

No. 22-60225

IN THE
United States Court of Appeals for the Fifth Circuit

MIDSHIP PIPELINE COMPANY, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent.

On Petition for Review of Orders of the Federal Energy
Regulatory Commission

**PETITIONER'S REPLY IN SUPPORT OF MOTION FOR A STAY
PENDING JUDICIAL REVIEW**

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CERTIFICATE OF INTERESTED PERSONS

The number and style of the case are: Case No. 22-60225, *Midship Pipeline Company LLC v. Federal Energy Regulatory Commission*.

Pursuant to Fifth Circuit Rule 27.4 and 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner

Midship Pipeline Company LLC. Midship Pipeline Company, LLC is a wholly-owned subsidiary of Midship Holdings, LLC, which is owned by Cheniere Midship Holdings, LLC and EIG Midship Holdings I, LP. Cheniere Midship Holdings, LLC is indirectly owned by Cheniere Energy, Inc. No other publicly-held company owns 10% or more of Midship Pipeline Company LLC.

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Federal Energy Regulatory Commission

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Additional Interested Persons

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Lydia Roper

Cody McComas

Central Land Consulting, LLC

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Devon Gas Services, L.P.

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Gulfport Energy Corporation

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INTRODUCTION

In enacting the Natural Gas Act (“NGA”), Congress did not grant the Federal Energy Regulatory Commission (“FERC” or “Commission”) authority to determine the cost of property restoration where the pipeline is built under a certificate issued by FERC. Instead, Congress left the matter of liability for property damage (including any remaining restoration costs where the landowner has refused access to the property) to be resolved under state law, via state law remedies. But here, FERC has ordered its administrative law judge (“ALJ”) to make such a determination. *See Midship Pipeline Company, LLC*, 177 FERC ¶ 61,186 (2021) (“ALJ Order”). This Court stayed that ultra vires cost determination proceeding from moving forward while it considers this motion. The Court should keep the stay in place until it resolves the merits of this case. As FERC Commissioner Danly recently explained, the stay request is warranted because the ALJ Order “was not only misguided, but was *ultra vires*.” Danly Dissent, 179 FERC ¶ 61,096, at P2 (2022).

In arguing that a stay should be denied, FERC mischaracterizes Petitioner’s arguments, portraying Midship Pipeline Company, LLC

(“Midship”) as trying to deprive it of the ability to examine compliance with certificate obligations. Not so. FERC has established a separate proceeding to do just that. *See Midship Pipeline Company, LLC*, 177 FERC ¶ 61,187 (2021). But “the cost of completing such compliance tasks ... [is] irrelevant.” Danly Dissent, 179 FERC ¶ 61,096, at P7; *see* Motion at 14-15. There simply is no lawful basis for FERC to be engaging in a restoration cost determination.

FERC tries to portray the claimed harm to Midship as mere complaints about the burden of a cost determination proceeding. Midship, however, sought a stay based on the harm of allowing this ultra vires exercise of power by FERC, which will result in an ultra vires cost determination. In *Cochran v. SEC*, 20 F.4th 194, 209-10 (5th Cir. 2021) (en banc), this Court distinguished between a challenge to the “cost and annoyance” of an administrative proceeding, which does not constitute irreparable harm, and a challenge to “the entire legitimacy of [the] proceeding[],” like that Midship is raising here.

None of FERC’s arguments support allowing the ultra vires cost determination to move forward while this Court considers its legality. And in the absence of a stay, the Commission’s exercise of this newly

discovered ultra vires power will quickly multiply. Indeed, since the order here, numerous landowners (who have barred Midship from accessing their land to complete restoration work) are now seeking ALJ hearings for similar cost determinations, hoping for a big payday.¹ Thus, the stay should be maintained until this Court renders a decision on the merits of this case.

ARGUMENT

All of the stay factors support continuing the stay of the ALJ proceeding to determine restoration costs.

I. Midship Is Likely to Succeed on the Merits.

First and foremost, a stay is warranted because Midship is likely to succeed on the merits.

A. Determining Restoration Costs Exceeds the Commission's Authority.

The Commission does not dispute that it has no statutory authority to require a pipeline company to compensate a landowner for the costs of restoration, that in enacting the NGA Congress did not displace traditional state tort remedies, or that an ALJ's authority

¹ *E.g.*, Billy Miller's Request to the Commission for ALJ Proceedings, Docket Nos. CP17-458, CP19-17 (May 12, 2022) (appended here).

cannot exceed that of the appointing agency. The Commission nevertheless argues that it should be allowed to proceed to determine the costs of restoration (including landowner self-restoration work), while the lawfulness of such a proceeding is being challenged in this Court. The Commission's arguments are misguided.

The Commission contends that a stay is unwarranted because the Commission is likely to win on review in this Court, given its broad authority under the NGA. *See Opp.* at 16. But FERC's general NGA powers do not support the specific "unprecedented" exercise of power at issue here. *Danly Dissent*, 179 FERC ¶ 61,096, at P9.

The Commission may issue orders only as "necessary or appropriate to carry out" its statutory responsibilities. 15 U.S.C. § 717o. And, as relevant here, the Commission may investigate only those matters that are "necessary or proper ... to determine whether any person has violated or is about to violate" the statute, or a regulation or order thereunder. 15 U.S.C. § 717m(a). Determining the costs of restoration is not "necessary or proper" to determine whether a certificate compliance violation has occurred or is about to occur. *See Motion* at 13-15; *see also Danly Dissent*, 179 FERC ¶ 61,096, at P4

“determining cost” of restoration is not “necessary or proper” to “determining whether Midship has violated or is about to violate its certificate”).

The Commission cannot exercise powers not granted by Congress. *See Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017) (“[T]he principle that a matter not covered [in a statute] is not covered is so obvious that it seems absurd to recite it.” (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (Thomas/West 2012))). FERC insists, however, that, restoration cost information will somehow be helpful in exercising “the Commission’s authority to ensure compliance” with the certificate. Opp. at 16. But the question of whether the land has been properly restored does not depend on the cost of restoration. As Commissioner Danly put it in his dissent from FERC’s denial of a stay, although the Commission “oversees the restoration to ensure compliance, the cost of completing such compliance tasks ... [is] irrelevant.”² Danly Dissent, 179 FERC ¶ 61,096, at P7. Determining the costs of restoration is therefore not

² Compare 15 U.S.C. § 717e(a) (granting the power to investigate cost of natural gas company’s property when necessary for rate-making).

necessary for the Commission to ensure Midship's compliance with the certificate—and the Commission does not and cannot explain why it would be.

Further, the cases cited by FERC to demonstrate the purported breadth of its authority, Opp. at 17-18, are inapposite. In those cases, the challenged actions were “essential” to the agency's ability to perform its duties under the NGA. *Continental Oil Co. v. FPC*, 519 F.2d 31, 33 (5th Cir. 1975). For example, in *Superior Oil Company v. FERC*, cited by the Commission at 17, this Court upheld FERC orders requiring affiliated producers of natural gas companies to provide certain information to FERC because without that data “accurate analysis of production costs would be impossible.” 563 F.2d 191, 197 (5th Cir. 1977); *id.* at 198 (the information was “essential”). In contrast, here, determining the cost of remaining restoration work is simply irrelevant to any compliance inquiry. Motion at 14; *see supra* 5. And where, as here, FERC has already initiated a compliance inquiry in a separate matter, FERC's error in this regard is obvious.

Finally, calculating restoration costs in this context—where the Landowner has denied Midship access to perform restoration work, and

insists on compensation from Midship for self-performing the restoration—means calculating the costs of the Landowner performing the restoration. The Commission argues that the Commission did not instruct the ALJ to determine the cost of the Landowner performing the restoration. Opp. at 19. But in this context, calculating the cost of restoration necessarily means calculating the cost of the Landowner performing the restoration—and, therefore, the amount of compensation that Midship owes the Landowner, which the Commission has no authority to determine. Motion at 15-16; Danly Dissent, 179 FERC ¶ 61,096, at P9 (explaining that FERC’s request that “the ALJ ... consider the costs of *self-remediation*” shows that the purpose of the proceeding is to identify an “amount for Midship to pay the landowner”).

B. This Petition for Review Is Not Premature.

Finally, contrary to FERC’s arguments (Opp. at 19-21), there is nothing premature about the challenge here. Midship challenges the Commission’s authority to instruct an ALJ to determine the costs of restoration—something the Commission has already done by issuing the ALJ Order, which initiated a proceeding that is in the discovery

process, with set dates for testimony and a hearing. And Midship is suffering present and immediate harm from that order by being subjected to an ultra vires proceeding. *See Mississippi Valley Gas Co. v. FERC*, 659 F.2d 488, 498-99 (5th Cir. 1981). Without this Court's action, that harm will continue, and may even grow in scope as other landowners may deny Midship access to perform work, demand compensation, and have those costs determined through ultra-vires FERC ALJ hearings, rather than the state law process Congress intended. Midship is, therefore, "aggrieved" by the ultra vires ALJ Order. 15 U.S.C. § 717r(b).

FERC mischaracterizes the order at issue, stating that it "merely reserves the issues pending a hearing." Opp. at 20 (quoting *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980)). But the order unambiguously instructs the ALJ to determine the costs of restoration. ALJ Order, at Ordering Paragraph A. Midship is challenging the Commission's ultra vires exercise of power in ordering the ALJ to make a cost determination. Midship's challenge is not based on speculation about what that determination will be.

The cases cited by the Commission (Opp. at 12), *Total Gas & Power N. America, Inc. v. FERC*, 859 F.3d 325 (5th Cir. 2017), and *Energy Transfer Partners, LP v. FERC*, 567 F.3d 134 (5th Cir. 2009), have no application here.³ In those cases, FERC had not determined that the petitioners had committed violations or imposed penalties—and it was possible that FERC would never do so. Put simply, the petitioners in those cases sought to “preemptively challenge a FERC order that [might] never be issued.” *Total Gas*, 859 F.3d at 339; see *Energy Transfer Partners*, 567 F.3d at 146. Moreover, the Court emphasized in *Total Gas* that the petitioner “explicitly concede[d] that FERC ha[d] the authority to conduct a proceeding regarding the alleged violation and to propose a penalty.” *Id.* at 335.

In stark contrast, Midship does *not* concede that the Commission has the authority to conduct a proceeding to determine the costs of restoration. To the contrary, Midship’s position is that such a cost determination proceeding is wholly ultra vires. See, e.g., Motion at 16-17. Moreover, Midship is challenging an order already issued—the

³ The Commission also cites *System Energy Resources, Inc. v. FERC*, No. 21-60522 (5th Cir. 2019). Opp. at 21. The Court’s order dismissing that petition contains no analysis and therefore carries little weight here.

order instructing an ALJ to determine the costs of restoration—and there is no question that, absent a stay, the ALJ *will* make a determination on costs. Thus, there nothing speculative or premature about this challenge.

II. Midship Will Suffer Irreparable Harm Absent a Stay.

Absent a stay, Midship will suffer the irreparable harm of being subjected to an ultra vires agency proceeding and receiving an unauthorized cost determination.

The Commission erroneously characterizes Midship’s harm as “wasted time and resources.” Opp. at 11. To the contrary, Midship is challenging the legitimacy of the order authorizing the proceeding to determine costs. Motion at 17. For that reason, this case is distinct from *Pennzoil Co. v. FERC*, where this Court stated that the order at issue had “no direct and immediate impact on Pennzoil that [could] not be altered by subsequent Commission action.” 742 F.2d 242, 245 (5th Cir. 1984); *see* Opp. at 11-12 (citing *Pennzoil*).⁴ Here, no “subsequent

⁴ The Commission also cites the denial of a motion seeking a stay of agency proceedings in *Energy Transfer Partners v. FERC*. Opp. at 12. As discussed, *supra* 9, *Energy Transfer Partners* is distinguishable. Moreover, the cited order contains no explanation. Order Denying Stay, No. 08-60730 (5th Cir. Dec. 9, 2008).

Commission action” can alter the harm from allowing an ultra vires and unauthorized cost determination.

The Commission asserts that because Midship has not challenged FERC’s authority to conduct an ALJ proceeding to determine the scope of restoration, Midship has not shown harm, as it would be forced to undergo an ALJ proceeding regardless. Opp. at 15. Again, the Commission misstates the harm that Midship has alleged. It is not the harm of the cost and burden of an ALJ proceeding; it is participating in an ultra vires administrative proceeding that is certain to result in an ultra vires determination.

Indeed, this Court has recognized the unique harm that an ultra vires proceeding causes. Although, as the Commission observes, Opp. at 13-14, *Cochran*, 20 F.4th 194, and *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), arose in different contexts, both demonstrate that being forced to participate in an illegitimate administrative proceeding effects profound harm. *See* Motion at 17.

III. A Stay Will Not Harm Any Interested Party and Serves the Public Interest.

No party will suffer harm from a stay. To the contrary, the stay is in the public interest. Staying the ALJ’s determination of restoration

costs will not delay the determination of the scope of restoration or the performance of that work. At the same time, staying the Commission's determination of costs until this Court has analyzed whether the Commission has the authority to make such a determination serves the interest of efficiency.

The Commission insists that a stay will delay its determination of the scope of restoration and interfere with its ability to ensure certificate compliance. Opp. at 22-23. But, as explained, *supra* 5-6, how much the restoration will cost and what restoration is required—or, for that matter, whether Midship has complied with its certificate—are separate, independent questions. As Commissioner Danly explained, the requirement to restore land is like the requirement to “paint a portion of a wall so that it matches the existing paint”; how much it costs to paint that wall, or whether the wall is painted with a brush or a roller, is irrelevant to that requirement. Danly Dissent, 179 FERC ¶ 61,096, at PP6-7. Staying the ultra vires cost determination proceeding thus has no bearing on the Commission's ability to determine the scope of restoration required.

The Commission contends that the Commission's views as to the public interest should receive deference. Opp. at 21-22. That FERC can evaluate the public interest in deciding whether to grant a certificate of public convenience and necessity, 15 U.S.C. § 717f, does not mean that FERC's position on the public interest deserves deference in the stay context, where its actions are being challenged as ultra vires.⁵

Finally, FERC suggests (at 22-23) that staying an administrative proceeding is never in the public interest. In support, FERC cites cases where plaintiffs lacked standing to challenge the government action or the challenged action was not final. Opp. at 22-23 (citing *INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 291 (5th Cir. 1999)). In essence, then, FERC's public interest argument is simply an echo of its argument (discussed above) that the petition for review is premature. Moreover, there is no public interest in the Commission exercising powers that Congress did not grant it. To the

⁵ Likewise, that FERC denied Midship's stay request, over Commissioner Danly's dissent, does not demonstrate that a stay is not in the public interest, *cf.* Opp. at 23, given that Federal Rule of Appellate Procedure 18(a)(1) provides that "[a] petitioner must ordinarily move first before the agency for a stay pending review."

contrary, the public has a strong interest in preventing the Commission from acting in an ultra vires fashion, exercising powers Congress left to the states.

CONCLUSION

For the foregoing reasons, Midship respectfully requests that this Court issue a stay pending review.

May 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 13, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Robert M. Loeb

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(C) because it contains 2,596 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook 14-point font.

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May 12, 2022

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission (FERC)
888 First Street, NE
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FERC Docket Nos. CP17-458, CP19-17

RE: **Billy Miller's Request to the Commission for ALJ Proceedings**

Dear Secretary Bose,

In the past several months, Central Land Consulting (CLC) and several landowners have attempted to reach a resolution involving the landowner's self-performance of restoration issues. Midship has mobilized over and over, in some cases six to eight separate times, without successfully remediating the properties. The landowners have attempted numerous times to discuss resolutions with Midship but have not made progress but rather have received push back and silence. Additionally, we have tried to re-introduce FERC's DRS process but this too has failed with strong opposition from Midship.

In the recent weeks, CLC has received numerous complaints from landowners regarding letters from Midship that requested permission to mobilize for an additional 24 months. This is beginning to look like last year's process where the landowners and CLC spent great time and resources on cost and settlements and then Midship delays the process until they begin stating they will mobilize once again. To be honest, this is not going over very well with the landowners and has the landowners questioning why Midship continues to disturb the properties over and over again.

The landowners have either had enough of Midship's mobilizations or have spent money, resources, and time attempting to clean up the impacts that Midship left them with. It would be detrimental if Midship disrupted the landowner's hard work and expense for another fruitless mobilization. Since it has become clear that there is not a path forward with settlement discussions, and landowners do not wish Midship to disrupt and mobilize to their properties, we are formally requesting the Commission initiate Administrative Law Judge (ALJ) proceedings on the list of high priority landowners attached below. These are landowners where there has been excavated trench rock and construction debris buried on the property and Midship is unwilling to negotiate or discuss the details. We suggest the Commission to utilize the framework already set out in its December 16, 2021 Order in Docket No. CP17-458-012. In CP17-458-012, the Commission noted that it cannot award damages, but found that "developing a record as to the necessary measures and their cost will assist [the Commission] in evaluating what further remediation is required and what further steps to take to resolve the issues."

While we understand that the Commission cannot force Midship to pay damages to the landowners, these proceedings will help the Commission understand the landowner's concerns, restoration costs, extent and severity of impacts, and to determine whether Midship is in violation or is in danger of being in violation of the FERC certificate.

Landowner Billy Miller of Bryan County Oklahoma, tract BR-0907, BR-0909 has communicated urgency in requesting the Commission to order an ALJ proceeding for his tracts and continued restoration issues. Currently, Mr. Miller is hindered from his ability to access portions of his farm and cannot return to normal farming practices.

Currently Mr. Miller's issues consist of :

- Subsoil sandwich is present throughout nearly entire ROW
- Some areas, subsoil layer is 12 inches thick
- Extremely excessive rocks buried in the ROW. Off-ROW has no rocks in ag fields.
- Rock found buried in ROW appears to have been excavated from the trench
- Extreme soil compaction
- Waterways are unable to adequately flow which causes ponding

On October 19, 2021 Midship reported in the weekly progress reports that Joint Inspection with CLC, FERC, and Midship that no compliance issues were noted during inspection, Midship will continue to monitor vegetation. During the same inspection date with Midship and FERC we identified large boulders, severe mixing of soils, buried subsoil layers, and areas of contours that have not been restored.

Current condition photos and our most recent inspection for this property will be submitted to the docket in a future filing.

Mr. Miller respectfully requests the Commission to act on his request to Order an ALJ proceeding within the next 30 days from the date of this letter to act on Mr. Miller's request. We are hopeful the Commission will address this in the upcoming weeks.

Please feel free to contact (330) 312-1060 with any questions or for further assistance.

Respectfully Submitted,

/s/ Nate Laps

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President of Operations
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