

**NOT CURRENTLY SCHEDULED FOR ORAL ARGUMENT;
ORAL ARGUMENT PREVIOUSLY SCHEDULED
FOR MARCH 29, 2021 POSTPONED**

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 20-5203

CLETUS WOODROW BOHON, *ET AL.*,
Appellants,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA, HON. JAMES E. BOASBERG, No. 1:20-cv-00006-JEB

**SUPPLEMENTAL BRIEF OF APPELLEE
FEDERAL ENERGY REGULATORY COMMISSION**

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

Scott Ray Ediger
Attorney

For Appellee
Federal Energy Regulatory
Commission
Washington, D.C. 20426

October 6, 2021

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INTRODUCTION

Pursuant to this Court's September 15, 2021 Order, Defendant-Appellee Federal Energy Regulatory Commission hereby files its supplemental brief. The Supreme Court's recent decision in *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021), does not change any of the governing law; instead it confirms: (1) that a collateral challenge to a FERC certificate order cannot be brought outside the direct review provisions of the Natural Gas Act; and (2) that the district

court here correctly found that it lacked jurisdiction to consider the complaint of Plaintiffs-Appellants (the Bohons).

BACKGROUND

The Bohons filed this action in federal district court, seeking a declaratory judgment that the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, unconstitutionally delegates eminent domain authority. *See* Complaint, JA 9. The district court dismissed the action, finding lack of subject-matter jurisdiction. *See* Memorandum Opinion, JA 268. The Bohons appealed to this Court, and briefing was complete on February 26, 2021.

This Court scheduled oral argument for March 29, 2021. *See* Order (Jan. 29, 2021). However, the Commission requested postponement of oral argument pending the Supreme Court's decision in *PennEast Pipeline Co. v. New Jersey*, S. Ct. No. 19-1039. *See* Commission Motion (Feb. 23, 2021). As noted in the Commission's motion, the Supreme Court requested briefing on a threshold, jurisdictional issue related to jurisdiction to entertain arguments outside the statutory scheme (15 U.S.C. § 717r) for judicial review of Commission orders. This Court granted the Commission's motion and asked the parties to file motions to govern future proceedings within

30 days of Supreme Court disposition of the *PennEast* case. *See* Order (Mar. 1, 2021).

The Supreme Court decided the case on June 29, 2021. *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021). The Commission and Mountain Valley Pipeline filed a joint Motion to Govern Future Proceedings, asking this Court to set a briefing schedule for simultaneous briefs 21 days after entry of an order on the motion. *See* Commission and Mountain Valley Motion to Govern (July 29, 2021). On September 15, 2021, this Court ordered supplemental briefs.¹

ARGUMENT

I. *PennEast* Decision

In *PennEast*, the Supreme Court explained that the proceedings began when the pipeline, as the holder of a Commission-granted

¹ Also on July 29, 2021, the Bohons filed a Motion to Govern, which included a request that this Court “reverse and remand this case for trial on the merits.” Bohon Motion to Govern at 1 (July 29, 2021). The Commission and Mountain Valley filed separate responses on August 9, 2021, opposing summary relief. This Court denied the Bohons’ request for summary relief when it ordered supplemental briefing on the implications of the *PennEast* decision. *See* Sept. 15 Order (“The merits of the parties’ positions are not so clear as to warrant summary action.”).

certificate of public convenience and necessity, initiated a condemnation action in federal district court pursuant to its statutory authority, 15 U.S.C. § 717f(h). *See id.* at 2253. Such condemnation cases are specifically carved out from the normal judicial review scheme for review of Commission orders at 15 U.S.C. § 717r(b). *See Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 629-30 (4th Cir. 2018) (explaining that “Congress knew how to allow for district court jurisdiction” when it drafted section 717f(h)); *see also* Memorandum Opinion at 10 (citing *Berkley*), JA 277.

In the condemnation proceeding, New Jersey advanced the “statutory argument” that section 717f(h) does not grant natural gas companies the right to bring condemnation suits against nonconsenting States. *PennEast*, 141 S. Ct. at 2254. The Court determined it had jurisdiction to address New Jersey’s defense because the defense was not a “collateral attack” on a Commission order and because the defense did not seek to “modify” or “set aside” a Commission order. *See id.* (quoting 15 U.S.C. § 717r(b)).

The Court explained that interpreting the scope of section 717f(h) condemnation authority in the condemnation action did not

contemplate “modify[ing]” or “set[ting] aside” the Commission order, because the Commission order did not “grant PennEast the right to file a condemnation suit against [New Jersey]” or address “whether § 717f(h) grants that right.” *Id.* at 2254. On this basis, the Court distinguished cases that do collaterally attack a Commission order. *See id.* (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)).

Tacoma, which the Commission cited in its initial brief to this Court (*see* Commission Br. 28), remains leading authority for the proposition that the Natural Gas Act “necessarily preclude[s] de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.” 357 U.S. at 336 (discussing identically worded provision in Federal Power Act); *see also* Memorandum Opinion at 9 (citing *Tacoma*), JA 276.

PennEast’s focus on whether a defense asserted in a condemnation proceeding was a “collateral attack” on a Commission order bolsters the Commission’s position here that the District Court properly dismissed the Bohons’ complaint. By sharp contrast to New Jersey’s posture in *PennEast*, the Bohons’ complaint is a collateral attack on Commission orders: The Bohons seek a judicial ruling that the Mountain Valley

certificate orders were “facially” unconstitutional “and that all such certificates already issued are void ab initio.” Complaint at 14-15, JA 22-23; *see also* Memorandum Opinion at 15 (Bohons’ claims are the “the means by which they seek to vacate the granting of the Certificate to Mountain Valley Pipeline”) (*quoting Berkley*, 896 F.3d at 632), JA 282; Memorandum Opinion at 6 (scope of relief sought in Bohons’ complaint is “breathtaking”), JA 273. No such ruling was sought in the *PennEast* proceedings.

Determining whether the Bohons’ lawsuit presents a “collateral attack” on Commission orders can be resolved by looking at the “target” of the actions, an analysis the Supreme Court has used when considering preemption claims. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385-86 (2015) (resolving federal preemption question by “considering the target at which the state law aims in determining whether that law is pre-empted”). In *Oneok*, the Court found the relevant state lawsuits to be “directed at” matters left for state jurisdiction and therefore found no preemption. *See id.* at 386; *see also FERC v. Electric Power Supply Ass’n*, 577 U.S. 260, 282-83 (2016) (explaining that, in context of Federal Power Act, the Commission

action “focused wholly on the benefits” of the Commission action on the wholesale market);² *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) (explaining that States may not achieve ends through “regulatory means” that target, or “intrude on FERC’s authority”). Here, the Bohons “target” Commission orders, and therefore fall into the “collateral attack” category. *See* Complaint at 14 (seeking declaration that Mountain Valley’s eminent domain authority is “facially unconstitutional”), and 14-15 (seeking declaration that “all such certificates already issued are void ab initio), JA 22-23.

There is no support for the Bohons’ contrary reading of *PennEast*. In defining a “collateral attack,” the Bohons would exclude any constitutional claim. *See* Bohon Motion at 8 (filed July 29, 2021) (explaining that *PennEast* “held” that “constitutional nondelegation challenges to the [Natural Gas Act] are not “collateral attacks”). This is not the holding of *PennEast*. Rather, *PennEast* held that New Jersey could assert a defense in a condemnation proceeding as long as it is not

² Because “the relevant provisions of the two statutes are analogous,” courts “routinely rel[y] on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016).

a “collateral attack” on the Commission order. *PennEast*, 141 S. Ct. at 2254. As discussed above, that question can be answered by considering the “target” of the Bohons’ complaint. Here, the target of the Bohons’ complaint is the Commission’s orders. *See* Complaint at 14-15 (seeking to void Commission orders), JA 22-23.

Nor does *PennEast* demonstrate a flaw in the District Court’s reasoning. The District Court found that the Bohons’ complaint was a collateral attack on the Commission orders. If the Bohons are successful on their constitutional claims, the Commission’s Mountain Valley orders will be invalidated. *See* Memorandum Opinion at 15, JA 282. The Bohons’ constitutional claims are merely the “vehicle” by which they seek to vacate the Commission order. *Id.* (citing *Elgin v. Department of the Treasury*, 567 U.S. 1, 21-22 (2012)); *see also id.* at 12 (explaining that the bifurcated litigation surrounding the Mountain Valley project “speaks to the duplicative nature of collateral constitutional attacks on [the Commission’s] pipeline process brought outside of the administrative-review scheme”), JA 279.

The District Court recognized that the Natural Gas Act “does not channel every person with standing to challenge the statute to FERC,

only those ‘aggrieved by’ a specific pipeline-certification issuance who have access to the administrative-review scheme in the first instance.” Memorandum Decision at 16, JA 283. *PennEast*, a condemnation proceeding, demonstrates the point the District Court was making. New Jersey could not have raised the Eleventh Amendment sovereign immunity defense until the holder of the FERC-issued certificate of public convenience and necessity initiated post-certificate condemnation proceedings pursuant to the specific statutory carve-out for district court condemnation proceedings at 15 U.S.C. § 717f(h). The Commission’s certificate order “neither purports to grant PennEast the right to file a condemnation suit against States nor addresses whether § 717f(h) grants that right.” 141 S. Ct. at 2254.

By contrast, the Bohons were “aggrieved” by a specific pipeline certificate order that permitted Mountain Valley to exercise eminent domain authority. In addition, the Bohons were given an opportunity to seek agency rehearing and judicial review, *see* 15 U.S.C. § 717r, meaning they had “access to the administrative-review scheme in the first instance.” Memorandum Decision at 16, JA 283. Because the Bohons seek to “set aside” the Mountain Valley order on the basis of

arguments that they could have raised earlier, the complaint is a collateral attack that remains impermissible under *PennEast*.

The Commission's initial brief fully supports the District Court's determination that the Bohons' complaint is a collateral attack on the Commission's Mountain Valley orders. *See* Commission Br. 32-33 (noting that Bohons failed to avail themselves of the statutory right to participate as intervenors in the agency Mountain Valley proceeding with the additional right to seek redress in the court of appeals on direct review). The Bohons' claims should have been raised and addressed during the normal course of judicial review of the Mountain Valley certificate proceeding pursuant to 15 U.S.C. § 717r. *See id.* 35-39; *see also* Memorandum Opinion at 4 (citing *Appalachian Voices v. FERC*, No. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished)), JA 271. The *Appalachian Voices* court, when reviewing the Mountain Valley certificate orders challenged here by the Bohons, "rejected the petitioners' constitutional claims grounded in the Fifth Amendment's Due Process and Takings Clauses." Memorandum Opinion at 4, JA 271.

Finally, the Bohons may be correct that “[d]istrict courts routinely adjudicate the merits of constitutional non-delegation challenges.” Bohon Motion at 11 (filed July 29, 2021). But this broad statement misses the point. First, if there are cases allowing collateral attacks on Commission orders (raising non-delegation or other constitutional arguments) outside the regular channels of the Natural Gas Act, the Bohons fail to cite them. As explained above, *PennEast* is not such a case because it did not involve a collateral attack on a Commission order. Second, the outcome here has nothing to do with denying “the aggrieved access to justice.” *Id.* at 12. To the contrary, the Natural Gas Act provides the “aggrieved” access to review of constitutional claims by an Article III court. *See* 15 U.S.C. § 717r(b) (any party “aggrieved” by a Commission order may obtain judicial review); *see also* Memorandum Opinion at 18 (Because FERC’s expertise can be “brought to bear” on Plaintiffs’ constitutional claims, those claims must be channeled through the exclusive Natural Gas Act review process; Bohons cannot “circumnavigate the statutory scheme to achieve remedies that would apply nationwide.”) (quoting *Jarkesy v. SEC*, 803 F.3d 9, 23 (D.C. Cir. 2015)), JA 285.

II. FERC Order No. 871

The Commission's initial brief pointed to ongoing efforts by the Commission to reduce the time between commencement of pipeline construction and opportunity for judicial review, to address the due process concerns of landowners like the Bohons. *See* Commission Brief 34-35 (citing ongoing proceedings in FERC No. RM20-15, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, Final Rule, Order No. 871*, 171 FERC ¶ 61,201 (June 9, 2020); and *Order Addressing Arguments Raised on Rehearing and Clarification, and Providing for Additional Briefing, Order No. 871-A*, 174 FERC ¶ 61,050 (Jan. 26, 2021)).

Since the filing of the Commission's initial brief, the Commission adopted additional landowner protections concerning the exercise of eminent domain authority. The Commission expanded its reforms by announcing a new general policy of presumptively staying certificate orders during the rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners. *See* *Order Addressing Arguments Raised on Rehearing and Clarification, and Setting Aside, in Part, Prior Order, Order No. 871-B*, 175 FERC

¶ 61,098 PP 43-51 (May 4, 2021). “[A] stay would be operative to withhold the eminent domain authority otherwise afforded by [the Natural Gas Act].” *Id.* P 46. The Commission denied rehearing of Order No. 871-B. *See* Order Addressing Arguments Raised on Rehearing and Clarification, Order No. 871-C, 176 FERC ¶ 61,062 (Aug. 2, 2021). These reforms further advance landowners’ ability to seek timely judicial review of Commission certificate orders.

CONCLUSION

For these reasons, and for the reasons stated in the Commission’s initial brief, the District Court’s dismissal of this case should be affirmed.

Respectfully submitted,

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

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Certificate of Compliance

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Order of this Court, dated September 15, 2021, directing supplemental briefing, because it contains 2,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Century Schoolbook 14-point font in Microsoft Word.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

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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 District of Columbia Circuit by using the appellate CM/ECF system on October 6, 2021. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

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