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Before the House Energy & Commerce Committee
Subcommittee on Energy

Hearing on "Modernizing the Natural Gas Act to Ensure it Works for Everyone."

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Mr. Chairman, thank you for the opportunity to testify today as to some of the problems plaguing the use of eminent domain under the Natural Gas Act. My name is David Bookbinder, and I am the Chief Counsel of the Niskanen Center. The Niskanen Center is a non-profit think tank and advocacy group founded in 2015 that works to advance an open society.

My testimony will focus on four specific pipeline eminent domain problems: (1) inadequate notice; (2) conditioned certificates; (3) tolling orders; and (4) "quick take" condemnations that may be fit subjects for legislative action. But before going into those issues, it is important to consider what the proper role of the Natural Gas Act should be in today's economy.

I. The Natural Gas Act in Today's Economy

Congress enacted the Natural Gas Act (NGA) in 1938, in order to *protect consumers from monopoly pricing of natural gas;* as the Supreme Court put it, "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Rfg. Co. v. Pub. Serv. Comm'n*, 360 360 U.S. 378, 388 (1959). The source of those "excessive rates and charges" was the concentration of supply in the hands of a small group of companies:

> Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies… State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the

> types of problems with which those participating in the hearings were pre-occupied. Congress addressed itself to those specific evils."

Federal Power Commission et al. v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944). Thus, "[t]hese provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies." *Id*. at 612.

It is unclear whether the circumstances which led to the NGA remain relevant more than 80 years later, especially given the fact that the United States has abundant supplies of natural gas, and consumption is expected to remain flat for the next decade; according to the U.S. Energy Information Administration: "U.S. natural gas consumption in the Reference case slows after 2020 and remains relatively flat through 2030 because of slower industrial sector growth. Consumption also declines in the electric power sector during this period."[1] The fact that this stagnation in domestic demand is coupled with further increases in production necessarily means, "an increase in U.S. exports of natural gas." *Id.* In other words, more and more pipelines are being built not to benefit U.S. consumers, but rather to benefit companies shipping LNG overseas. And how shipping gas overseas is a "public use" or "public benefit" under the Takings Clause justifying the use of eminent domain is an open question which, in the absence of any legislative guidance, we expect that the Supreme Court will eventually have to decide.

II. PROBLEMS WITH IMPLEMENTING EMINENT DOMAIN UNDER THE NATURAL GAS ACT

A. The Need for Notice Satisfying the Fifth Amendment

The Fifth Amendment's Due Process Clause provides that no person may be "deprived of life, liberty or property without due process of law." And the *sine qua non* of due process for landowners whose property may be taken by pipeline companies is giving them adequate notice that the pipeline company has asked FERC for permission

[1] https://www.eia.gov/outlooks/aeo/pdf/AEO2020%20Natural%20Gas.pdf, p. 4.

to do so, the nature of FERC's administrative process by which this permission may be granted, and landowners' rights in this procedure.

Adequate notice to landowners is thus critical for many reasons, but especially because of how Congress wrote the NGA's judicial review provisions. 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).

As described below, the problem – which rises to Constitutional levels – is that FERC's 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. In addition, 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, making intervention more challenging.

Compounding this situation is that FERC delegates its Fifth Amendment responsibilities to the pipeline companies, entities with the least interest in providing adequate notice. Moreover, FERC has *no* policies or procedures to ensure that pipeline companies then provide *any* notice to landowners. In response to a recent FOIA request from the Niskanen Center asking for documents concerning "any FERC policies, practices, or procedures in place to ensure that certificate applicant pipeline companies have sent notice to all affected landowners", FERC responded that, "A search of the Commission's non-public files identified no documents responsive to this request."

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"[2] with relevant information about the Certificate process (the "landowner notice letter"), which "shall include":

[2] "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; (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

(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 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

area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone." 18 CFR 157.6(d)(2).

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 described 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 previously reviewed the NOAs FERC issued in 2018 for pipeline construction projects under NGA section 7(c).[3] 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."

Niskanen also picked NOAs for four other section 7(c) pipeline construction projects randomly from the Federal Register.[4] 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

[3] These NOAs were 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).

[4] 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).

cryptic sentence in a 4-page, single-spaced document.[5] And, 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?*[6] 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; last visited on February 2, 2020), 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.

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. <u>FERC Imposes Arbitrarily Short Deadlines to Intervene in Certificate Proceedings</u>.

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[5] 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.

[6] Available at https://www.ferc.gov/resources/guides/gas/gas.pdf; last visited February 2, 2020.

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 Niskanen reviewed, 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. 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.)[7] 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;

(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

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

(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 FERC's other notice practices, 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 FERC's other notice practices, 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.

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. <u>FERC's Notice Practices Do Not Take Account of Relevant Demographics.</u>

In *Memphis Light*, 436 U.S. at 15, n. 15 (emphasis added), 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.*

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[8], of these 17 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, *less than half of the adult population has 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 19 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

[8] 7 https://www.ers.usda.gov/data-products/county-level-data-sets/download-data/.

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 – or as a separate document – 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 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 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 proceedings (for "blanket certificates"), FERC gives 60 days' notice for intervention:

> [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, in such notices FERC requires pipeline companies to include specific text in these blanket certification landowner notifications (*id*. at (d)(2)(vi)):

> 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.

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).

Niskanen believes that this Committee may want to consider amending the Natural Gas Act to remedy these notice problems.

III. FERC's Use of "Conditioned Certificates" Violates the Takings Clause

The Supreme Court has long distinguished between laws that authorize government officials to exercise "the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). The first type of law "carries with it the sovereign's full powers except such as are excluded expressly or by implication." *Id*. But the second kind of law is more strictly construed; these laws "do not include sovereign powers greater than those expressed or necessarily implied." *Id*. Such strict construction is more than justified in dealing with conditioned certificates.

A. Conditioned Certificates Violate the Takings Clause by Allowing Takings <u>That Are Not Necessarily for a Public Use</u>.

None of FERC's eminent domain practices have engendered more controversy than allowing Certificate holders to use eminent domain to take property when they have not yet obtained the other state and federal approvals necessary to construct and operate the pipeline, and in fact may never be able to do so. To put this in a familiar context, just imagine a court being asked to order condemnation of land for a project, when the land would not only need to be re-zoned to accommodate the intended use,

but the developer has not even applied for the re-zoning.

Even though there will be no "public convenience and necessity" under the Natural Gas Act allowing construction and operation until such time as a pipeline obtains all of these other authorizations, there is apparently enough "public benefit" in the mere possibility that the pipeline will be built to satisfy the Takings Clause. 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 yet legally viable. If a pipeline fails to obtain any of those necessary permits, FERC will have allowed it to take (and destroy) property for no purpose (and certainly no public benefit) whatsoever, an obvious violation of the Takings Clause.

This is not a theoretical problem. The most dramatic recent example of it came in connection with the Constitution pipeline, when New York State denied the necessary § 401 water quality certification for the project. That decision was then upheld by the Second Circuit in *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d. Cir. 2017). Unfortunately, acting on the basis of its conditioned certificate, Constitution had already seized part of the Holleran family property in New Milford, PA, and cut down more than 500 mature trees. The Constitution pipeline may never be built, but the Holleran family was left with the rotting mess of hundreds of dead trees where a thriving forest had once stood.

After failing in its litigation against New York State, Constitution petitioned FERC to declare that New York had waived its right to deny the § 401 certification. Even though FERC denied that petition and the subsequent request for rehearing (*Constitution Pipeline LLC*, 162 FERC ¶61,014 (2018); *rehearing denied*, 164 FERC ¶61,029 (2018), FERC not only refused to rescind Constitution's Certificate, but has extended its life to December 2020 and is thus continuing to deny the Hollerans enjoyment of their

own property. FERC justified this extension on the grounds that Constitution had appealed FERC's denial of its petition to the D.C. Circuit (*Constitution Pipeline v. FERC*, No. 18-1251 (docketed September 14, 2018)), and "there is no reason for the Commission to believe that Constitution . . . will not construct its facilities and place them in service by December 2020, assuming a timely favorable decision from the court." 165 FERC ¶61,081, para. 12 (2018).[9]

Thus FERC not only allowed Constitution to take the Hollerans' property back in 2015 on the assumption that all other authorizations would follow, but is now allowing Constitution to hang on to it until at least 2020 on the chance that FERC's own decision will be overturned by the D.C. Circuit. The consequences of FERC's approach could be avoided simply by not allowing exercise of eminent domain on the basis of a conditioned certificate. And the same fate that befell the Hollerans looms over thousands of property owners across the country.

The issue of whether eminent domain can be exercised when it is not certain that the intended public benefit will materialize is not new. 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. However, the City's 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.

[9] And since that time, FERC voluntarily remanded the case in light of a different D.C. Circuit decision, and decided that New York State had waived its right to object to the 401 permit (*Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019)). FERC then affirmed its decision on rehearing (*Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199 (2019)), which is once again under review in the Second Circuit.

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.

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 will result in any "public benefit".

The specific issue of whether a conditioned certificate for a natural gas pipeline can be used to condemn property was recently decided in *Matter of National Fuel Gas Supply Corporation v. Schueckler*, 2018 N.Y. App. Div. LEXIS 7566 (4th Dept. 2018), appeal docketed December 7, 2018. The plaintiff in *Schueckler* tried to condemn property even though New York State had denied a required Clean Water Act § 401 certification, arguing that while the § 401 certification was a condition precedent to construction of the pipeline, it was not a condition precedent to exercise of eminent domain. The Court dismissed this distinction:

> The certificate itself is not the source of petitioner's authority to condemn, and it thus can neither authorize nor prohibit the acquisition of property by eminent domain. Rather, the lodestar of petitioner's eminent domain power is the public project authorized by the certificate . . . . The certificate, in other words, simply authorizes the public project, and the power of eminent domain stands or falls with that project as a necessary ancillary to its implementation (see generally NY Const. art 1, § 7(a)). Thus, when the public project cannot be legally completed, any eminent domain power in connection with that project is

> necessarily extinguished. To say otherwise would effectively give a condemnor the power to condemn land in the absence of a public project, and that would violate the plain text of the State Constitution.

Id. at 15. *Schueckler* dealt with a § 401 certification that had been denied, as opposed to one that has not yet been granted, but the legal principle is the same: unless the project can legally proceed, there is no public use or benefit that can support the use of eminent domain. As the Ohio Supreme Court noted in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 383 (Ohio Sup. Ct. 2006):

> A municipality has no authority to appropriate private property for only a contemplated or speculative use in the future. Public use cannot be determined as of the time of completion of a proposed development, but must be defined in terms of present commitments which in the ordinary course of affairs will be fulfilled.

Here, there is no basis for assuming that "in the ordinary course of affairs" any pipeline will receive all the other necessary authorizations.

Niskanen believes that this Committee may want to consider amending the Natural Gas Act to address issues of conditioned certificates.

IV. FERC's Use of Tolling Orders Violates the Due Process Clause Because When Property is Taken Without a Pre-Deprivation Hearing, at a Minimum a Prompt Post-Deprivation Hearing is Required.

As discussed above, the Natural Gas Act requires parties to first ask the Commission to rehear an issue before they can seek review of FERC's Certificate decision in the appropriate federal appellate court. And the NGA requires that FERC act on that request within 30 days, or it is deemed denied and parties can then move on: "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." 15 U.S.C. 717r(a) But FERC has taken the position that the NGA only requires it to "act" within 30 days, not that it has to decide the rehearing request. This has led to FERC's practice of issuing "tolling orders" within the 30-day period, which "act" on the rehearing request only to the extent that they grant FERC further (indeed, indefinite) time to consider the rehearing request.

Congress may certainly insist that, before seeking judicial review, parties must request rehearing from FERC in order to give the Commission the opportunity to amend its original decision. And it may even be proper to read the Natural Gas Act to allow FERC all the time it requires for rehearing when considering only statutory or regulatory issues that do not impose irreparable injury. But the NGA cannot be read – as FERC has done – to allow for such an indefinite process when the result is to deprive affected landowners of their due process rights to a "prompt" post-deprivation hearing and thus inflict the irreparable injury of the taking—and destruction—of their property.

What makes this situation all the more troubling is that FERC allows itself to take months and months to rehear issues *that it concedes it has no authority to decide*. Because FERC has not—and cannot—decide these issues, that leaves only the federal appellate courts to do so in the review of the Certificate decision, and due process requires that it be done "promptly" after FERC issues a Certificate to build a pipeline.

A. FERC's Rehearing Orders Decline to Adjudicate Numerous Constitutional Issues Concerning the Taking of Landowners' Property.

FERC has repeatedly said that it is not competent to decide landowners' Constitutional claims under the Due Process and Takings Clauses; indeed, one entire section of a recent FERC rehearing order is titled, "Eminent Domain Concerns Are Best Addressed by a Federal Court." *Mountain Valley Pipeline*, 163 FERC ¶ 61,197, at ¶¶ 73–79.

Many of the issues raised by landowners in FERC Certificate proceedings pose pure questions of constitutional law, which FERC has disclaimed authority to decide in various Orders, including: Does the Takings Clause require the Commission to determine whether a pipeline is able to provide "just compensation" before issuing a Certificate allowing pipeline to expropriate landowners' property?, see *Atlantic Coast* Pipeline, 164 FERC ¶ 61,100 at ¶ 88 n.226 (stating "[d]ue process rights are nonetheless preserved because constitutional challenges to agency decisions may be raised in appeals of final agency decisions" (citations omitted)); *Mountain Valley Pipeline*, 163 FERC ¶ 61,197, at¶ 76; see also *PennEast Pipeline Co.*, 164 FERC ¶ 61,098 at ¶ 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. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court"); and does the Commission permitting "quick take" procedures violate the due process clause and separation of powers doctrine?, see *Atlantic Coast Pipeline*, 164 FERC ¶ 61,100 at ¶¶ 84, 89 (finding that FERC's "role does not include directing courts how to conduct their own proceedings"); *Mountain Valley Pipeline*, 163 FERC ¶ 61,197 at ¶¶ 76, 77.

FERC has repeatedly disclaimed authority to decide any of these issues. As a result of both FERC and federal district courts hearing condemnation cases disclaiming authority to decide such issues, a nightmare scenario has resulted wherein property is taken destroyed via quick take, and years go by without a penny going to the injured landowners or the pipeline even being constructed. The Constitution Pipeline and the Holleran's property discussed above serves as an unfortunate example. Consequently, only the federal appellate courts that review FERC's Certificate decisions are left to decide these issues, and due process requires that it be done "promptly" after FERC issues a Certificate.

B. The Due Process Clause Guarantees—at a Minimum—Prompt Post-Deprivation Review.

Because a Certificate of Public Convenience and Necessity gives a pipeline eminent domain authority which it can exercise immediately, FERC's impermissible use of tolling orders means that landowners have been deprived of their due process right to a "pre-deprivation hearing." The Supreme Court has been crystal clear that a pre-deprivation hearing is required even when the interference with the landowners' rights are far less intrusive and destructive than what landowners have experienced:

> [I]n *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 the owner's use or possession and did not affect, as a general

matter, rentals from existing leaseholds.

United States v. James Daniel Good Real Prop., 510 U.S. 43, 54 (1993) (citations omitted). But it is black-letter law that when property is taken and—for whatever reason—a pre-deprivation hearing is not provided, the only way to satisfy due process is with a "prompt" post-deprivation hearing. See *Barry v. Barchi*, 443 U.S. 55 (1979). Assuming that landowners must settle for a prompt post-deprivation hearing, allowing seizure of property so that a private corporation can build a natural gas pipeline is hardly comparable to the handful of "extraordinary situations" where the Supreme Court has held that it is warranted. *See Fuentes v. Shevin*, 407 U.S. 67, 90–92 (1972) (noting the "extraordinary situations" that justify postponing an opportunity for a hearing, including the "summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food").

If due process entitles landowners only to a post-deprivation hearing, 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 suspended Barchi's license when 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 New York statute governing this process set no deadline for such a hearing, providing only that the Board would have 30 days after the hearing to give its decision. *Id*. at 61. 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. Indeed, insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed . . . . We also discern

> little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing.

Id. at 66 (emphasis added). 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." Id. And, in light of the irreparable damage that Landowners' properties will suffer and have suffered as a result of FERC pipeline Certificates, Justice Brennan's concurrence is particularly apt: "To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided -- i.e., either before or immediately after suspension." *Id.* at 74.

Even when the Supreme Court has found that delay in a post-deprivation hearing does not violate due process, its reasoning shows why the delay in the case of FERC's use of tolling orders most certainly does. *In Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988), the FDIC suspended Mallen from his role as a bank president and director after his indictment for making false statements to the agency. Since the suspension order "affected a deprivation of this property interest," *id*. at 240, Mallen was entitled to due process. The Court decided that 90 days to hold both a postdeprivation hearing and reach a decision did not violate the Due Process Clause because Congress had determined that indicted bank officers must be suspended to preserve banking industry integrity, the delay benefited Mallen because it allowed time for a fair process, and the suspension was incidental to the injury caused by the indictment. *Id*. at 243.

In contrast, no such interests are present when pipeline companies are taking landowners' property. On the one hand, there can be no possible interest in giving FERC unlimited time to reconsider landowners' constitutional arguments; as further outlined above, it has already said that it has no authority to decide them. And on the other hand, having their land expropriated does not represent a marginal additional harm to landowners, since that alone is their injury.

Other courts—including the D.C. Circuit—have followed the framework laid down in *Barchi* and *Mallen*. Citing *Barchi*, in *Tri County Indus. v. District of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997), the court held that due process was violated even if it was possible for the plaintiff to obtain a stay of an order suspending his building permit, because he had "no assurance that any such stay would be issued promptly." In *Horne Bros., Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972), the Defense Department suspended the plaintiff from bidding on government contracts without notice or a hearing. Noting that the suspension "may be continued for eighteen months or more," the court held that, "[w]hile we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor [to contest the suspension], that cannot be sustained for a protracted suspension." *Id*. at 1270. And in *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 104 (D.D.C. 2012), seven months after plaintiff's car was seized, the Court held that the plaintiff was likely to succeed on his claim he was denied his right to a prompt postdeprivation hearing. See also *Gershenfeld v. Justices of Supreme Court*, 641 F. Supp. 1419, 1428 (E.D. Pa. 1986) (finding that a state bar disciplinary rule violated due process because it allowed for the suspension of an attorney without any deadline for a postsuspension hearing).

If *Barchi* and its progeny stand for anything, it is that a post-deprivation hearing must be held "promptly" after the taking, and that processes that provide no deadlines at all for that hearing are per se violations of the Due Process Clause.

B. FERC'S Policy and Practice of Indefinitely Delaying the Required Prompt Post-Deprivation Hearing Violates Landowners' Due Process Rights.

As noted, FERC's tolling orders are not brief pauses for reflection; as Judge Millett of the D.C. Circuit noted in a recent concurrence, "between 2009 and 2017, the Commission issued tolling orders in response to 99% of requests for rehearing of pipeline certification decisions." *Allegheny Defense Project v. FERC*, 932 F.3d 940, 951 (2019). These orders last for months, and in some cases, years. Thus, "[t]he result is that

the Commission can toll until the cows come home and thereby forestall judicial review while people's homesteads are being destroyed." *Id.* at 952.

These sorts of delays – during which landowners' property is subject to condemnation and irreparable destruction – violate the requirement of a swift postdeprivation hearing. Fortunately, the D.C. Circuit has heeded Judge Millett's concerns and ordered rehearing *en banc* of *Allegheny Defense Project v. FERC*, and we're hopeful that the court will remedy this problem without the need for legislative guidance. In any event, Niskanen believes that the Committee may want to consider amending the Natural Gas Act to address the issue of tolling orders.

V. "Quick Take" Condemnations Under the Natural Gas Act Violate the Takings Clause

Under normal eminent domain proceedings, the government takes possession of condemned land following an order of condemnation, which includes a determination that the taking is for a public use, and a trial determining just compensation. Normally, the government is not allowed possession of the land until after just compensation has been finally determined and paid. *See E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 821 (4th Cir. 2004).

In certain statutes, Congress has granted the federal government "quick-take" power. This power allows the government immediate right of possession of land upon filing a declaration of public use and depositing with the court the amount it believes suffices for just compensation. The government then has immediate access to the land before just compensation is determined and paid. *See Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 550 F.3d 770, 774 (9th Cir. 2008).

Pipeline companies have created their own form of quick take, even though in the Natural Gas Act Congress did not authorize anything beyond traditional condemnation procedures requiring payment to the landowner before the condemnor is awarded possession. Before the trial for just compensation, the pipeline company asks the court for immediate possession of land through a preliminary injunction. If the company can show (1) it will likely succeed in the eminent domain proceedings, (2) it

will be irreparably harmed without immediate possession, (3) the equities tip in its favor, and (4) an injunction is in the public interest, then the court may grant the preliminary injunction for immediate possession. (Sometimes, as in statutory quick-take cases, the court will require a deposit to the court of the company's proposed just compensation amount.) Thus the pipeline can obtain immediate possession of private land before a court determines either public use or just compensation and before the landowner has received just compensation. *See E. Tennessee Nat. Gas Co.*, 361 F.3d at 831.

In *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170 (2019), the Supreme Court recently reaffirmed the principle that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." The Court held that taking property without paying for it violates the Fifth Amendment's Just Compensation Clause "[r]egardless of posttaking remedies that may be available to the property owner," explaining that, "[t]he Clause provides: '[N]or shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'" *Id*. The Court eloquently summed up the issue of taking possession without paying compensation:

> To grant possession of private property without payment of just compensation violates the Fifth Amendment's guarantee because [a] later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

Id. at 2172. This statement applies perfectly to the process by which pipeline companies take landowners' property before paying for it, and this Committee may want to consider codifying this approach to property rights in the context of the Natural Gas Act.