERC by overnight mail, and serving the applicant but not any of the other parties.

On its own and in combination with the FERC notice practices discussed herein, this sort of conflicting and inaccurate information violates affected landowners Due Process rights.

(ii) FERC does not tell affected landowners what are the required contents of a motion to intervene.

As noted above, in the landowner notice letter an affected landowner gets three separate documents relating to intervention: FERC's NOA, the *An Interstate Natural Gas Facility on My Land? What do I Need to Know?* pamphlet, and FERC's "information sheet on how to intervene in Commission proceedings". *Remarkably, not one of these three documents tells landowners what they must include in a motion to intervene.*

For landowners to discern what the required contents of an intervention motion are, there is only this one sentence in the Information Sheet: "All motions to intervene should be submitted to the Commission pursuant to 18 C.F.R. § 385.214." And 18 CFR § 385.214(b) finally tells landowners that an intervention motion must contain the following information:

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.
(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
(A) Consumer,

(B) Customer,
(C) Competitor, or
(D) Security holder of a party; or
(iii) The movant's participation is in the public interest.

Astonishingly, the Commission's regulation does not list "landowners whose property may be taken" as an example of someone who "has an interest which may be directly affected by the outcome of the proceeding". In fact, an affected landowner reading this might think that they have no basis for intervention at all.

On its own and in combination with the FERC notice practices discussed herein, this failure to adequately inform affected landowners of what they must include in a motion to intervene violates the Due Process Clause.

4. FERC's Notice Practices Violate the Due Process Clause.

The Supreme Court has repeatedly dealt with the issue of what is adequate notice under the Due Process Clause. The seminal case governing this issue is *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). The issue in *Mullane* was whether newspaper publication notice sufficed to inform trust beneficiaries of a judicial settlement of the accounting for their accounts. The Court held that it was not:

> 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. *The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance*. *Id*. at 314 (emphases added; citations omitted).

Citing its 1914 ruling in *Grannis v. Ordean*, 234 U.S. 385, 394, which held that "The fundamental requisite of due process of law is the opportunity to be heard", the Court observed that, "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." *Id*. at 314.

It is difficult to see how the notice the Commission gives landowners telling them that they must intervene in Certificate proceedings in order to preserve their rights to judicial review, the arbitrarily short time in which they must act, and the inconsistent and confusing information provided as to how to accomplish that, either informs landowners of their choice or allows them to act on it. FERC's NOAs are a perfect example of what *Mullane* referred to as "mere gesture": "[W]hen notice is a person's due, process which is a mere gesture is not due process. *The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.*" *Id*. at 315 (emphasis added).

In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), the Supreme Court dealt with the specific issue of the Due Process requirements concerning what notice must be provided about the recipient's means of appealing adverse decisions, precisely the issue with FERC's notice procedure.

In *Memphis*, a municipal utility customer received a "final notice" which "simply stated that payment was overdue and that service would be discontinued if payment was not made by a certain date." *Id*. at 13. However, the notice said nothing about the utility's procedures for appealing the utility's termination decision, and thus the question was "whether due process requires that a municipal utility notify the customer of the availability of an avenue of redress within the organization should he wish to contest a particular charge" prior to termination of service." *Id.*

Citing *Mullane*, the Court held that, “Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, was not ‘reasonably calculated’ to inform them of the availability of "an opportunity to present their objections" to their bills.” *Id*. at 14.

FERC’s failure to adequately inform affected landowners of the sole means by which they could challenge the Commission’s Certificate decision (and what they must do in order to preserve that right) is no less deficient under the Due Process Clause than the lack of notice of the process by which the notice recipient could challenge the adverse determination at issue in *Memphis Light*.

Courts have also dealt with means and content of notice specifically in the context of determining what Due Process requires in eminent domain procedures. In *Brody v. Village of Port Chester*, 434 F.3d 121 (2nd Cir. 2005), the defendant published notice of its findings that the taking of Brody’s property would constitute a “public use”; such publication triggered a 30-day period for Brody to seek judicial review of the “public use” determination. After the Village started condemnation proceedings, Brody claimed that “he was unaware of the brief period of time allowed under [New York law] for seeking judicial review of the public use determination”, and that even if he had seen the published notice, the information it contained “would not have informed him of the legal consequence of the publication and thus does not satisfy due process requirements.” *Id*. at 127.

The Second Circuit began its analysis by saying that notice in eminent domain cases was governed by *Mullane*: “accordingly, we hold that where, as here, a condemnor provides *an exclusive procedure for challenging a public use determination*,

it must also provide notice in accordance with the rule established by *Mullane* and its progeny." *Id.* at 129 (emphasis added). Thus the Court first held that, because the Village had the names and addresses of all potential condemnees, notice by mail, and not by publication, was required. *Id*.

More germane to the issues concerning FERC's practices was the question of the content of the notice; in the published notice in *Brody*, "there was no mention of the commencement of the exclusive thirty-day period, established by [New York law], in which the property owner can challenge the Village's public use determination." *Id.* Relying on *Mullane*, the Court held:

> Just as with the form of notice, the content of the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314. This includes the corollary requirement that the notice "must be of such nature as reasonably to convey the required information." *Id*. (citing *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914)). Of course, this raises the question: what is the required information? We think that the general facts and circumstances test of *Mullane* gives us the answer. *Mullane* requires *as much notice as is practicable* to inform a condemnee of legal proceedings against his property. 339 U.S. at 315. Accordingly, we agree with Brody that the notice sent to affected property owners *must make some conspicuous mention of the commencement of the thirty-day review period to satisfy due process*. *Id*. at 130 (emphasis added).

The Court found no reason why notice of the Village's determination should not contain information about the 30-day period to seek judicial review:

> [New York law] establishes a short, exclusive period of time to challenge the public use determination. *The additional information (i.e., that the publication also commences the thirty-day challenge period) imposes a comparatively small burden on the Village while ensuring that property owners are apprised of the limited opportunity to challenge the condemnation decision.* Thus, we now hold that "reasonable notice" under these circumstances must include mention of the commencement of the thirty-day challenge period. *Id.* at 132 (emphasis added).

What the Second Circuit concluded about the Village's notice procedures applies equally to the Commission's: in eminent domain situations, the benefit to landowners of including "conspicuous mention" of their exclusive opportunity to preserve their right to judicial review far outweighs the comparatively small "burden" of including the necessary information in the landowner notice letter.

Just two months ago, the Tenth Circuit reached a similar conclusion in *M.A.K. Investment Group, LLC v. City of Glendale*, 889 F.3d 1173 (2018). The defendant had made a "blight determination" that allowed it to condemn M.A.K.'s property, but never informed M.A.K. of that fact. M.A.K. only discovered this months later, and after the 30-day period to challenge the determination had expired. The Court held that failure to notify the plaintiff violated Due Process by depriving M.A.K. of its opportunity to seek judicial review:

> Without the minimal step of actual notice, M.A.K. was left unaware of the potentially looming condemnation action, and so had little reason to even investigate whether it could challenge the blight determination that authorizes that action. As a consequence, M.A.K. lost its statutory right to review within thirty days. . . . When in the absence of notice, property owners are likely to lose a property right—in a cause of action or otherwise—the *Mullane* rule applies. *Id.* at 1182.

If affected landowners do not know that they must intervene in the Certificate proceeding in order to secure their right to judicial review, they suffer the same violation of their Due Process rights as M.A.K.

5. FERC's Notice Practices Do Not Take Account of Relevant Demographics.

In *Memphis Light*, one of the factors that the Court took into account when deciding "what process is due" was the demographics of the population receiving the notice:

> While recognizing that other information would be "helpful," the dissent would hold that "a homeowner surely need not be told how to complain about an error in a utility bill . . . ." Post, at 26. . . . In the particular circumstances of a threat to discontinue utility service, the homeowner should not be left in the plight described by the District Court in this case. Indeed, the dissent's view identifies the constitutional flaw in petitioners' notice procedure. The Crafts were told that unless the double bills were paid by a certain date their electricity would be cut off. But -- as the Court of Appeals held -- this skeletal notice did not advise them of a procedure for challenging the disputed bills. *Such notice may well have been adequate under different circumstances. Here, however, the notice is given to thousands of customers of various levels of education, experience, and resources.*

Memphis Light, 436 U.S. at 15, n. 15 (emphasis added). In other words, demographics – "various levels of education, experience, and resources" – are relevant in determining what notice is due. With this in mind, it is worth examining the relevant demographics of the places where pipelines are being built and eminent domain exercised.

One of the most controversial pipelines FERC has recently approved is the Mountain Valley Pipeline, which goes through 17 counties in Virginia and West Virginia. According to the federal government[7], of the 17 Mountain Valley Pipeline counties, the percentage of the adult population in 2016 with *less than a high school education* ranges from 42% in Roanoke County, VA, to 77% in Webster County, WV. Moreover, Roanoke County is an outlier: In each of the other 16 counties, *half or more of the adult population has less than a high-school education*.

The lack of education in these counties is reflected as well in federal poverty statistics. In Webster County, where fewer than 1 in four adults has a high-school degree, 30% of the people live below the federal poverty line, compared with 12% for

[7] https://www.ers.usda.gov/data-products/county-level-data-sets/download-data/.

the nation as a whole. In half of these counties, 20% or more of the population lives below the poverty line. And the federal poverty line for a family of four is only $24,563.

In contrast, nationally more than 88% of Americans have at least a high school degree. In other words, the population of the Mountain Valley Pipeline Counties is between roughly 4 and 6 times more likely to lack a high school degree than the nation as a whole. And yet these people, lacking "education, experience, and resources" – the very people that Justice Powell singled out in *Memphis Light* – are the people that FERC provides with the kind of "notice" described above.

6. FERC Can Easily Remedy its Due Process Notice Violations.

FERC can fix each of the problems discussed above, and thus comply with Due Process requirements, by including in each NOA a simple statement along the following lines:

> If the Commission grants the requested Certificate of Convenience and Public Necessity for the applicant's proposed pipeline, then the applicant will have the right, subject to paying just compensation, to take your property for its pipeline project.
>
> The only way you can have a court review the Commission's decision to grant the Certificate is by intervening now as a party in this proceeding. If you do not intervene now, you will not be able to ask a court to review the Commission's decision.
>
> You have 60 days from the date of this Notice of Application to intervene in this proceeding. There are two ways for you to intervene:
> (1) File your request to intervene electronically by using the "eFiling" link at http://www.ferc.gov. The Commission strongly encourages the use of electronic filing.
> (2) File paper copies of your request to intervene. To do so, you must send a signed original and 3 copies to FERC by regular mail (at Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426), and one copy to the applicant at its principle place of business, listed in the first sentence

> of this notice. Be aware that if you choose to use paper filing, in the future you will have to send a copy of any comments or other documents you wish to file not only to FERC and the applicant, but also to every other party in the proceeding, and the number of parties can become very large.
>
> If you are a landowner, your request to intervene should just say that you have received this notice, that your land may be taken by the pipeline company, and include the docket number(s) listed at the top of the first page of this notice.

Niskanen does not believe there is any imaginable impediment to including such notice about the consequences to affected landowners of not intervening, and to giving clear, non-contradictory instructions about the mechanics of intervention.

Nor does Niskanen believe that there is any valid reason for not setting a standard period of time to intervene, and believes that a 60-day period for affected landowners to file to intervene is justified. Given the potential impacts to landowners, allowing them a reasonable amount of time to secure their Due Process rights to judicial review of FERC's decision is justified, especially in Certificate proceedings that can last for years.

In fact, in *other* pipeline intervention situations, FERC gives 60 days' notice for intervention in proceedings for blanket certificates:

> [T]he Secretary of the Commission shall issue a notice of the request within 10 days of the date of the filing, which will then be published in the FEDERAL REGISTER. The notice shall designate a deadline for filing protests, or interventions to the request. The deadline shall be 60 days after the date of issuance of the notice of the request."

18 CFR 157.205(d). Moreover, FERC requires pipeline companies to include specific text in these blanket certification landowner notifications:

> This project is being proposed under the prior notice requirements of the blanket certificate program administered by the Federal Energy Regulatory Commission. Under the Commission's regulations, you have the right to protest this project within 60 days of the date the Commission issues a notice of the pipeline's filing.

> If you file a protest, you should include the docket number listed in this letter and provide the specific reasons for your protest. The protest should be mailed to the Secretary of the Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426. A copy of the protest should be mailed to the pipeline at [pipeline address]. If you have any questions concerning these procedures you can call the Commission's Office of External Affairs at (202) 208–1088.

157.203(d)(2)(vi). If FERC can do it for one type of pipeline certificate process, then there is no reason why FERC cannot do so here. Given that each of its Certificate pipeline decisions means that eminent domain will be used against dozens, or even hundreds, of landowners, it is the least FERC can do to satisfy the Due Process Clause.

When dealing with the sufficiency of notice when a state seized someone's house for delinquent taxes while aware that the homeowner had not received notice, the Supreme Court stated:

> There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. *It is not too much to insist that the State do a bit more to attempt to let him know about it* when the notice letter addressed to him is returned unclaimed.

Jones v. Flowers, 547 U.S. 220, 239 (2006) (emphasis added).

II. FERC'S ADMINISTRATIVE PROCESS DOES NOT SATISFY THE DUE PROCESS CLAUSE BECAUSE THE AGENCY IS NOT COMPETENT TO – AND HAS DISCLAIMED ANY AUTHORITY TO - ADJUDICATE CONSTITUTIONAL CLAIMS.

A. The Due Process Clause Guarantees Landowners a Hearing Before Their Property is Taken

> The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. *See United States v. $ 8,850*, 461 U.S. 555, 562, n.12; *Fuentes v. Shevin*, 407 U.S.

> 67, 82 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

United States v. James Daniel Good Real Property, 510 U.S. 43, 48-49 (1993)(parallel citations omitted). Land, of course, is a form of "property" protected by the Fifth Amendment. *Jones v. Flowers*, 547 U.S. 220 (2006)(tax sale of Petitioner's home).[8]

The Supreme Court has repeatedly and emphatically ruled that absent compelling circumstances, Due Process requires a hearing *before* property is taken: "We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)).

In *James Daniel Good Real Property*, the Court articulated the need for predeprivation hearing when the government is taking real property:

> Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing.
>
> In *Fuentes*, we held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing. And in *Connecticut v. Doehr*, we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with

[8] For property seized via eminent domain, the predeprivation hearing is required to address only the propriety of the "pubic use" determination, not the question of "just compensation". The Supreme Court has held that Due Process "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken", only that "the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890).

> the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds.
>
> The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property.

Id. at 53-54 (citations omitted).

B. Because FERC Cannot Adjudicate Constitutional Issues, by Definition FERC's Certificate Decision Process Does Not Satisfy the Due Process Requirement of Notice and a Hearing.

Assuming, of course, the Commission remedies the Due Process violations endemic in its notice procedures, in normal circumstances it could be argued that FERC's Certificate process satisfies the Fifth Amendment's predeprivation hearing requirement. But the Commission's procedures do not satisfy this requirement in many cases where landowners have had their property taken, for the simple reason that FERC has no power to decide the Constitutional issues raised by landowners' claims. In fact, because the Commission has emphatically disclaimed any such authority, any such hearing cannot, by definition, satisfy the Due Process Clause.

The Constitutional questions raised by FERC's practice of issuing "conditioned certificates" is a perfect example of this. FERC frequently issues a Certificate "conditioned" on becoming effective when the recipient has satisfied those conditions. In most cases, these conditions include obtaining other federal or state approvals necessary for pipeline construction or operation.

For affected landowners, the problem is that even such a "conditioned" certificate still allows the pipeline company to exercise eminent domain, leading to the nightmarish situation where a landowner's property is taken, trees cut, land ditched, etc., but then

the pipeline is never built because other necessary approvals cannot be obtained. As described below in Section IV, allowing pipeline companies to exercise eminent domain on the basis of such conditioned certificates violates the Takings Clause.

The entirely separate Due Process issue inhering in the question of conditioned Certificates is that FERC has expressly stated that it has no authority to deny the holder of a conditioned Certificate the right to exercise eminent domain.

The Commission's October 13, 2017 decision granting a Certificate for the Mountain Valley Pipeline (MVP) is an example of this situation. The MVP Certificate was conditioned on MVP obtaining "all necessary federal and state permits and authorizations, including the water quality certifications, prior to receiving Commission authorization to commence construction." 161 FERC ¶ 61,043 at ¶ 187.[9]

The Commission was unequivocal that, having granted the Certificate, it had no authority to in any way condition the use of eminent domain:

> Once the Commission makes that determination and issues a natural gas company a certificate of public convenience and necessity, it is NGA section 7(h) that authorizes that certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner. MVP Certificate Decision ¶ 59.

In fact, "such a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution." Id. ¶ 63. Or, as the Supreme Court has held, "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the

[9] Unfortunately, tree-cutting, ditching, and other such permanently destructive actions are considered "preconstruction" activities. *See, e.g., Delaware Riverkeeper v. FERC*, 857 F.3d 388, 395 (D.C. Circuit 2017).

jurisdiction of administrative agencies." *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result); "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Because FERC has disclaimed any authority to address the question of whether conditional Certificates violate the Takings Clause and, by extension, any of the other Takings Clause or other Constitutional claims that have arisen from the Commission's practices under the Natural Gas Act (including, for example, whether the Takings Clause's "public use" requirement can be satisfied when the Commission relies solely on precedent agreements between the applicant and affiliated entities, or whether the pubic use requirement can be satisfied by Commission decisions made without the necessary information contained in environmental reviews conducted by other agencies) then the Commission's Certificate procedures do not – *and cannot* – satisfy the Due Process Clause's requirement of a predeprivation hearing.

III. FERC's Use of "Tolling Orders" Violates the Due Process Clause.

FERC's tolling orders violate Due Process in one of two ways. If, for some reason, Due Process does not entitle landowners to a predeprivation hearing, then tolling orders unconstitutionally delay the required post-deprivation hearing. Alternatively, if FERC's Certificate process *does* satisfy the Due Process pre-deprivation hearing requirement, then tolling orders violate the Due Process Clause by excessively delaying judicial review.

A. Tolling Orders.

As a predicate for judicial review of a Commission decision, the Natural Gas Act requires that intervenors have applied to the Commission for rehearing (15 USC § 717r(a)), and that the Commission have issued an "order of the Commission upon the application for rehearing". 15 USC § 717r(b).

Once a party submits a rehearing request, FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." 15 USC § 717r(a). Because the Commission's order on rehearing is a jurisdictional requirement for judicial review, Congress required FERC to act swiftly on rehearing requests: "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." Unfortunately, the Commission has developed a practice of issuing a unique type of order on rehearing – dubbed a "tolling order" – that not only thwarts Congressional intent, but also violates the Due Process Clause.

A tolling order purports to grant rehearing, but only for the purpose of allowing the Commission to further consider the matter. The tolling order in the Mountain Valley Pipeline proceeding contains FERC's boilerplate language:

> In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.

Order Granting Rehearing for Further Consideration, No. CP16-10, 20171213- 3061 (Dec. 13, 2017)(available at https://elibrary.ferc.gov/IDMWS/search/fercgensearch.asp).

The Commission issues tolling orders in virtually every pipeline proceeding; according to one study, the Commission issued them in 99% (74 out of 75) of requests

for rehearing of pipeline Certificate orders over the last 8 years. Petition for Extraordinary Writ in *In re Appalachian Voices, et al.*, No. 18-1006, at p. 5 (D.C. Cir. Jan. 8, 2018); *see also* Exhibit G to Petition for Extraordinary Writ. These tolling orders are not brief pauses for reflection; according to the cited study, the *average* length of time between the tolling order and FERC's final order on rehearing is 194 days, or more than six months, and some tolling orders have lasted more than 18 months.

C. If Affected Landowners Are Only Entitled to Post-Deprivation Review, then Tolling Orders Violate Their Due Process Right to a Prompt Hearing.

If affected landowners are only entitled to post-deprivation hearing, then the use of tolling orders means that affected landowners do not receive their Constitutionally-required hearing for months, and sometimes *years*, after the Commission's decision authorizing the Certificate holder to seize their land. But for a post-deprivation hearing to satisfy the Due Process Clause, the Supreme Court has held that it must come promptly on the heels of the taking.

In *Barry v. Barchi*, 443 U.S. 55 (1979), the New York State Racing and Wagering Board had suspended Barchi's license after a horse he trained tested positive for a banned drug. After holding that the State's "important interest in assuring the integrity of the racing carried on under its auspices" justified suspending Barchi's license without a prior hearing (*id.* at 64), the Court addressed the adequacy of the State's post-suspension hearing procedure.

The state law governing this process set no deadline for a hearing, and the Board would have 30 days after such hearing to give its decision. 443 U.S. at 60. The Court gave such an open-ended process short shrift:

> Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. . . . . Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us.

Id. at 66. As a result, the Court concluded that Due Process required "that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay." Use of tolling orders lasting for months, and even years, does not satisfy the "without appreciable delay" standard.

D. If FERC's Certificate Process Does Satisfy the Requirement of a Pre-Deprivation Hearing, then Tolling Orders Violate Due Process by Excessive Delay in Judicial Review.

In the normal course, affected landowners whose property is taken as the result of a Commission, could seek immediate relief in the appropriate Court of Appeals as soon as the Commission acted on their request for rehearing or 30 days after filing the request, whichever was earlier. (The appropriate Court of Appeals is either the D.C. Circuit, or in the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business". 15 U.S.C. 717r(b).)[10]

In an analogous situation, courts have held that even where a statute grants exclusive review of agency action to an appellate court, if the agency cannot adjudicate

[10] Landowners whose property has been taken based on FERC Certificates have no recourse in subsequent federal district court proceedings that determine just compensation. Those courts insist that landowners must raise any substantive claim in the rehearing and appellate review processes. *See, e.g.*, *Mountain Valley Pipeline*, 2018 WL 648376, at *8 ("the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking")(quoting *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 F. App'x 495, 498 (1st Cir. 2005)); *Millennium Pipeline Co., L.L.C. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011).

a predeprivation constitutional challenge, district courts nevertheless have jurisdiction over the constitutional claim in order to avoid the inherent delays in the agency process. In such cases, the risk of "sufficiently serious irreparable injury [leads us] to conclude that the administrative review process is insufficient to afford him full relief." *Carl Kreschollek v. Southern Stevedoring Company*, 78 F.3d 868, 874–75 (3d Cir. 1996).

If agency inability to adjudicate constitutional issues suffices to justify going entirely outside of the statutory scheme and allowing district courts to address the issue, it more than justifies staying within the statutory scheme but ensuring the timeliness of appellate review.

IV. FERC'S PRACTICE OF ISSUING CONDITIONAL CERTIFICATES VIOLATES THE DUE PROCESS CLAUSE BY AUTHORIZING TAKINGS THAT ARE NOT FOR A PUBLIC USE.

Few of FERC's eminent domain practices have engendered more controversy than allowing Certificate holders to use eminent domain to take property when it is speculative whether the pipeline will ever be built, or whether it will be built on the property that has been taken. Niskanen notes that the Commission's Policy Statement provides that, "Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace." 88 FERC ¶ 61,227, p. 20. If landowners should not be subject to eminent domain for projects that are not "financially viable", Niskanen does not understand why they should be subject to eminent domain for projects that are not legally viable because they have failed to obtained the requisite permissions.

Unfortunately, FERC has effectively washed its hands of such outcomes, claiming, as noted above, that it has no authority to curtail the use of eminent domain

once it has granted a Certificate, even if the Certificate does not authorize construction until all other federal and state permissions are obtained.[11] This is problematic, for two reasons. First, as other commenters have pointed out, this means that FERC is making findings that the pipeline is required for "the public convenience and necessity" (15 U.S.C. 717f(e)) without knowing whether the project will meet the criteria in various other state and federal statutes. In other words, FERC cannot possibly know if the pipeline will satisfy the Natural Gas Act's statutory criteria (let alone the Constitutionally-mandated "public use" requirement) without, for example, the environmental impact findings by the state and/or federal agencies responsible for making those determinations.

Second, FERC's position leads to situations such as what happened, for example, to the Holleran family of New Milford, Pennsylvania. Constitution Pipeline, LLC, acting under the eminent domain authority of a conditioned certificate, seized part of the family property (complete with gun-toting U.S. Marshalls), cut more than 500 mature trees, but was then unable to build the pipeline because New York State denied a necessary Clean Water Act § 401 water quality certification for the project. New York's denial was then upheld by the Second Circuit: *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018).[12] The Constitution pipeline will never be built, but the

[11]However, FERC has at least once conditioned the use of eminent domain on the pipeline applicant getting other necessary approvals; *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653, 657 (4th Cir. 2011).

[12] Constitution unsuccessfully petitioned the Commission for an order that New York had waived its right to deny the 401 certification. *Constitution Pipeline LLC, CP18-5* (Declaratory Order Denying Waiver), 162 FERC ¶61,014 (2018); *rehearing denied*, 1 64 FERC ¶61,029 (2018).

Holleran family was left with the rotting mess of hundreds of dead trees where a thriving forest had once stood. A copy of Catherine Holleran's declaration describing this history is attached as Exhibit 1.

Granting eminent domain authority without certainty that the intended project will be built violates the Takings Clause requirement that any property taken must be for a "public use". If the proposed project is never built, then by definition the taking did not (and could not) satisfy that criterion.

State (but apparently not federal) courts have had to deal with this situation before. In *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (1994), the Mississippi Supreme Court addressed the situation where the City of Vicksburg condemned the defendant's property in order to convey it to a private corporation for casino development, but the conveyance to the casino company did not specify, in any way, what the company was required to do with the property. Accepting the legislative determination that casino development was a "public use", the Court found that:

> the City failed to provide conditions, restrictions, or covenants in its contract with Harrah's to ensure that the property will be used for the purpose of gaming enterprise or other related establishments. In fact, testimony indicates that Harrah's may do anything it wishes with Thomas' property, limited solely by a thirty year reversionary interest in the City.

Id. at 943. This led the court to conclude that, "Because the use of Thomas' land will be at the whim of Harrah's, the private use of Thomas' property by Harrah's will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best." *Id*.

Similarly, in *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 352 (1998), the issue was whether "there are sufficient assurances that the

properties to be condemned will be used for the public purposes cited to justify their acquisition." The Court held that there were, in fact, no assurances of the property being used for the cited public uses, because the developer "is not bound to use these properties for those purposes." *Id*. at 357.[13]

For pipelines, there simply can be no "reasonable assurances" that each and every other federal and state agency will grant the necessary permissions, or do so such that each particular parcel of condemned land will be necessary for pipeline construction or operation. As a result, there can be no "reasonable assurances" that property condemned under the Natural Gas Act is taken for a "public use".

ACCESS TO RIGHTS-OF-WAY

A second question posed by the Commission in its Notice of Inquiry was:

> B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

Niskanen notes that the current Policy Statement does not appear to address this issue. Niskanen believes that two principles should guide the Commission's thinking on this issue: unless state law compels them to grant it, landowners have the absolute right to deny access to their property, and if pipeline companies want that access, they should pay landowners for it.

[13] Ironically, this issue was raised in, and rejected by, the state trial court in *Kelo v. New London*, 2002 Conn. Super. LEXIS 789 *, at 144-154, the case that eventually became *Kelo v. City of New London*, 545 U.S. 469 (2005). And, as fate would have it, the property that the Supreme Court held could be condemned was never put to a public use or, in fact, for any use whatsoever.

Under the Commission's regulations, it is the applicant's burden to provide the Commission with the information necessary to make the determination as to whether the pipeline is required for "the public convenience and necessity", e.g., "Applications under section 7 of the Natural Gas Act *shall set forth all information necessary to advise the Commission fully* concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested." 18 CFR 157.5(a) (emphasis added). Moreover, 18 CFR 157.5(b) provides:

> Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

Since the survey information as to the pipeline's route is most certainly "necessary for the consideration and ultimate determination of the application", the Commission's own regulations require *complete* survey information as a necessary predicate for issuing a Certificate. And, as if 157.5(b) were not clear enough, 157.5(c) drives this home:

> This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

Niskanen believes that the Commission should not consider applications where the applicant's proffered excuse for not submitting the required information is due to its failure to obtain survey access to property. If pipeline companies must submit that information, then (at least in states that do not allow for survey access as a matter of law) they will simply have to pay landowners for access to their property in order to get it.

Conclusion

Niskanen thanks the Commission for the opportunity to submit these comments, and looks forward to the Commission's efforts to remedy each of the Constitutional violations noted above.

Respectfully submitted,

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