ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DELAWARE RIVERKEEPER NETWORK, *et al.*, Petitioners v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent	Case No. 18-1128 (Consolidated with 18-1144, 18-1220, 18-1226, 18-1233, and 18-1256)

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 162 FERC ¶ 61,053 (January 19, 2018) and 164 FERC ¶ 61,098 (2018)(August 10, 2018)

FINAL BRIEF AMICUS CURIAE OF NISKANEN CENTER IN SUPPORT OF PETITIONERS

David Bookbinder
Megan Gibson
Niskanen Center
820 First Street, NE
Washington, DC 20002
301-751-0611
dbookbinder@niskanencenter.org
mgibson@niskanencenter.org

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Niskanen Center states that (with the exception of itself) all parties, intervenors, and amici appearing in this Court are listed in the Joint Brief of Petitioners, Document #1765582.

RULE 26.1 DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Orders

STATEMENT OF INTEREST, IDENTITY OF AMICUS CURIAE, AND INTRODUCTION[1]

Amicus Niskanen Center ("Niskanen") is a 501(c)(3) libertarian think tank and advocacy organization with a strong interest in securing Americans' rights to their property. It is a fundamental matter of justice 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 sufficiently to render them indifferent to the taking.

Niskanen submits this brief to bring to the Court's attention additional points in support of one of Private Petitioners' arguments: whether allowing the taking of property under a "conditioned" certificate of pubic convenience and necessity ("Certificate") violates the Fifth Amendment.[2] None of these points are made in Petitioners' briefs; Niskanen believes *strongly* in not wasting the Court's time or its own repeating arguments made by the parties.

While Private Petitioners argue that "conditioned certificates" violate the Public Use Clause because FERC cannot determine whether there is a public benefit without the information developed in the proceedings for the other required authorizations,

---

[1] Counsel for all parties have consented to this brief. Counsel for Niskanen authored this brief in whole, and no party, party's counsel, or any other person contributed money that was intended to fund preparation or submission of this brief.

[2] Niskanen refers to Delaware Riverkeeper Network, New Jersey Conservation Foundation, The Watershed Institute, Hopewell Township, and Homeowners Against Land Taking – PennEast, Inc. as the "Private Petitioners", and Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of the Rate Counsel as "State Petitioners".

Niskanen discusses (pp. 5-10) why conditioned certificates violate the Pubic Use Clause because there simply cannot be a "public benefit" or "public purpose" to taking property *unless, at a minimum, the project can legally be built.* If *any* of the other authorizations necessary to build the pipeline are not granted, then PennEast will have taken the property of hundreds of landowners for no purpose whatsoever, and courts have refused to allow exercise of eminent domain in similar situations where there was no legal certainty that the project for which property was taken could actually be built.

By allowing eminent domain based on a conditioned certificate, FERC has not only assumed that each of the numerous state and federal agency proceedings will grant the necessary permits, but also that each agency will grant permission to construct the pipeline exactly where the Certificate authorizes. While FERC (presumably) would agree that it could not presume the outcome of its own administrative process, it apparently has no qualms about presuming the outcome of multiple other state and federal administrative processes, *even when those agencies have warned FERC not to do so because it is likely that they will mandate changes to the route for which FERC has authorized condemnation.* As discussed below (pp. 10-11), the New Jersey Department of Environmental Protection, the agency authorized to issue two of the most significant permits (water quality certification under § 401 of the Clean Water Act, and wetland fill permits under § 404 of the Clean Water Act) repeatedly warned FERC that since PennEast failed to survey 65% of the pipeline route in New Jersey, it

is highly unlikely that NJDEP will allow construction where PennEast is busy condemning land.

The danger of allowing eminent domain based on a conditioned certificate is made even more apparent given the consequences for the citizens of Hopewell, N.J. Even FERC has conceded that it might not be best to run a gas pipeline straight through the center of town, when a 2.5 mile detour would obviate the need – in FERC's own words – to put it where it would "cross residential areas, farmlands, a portion of planned Hopewell Township affordable housing, and a parcel planned for a Hopewell Township emergency services facility" (Order Issuing Certificates, 162 FERC ¶ 61,053 (January 19, 2018) ("Certificate Decision"), ¶ 215; JA 43). And even though FERC ordered PennEast to investigate this alternative route (Certificate Decision, Appx. A ¶ 13; JA 48-49), *and has expressly stated that it "has yet to reach a decision" as to which route it will ultimately approve,* FERC nevertheless is still allowing PennEast to condemn the property on the original route through Hopewell. Thus, as discussed below (pp. 11-12), even when FERC itself must agree that there is a reasonable possibility that PennEast will never need the Hopewell Township properties, FERC is perfectly willing to allow PennEast to take them from their owners anyway.

Finally, even though FERC claims it has the authority to condition construction and operation of the pipeline on obtaining all those other permits, it nevertheless claims that it cannot so condition the exercise of eminent domain.

Niskanen explains (pp. 12-14) why this not only makes no sense, but also that FERC refuses to even acknowledge that it has *previously done exactly that*, as laid out in great detail in *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653, 657 (4th Cir. 2011). FERC's failure to offer any explanation for its current position is even more damning in light of its previous practice of doing exactly what it now says it has no authority to do.

In sum, having created a situation where hundreds of landowners will lose their property in order to either build a project with only incidental public benefit or, bizarrely, to not build that project at all (or build it in completely different locations), FERC has repeatedly violated the Takings Clause.

Argument

I. ALLOWING EMINENT DOMAIN BASED ON CONDITIONED CERTIFICATES VIOLATES THE TAKINGS CLAUSE BY AUTHORIZING TAKINGS THAT ARE NOT NECESSARILY FOR A PUBLIC USE.

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 That Are Not Necessarily For a Public Use.

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 PennEast obtains all of these other authorizations, there is apparently enough "pubic 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 PennEast 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), *cert. denied* 138 S. Ct. 1697 (2018)). 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. Declaration of Catherine Holleran, Ex. 1, ¶ 25. The Constitution pipeline will 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.

It gets worse. 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 has appealed FERC's denial of its petition to this Court

(*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).

Thus FERC not only allowed Constitution to take the Hollerans' property back in 2015 on the completely unwarranted 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 this Court. The consequences of FERC's cavalier attitude towards other people's property 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 hundreds of property owners as PennEast proceeds with its condemnation campaign.[3]

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

[3] Once PennEast obtains the land on the basis of the Certificate (unless otherwise barred under state law), it is allowed to cut down all the trees on the 100-125'-wide easement (FEIS 2.2.1; JA 406), dig a 7-10'-deep trench its entire length (Certificate ¶ 124; JA 25), and engage in other "preconstruction" activities. *See, e.g., Delaware Riverkeeper v. FERC*, 857 F.3d 388, 395 (D.C. Cir. 2017).

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.

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 the required § 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" PennEast will receive all of the other necessary authorizations for its pipeline.

B. The PennEast Certificate Will Almost Certainly Result in Takings That Will Never Be Used for the Pipeline.

Yet another problem with this conditioned certificate is that PennEast will almost certainly not be able to build the pipeline where it is now condemning property. And thus there is not now, *and there will never be*, a public benefit to these takings.

1. PennEast is Taking Property Along a Route That the State of New Jersey Has Said Will Likely be Changed.

The New Jersey Department of Environmental Protection ("NJDEP") has repeatedly cautioned FERC against allowing the use of eminent domain when it is likely that NJDEP will require changes to the approved route as part of NJDEP's § 404 wetlands permitting process:

> In this case, condemning a permanent easement for the Project is premature. The environmental resources have not been fully assessed yet, which will likely cause the route to change. . . . The existing route relies upon mitigation before seeking minimization or avoidance of impacts on environmental resources; once minimization or avoidance are appropriately considered, *the route will likely change*. . . The alternatives suggested by NJDEP have not been fully vetted . . . and the outcome of the Hopewell Interconnect alternative has not been determined yet. . . , either or both of which will change the route. *Any route*

> *change could alter the Project's location on a particular property or relocate the Project to another property.*

NJDEP Rehearing Request, p. 58 (emphasis added); JA 825. FERC responded to this plea with a complete non-sequitur:

> We dismiss NJDEP's argument that the use of eminent domain is premature because the current route may be modified. Environmental Condition No. 4 requires that PennEast's exercise of eminent domain authority be consistent with the facilities and locations authorized in this proceeding.

Rehearing Denial ¶ 32; JA 83. The problem is not that PennEast is exercising eminent domain that is not "consistent with" the Certificate, the problem is that the Certificate authorized a pipeline route – and takings along that route – before NJDEP undertook its wetlands permitting process. That is what happens when FERC issues a Certificate conditioned on subsequently getting such necessary authorizations.

2. PennEast is Taking Property In the Town of Hopewell That the Commission Itself Has Said May Not Be Used for the Pipeline.

Responding to comments on the Draft Environmental Impact Statement by the Town of Hopewell, FERC asked PennEast to evaluate an alternative route that would avoid putting 2.5 miles of the pipeline through the Town, including, "residential areas and farmlands, a portion of planned Hopewell Township affordable housing between MPs 112.1R2 and 112.6R2, and a parcel planned for a Hopewell Township emergency services facility." Final Environmental Impact Statement ("FEIS") at 3-37; JA 448. The FEIS noted that PennEast had done so but had concluded that such an alternative was "not feasible". FEIS at 3-37; JA 448.

However, the FEIS noted several deficiencies with PennEast's analysis, and FERC then ordered PennEast to "provide additional details on the feasibility" of this alternative. Certificate Decision ¶ 215; JA 44. As of the date of FERC's Rehearing Decision, PennEast had not done so, and as a result, FERC itself says that *it has not yet decided which route to approve*:

> Consequently, the Certificate Order includes Environmental Condition 13, which bars PennEast from commencing construction until it submits additional details on this alternative's feasibility. Because PennEast has yet to do so, we have yet to reach a decision on whether to adopt the PennEast or Hopewell Township interconnection.

Rehearing Denial, ¶ 97; JA 96. The problem, of course, is that even though an alternative to PennEast's plan is obviously a realistic possibility, *PennEast is busily condemning land along its original route in the Township*. To date, PennEast has initiated condemnation proceedings against at least 15 properties (as listed in Exhibit 2) that would not be needed for the pipeline if FERC were to opt for the alternate route. Again, what may be entirely unjustified takings could be avoided if condemnation could not be based on conditioned certificates.

C. Nothing In The Natural Gas Act Prevents FERC From Conditioning the Use Of Eminent Domain Upon a Certificate Holder Acquiring All Necessary Authorizations.

The simplest way for FERC to avoid all of these Takings Clause violations would be to impose the same condition on the use of eminent domain as it imposes on construction of the pipeline itself, *i.e.*, that it may not be used until all the necessary authorizations are in place. Here, NJDEP requested that, prior to PennEast obtaining

all the other necessary authorizations, FERC limit the use of eminent domain to allowing access "for surveying, soil boring, and other environmental assessments". NJDEP Rehearing Request p. 59; JA 826. FERC refused to do so, claiming that it lacks the necessary legal authority:

> 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.

Rehearing Denial ¶ 33; JA 83. FERC's bald disclaimer of any such authority makes no sense; if the Natural Gas Act allows FERC to condition the construction and operation of the pipeline, there is no logical reason why FERC cannot condition the use of a single step in the process. Moreover, FERC's disclaimer rings hollow, since FERC has at least once explicitly conditioned the use of eminent domain on the pipeline applicant getting other necessary approvals:

> Environmental Condition 55 of the certificate stated that "Mid-Atlantic shall not exercise eminent domain authority granted under [the Natural Gas Act] section 7(h) to acquire permanent rights-of-way on [residential] properties until the required site specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects ("OEP")].

Mid-Atlantic Express, LLC v. Baltimore County, 410 Fed. Appx. 653, 657 (4th Cir. 2011). Nor can FERC claim that this was an oversight; when the certificate holder in *Mid-Atlantic* sought clarification of this condition, FERC's order affirmed that it had this

authority. *Order on Rehearing and Clarification and Denying Stay,* 129 FERC ¶ 61,245 at ¶ 24 (Dec. 17, 2009).

This is the epitome of arbitrary agency action. "A fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy v. FERC*, 473 F.3d 1239 (D.C. Cir. 2006). FERC may not alternately condition the use of eminent domain in one instance, and then deny (without explanation) that it even has that authority in another. *Westar Energy* provides a perfect analogy, because in that case FERC denied Westar's request for permission to file corrected transmission data after the deadline for doing so, even though it had accepted another utility's similarly corrected filing after the deadline. When FERC could not explain why it had treated these two identical situations differently, this Court held that FERC's decision was "arbitrary and capricious in that it provides no basis in fact or in logic for the Commission's refusal to treat Westar as it had treated KCPL." *Id.* at 1241. Likewise, FERC "provides no basis in fact or logic" for conditioning eminent domain for the Mid-Atlantic Express pipeline, but not for PennEast.

D. Even if All Subsequent Authorizations Are Obtained, Conditioned Certificates Unlawfully Deprive Landowners of Their Property Before That Occurs.

Even assuming that PennEast would eventually satisfy all of the conditions necessary to begin construction, allowing condemnation *before* that time works an independent injury on landowners. The right to exclusive possession is a substantive property right: *see Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (calling the "right to

exclude others [ ] one of the most essential sticks in the bundle of rights that are commonly characterized as property); *accord Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). Thus depriving landowners of it for years before it may become necessary for construction is unjustified. In this case, it is more than 11 months after FERC issued the Certificate, and more than 4 months after FERC denied rehearing, and *PennEast has still not even applied for either the § 401 water quality certification or the § 404 wetlands fill permit.*[4] Nevertheless, PennEast is busy condemning property right and left, having filed more than 180 condemnation complaints (Pvt. Pet. Br. 31) since FERC issued the Certificate.

Indeed, much of the substantive law of property—with its life estates, remainders, and determinable fees—is concerned very much with the timing of possession. And federal law routinely recognizes the substantive differences between future and present possession in all manner of contexts. *See, e.g.*, *Fondren v. Commissioner*, 324 U.S. 18, 20 (1945) (holding that giving an interest in property without "the right presently to use, possess or enjoy the property" did not qualify as a

[4] PennEast had previously applied for the § 404 wetlands permit, which NJDEP denied without prejudice because the application lacked much of the required information. Certificate Decision ¶ 128; JA 25-26.

gift under relevant regulation); *In re Brunson*, 498 B.R. 160, 163 (Bankr. W.D. Tex. 2013) (noting that bankruptcy law's homestead protection covers present possessory interests but not future interests). This Court should also recognize the landowners' right to possession until such time as PennEast has obtained all necessary authorizations and can legally proceed with the project.

Conclusion

For the reasons given herein, this Court should vacate the Certificate Order and remand to the Commission for further consideration.

Respectfully submitted,

s/*David Bookbinder*
David Bookbinder
D.C. Bar No. 455525
Megan Gibson
D.C. Bar No. 1021191
Niskanen Center
820 First Street, NE
Suite 675
Washington, DC 20002
mgibson@niskanencenter.org
dbookbinder@niskanencenter.org

Date: June 4, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in FRAP 29(a)(5) because this it contains 4,172 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Garamond) in 14-point font.

Dated: June 4, 2019

s/*David Bookbinder*
David Bookbinder
D.C. Bar No. 455525
Niskanen Center
820 First Street, NE
Suite 675
Washington, DC 20002
(301) 751-0611
dbookbinder@niskanencenter.org

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2019, I electronically filed the foregoing Final Brief Amicus Curiae of Niskanen Center in Support of Petitioners with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

s/*Megan C. Gibson*
Megan C. Gibson
D.C. Bar No. 1021191
Niskanen Center
820 First Street, NE
Suite 675
Washington, DC 20002
(202) 810-9260
mgibson@niskanencenter.org

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSTITUTION PIPELINE, Plaintiff v. A PERMANENT EASEMENT FOR 1.84 ACRES AND TEMPORARY EASEMENTS FOR 3.33 ACRES IN NEW MILFORD TOWNSHIP, SUSQUEHANNA COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 127.00-1,603.00,000 Defendants.	CIVIL ACTION NO: 3:14-2458

Declaration of Catherine Holleran Under 28 U.S.C. §1746 In Support of Motion to Dissolve Injunction and Set for Hearing the Question of Damages

My name is Catherine Holleran and I am above the age of 18, competent to testify and have personal knowledge of the matters set forth in this Declaration. Under penalty of perjury, I state the following:

1. I reside in New Milford, Pennsylvania. The property that is the subject of this condemnation action is located at 2131 Three Lakes Road, New Miford Pennsylvania. I am one of the owners of the property that is the subject of this case, along with my siblings Michael Zeffer and Patricia Glover and our nephew Dustin Webster. Our sister Maryann Zeffer is a Life Tenant who lives on the property but is not an owner listed on the deed.

Description of the Property

2. The property has been in our family for over 60 years. My parents purchased the property around 1950 and moved here to raise a family. My siblings and I all grew up here. In their later years, our parents deeded the property to me and my siblings. Maryann signed over her share to me and currently lives on the property, and our nephew Dustin acquired his share from his mother who was also one of our siblings.

3. The parcel is approximately 23 acres in size. The property is split from north to south by Three Lakes Road. Before the pipeline came through,we used the woods for recreational purposes. We had a trail for four-wheelers and walking. The fields have all been used for haying by my brother, but are excellent potential building sites for any of our children or heirs. My husband and family and I also do a small Maple Syrup business, mostly as a hobby, but it had potential. The subject woods are mostly ash trees and sugar maples, about half and half, with some cherry and occasional hickory or beech.

4. All the property on the EAST side of the dirt road, (the east half of the parcel) is located in close proximity to Upper Lake. Upper Lake. is a private, natural spring-fed lake with no motors, and the property has 210 feet of lake frontage. One of the lake's main inlet streams winds through this portion and is quite picturesque.

5. We also have two small cottages on the property; our father built them both. One is mainly used for storage now, but the larger is used steadily from spring through late fall for ourselves and family, and for occasional rental. There is an additional cottage road (Blue Gill Lane) that accesses our cottages, and continues on along the west shore of the lake to other private cottages. Blue Gill Lane is partially in our parcel. On the east side of road (across from house) is a large old barn which was on the property when purchased in 1950. The lakeside

piece also has a natural spring, an additional small but steady inlet to the lake. There are several early American stone walls that cross through the west side of property, around the homestead and fields.

The FERC Certificate and Hearing for Immediate Possession

6. My husband and I first learned that the pipeline would cross our property in the summer of 2012 when our daughter, who is an archaeologist, learned from colleagues who were members of a crew working for Constitution, that shovel tests were scheduled in front of our house.. After that, we received requests for surveys and initially agreed to one, but realized that allowing Constitution continued access to our property was not in our best interest. The proposed route would run through the property through the fields that we farm and along the western border where it cut through heavily wooded areas. Because of this proposed damage, we filed comments at FERC opposing the pipeline and asking FERC to revise the route.

7. In May 2013, we received a compensation offer from Constitution that was far too low and would not compensate us for the extensive damage that the pipeline would cause to our property.

8. In December 2014, FERC granted a certificate to Constitution Pipeline to construct and operate its project. Shortly after that, Constitution filed a complaint for eminent domain and immediate possession and we retained an attorney to represent us.

9. On February 13, 2015, there was a hearing in Scranton on Constitution's motion for immediate possession. Constitution put on witnesses testifying that the company could lose up to $60,000/day if they could not access our property immediately to begin construction.

10. Constitution also claimed that they had an urgent need to gain entry due to a

claimed limited time frame in which to cut trees under the Migratory Bird Treaty Act. Constitution's witness explained that the Act prohibited them from tree cutting between April 1 and October 31 to avoid disrupting migratory bird habitat. Constitution's witness testified that immediate possession was imperative so that the work could be completed within that time frame.

11. The court granted Constitution immediate possession on March 17, 2015. However, they were unable to reach our property before the March 31 cut off date for felling trees.

12. On April 3, 2015, I received a letter from Constitution's lawyer stating that a survey crew had been out to the property on March 31, 2015 to stake the route to survey and that the next day, all the stakes had been removed and stolen. Neither I nor anyone in my family know what happened to the stakes. Once the property was re-staked there was no activity of note for the rest of 2015.

Hearing on Contempt Motion and Tree Clearing

13. In January 2016, my daughter Megan had an encounter with a Constitution crew member on our property within the easement area. Constitution's crew asked Megan if she would prefer that they left, and she said yes, so they did. There were no demands. It was all very peaceful and we thought little of the encounter. But on February 1, 2016, Constitution sent a letter to our then-attorney which referenced the encounter and inaccurately stated that Megan had denied Constitution's crews access. There may have been some other conversations between my family and the crew at this time, I cannot recall any specific conversations or the details.

14. We then heard from Constitution formally (as opposed to conversations with crew members) through a letter dated January 30, 2016. The letter stated that Constitution planned to

begin limited tree felling activities as early as February 5, 2016 as soon as its contractors and crews could be trained and deployed and that it would finish before March 31st.

15. My family and I opposed the tree clearing. I sent a letter to FERC on Feb. 10, 2016 to stay tree felling, actually asking them to "cease and desist" but the request was either ignored or rejected. Constitution also contacted our then-attorney directly expressing concern about the letter.

16. To support our opposition to the project, we allowed other project opponents to congregate peacefully on our property well outside the established right-of-way. On February 10, 2015 an encounter between a family member and Constitution's crew again took place, and state police were called in. However, the police did not intervene because they concluded that nothing unlawful had occurred.

17. Even though no one ever blocked access to the right of way in February 2016, Constitution brought a contempt action against us before the same federal court that had granted possession. Constitution argued that it was unable to access the easement which was, and would continue to delay construction. Again, Constitution presented witnesses claiming that the pipeline had to be built quickly to meet the in-service deadlines.

18. The court found that we were not in contempt of the order and Constitution was allowed to proceed.

19. As best I can recall, the tree cutting began on March 1, 2016. Constitution's crew assaulted our property surrounded by armed U.S. marshals and Pennsylvania police, the U.S. Marshals brandishing their weapons. We had seen Constitution crews clearing trees within the vicinity of our property but had never seen armed guards on any other properties. I felt as if we

were targeted merely because we exercised our First Amendment rights to oppose the pipeline.

20. Constitution finished the tree clearing within a four-day period. All told, Constitution took down just over 550 trees of significant size, not including countless saplings.

21. The damage was so devastating that I was not even able to look at it for several days. However, a few weeks after the trees were cleared, my husband was checking one of the sap lines on the remaining trees and encountered a woman in the right of way. She explained something about checking the environmental water runoff prevention since they were done with the work. This occurred just after the New York Department of Environmental Conservation had denied Constitution's Section 401 application. By that time, Constitution's crews were gone, and the woman explained that Constitution had discontinued work, everyone was laid off and only she and her boss remained.

22. Meanwhile, Constitution simply left the felled trees lying on the property. Finally, we all received a letter dated May 9, 2016 that stated that we could remove the trees on our own which we started to do because the property was such a mess.

23. On October 13, 2016, FERC authorized Constitution to process, stack and haul previously felled trees which at this point were tangled, and rotting on landowners' properties.

Damages

24. It is difficult to begin to assess the damages that we have suffered as a result of Constitution's occupation and destruction of our property. But as I attempt to briefly summarize, the damage - both physical, financial and emotional has been extensive - and to add insult to injury, Constitution has not paid us anything at this point.

25. I will start with the lost trees which are the most obvious loss - though far from

the only loss. I counted a total of 558 trees removed. ONly the largest trees, 7-8" in diameter were stacked; this number does not include the hundreds of countless saplings, all potential mature hardwoods, which were also clearcut. My brother and I determined that the tree species were roughly half ash and half sugar maples. Some of the trees were easily 1.5 to 2 feet in diameter which would make them about 200 years old. These trees are irreplaceable.

26. As mentioned, we ran a small maple syrup business from some of the trees that we had tapped. We had started to expand in 2015, adding more mainlines and taps, but we stopped when Constitution told us that the trees would be cut in 2015. We continued to expand a bit in 2016 since nothing had ever developed with the tree cutting thus far, and it was an early sap run that year. We did not ever get to the potential at this location of tapping all the usable trees, all because of the proposed pipeline threatening to come through. We have not done any further tapping at this location, as it is no longer economical since the loss of all the trees coming down the steep slopes destroyed the gravity feed of the sap down tubing.

27. Constitution did not remove any of the cut trees from the right of way at first. Two family members spent weeks with their own equipment dragging the trees down into the fields, and stacking or lining them together. We even had to build a second entry/driveway crossing from the road into one of the fields to access it with the equipment. The clean up task was both time consuming and costly for us and should have been done by Constitution but we had no idea when Constitution would return to clean up the mess.

28. Constitution finally sent word that they would be starting to clean up sometime in October 2016. In actuality, Constitution crews did not come until spring of 2017 - a full year

after the trees had been removed. Constitution stacked the trees for us and chipped the tops that were useless. Constitution put in "stockings" to prevent runoff, sawed off the tree stumps to ground level, and seeded the area so that it wasn't just dirt surface. Even with this effort, the entire corridor still has all the root systems/tree stumps under the ground surface, as Constitution did not dig them out. As a result, we are stuck - removing the stumps would be prohibitively expensive, yet with the stumps in the ground, we are limited in what we can do in the easement.

29. Constitution made a flattened-out "roadway" for their equipment to proceed through for their work, which still remains. The area used to be one continuous steep slope, except for the narrow area where we had our walking path through the woods, and they have not returned the site to its original slope. The tree canopy is gone, and instead of the shady, leaf-covered forest floor, with our serene walking path, it is completely open and exposed. The entire area is different from how it was before.

30. The entire ordeal has had an enormous emotional toll. The court proceedings followed by the armed guards on the property created immeasurable stress. I also believe that we were treated more harshly than other landowners because we spoke out against the pipeline. After the trees came down, I experienced a terrible period of despair. Finally, we have been in a state of limbo for over three years with no compensation from Constitution and lingering uncertainty about whether or not the pipeline would be built. It is only now that Constitution has lost on all of its appeals of the permits in New York that it is clear that the pipeline will not go forward - which is why we are taking action to have our property returned to us with payment of

damages for our property and business destruction, emotional distress and violation of our constitutional rights.

Under penalty of perjury, I declare that the foregoing statement is true and accurate to the best of my knowledge.

/s/ Catherine Holleran

Catherine Holleran July 10, 2018

EXHIBIT 2: HOPEWELL TOWNSHIP PROPERTIES IN CONDEMNATION PENNEAST PROCEEDINGS

Owner (Last Name)	Lot/Block
Pepperman	10.14 / 72
Varhley	10.13 / 72
Princeton Research Lands	31/72
Princeton Research Lands	11/72
Princeton Research Lands	19.03/78
Wellington Manor Homeowners Association	9.40/78
Transco Pipeline	30/78
Kasya, LLC	2/78
Laurenti Holding Co., LLC	5.01/85
Hopewell Township	3/85
Kane	9/85
Pirone	22/85
US Bank Trust	25.02/91
Smith	9/91
Briehler	34/91