

174 FERC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee, Richard Glick,
Allison Clements, and Mark C. Christie.

PennEast Pipeline Company, LLC

Docket No. CP20-518-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued January 19, 2021)

1. On August 31, 2020, Robert Kaiser (Petitioner) filed a petition for an order declaring that PennEast Pipeline Company, LLC (PennEast) be prohibited from exercising eminent domain authority until PennEast has received the necessary permits and authorizations to commence construction. This order denies the petition.

I. Background

2. On January 19, 2018, the Commission issued a certificate of public convenience and necessity for the PennEast Project, an approximately 116-mile greenfield natural gas pipeline designed to provide natural gas transportation service from receipt points in the eastern Marcellus Shale region, in Luzerne County, Pennsylvania, to delivery points in New Jersey and Pennsylvania, terminating at an interconnection with Transcontinental Gas Pipe Line Company, LLC in Mercer County, New Jersey.¹ Environmental Condition 10 appended to the order provided that PennEast could not begin project construction until it had obtained all applicable authorizations required by federal law.

3. Following issuance of the Certificate Order, PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (2018) (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom. Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, *et al.* (first petition filed May 9, 2018) (argument held in abeyance October 1, 2019, “pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit’s decision”).

Court) in order to obtain necessary easements for the project,² pursuant to NGA section 7(h), which grants holders of a certificate of public convenience and necessity eminent domain authority. The State of New Jersey and its agencies (collectively, New Jersey) claimed property interests in forty-two parcels of land at issue and moved to dismiss the condemnation actions, asserting that the Eleventh Amendment of the U.S. Constitution grants New Jersey sovereign immunity from suit by private parties such as PennEast in federal court.³ The District Court granted PennEast's application for orders of condemnation and rejected New Jersey's sovereign immunity argument.⁴ New Jersey then appealed to the United States Court of Appeals for the Third Circuit, which held that the NGA does not abrogate New Jersey's sovereign immunity and vacated the District Court's order.⁵ PennEast filed a petition for certiorari with the U.S. Supreme Court on February 18, 2020.

4. On January 30, 2020, the Commission issued a declaratory order in response to a October 4, 2019 petition from PennEast seeking the Commission's interpretation of section 7(h) as it applies to state lands. The Commission found that: (1) NGA section 7(h) confers to certificate holders the federal government's eminent domain authority to condemn any land necessary to effectuate the certificate, including state land; and (2) the Commission lacks the statutory authority and the administrative mechanisms needed to condemn state land on behalf of certificate holders. The Commission declined to address whether NGA section 7(h) delegates to certificate holders the federal government's exemption from state claims of sovereign immunity pursuant to the Eleventh Amendment.⁶

5. On August 31, 2020, Petitioner requested the Commission issue a declaratory order that prevents PennEast from exercising its eminent domain authority until PennEast has received the necessary permits and authorizations to commence construction.

² *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018).

³ *Id.* The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

⁴ *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, *12, 25.

⁵ *In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 99, 111-13 (3d. Cir. 2019).

⁶ *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at PP 8-9 (PennEast Declaratory Order), *reh'g denied*, 171 FERC ¶ 61,135 (2020).

II. Public Notice, Interventions, Protests and Comments

6. Notice of the petition was published in the *Federal Register* on September 14, 2020, establishing September 30, 2020, as the deadline for filing comments and interventions.⁷ Timely, unopposed motions to intervene were filed by New Jersey Natural Gas Company, NJR Energy Services Company, and PennEast.⁸

7. On September 1, 2020, September 4, 2020, and December 3, 2020, Petitioner filed supplemental comments.⁹ PennEast's motion to intervene included a protest. On October 3, 2020, Petitioner filed a motion for leave to answer and answer to PennEast's protest. The Commission's Rules of Practice and Procedure do not permit answers to protests.¹⁰ Accordingly, we reject Petitioner's answer.

III. Discussion

8. Petitioner requests that the Commission issue a declaratory order preventing PennEast from exercising its eminent domain authority over all affected landowners "until PennEast has received the necessary permits and authorizations to commence construction."¹¹ Petitioner argues that: (1) the Commission's issuance of the PennEast

⁷ 85 Fed. Reg. 56,596 (Sept 14, 2020).

⁸ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2020).

⁹ On September 11, 2020, Petitioner filed, in this proceeding, comments on the Environmental Assessment in Docket No. CP20-47-000, a pending amendment proceeding involving the PennEast Project. Those comments will be addressed in the amendment proceeding.

¹⁰ 18 C.F.R. § 385.213(a)(2) (2020).

¹¹ Robert J. Kaiser August 31, 2020 Petition at 2 (Petition). Petitioner also seeks waiver of the filing fee associated with the petition, claiming that good cause exists for the Commission to waive this fee. Petitioner has submitted financial information demonstrating that he is economically unable to pay the appropriate fee. Therefore, we grant the waiver. 18 C.F.R. § 381.106(a) (2020); *see Cal. Power Exch. Corp.*, 106 FERC ¶ 61,047, at P 12 (2004) (granting petition for waiver of the filing fee after applicant demonstrated "financial distress" through operating revenues and cash preserves); *Cal. Power Exch. Corp.*, 105 FERC ¶ 61,101, at P 20 (2003) (same); *Constellation Power Source, Inc. v. Cal. Power Exch. Corp.*, 100 FERC ¶ 61,124, at P 55 (2002) (same); *Cal. Power Exch. Corp.*, 98 FERC ¶ 61,097, at 61,305-06 (2002) (same).

Declaratory Order allows the Commission to grant the relief requested here;¹² (2) it is unlikely that the PennEast Project will be constructed due to the uncertainty caused by the Third Circuit's decision in *In re PennEast*;¹³ and (3) the PennEast Project is no longer necessary and the Commission's analysis in the certificate proceeding was inadequate.¹⁴

9. PennEast argues that the Petition fails to cite any law or precedent to support the requested relief, and that the Commission has consistently held that it does not have authority to limit eminent domain.¹⁵ PennEast further argues that the Petition improperly seeks rehearing and stay of the Certificate Order.¹⁶

10. We conclude that the Commission has no authority to grant the requested relief. As stated in the Certificate Order, “[t]he Commission does not have the authority to limit a pipeline company’s use of eminent domain once the company has received its certificate of public convenience and necessity.”¹⁷ Nor does the Commission oversee the acquisition of property rights through eminent domain, including issues regarding the

¹² Petition at 1.

¹³ *Id.* at 2.

¹⁴ Robert J. Kaiser September 1, 2020 Comments at 1-2.

¹⁵ PennEast September 30, 2020 Protest at 6-7.

¹⁶ *Id.* at 5-12.

¹⁷ Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (“The Commission does not have the authority to limit a pipeline company's use of eminent domain once the company has received its certificate of public convenience and necessity.”). *See also* *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that NGA section 7(h) “contains no condition precedent” to the right of eminent domain other than issuance of the certificate when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . . Thus, FERC does not have discretion to withhold eminent domain once it grants a Certificate.” (citation omitted)); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . . The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (citation omitted)).

timing of and just compensation for the acquisition of property rights. As the Commission has explained, these matters are for the applicable state or federal court.¹⁸

11. Additionally, Petitioners argue that the issuance of the PennEast Declaratory Order allows the Commission to grant the relief requested here is unavailing. In the PennEast Declaratory Order, the Commission was determining the scope of NGA section 7(h), not interfering with its administration.¹⁹ It was not, as Petitioner requests, purporting to limit a certificate holder's exercise of its statutorily-conferred rights.

12. Next, Petitioner alleges deficiencies in the Commission's analysis in the underlying certificate proceeding, including the Commission's determinations related to the need for and environmental impacts of the project.²⁰ Such arguments are an improper collateral attack on the Certificate Order and are hereby rejected.²¹

13. Finally, we are not convinced by Petitioner's assertions regarding the likelihood of the PennEast Project's eventual construction.²² As discussed in the Order Granting Request for Extension of Time,²³ PennEast has sought Supreme Court review of the Third Circuit's decision and, further, may still acquire necessary state lands by means

¹⁸ *E.g.*, *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018); *see, e.g.*, Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 n.82. Similarly, Petitioner's claim that PennEast has failed to negotiate with landowners, thus preventing it from exercising the right of eminent domain, is a matter to be determined in the applicable state or federal court.

¹⁹ PennEast Declaratory Order, 170 FERC ¶ 61,064 at P 13 & n.45, *reh'g denied*, 171 FERC ¶ 61,135 at P 22 & n.66.

²⁰ Robert J. Kaiser September 1, 2020 Comments at 1-2.

²¹ *Rockies Exp. Pipeline LLC v. 4.895 Acres of Land, More or Less*, 734 F.3d 424, 431 (6th Cir. 2013) (rejecting landowner's claim for damages from eminent domain taking by pipeline as an impermissible collateral attack on the essential fact findings made by the Commission in issuing the certificate order authorizing the pipeline); *Algonquin Gas Transmission, LLC*, 171 FERC ¶ 61,148, at P 13 (2020) (refusing to relitigate a coalition of environmental and community organizations' claim that circumstances have eroded public need for the project).

²² Petitioner's December 3, 2020 comment asserts without support that one of the project's partners has "pull[ed] its commitment" to the project. Because the assertion is unsupported, we need not address it further.

²³ *See PennEast Pipeline Co, LLC*, 170 FERC ¶ 61,138, at P 18 (2020).

other than eminent domain, i.e. through negotiation with New Jersey. That the Third Circuit's opinion may impede PennEast's efforts to exercise eminent domain over certain parcels of land along the project's route does not affect our finding that the project remains required by the public convenience and necessity.

The Commission orders:

The petition for declaratory order is denied.

By the Commission. Commissioners Glick and Clements are concurring with a joint separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

Docket No. CP20-518-000

(Issued January 19, 2021)

GLICK, Commissioner, and CLEMENTS, Commissioner, *concurring*:

1. We concur in today's order because we agree that the statute and relevant court cases leave us no discretion to condition eminent domain authority following the issuance of a certificate under section 7 of the Natural Gas Act (NGA).¹ Nevertheless, we write separately to explain our belief that those cases illustrate why the Commission should end its current approach to issuing conditional section 7 certificates.

2. The Commission regularly issues section 7 certificates when a pipeline developer does not have all—or sometimes even any—of the regulatory authorizations and permits needed to construct a proposed pipeline. That practice allows pipeline developers to condemn land via eminent domain before it is prudent or necessary to do so.² Once the Commission issues a certificate, nothing stands between a pipeline developer and taking that certificate to court to begin the process of condemning private land.³ Indeed, pipeline developers often begin the condemnation process just days after the Commission issues a certificate.⁴ The developers are often far from the point of commencing construction as they must still contend with the legal, regulatory, and practical hurdles

¹ See *PennEast Pipeline Co.*, 174 FERC ¶ 61,056, n.17 (2021) (Order) (citing *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018), *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018), and *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000)).

² See, e.g., *PennEast Pipeline Co.*, 162 FERC ¶ 61,053 (2018) (*PennEast*) (Glick, Comm'r, dissenting at 3).

³ See, e.g., *Twp. of Bordentown*, 903 F.3d at 265 (explaining that NGA section 7(h) “contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to acquire the right of way by contract”) (internal quotations and alterations omitted).

⁴ See, e.g., *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (Glick, Comm'r, dissenting at P 25 & n.63) (discussing how the Spire pipeline commenced over 100 separate eminent domain actions beginning just a week after receiving its section 7 certificate); *infra* P 3 (discussing PennEast's exercise of eminent domain).

associated with securing the necessary permits. Under those circumstances, we should not be awarding conditional certificates that allow a pipeline developer to rush to seize private land.⁵

3. The PennEast pipeline illustrates the problem. The Commission issued PennEast a certificate on January 19, 2018.⁶ Beginning roughly two weeks later, on February 6, 2018, PennEast filed over a hundred separate eminent domain proceedings in New Jersey alone.⁷ As of today, exactly three years after issuing that certificate, PennEast still does not have all the federal authorizations it needs to construct the project. It is not fair to have deprived so many landowners of their private property *at least three years* before any construction can occur and with substantial uncertainty remaining.

4. But there is a straightforward solution to this problem. The Commission can stop its practice of issuing conditional section 7 certificates as a matter of course. Doing so would make good on the Commission's concerns for landowners' interests by ending a premature use of eminent domain.⁸

⁵ We recognize that it is the Commission's practice not to allow a pipeline developer to begin construction until it receives all necessary authorizations. *See, e.g.*, Order, 174 FERC ¶ 61,056 at P 2. That practice is necessary for the issuance of conditional certificates to be even plausibly legal. But it leaves landowners exposed to the loss of their property while the proposed pipeline waits for federal authorizations that may, or may not, be issued.

⁶ *PennEast*, 162 FERC ¶ 61,053.

⁷ *See, e.g.*, Verified Complaint, *PennEast Pipeline Co. v. David & Maryann Briede*, 3:18-cv-01585 (BRM) (DEA) (D.N.J. Feb. 6, 2018).

⁸ We recognize that there may be instances where access to land along a proposed pipeline route is necessary to complete the surveys that may be required for certain federal authorizations. But those are the sort of details that we—or Congress—could resolve should the Commission end its current practice of issuing conditional certificates.

For these reasons, we respectfully concur.

Richard Glick
Commissioner

Allison Clements
Commissioner