

**Spire STL Pipeline LLC**

**Docket No. CP17-40-007**

**REQUEST FOR REHEARING OF INTERVENORS  
SCOTT TURMAN, ST TURMAN CONTRACTING, JACOB GETTINGS, KENNY  
DAVIS, 4850 LONGHORN, SINCLAIR FAMILY FARM LLC, AND NISKANEN  
CENTER**

Pursuant to section 19(a) of the Natural Gas Act, 15 U.S.C. 717r(a), and Rule 713 of the Federal Energy Regulatory Commission’s Rules of Practice and Procedure, 18 C.F.R. 385.713, Intervenor Scott Turman, ST Turman Contracting (together, “Mr. Turman”), Jacob Gettings, Kenny Davis, 4850 Longhorn (owned by Patrick Parker), and Sinclair Farm LLC, (collectively “Landowners”) and Niskanen Center, hereby request rehearing of FERC’s December 3, 2021 “Order Issuing Temporary Certificate” (177 FERC ¶ 61,147) (the “Temporary Certificate”), in the above-captioned matter.

### Concise Statement of Alleged Error

The Temporary Certificate fails to state that it does not confer eminent domain authority under Section 7(h) of the Natural Gas Act (“NGA”) or, if it does confer such authority, why that authority should not be stayed by operation of Orders 871-B and 871-C.

## Statement of Issues

1. Section 7(h) grants a “holder of a certificate of public convenience and necessity” eminent domain authority, and certificates of public convenience and necessity are issued under Section 7(e). The Temporary Certificate, in contrast, was issued under section 7(c), and thus did not grant eminent domain authority.

2. Assuming that the Temporary Certificate could confer eminent domain authority, the Commission should invoke Rules 871-B and 871-C to stay any such authority pending completion of rehearing, and thus Spire may not use the Temporary Certificate as the basis for pursuing its pending condemnation actions against Landowners. Landowners seek a stay of *only* any eminent domain authority the Temporary Certificate carries, and not of any other provision.

3. Landowners want to be clear that a Commission determination that the Temporary Certificate does not carry eminent domain authority will not in any way interfere with the pipeline's continued operation. Landowners are seeking to end the condemnation proceedings against them to prevent Spire from obtaining title to the easements it obtained via preliminary injunction, but will not seek to eject Spire or otherwise interfere with the pipeline's delivery of natural gas so long as it continue to operate pursuant to a valid certificate. Landowners do, however, reserve the right to seek damages for Spire's continued trespass.

### **Background**

Only twelve days after the Commission issued Spire its section 7 certificate on August 3, 2018 (the "Original Certificate"), Spire filed condemnation complaints against Landowners in two federal district courts to seize their properties for the project.<sup>1</sup> In December 2018, both district courts issued injunctions granting Spire immediate possession of Landowners' properties prior to payment of just compensation.<sup>2</sup> While Spire could have negotiated fair easement

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<sup>1</sup> *Spire STL Pipeline v. Turman*, Verified Complaint for Condemnation of Pipeline Easements, No. 3:18-CV-1502 (S.D. Ill. Aug. 15, 2018) (listing consolidated condemnation actions); *Spire STL Pipeline LLC v Betty Ann Jefferson et al*, Complaint for Condemnation Against All Defendants, No. 3:18-cv-03204 (C.D. Ill. Aug. 15, 2019) (listing consolidated condemnation actions).

<sup>2</sup> See *Spire STL v. Turman*, No. 3:18-CV-1502, Order Granting Immediate Possession, Doc.135 (December 12, 2018); *Spire STL v. Betty Ann Jefferson*, No. 18-CV-03204, Order Granting Preliminary Injunction for Possession, Doc.114 (December 14, 2018).

agreements with the Landowners in the more than three years since filing condemnation lawsuits, Spire instead chose to litigate aggressively, litigation that continues to this day.

However, on October 8, 2021, the D.C. Circuit's mandate issued in *Environmental Defense Fund v. FERC*, 2 F.4<sup>th</sup> 953 (2021)<sup>3</sup>, and thus Spire could no longer claim eminent domain authority under the Original Certificate. Nevertheless, Spire continued its condemnation proceedings against the Landowners by claiming that the Commission's 90-day certificate issued on September 14, 2021 (the "90-day certificate") also carried eminent domain authority. And now that the 90-day Certificate is no longer in effect, Spire is pursuing those cases against Landowners by claiming that the Temporary Certificate carries such authority.

### **The Landowners**

#### Kenny Davis

Kenny Davis is a landowner who along with his wife own a 40-acre property in Scott County, Illinois that Davis and his friends and family use for hunting and other outdoor recreation. The Spire Pipeline cuts through the middle of the property for approximately 1500 feet, precluding Davis and his wife from building a second home on the property. In addition, the pipeline razed trees, altered the hunting grounds, and damaged soils used for agricultural purposes. To date, Spire has not restored the property to pre-construction conditions and in fact, problems on the Davis property were expressly identified in the Commission's March 18, 2021, compliance order against Spire. *Spire STL Pipeline*, Order on Compliance, 174 FERC ¶ 61,219 (2021).

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<sup>3</sup> *Environmental Defense Fund v. FERC*, No. 20-1016, ECF #1917347. The Court had denied Spire's motion to stay issuance of the mandate on October 1, 2021. ECF #1916411.

### Jacob Gettings

Jacob Gettings resides part-time in Jerseyville, Illinois, where he and his wife own a home that is connected to a highly-productive family farm on a 280-acre tract of land characterized by high quality topsoil up to 22 inches deep. As a result of the construction of the Spire Pipeline, less than a foot of topsoil remains in the half-mile easement, and the soil is deeply compacted making it less productive for crops. To date, Spire has not restored the property to pre-construction conditions, and in fact, problems on the Gettings property were expressly identified in the Commission's March 18, 2021, compliance order against Spire. *Spire STL Pipeline*, Order on Compliance, 174 FERC ¶ 61,219 (2021).

### 4850 Longhorn

Patrick Parker and his family own a 350-acre tract of land in Jersey County Illinois through 4850 Longhorn which is an intervenor and where Parker oversees farming operations. The route of the Spire STL pipeline cuts through the middle of pastures and farmland for a distance of approximately 3900 feet. The pipeline construction caused long-term damage to the soil, including mixed and lost topsoil, an invasion of weeds both within and outside the easement, and deep compaction, resulting in reduced productivity and extra work by Parker and his family. To date, Spire has not restored the property to pre-construction conditions.

### Sinclair Family Farm LLC

The Sinclair Family Farm LLC, owned by the Sinclair family is located in Jersey County, Illinois. The pipeline easement through the property is 5150 feet -- nearly a mile -- long, cutting through productive pastures. As with the other properties in Spire's path, pipeline construction caused loss and mixing of topsoil, compaction and uneven grade resulting in reduced

productivity. Given the sheer length of the easement, the impacts are magnified. To date, Spire has not restored the property to pre-construction conditions.

#### Scott Turman and ST Turman Contracting, LLC

Scott Turman and ST Turman Contracting, LLC (an Illinois corporation) each own pieces of active farmland in Illinois where Spire has seized land for the Pipeline. Mr. Turman owns the one in Greene County (610 acres), and ST Turman Contracting owns an 80-acre portion of a 180-acre property in Jersey County. Mr. Turman, who is also a contractor, had started preliminary work on building his new home on the Jersey County property when Spire seized part of the property and installed the pipeline right next to where the house would be, forcing Mr. Turman to abandon plans for his new home. The Pipeline has also wreaked damage to the farmland on both properties, compacting the soil so that it cannot be farmed, and during excavation the pipeline trench brought large rocks to the surface making the use of some farming equipment impossible. The Pipeline has also dissected one of the fields on his Greene County property, leaving an approximately 50' strip of land completely separated from the rest of the field. Mr. Turman wants Spire to stop operating as soon as possible so that he can resume building his new home, and then restore his property to its original condition.

#### **The Condemnation Cases**

##### Central District of Illinois Condemnation Cases

Spire's condemnation cases in the Central District of Illinois, including its cases against Landowners Davis and Turman, are consolidated under *Spire STL Pipeline LLC v Betty Ann Jefferson et al*, No. 3:18-cv-03204. On September 15, 2021, months after *EDF v. FERC* was decided on June 22, 2021, Spire moved for summary judgment on a slew of landowners' properties. *See, e.g.*, ECF 189, 192, 195, 198, 201. Responding to a motion to dismiss the

complaint made following the *EDF v. FERC* mandate, Spire moved to amend the condemnation and preliminary injunction orders “to reflect the continued validity and operation of the Spire STL Pipeline in accordance with the FERC Certificate pursuant to the [90-Day Certificate].” ECF 211, p. 4.

In light of *EDF v. FERC* and the 90-Day Certificate, on October 6, 2021, the Court stayed proceedings until November 22, 2021. But on October 27, 2021, the Court amended a previous order and preliminary injunction to “recognize[] that [Spire’s] authority to continue operation of the Spire STL Pipeline through Defendants’ properties is now based on and subject to the terms of the [90-Day Certificate] issued by [FERC] on September 14, 2021.” ECF 216, p. 12.

On December 6, 2021, Spire filed another motion to amend the Court’s orders “to reflect the continued validity and operation of the Spire STL Pipeline in accordance with the FERC Certificate pursuant to the December 3, 2021, Temporary Certificate.” ECF 224, p. 4. The Court has yet to rule on this motion.

#### Southern District of Illinois Condemnation Cases

Spire’s condemnation cases in the Southern District of Illinois, including its cases against Landowners Turman, Gettings, Longhorn and Sinclair, are consolidated under *Spire STL Pipeline LLC v. Turman et al*, No. 3:18-cv-01502. Following *EDF v. FERC*, landowners moved to vacate the order of condemnation, dissolve the preliminary injunction, and for other relief. Remarkably, Spire not only opposed that request, but on July 29, 2021, affirmatively pressed the court to continue the proceedings as if *EDF v. FERC* had changed nothing: “Spire therefore respectfully requests the Court deny Defendants’ Motion for Relief in its entirety and permit the case to proceed in accordance with the Scheduling Order.” Spire STL Pipeline LLC’s Objection

to Defendants' Joint Motion for Relief, ECF 219 (the Scheduling Order had been entered on July 24, 2020, and modified on November 20, 2020, ECF 198, 205). On August 2, 2021, the Court stayed the case, but denied all other requested relief. ECF 221.

On October 8, 2021, a renewed motion to vacate was filed based on the D.C. Circuit's mandate, issued earlier that day. ECF 222. In response, Spire filed a request that the Court amend its earlier orders confirming condemnation and granting a preliminary injunction to reflect that the 90-Day Certificate granted it the right to take Mr. Turman's property:

"To the extent that this Court's December 3, 2018, Order Confirming Condemnation and December 12, 2018 Order granting Spire STL's possession of the easement areas (as modified by Order dated January 14, 2021) are based on or rely upon the FERC Certificate, Spire requests the Court amend both Orders to reflect the continued authority to operate the Spire STL Pipeline in accordance with the FERC Certificate pursuant to the [90-Day Certificate]." ECF 223-1, p. 4.

On December 10, 2021, the Court issued a text order lifting the stay of the cases, terminating all pending motions as moot, and asking for a Joint report within 30 days as to the future of the case given the Temporary Certificate. ECF 227.

Intervenors do not dispute that Spire may continue to operate under the terms of the Temporary Certificate, but FERC must modify the Temporary Certificate to clearly state that it does not confer eminent domain authority or, if it does, that the Commission will stay that authority pursuant to Orders 871-B and 871-C. Failure to do so means that Spire, having already taken and wrecked Landowners' property for an illegal pipeline, will continue its attempts to gain title to that property as well.

## Argument

### **I. A Temporary Certificate Issued Under Section 7(c) Does Not Confer Eminent Domain Authority.**

As a straightforward textual matter, the Temporary Certificate is not endowed with eminent domain authority. NGA Section 7(h) (15 U.S.C. 717f(h)) provides that:

When any **holder of a certificate of public convenience and necessity** cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas...it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

The Commission issues certificates of public convenience and necessity under Section 7(e) (15 U.S.C. 717f(e)), which provides that:

a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

In other words, an applicant must meet the specific criteria in Section 7(e) before the Commission may grant it the requested certificate and, with it, eminent domain authority. In contrast, the Commission granted the Temporary Certificate under Section 7(c)(1)(B), which allows it to grant a “temporary certificate” – *not* a certificate of public convenience and necessity – in “cases of emergency”. Because grants of eminent domain must be expressly authorized and narrowly construed, it is clear that “temporary certificates” do not have this authority.

Unfortunately, for the second time the Commission has stuck its head in the sand and refused to decide whether the holder of a Temporary Certificate may exercise eminent domain:



We reiterate our findings from the November 18, 2021 Rehearing Order regarding eminent domain authority and temporary certificates. As stated in that order, while courts have repeatedly held that Congress gave the Commission no authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain in a certificate issued pursuant to the procedures laid out in section 7(e), they have not had occasion to address whether the same holds in the case of a temporary certificate issued without those procedures. Accordingly, we believe that issue, which goes to the scope of section 7(h)—a provision that gives courts a particular implementing role—is better resolved by the courts than the Commission.

Temporary Certificate, P 70.

As Commissioner Danly stated in his dissent from the Rehearing Order for the 90-day Certificate, “To require the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority upon temporary certificate holders is irresponsible and unnecessary.” 177 FERC ¶ 61,114, Danly Dissent, P 8. Moreover, as Commissioner Danly noted, the Commission took just the opposite position when it opined at length as to “the scope of section 7(h)” its PennEast proceedings. *Id.* P 9. Commissioner Danly repeated his call for the Commission to “announce its view on the matter in the first instance.” Temporary Certificate, Danly Dissent, ¶ 2.<sup>4</sup>

By refusing to opine on this issue, the Commission is affirmatively endorsing Spire's attempts to complete condemnation and take title to Landowners' property for an illegal pipeline that is operating on borrowed time. The Commission should decide this issue, and in doing so acknowledge that the Natural Gas Act does not grant eminent domain authority to temporary certificates issued under section 7(c)(1)(B).

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<sup>4</sup> Commissioner Danly also previously noted that the Commission further “mudd[ie]d the waters by referring to the 90-day certificate as “a temporary certificate *of public convenience and necessity*” (Rehearing Order for the 90-day Certificate, 177 FERC ¶ 61,114, Danley Dissent, P 13) which it did again with the Temporary Certificate, *i.e.*, “we grant a temporary certificate of public convenience and necessity”. Temporary Certificate, P 1.

## **II. Even if the Temporary Certificate Confers Eminent Domain Authority, that Authority is Stayed by Operation of Orders 871-B and 871-C.**

On May 4, 2021, the Commission issued Order 871-B, “Limiting Authorizations to Proceed with Construction Activities Pending Rehearing”. 175 FERC ¶ 61,098. In it, the Commission announced:

a policy of presumptively staying an NGA section 7(c) certificate order during the 30-day period for seeking rehearing, and pending Commission resolution of any timely requests for rehearing filed by a landowner, until the earlier of the date on which the Commission (1) issues a substantive order on rehearing or otherwise indicates that the Commission will not take further action, or (2) 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a).

*Id.* ¶ 43. This policy would apply, “[i]n Section 7(c) certificate orders issued after the effective date of this order”. *Id.* ¶ 46, n. 94.<sup>5</sup>

The Commission was explicit that its goal was to prevent the use of eminent domain before rehearing was complete:

Given the grave consequences that eminent domain has for landowners, we believe that it is fundamentally unfair for a pipeline developer to use a section 7 certificate to begin the exercise of eminent domain before the Commission has completed its review of the underlying certificate order, through consideration of the merits of any timely filed requests for rehearing, either by issuance of an order on rehearing or a notice indicating that the Commission will not take further action. . . . There is no question that eminent domain is among the most significant actions that a government may take with regard to an individual’s private property. And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation.

*Id.* ¶ 47. The Commission took pains to explain that the policy would not apply if eminent domain proceedings had been concluded: “This policy will *not* apply where the pipeline developer has already, at the time of the certificate order, acquired all necessary property interests or where no landowner protested the section 7 application.” *Id.* ¶ 46 (emphasis in

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<sup>5</sup> Order 871-B was published in the Federal Register on May 13, 2021, and its effective date was June 14, 2021. *See* Order 871-C, 176 FERC ¶ 61,062, p. 1.

original). On August 2, 2021, the Commission issued Order 871-C, 176 FERC ¶ 61,062, its order on rehearing of Order 871-B. Order 871-C affirmed Order 871-B's policy of presumptively staying all section 7 certificates for the 30-day period for seeking rehearing and then for the pendency of the rehearing process if any landowner seeks rehearing as to the validity of the certificate.

*If* the Temporary Certificate grants eminent domain authority, in light of Spire's insistence that the ongoing condemnation proceedings against Landowners go forward solely on the basis of the Temporary Certificate, the Commission should apply Orders 871-B and 871-C to the extent of staying such eminent domain authority. Intervenors are *not* requesting that the Temporary Certificate be stayed in its entirety, but only to the extent it grants eminent domain authority. Having the power to stay the entire certificate, the Commission surely has the authority to stay only that provision. Having repeatedly violated the NGA in issuing the Original Certificate, the Commission should not compound its errors by abetting Spire's efforts to grab title to Landowners' property.

Landowners note that when they made this request in seeking rehearing of the 90-day Certificate, they made this same limited request: "Intervenors are *not* requesting that the Temporary Certificate be stayed in its entirety, but only to the extent it grants eminent domain authority." Unfortunately, while the Commission acknowledged this argument ("The Niskanen Center asserts that because the Commission can stay a certificate under Order Nos. 871-B and 871-C, the Commission can take the lesser step of staying only the eminent domain authority related to a temporary certificate"; Rehearing Order on 90-day Certificate, P 12), it refused to address the issue. Instead, it treated Landowners' stay request as a request to stay the entire Certificate, stating that a stay would be "inconsistent" with its finding that the 90-day

certificate was needed to avoid an emergency, i.e., a stay “would thereby perpetuat[e] the emergency circumstances that the certificate was issued to remedy.” *Id.* P13.

Like the question of whether the Temporary Certificate carries eminent domain authority, the Commission should stop avoiding this issue and, if the Temporary Certificate does carry such authority, the Commission should stay it (and no other provision) pending rehearing pursuant to Orders 871-B and 871-C.

### **Conclusion**

For the reasons given herein, the Commission should clarify that the Natural Gas Act does not endow the Temporary Certificate with eminent domain authority and, in the alternative, that the Commission should stay any such authority pursuant to Orders 871-B and 871-C.

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Respectfully submitted,

s/David Bookbinder

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