No. _____

In The
Supreme Court of the United States

LYNDA LIKE, et al.,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Natural Gas Act (15 U.S.C. § 717f(h)) delegates to certain private companies the ordinary eminent domain power: that is, the power to bring a condemnation lawsuit and then buy land at an adjudicated price after final judgment. The Act does not delegate the separate power to take immediate possession of land.

Notwithstanding the Act's limited delegation, are district courts empowered to enter preliminary injunctions giving private companies immediate possession of land before final judgment in Natural Gas Act condemnations?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The opinion below consolidated four separate appeals, case numbers 17-3075, 17-3076, 17-3115, and 17-3116.

In case number 17-3075, Petitioners Hilltop Hollow Limited Partnership and Hilltop Hollow Partnership, LLC were appellants; the full caption was *Transcontinental Gas Pipe Line Company, LLC* v. *Permanent Easements for 2.14 Acres and Temporary Easements for 3.59 Acres in Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1201606900000; Hilltop Hollow Limited Partnership; Hilltop Hollow Partnership LLC General Partner Of Hilltop Hollow Limited Partnership; Lancaster Farmland Trust; All Unknown Owners*.

In case number 17-3076, Petitioner Stephen D. Hoffman was the appellant; the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement for 2.02 Acres and Temporary Easements for 2.76 Acres in Manor Township, Lancaster County Pennsylvania, Tax Parcel Number 4100300500000, 3049 Safe Harbor Road, Manor Township, Lancaster, Pa; Stephen D. Hoffman; and All Unknown Owners*.

In case number 17-3115, Petitioner Lynda Like was the appellant; the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement for 1.33 Acres and Temporary Easements for 2.28 Acres Conestoga Township, Lancaster County,*

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT – Continued

Pennsylvania Tax Parcel Number 1202476100000, 4160 Main Street Conestoga, PA, 17516; Lynda Like, also known as Linda Like, and All Unknown Defendants.

In case number 17-3116, appellants were Blair B. Mohn and Megan E. Mohn, who do not join in this petition, and the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement for 0.94 Acres and Temporary Easements for 1.61 Acres in Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1203589400000, Sickman Mill Road; Blair B. Mohn; Megan E. Mohn, and All Unknown Owners*.

Petitioners Hoffman and Like are natural persons. Petitioner Hilltop Hollow Limited Partnership is a Pennsylvania limited partnership whose general partner is Petitioner Hilltop Hollow Partnership, LLC. Hilltop Hollow Partnership, LLC, has no parent corporations and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 907 F.3d 725 and reproduced at App. 1. The district court's memorandum opinion and orders granting preliminary injunctions are unreported and reproduced at App. 33–80.

JURISDICTION

The opinion of the Third Circuit was filed on October 30, 2018. App. 1. On December 13, 2018, the Third Circuit denied a timely filed petition for rehearing and rehearing en banc. App. 99. This Court's jurisdiction rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Respondent's asserted authority to condemn petitioners' property stems from the Natural Gas Act, 15 U.S.C. § 717f(h), which provides:

> 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, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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 practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

STATEMENT

Respondent Transcontinental Gas Pipe Line Company filed this condemnation action in early 2017 and a few months later was granted a preliminary injunction giving it immediate possession of large swaths of petitioners' land in rural Lancaster County.

Transcontinental sent work crews to take over petitioners' land and, in the ensuing year and a half, the company has completed construction of the pipeline that necessitated the condemnation actions in the first place. Meanwhile, because the underlying lawsuits have not reached final judgment, none of the petitioners has received any compensation whatsoever.

This take-first-pay-later structure is unusual in federal condemnations. Ordinarily, a property owner is compensated at the moment her property is taken away: In a normal eminent domain case (what this Court has called a straight-condemnation action), a court determines the value of the property a condemnor wishes to acquire and, after judgment, the condemnor has the option to either purchase the property at the adjudicated price or move to dismiss the condemnation. "The practical effect of final judgment on the issue of just compensation," in other words, "is to give the Government an option to buy the property at the adjudicated price." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 4 (1984). And while the federal Government has the separate power to take immediate possession of land under the Declaration of Taking Act, 40 U.S.C. § 3114, that mechanism also pairs possession with payment. Like in straight-condemnation actions, an agency proceeding under the Declaration of Taking Act must pay landowners compensation (or an estimate thereof) before entering onto land. 40 U.S.C. § 3114(b).

Here, though, petitioners face the worst of both worlds. Transcontinental, as a private actor, has been delegated less power than the usual federal

condemnor. But, paradoxically, companies like Transcontinental exercise a power that is far more severe than anything Congress has authorized for anyone: the power to take land *now* but delay the owner's compensation for months or years after the fact. The Natural Gas Act, which delegates the power of eminent domain to certain private companies like Transcontinental, delegates only the authority to bring straight-condemnation actions, not the power to take immediate possession. 15 U.S.C. § 717f(h). Lacking the statutory power to take immediate possession, Transcontinental instead harnessed the equitable power of the federal courts. Notwithstanding this Court's well-established rule that equitable remedies like preliminary injunctions may not be invoked to rearrange parties' substantive rights, the company sought and obtained a preliminary injunction granting it immediate possession of petitioners' land. At the same time, petitioners were not entitled to (and still have not received) any compensation. The upshot is that, even though Transcontinental has been delegated less power than the typical federal condemnor, it has been allowed to exercise more—and to leave property owners in a worse position—than if Congress had delegated the power of immediate possession in the first place.

While this situation is unusual in the context of the federal power of eminent domain, it is all too common in the context of condemnations under the Natural Gas Act. In that sense, petitioners are far from alone: District courts across the country have entered

similar preliminary injunctions in Natural Gas Act condemnations as a matter of course. Like Transcontinental, pipeline companies thereby secure immediate possession of private property without congressional approval while landowners wait months or years for any compensation. Indeed, preliminary injunctions in Natural Gas Act cases are very much the rule rather than the exception—they are requested and granted in such condemnations routinely, which means district courts have entered hundreds of these injunctions, transferring the rights to thousands of acres of land without a final judgment or contemporaneous payment of compensation.

Congress could, of course, authorize this state of affairs if it so chose. But it has not. In fact, when Congress actually authorizes condemnors to take immediate possession of land, it routinely insists that property owners be paid for their loss immediately. In short, in the absence of congressional authorization to grant immediate possession of land, the district courts have instead fashioned a substitute harsher than anything contemplated by the legislature. This Court should grant review to determine whether district courts are empowered to rearrange property rights among private parties in this manner.

A. Background

1. Petitioners are rural Lancaster County landowners who have carved out homes for themselves in what they consider one of the most beautiful places in

America. Gary Erb, who owns his home through Petitioner Hilltop Hollow Limited Partnership, described his joy at having moved into his "dream property"—a rural home where he and his three sons can hunt deer and where the boys, as they get older, will be able to build homes of their own to stay close to family. C.A. App. A01069–A01072 (Tr. Evid. Hrg. (July 20, 2017)). Petitioner Stephen Hoffman is a professional forester who with his wife Dorothea has lived in a carefully selected woodland retreat for over a decade. *Id.* at A01109–A01111. And Petitioner Lynda Like inherited acreage of farmland from her father in 1993, having promised him that she would preserve it for her family and allow her sons to build homes there when they eventually reached adulthood. *Id.* at A01185, A01190.

Petitioners' rural paradises have been disrupted by the eminent domain action at the heart of this case, which has brought noise, construction crews, equipment, and permanent disruption to their land and lives. That much is not unusual; eminent domain frequently means disruption for rural landowners as local or state governments build roads or schools or highways. But petitioners have not been condemned for a road or a school or a highway; they have been condemned for the construction of a private natural-gas pipeline. As a result, this condemnation is governed by the Natural Gas Act—which, as discussed below, has had dramatic consequences for petitioners' substantive property rights.

2. Under the Natural Gas Act, it is unlawful to build a facility (including a pipeline) for the

transmission of natural gas without first obtaining a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC). 15 U.S.C. § 717f(c)(1)(A). Any such certificate automatically carries with it the power to take any necessary property that cannot be voluntarily acquired by initiating an eminent domain proceeding in state or federal court. 15 U.S.C. § 717f(h).

Because the power of eminent domain flows automatically from the issuance of the FERC certificate, eminent domain actions under the Natural Gas Act proceed somewhat differently from other eminent domain actions. While property owners are ordinarily entitled to raise any and all defenses challenging a condemnor's right to take their land, courts have consistently held that property owners who want to contest a company's right to exercise eminent domain under the Natural Gas Act can do so only by directly appealing FERC's initial grant of the underlying certificate. *See* 15 U.S.C. § 717r(b) (providing for direct appeal to D.C. Circuit or the Circuit in which the project is located). Courts have uniformly held that they lack jurisdiction to hear objections to a taking outside the context of a direct appeal of the certificate, including in a condemnation action itself. *See*, *e.g.*, *Adorers of the Blood of Christ* v. *FERC*, 897 F.3d 187, 194–95 (3d Cir. 2018) (no jurisdiction to hear Religious Freedom Restoration Act challenge to pipeline condemnation); *accord Maritimes & Ne. Pipeline, LLC* v. *Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005) ("Once a [certificate] is issued by the FERC, and the gas company is unable

to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking."). In other words, once a FERC-certified pipeline company files a condemnation action, its legal authority to maintain that action is, as far as the district court is concerned, effectively beyond question.

Respondent Transcontinental Gas Pipe Line Company holds a certificate from FERC authorizing the construction of the Atlantic Sunrise Pipeline Project, a natural-gas pipeline that runs through five States, including ten counties in Pennsylvania. The route runs directly through petitioners' rural Lancaster County homesteads. Petitioners did not want a pipeline running across their land or near their homes, and they declined Transcontinental's offer to purchase easements across their land, believing that the offer would not compensate them for the business losses, inconvenience, and permanent displacements that would come along with the pipeline. Condemnation followed.

B. Proceedings Below

Transcontinental filed the three[1] substantially identical condemnation actions that give rise to this

[1] A fourth condemnation action—against landowners Blair and Megan Mohn—was decided alongside these three in the consolidated appeals resolved by the Third Circuit in the opinion

petition in early 2017, seeking to condemn both permanent easements for the pipeline as well as broader temporary easements to allow for the construction of the pipeline. *E.g.*, App. 103–05, 118. That summer, the district court granted a motion for partial summary judgment, finding that the company possessed the necessary certification from FERC and was therefore legally authorized to condemn the properties at issue. App. 40–41. Simultaneously, the court issued preliminary injunctions, granting the company immediate possession of the rights of way while the underlying condemnation litigation continued. App. 53. While the company was required to post a bond to ensure eventual payment of just compensation, the landowners were not entitled to (and, to date, have not received) any compensation. *See* App. 60.[2]

The landowners appealed, arguing that the preliminary injunctions were invalid as a matter of law because the Natural Gas Act delegates to companies like Transcontinental only the ordinary power of eminent domain—not the more drastic power to take immediate possession of property. They contended that,

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below. The Mohns, however, have moved away from Lancaster County and do not join in this petition.

[2] In the meantime, respondent has taken full possession of the required easements and, as it reported to FERC last August, essentially completed construction of the pipeline. *See* Letter from Michael Dunn, Executive Vice President and Chief Operating Officer, The Williams Companies, to Federal Energy Regulatory Commission (August 24, 2018), https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15003167 (last visited March 8, 2019).

as the Seventh Circuit held in *Northern Border Pipeline Co.* v. *86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998) (*Northern Border*), a preliminary injunction would be appropriate only where a condemnor could show a "preexisting entitlement to the property" rather than only the future entitlement to the property that would be created at the end of the condemnation action. *Id.* at 472; *see also* App. 22–23.

The Third Circuit rejected these arguments and upheld the injunctions. App. 22–23. The panel held that the district court's grant of a motion for partial summary judgment determining Transcontinental's right to bring the condemnation action had established the sort of preexisting entitlement to the land contemplated by the Seventh Circuit in *Northern Border*. App. 22–23. Given that determination, the only question was what the district court had called "'the timing of the possession.'" App. 14. And an order that merely "hastened" Transcontinental's possession of petitioners' land, the Third Circuit concluded, involved only the sort of non-substantive right that could appropriately be rearranged by means of preliminary injunctive relief. App. 20–21.

The Third Circuit denied panel rehearing and rehearing en banc. App. 99–100. The condemnation cases remain pending in the district court, and the preliminary injunctions remain in effect.

REASONS FOR GRANTING THE PETITION

I. The decision below deviates sharply from this Court's precedents governing the use of eminent domain and equitable relief.

The approach endorsed by the Third Circuit below diverges from this Court's precedent. Longstanding precedent establishes three basic principles that govern this case, all of which work together to forbid a district court from entering a preliminary injunction that transfers private property from one private owner to another under the Natural Gas Act. Put briefly, this Court has said (1) that there is a difference between the ordinary power of eminent domain and the power to take immediate possession of property, (2) that private entities exercising delegated eminent domain power must be strictly limited to the powers actually granted, and (3) that, in the absence of statutory authorization, the federal courts' equitable powers do not extend to rearranging rights to use unencumbered property before a final judgment is entered. The decision below contravenes these principles.

1. This Court has repeatedly explained that the ordinary power of eminent domain is distinct from the power to take immediate possession of property. As described in *Kirby Forest Industries* v. *United States*, there are four methods by which the United States can exercise its sovereign power to acquire land involuntarily. 467 U.S. 1, 3–5 (1984). In the first, "so-called 'straight condemnation[,]'" the Government initiates condemnation proceedings in a district court, followed by a trial to determine the appropriate just

compensation for the property interest being taken. *Id.* at 3–4. "The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price." *Id.* at 4 (citing *Danforth* v. *United States*, 308 U.S. 271, 284 (1939)). "If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." *Id.* If not, the Government is entitled to move for dismissal of the condemnation action. *Id.*

If the Government wishes to acquire land without waiting for final judgment, though, it has other options: It can, when authorized, proceed under a statute allowing it to immediately take "title and right to possession" to property. *Id.* at 4–5; *see also* 40 U.S.C. § 3114. Alternatively, Congress may directly appropriate land through specific legislation. *Kirby Forest*, 467 U.S. at 5. Or the executive may acquire land "summarily, by physically entering into possession and ousting the owner," who then has a right to bring a suit for inverse condemnation to recover just compensation. *Id.* There is no dispute in this case that the Natural Gas Act gives Transcontinental only the "standard" kind of eminent domain power—the power to initiate a straight-condemnation case and buy land after judgment—and not any of the others. *See* App. 18; *cf. Van Scyoc* v. *Equitrans, L.P.*, 255 F. Supp. 3d 636, 639–42 (W.D. Pa. 2015) (collecting district-court cases holding that the Natural Gas Act does not preempt state-law trespass actions or authorize certificate holders to

invade private property outside the confines of a straight-condemnation action).

2. The limited language of the Natural Gas Act matters because delegations of the eminent domain power to private parties must be read narrowly. When a statute uses "broad language . . . to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself," such an "authorization . . . carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication." *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1946). But things are very different when it comes to "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *Id.* "These are, in their very nature, grants of limited powers" and thus "do not include sovereign powers greater than those expressed or necessarily implied[.]" *Id.*

This principle is nowhere to be found in the opinion below. To the contrary, the opinion below presumes that a grant of immediate possession to a private condemnor is appropriate unless Congress specifically intended to forbid such grants when it crafted the delegation of power in the Natural Gas Act. App. 16–17 ("Put another way, did Congress intend to forbid immediate access to the necessary rights of way when it granted only standard condemnation powers to natural gas companies?"). This is the wrong inquiry: As made clear by the discussion in *Carmack*, the question is whether the Natural Gas Act, expressly or by necessary implication, grants a certificate-holder like

Transcontinental the power to take immediate possession of land prior to final judgment in its condemnation action. And, as the court below expressly acknowledged, the statute does no such thing. App. 5.

3. Finally, specific statutory authorization for immediate possession is necessary here because this Court has already held that federal courts cannot use their equitable powers to deprive people of the use of their unencumbered property before a final judgment is entered. This Court's decision in *Grupo Mexicano de Desarrollo* v. *Alliance Bond Fund* illustrates the point. 527 U.S. 308 (1999). There, plaintiff creditors brought a breach-of-contract suit against a holding company that owed them substantial unsecured debts. *Id.* at 312–13. Finding that the defendant was on the brink of insolvency and in the process of dissipating its valuable assets in a way that would "frustrate any judgment" the plaintiff might win, the district court entered a preliminary injunction preventing the defendant from further transferring the rights to the assets in question. *Id.* (internal quotation marks omitted).

This Court reversed. Reasoning that federal courts' equitable powers remain limited to those "traditionally accorded by courts of equity," *id.* at 319, the Court held that courts had historically rejected the notion that equity could interfere with debtors' rights to their property before a creditor had obtained a final judgment against them. *Id.* at 319–23. Because there was no traditional power to grant such a preliminary injunction at equity, the wisdom of such an injunction

was beyond the purview of the courts: The ability to authorize (and the wisdom of authorizing) such a remedy rested solely with Congress. *Id.* at 332–33. *Grupo Mexicano* and the cases on which it relies stand for the basic proposition that a preliminary injunction is appropriate to the extent it "'grant[s] intermediate relief of the same character as that which may be granted finally,'" but not to the extent it creates new substantive rights. *Id.* at 326–27 (quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 220 (1945)).

The Third Circuit's opinion here breaks with this principle in two important ways: First, it authorized preliminary injunctions that are different in character from the final relief that could be entered at the end of the litigation. Second, those injunctions worked to alter the substantive rights of the parties.

The preliminary injunctions here are different in character from the final relief available to a condemnor. Straight condemnations, after all, do not result in an injunction giving the condemnor ownership of the land. As noted above, the effect of final judgment in a condemnation action is to give the condemnor an option to purchase the condemned property at the adjudicated price. *Supra* pp. 11-12. The condemnor is not required to exercise this option, and a properly drafted final judgment in a condemnation action reflects this fact. *See*, *e.g.*, Order, *United States* v. *Tract H05-08*, No. 2:04-cv-04 (M.D. Fla. Aug. 19, 2005) (ECF No. 21) (providing that "[o]n the date of deposit of the Just Compensation . . . title to the Property will vest in the Plaintiff . . . ."); *see also United States* v. *4,970 Acres*,

130 F.3d 712, 715 (5th Cir. 1997) (applying "the long standing rule that the government has an option to move for dismissal after a final condemnation judgment"); *United States* v. *122.00 Acres*, 856 F.2d 56, 57 (8th Cir. 1988) ("Ultimately, the United States determined that the jury award was beyond its budget capabilities; it chose to abandon the condemnation and move for dismissal of the action."). And, like any other condemnor, pipeline companies sometimes change their minds and elect not to purchase land they initially sought to condemn. *See*, *e.g.*, *Tenn. Gas Pipeline Co.* v. *104 Acres of Land*, 828 F. Supp. 123, 125 (D.R.I. 1993) (noting voluntary dismissal of condemnation action after change in pipeline route). The preliminary injunctions entered below, however, do not take the form of an option to purchase petitioners' land. Instead, they oust petitioners immediately upon the payment of a preliminary-injunction bond, giving Transcontinental the immediate right to use the land and enjoining petitioners from interfering with Trancontinental's possession. *E.g.*, App. 64–65.

Even if the preliminary injunctions here were exactly the same as the final judgment in a condemnation action, though, they would still run afoul of *Grupo Mexicano* because they create new substantive rights. An entitlement to possess land *now* is substantively different from an entitlement to possess land *in the future.* The Third Circuit rejects this distinction and justifies the preliminary injunction on the grounds that it does not alter the parties' substantive rights at all:

Since Transcontinental's substantive right to condemn was unquestioned, the court reasoned, the preliminary injunction affected only the procedural question of *when* the property changed hands. App. 20–21. But this cannot be correct: Prior to the entry of the preliminary injunctions, petitioners had the right to exclude Transcontinental and its agents from their land. After the entry of the preliminary injunctions, the company had the right to exclude petitioners from the land. The right to exclude is, as this Court has held time and again, one of the most important substantive aspects of property ownership. *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" (citation and internal quotation marks omitted)); *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.").

To be sure, the property owners here were going to lose the right to exclude Transcontinental from their land eventually—or, at least, they would if the company chose to exercise its option to purchase the easements after final judgment. But the timing of property rights makes a substantive difference. There is a substantive difference between a *future* interest in property and a *present* interest in property, just as there is a substantive difference between holding an option contract to buy a piece of property and holding title to the property itself. Indeed, much of the substantive law

of property—with its life estates, contingent remainders, and springing executory interests—is primarily about the timing of property ownership.

Simply put, injunctions that rearrange who can do what with property (and when) are substantive in nature. Indeed, the Court said just that in *Grupo Mexicano* itself: "Even in the absence of historical support, we would not be inclined to believe that it is merely a question of *procedure* whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment." 527 U.S. at 322–23 (emphasis added). Instead, "that question goes to the *substantive* rights of all property owners." *Id.* at 323 (emphasis added).[3]

The inescapable conclusion of *Grupo Mexicano* and the cases it relies on is that district courts cannot issue preliminary injunctions transferring unencumbered private property from one owner to another. A remainderman would not be entitled to an order granting him immediate possession of a life estate, a holder of an option contract to purchase land would not be entitled to an order granting immediate possession of that land, and Transcontinental was not entitled to an

[3] The Court's reasoning in *Grupo Mexicano* is supported by the fact that courts at all levels treat *future* interests in property as substantively different from *present* interests. *See*, *e.g.*, *Fondren* v. *Commissioner*, 324 U.S. 18, 20 (1945) (holding that giving a future interest in property without "the right presently to use, possess or enjoy the property" did not qualify as a gift under relevant regulation); *In re Brunson*, 498 B.R. 160, 163 (Bankr. W.D. Tex. 2013) (noting that state law's homestead protection covers present possessory interests but not future interests).

injunction here for precisely the same reason. Here, as in *Grupo Mexicano*, respondent has a contingent future right to petitioners' property that it has not yet distilled to a final judgment. Here, as in *Grupo Mexicano*, a district court has invoked its equitable jurisdiction to restrict the property owners' substantive rights to that property. And here, as in *Grupo Mexicano*, such a remedy is inappropriate absent congressional authorization.

II. Of the seven courts of appeals to address this question, only the Seventh Circuit has adopted an approach consistent with this Court's precedents.

The Seventh Circuit, faced with a request for a preliminary injunction in a condemnation under the Natural Gas Act, has articulated a rule that squares perfectly with this Court's precedents: Such an injunction is appropriate only to the extent a condemnor can demonstrate a *preexisting* right to the land at issue, as distinct from the *contingent future* right created by the eminent domain action itself. Other circuit courts adopting a contrary rule have attempted to distinguish the Seventh Circuit's decision, but their distinctions are at odds with the plain text and reasoning of the decision itself, as well as being contrary to this Court's precedents.

1. Unlike the Third Circuit below, the Seventh Circuit has articulated an approach to the question presented that follows this Court's teachings exactly.

In *Northern Border Pipeline Co.* v. *86.72 Acres*, 144 F.3d 469 (1998), the Seventh Circuit considered the same question presented here. There, as here, a pipeline company secured a FERC certificate authorizing the use of eminent domain. *Id.* at 470. There, as here, the company invoked that power by filing a series of actions under § 717f(h) of the Natural Gas Act. *Id.* at 471. There, as here, the company sought "immediate possession" of the land before entry of a final judgment setting just compensation. *Id.* But there, unlike here, the district court refused.

Affirming the district court's denial of the preliminary injunction, the Seventh Circuit held that injunctive relief was unavailable as a matter of law. Like the Third Circuit here, the Seventh Circuit noted that "the Natural Gas Act does not create an entitlement to immediate possession of the land." *Id.*; *see also* App. 5 ("The NGA . . . provides only for standard eminent domain power, not the type of eminent domain called 'quick take' that permits immediate possession."). Unlike the Third Circuit, however, the Seventh Circuit held that the federal courts have no equitable power to grant pipeline companies land in which they have no vested right. The company might well secure a "substantive entitlement" to the land "at the conclusion of the normal eminent domain process," 144 F.3d at 471—if, that is, the district court were to establish a sale price for the land and if the company were to elect to pay that price. But the prospect that the company might exercise that as-yet-undetermined option on an as-yet-unknown date does not translate

to "a substantive entitlement to the defendants' land *right now*." *Id.* (emphasis in original).

In this way, the Seventh Circuit noted, an eminent domain action under the Natural Gas Act differs from the mine-run dispute where a preliminary injunction might be available. Ordinarily, the plaintiff in a property dispute "claim[s] an ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit." *Id.* at 472. A condemnation action under the Natural Gas Act, by contrast, does not vindicate the pipeline company's "preexisting entitlement to the property." *Id.* It serves a different purpose entirely: It is "a means by which the sovereign [or the sovereign's delegatee] may find out what any piece of property will cost." *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). That a pipeline company has standing to bring such an action thus says nothing about whether it will ultimately possess the land. *See id.* For that reason, the Seventh Circuit affirmed, the district court could not "exercise[] . . . equitable power to enter a preliminary injunction ordering the defendants to grant the company immediate possession." *Northern Border* 144 F.3d at 471.

2. The Third Circuit (following the Fourth Circuit) distinguished the Seventh Circuit's approach on the grounds that here, unlike in *Northern Border*, the district court had granted a motion for partial summary judgment affirming the pipeline company's legal authority to maintain the condemnation action in the first place. App. 21–22; *see also E. Tenn. Natural Gas Co.* v. *Sage*, 361 F.3d 808, 827 (4th Cir. 2004) (drawing

the same distinction). The Eighth and Ninth Circuits have likewise ratified district courts' power to grant pipeline companies immediate possession of land. *All. Pipeline L.P.* v. *4.360 Acres*, 746 F.3d 362, 368 (8th Cir. 2014); *Transwestern Pipeline Co.* v. *17.19 Acres*, 550 F.3d 770, 777 (9th Cir. 2008). And in the months since the Third Circuit issued its decision here, the Sixth and Eleventh Circuits have endorsed this view as well, with little more than a nod to the weight of authority elsewhere. *Nexus Gas Transmission, LLC* v. *City of Green*, No. 18-3325 ___ Fed. Appx. ___, ___, 2018 WL 6437431, at *3 (6th Cir. Dec. 7, 2018); *Transcon. Gas Pipe Line Co., LLC* v. *6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018).[4]

That distinction, while widely adopted, lacks merit. It is true that the courts in *Sage*, in this case, and in similar cases had entered orders confirming that the pipeline companies had the "substantive right" to sue under § 717f(h) (an exercise that demands little more than verifying the fact that FERC has issued a certificate for the pipeline in question). *Cf.* App. 20 ("The only substantive right at issue is the right to condemn using eminent domain[.]"). But the "substantive right" to

[4] In addition to the courts of appeals, district courts—even within the Seventh Circuit—nearly uniformly hold that they have the power to grant immediate possession once they have granted a motion for partial summary judgment for a pipeline company. *See*, *e.g.*, *N. Natural Gas Co.* v. *L.D. Drilling, Inc.*, 759 F. Supp. 2d 1282, 1303 (D. Kan. 2010); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 18-cv-1327, 2018 WL 6528667 (E.D. Mo. Dec. 12, 2018); *Vector Pipeline, L.P.* v. *68.55 Acres of Land*, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001).

file a condemnation action under § 717f(h) is simply the standing to sue in the first place; it is not the same as the "substantive entitlement" to the land that arises "at the conclusion of the normal eminent domain process" if and when compensation is adjudicated and paid. *See Northern Border*, 144 F.3d at 471.

There was also no question that the company in *Northern Border* had the same right to sue under § 717f(h). The Seventh Circuit said so explicitly: "Northern Border has a substantive claim to property, based on its eminent domain power under § 717f, that is likely to prevail on the merits." *Id.* at 471. "[N]o one," the court emphasized, "disputes the validity of the FERC certificate conferring the eminent domain power, nor could they do so in this proceeding." *Id*. at 471–72. Nothing about those statements suggests that a district court can convert the "entitlement that will arise at the conclusion of the normal eminent domain process" into a "preexisting entitlement to the property" simply by granting a motion for partial summary judgment on an issue that was not (and could not have been) disputed in the case. *Id.*

Far from being "clearly distinguishable" (App. 23), therefore, *Northern Border* resembles this case in every material respect. Like Transcontinental—indeed, like every condemnor under the Natural Gas Act—the Northern Border Pipeline Company undisputedly had "the right to condemn" land by invoking the Natural Gas Act. *Compare Northern Border*, 144 F.3d at 471–72 *with Sage*, 361 F.3d at 827 *and* App. 20–21. The only question is whether that right can be

parlayed into immediate possession of the defendants' property. The majority view holds that it can; district courts can grant "immediate possession through the issuance of a preliminary injunction" so long as they have entered an order confirming the condemnor's substantive right to maintain the condemnation action. *Sage*, 361 F.3d at 828; *see also*, *e.g.*, App. 20–21; *Transcon. Gas Pipe Line Co., LLC*, 910 F.3d at 1152. The Seventh Circuit has held the opposite: District courts "ha[ve] no authority to enter a preliminary injunction awarding immediate possession." *Northern Border*, 144 F.3d at 472. Because only the Seventh Circuit's approach honors foundational constraints on the federal courts' equitable powers and this Court's instructions on proper interpretation of private delegations of the eminent domain power, the petition for certiorari should be granted.

III. The question presented is important.

The question presented is one of national importance because the landowners in this case are hardly alone. As the Inspector General of the Department of Energy has noted, recent significant growth in the natural-gas industry has dramatically increased the number of and controversy over natural-gas pipelines like the one in this case. *See* Office of Inspector General, U.S. Department of Energy, *Audit Report: The Federal Energy Regulatory Commission's Natural Gas Certification Process* (May 24, 2018), https://www.energy.gov/sites/prod/files/2018/05/f52/DOE-OIG-18-33.pdf (last visited March 8, 2019). Under the majority

rule endorsed by the decision below, all of these condemnors will be entitled to take immediate possession of private land by preliminary injunction.

And, if history is any guide, they will do exactly that. Preliminary injunctions granting immediate possession of property are not the exception in Natural Gas Act condemnations. They are the rule. Over the past 20 years, district courts have entered hundreds of preliminary injunctions granting private companies immediate possession of thousands of acres of private land. In the last five years alone, district courts in Pennsylvania (where this case arises) have issued at least 38 separate preliminary injunctions in Natural Gas Act cases, each of them transferring effective ownership of land to private companies to use for their own purposes.[5] As pipeline construction and related condemnations continue, so too will preliminary injunctions granting pipeline companies immediate possession of land.

These injunctions impose real hardships on property owners, as illustrated by those suffered by the property owners in this case. The district court granted Transcontinental immediate possession of petitioners' property on August 23, 2017. App. 35. Today, over 18 months later, the underlying condemnation actions are still pending in the district court and petitioners have therefore yet to receive a single dollar in compensation.

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[5] These numbers are drawn from a review of federal-court records available on the Public Access to Court Electronic Records system.

Allowing a condemnor to take land *now* means that property owners suffer damages *now*—but can recover only months or (as here) years later.

Congress, of course, is free to impose these hardships on landowners if it wishes; this Court has held that there is no constitutional requirement that just compensation be paid contemporaneously with a taking. *See Cherokee Nation* v. *S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). But Congress has not authorized this state of affairs. Indeed, Congress's revealed preference is (sensibly) to ensure that property owners are compensated at the moment they lose their property. In a straight condemnation, for example, "title and right to possession vest in the United States" only after the Government "tenders payment to the private owner." *Kirby Forest Indus.*, 467 U.S. at 4. And when the Government exercises its power to take immediate possession, the Declaration of Taking Act requires immediate payment of estimated compensation to the property owners. *See* 40 U.S.C. § 3114(b). Congress has even announced, more broadly, that when the federal Government is condemnor, payment should *always* precede possession. *See* 42 U.S.C. § 4651(4) ("No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with § 3114(a) to (d) of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.").

In other words, by allowing pipeline companies like Transcontinental to take immediate possession via preliminary injunction, district courts have created a system that is far harsher and far more burdensome to property owners than any process actually authorized by Congress. It may be that there are good reasons to abandon Congress's preference for immediate compensation when a private pipeline company rather than a government agency is doing the taking. But whatever those reasons might be, the decision to impose these burdens on property owners rests "where such issues belong in our democracy: in the Congress." *Grupo Mexicano*, 527 U.S. at 333.

IV. This case is a good vehicle for deciding the question presented.

This case is a good vehicle for resolving the question presented. Addressing the issue here does not require consideration of any factual disputes or deference to trial-court decisionmaking—the parties briefed this issue as a purely legal question, and the Third Circuit correctly reviewed the district court's injunctions de novo. App. 16. And, despite the fact that this case involves the review of a preliminary injunction, it will continue to present a live controversy even if the underlying condemnation actions in the district court reach final judgment while the case is pending before this Court.

First, a final judgment in the condemnation action will not resolve the question of whether the preliminary relief entered below was appropriate. As this Court noted in *Grupo Mexicano*, the entry of final judgment in favor of a plaintiff will usually moot the question of whether that plaintiff's preliminary injunction was properly granted because the final judgment "establishes that the defendant *should not have been engaging in the conduct that was enjoined*." 527 U.S. at 315 (emphasis in original). But where the petitioners' claim is that the preliminary injunction wrongfully restrained lawful conduct (here, excluding Transcontinental from land that petitioners still owned and that had not yet been condemned), "the substantive validity of the final injunction does *not* establish the substantive validity of the preliminary one." *Id.* "If petitioners are correct, they *have* been harmed by issuance of the unauthorized preliminary injunction—and hence *should* be able to recover on the bond—*even if* the final injunction is proper." *Id.* at 329 (emphases in original). Even if Transcontinental litigates the condemnation action to final judgment and elects to purchase the easements at issue—and even if it were to do so after this Court grants certiorari—that will have no effect on whether it was entitled to obtain immediate possession prior to that final judgment.

Second, even if mootness were on the table, petitioners' claims would still be reviewable by this Court because they would fall within the "exception to the mootness doctrine for a 'controversy that is capable of repetition yet evading review.'" *Kingdomware*

Technologies, Inc. v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted). That exception applies where (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration" and (2) "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). Both elements are met here: The propriety of a preliminary injunction frequently cannot be fully litigated before this Court if the enjoined party's claims would be mooted by a final judgment in the district court. And petitioners are reasonably likely to be subject to a Natural Gas Act condemnation again—and, indeed, are likely to be condemned by Transcontinental or its successor-in-interest. The complaints filed in the district court sought two different easements: a narrower easement for the pipeline itself and a broader "construction easement" for the land required for the construction phase of the pipeline project. *See*, *e.g.*, App. 103–05. And the permanent easements requested in the complaints below expressly seek the right to "alter[], repair[], chang[e] the size of, replac[e] and remov[e]" the pipeline. App. 103. If, as seems inevitable, Transcontinental needs to exercise its right to alter, repair, replace, or remove its pipeline, it will need to condemn yet another temporary construction easement. At that point, petitioners will once again be subject to having their land taken from them by preliminary injunction—unless this Court resolves the issue first.

* * *

This case presents an important question of property law on which the courts of appeals—with one exception—have sharply deviated from this Court's precedents governing the use of eminent domain and the crafting of equitable remedies. The petition for a writ of certiorari should be granted to bring the practice of lower courts back in line with this Court's precedents, to resolve the disagreement among the lower courts about the propriety of granting immediate possession via preliminary injunction in these cases, and to ensure that Congress, rather than the courts, retains control over exactly how much of its eminent domain power it delegates to private condemnors like respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-3075, 17-3076, 17-3115 & 17-3116

TRANSCONTINENTAL GAS PIPE
LINE COMPANY, LLC

v.

PERMANENT EASEMENTS FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1201606900000; HILLTOP HOLLOW LIMITED PARTNERSHIP; HILLTOP HOLLOW PARTNERSHIP LLC GENERAL PARTNER OF HILLTOP HOLLOW LIMITED PARTNERSHIP; LANCASTER FARMLAND TRUST; ALL UNKNOWN OWNERS

Hilltop Hollow Limited Partnership and Hilltop Hollow Partnership, LLC,

Appellants in 17-3075

TRANSCONTINENTAL GAS PIPELINE
COMPANY, LLC

v.

PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENTS FOR 2.76 ACRES IN MANOR TOWNSHIP, LANCASTER COUNTY PENNSYLVANIA, TAX PARCEL NUMBER 4100300500000, 3049 SAFE HARBOR ROAD,

App. 2

MANOR TOWNSHIP, LANCASTER, PA; STEPHEN D. HOFFMAN; AND ALL UNKNOWN OWNERS

Stephen D. Hoffman,

Appellant in 17-3076

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC

v.

PERMANENT EASEMENT FOR 1.33 ACRES AND TEMPORARY EASEMENTS FOR 2.28 ACRES CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA TAX PARCEL NUMBER 1202476100000, 4160 MAIN STREET CONESTOGA, PA 17516; LYNDA LIKE, also known as Linda Like, AND ALL UNKNOWN DEFENDANTS

Lynda Like,

Appellant in 17-3115

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC

v.

PERMANENT EASEMENT FOR 0.94 ACRES AND TEMPORARY EASEMENTS FOR 1.61 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1203589400000, SICKMAN MILL ROAD; BLAIR B. MOHN; MEGAN E. MOHN, AND ALL UNKNOWN OWNERS

Blair B. Mohn and Megan E. Mohn,

Appellants in 17-3116

App. 3

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil Actions Nos. 17-cv-00715, 17-cv-00723,
17-cv-00720, 17-cv-00722)
District Judge: Honorable Jeffery L. Schmehl

Submitted under Third Circuit LAR 34.1(a)
on October 2, 2018

Before: SHWARTZ, ROTH and FISHER,
Circuit Judges

(Opinion filed: October 30, 2018)

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OPINION

ROTH, Circuit Judge

Congress may grant eminent domain power to private companies acting in the public interest. This appeal requires us to determine the limits on Congress's grant of eminent domain power to private companies building gas lines under the Natural Gas Act (NGA), 15 U.S.C. § 717f(h).

The NGA gives natural gas companies the power to acquire property by eminent domain, but it provides only for standard eminent domain power, not the type of eminent domain called "quick take" that permits immediate possession.[1] The District Court granted a preliminary injunction to Transcontinental Gas Pipe Line Company, which effectively gave the company immediate possession of certain rights of way owned by appellant landowners. The landowners claim that granting immediate possession violated the constitutional principle of separation of powers because the taking of property by eminent domain is a legislative power and the NGA did not grant "quick take." We disagree and hold that the District Court's order did not violate the principle of separation of powers because Transcontinental properly sought and obtained the substantive right to the property before seeking equitable relief. We will therefore affirm.

I

Transcontinental is building a natural gas pipeline that runs through Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. For this project, named "Atlantic Sunrise Expansion Project," Transcontinental needed certain rights of way, including those owned by appellants Hilltop Hollow Limited Partnership, Stephen Hoffman, Lynda Like, and Blair and Megan Mohn (collectively "Landowners"). Under

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[1] For a further description of "quick take" *see* Section III.A *infra.*

§ 717f(h) of the NGA, gas companies may acquire property by eminent domain if they meet three requirements. A gas company must demonstrate, first, that it holds a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC); second, that it was unable to acquire the right of way through negotiation with the landowner; and third, that the amount claimed by the owner of the property exceeds $3,000. If these conditions are met, the gas company may "acquire the [necessary right-of-way] by the exercise of the right of eminent domain in the district court."[2]

Transcontinental has met all three requirements of § 717f(h). The administrative review leading up to the certificate of public convenience and necessity lasted almost three years and, as is evident from the record, included extensive outreach and many avenues of public participation. The process started when FERC granted the company's request to use the pre-filing process on April 4, 2014.[3] On July 29, 2014, FERC issued a Notice of Intent to Prepare an Environmental Impact Statement (EIS) for the Planned Atlantic Sunrise Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings (NOI).[4] The NOI was then mailed to 2500 interested parties. It invited comment on the project's environmental issues from all levels of government,

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[2] § 717f(h).

[3] A1424.

[4] A1424; 79 Fed. Reg. 44,023 (2014).

interest groups, Native American tribes, affected property owners, local media and libraries, and other interested parties. The Commission heard from 93 speakers and received over 600 written comments.[5] On March 31, 2015, the company filed its application to construct and operate the Atlantic Sunrise project.[6] FERC mailed letters to potentially affected landowners (as well as to government officials and other stakeholders) on October 22, 2015.[7] FERC issued the draft EIS on May 5, 2016, and published it on May 12, 2016.[8] At four public meetings in June 2016, FERC heard from 203 speakers and received over 560 written comments and 900 identical letters on the draft EIS.[9] Two alternative pipeline routes were identified following the draft EIS, and additional notices were mailed to potentially affected stakeholders, in response to which FERC received 25 additional comment letters.[10] FERC issued the final EIS on December 30, 2016, and published it on January 9, 2017.[11]

The Commission issued a certificate of public convenience and necessity to Transcontinental—the first requirement of § 717f(h) of the NGA—on February 3, 2017.[12] It found "[b]ased on the benefits" of the

[5] A1424.

[6] A1425.

[7] A1425.

[8] 81 Fed. Reg. 29,557 (2016).

[9] A1425.

[10] A1426.

[11] A1426; 82 Fed. Reg. 2,344 (2017).

[12] A1396.

pipeline, "the minimal adverse effects on landowners or surrounding communities," and "the absence of adverse effects on existing customers and other pipelines and their captive customers, . . . that the public convenience and necessity require[d] approval" of the project "subject to the conditions" set out in the Order Issuing Certificate.[13] Those conditions included requirements that Transcontinental, *inter alia*, construct the pipeline and make it available for service within three years of the date of the order,[14] comply with certain environmental conditions, and follow certain rate schedules.[15] FERC also required that Transcontinental execute firm contracts for volumes and service terms "equivalent to those in its precedent agreements" before construction.[16] The Order Issuing Certificate contained information on those binding precedent agreements, comprising 100% of the capacity generated by the project, with nine shippers.[17] The Landowners sought rehearing and included a request to

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[13] A1410.

[14] *See* 18 C.F.R. § 157.20(b), A1466.

[15] A1466-67.

[16] A1467.

[17] A1400-01, A1407-10. FERC noted that while "a number of the project shippers are producers," its "policy does not require that shippers be end-use consumers of natural gas. . . . [A] project driven primarily by marketers and producers does not render it speculative. Marketers or producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers in a given market and have made a business decision to subscribe to the capacity on the basis of that assessment." A1408.

stay the Order Issuing Certificate and construction of the project,[18] but FERC tolled the rehearing request on March 13, 2017,[19] denied the stay requests on August 31, 2017,[20] and finally denied the rehearing request on December 6, 2017.[21]

The second and third requirements for using the eminent domain powers under § 717f(h) of the NGA are that the gas company negotiate with the landowner for the necessary right of way and that value of the right of way exceeds $3000. Transcontinental extended written offers of compensation exceeding $3000 to each of the Landowners, but these offers were not accepted.[22] Transcontinental thus satisfied the second

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[18] Request for Rehearing and Motion for Stay of Certain Landowners (Mar. 6, 2017), Accession No. 20170306-5123; Petition for Rehearing of Lynda Like of Order Issuing Certificate for the Atlantic Sunrise Project and Request for Stay of Certificate (Mar. 6, 2017), Accession No. 20170306-5204; Petition for Rehearing of Follin Smith and Blair and Megan Mohn of Order Issuing Certificate for the Atlantic Sunrise Project and Request for Stay of Certificate (Mar. 6, 2017), Accession No. 20170306-5202.

[19] The tolling order noted that if FERC had not responded to the rehearing requests within 30 days, the requests would be considered denied under 18 C.F.R. § 385.713 (2016); therefore, FERC tolled the request "[i]n order to afford additional time for consideration of the matters." A669.

[20] Order Denying Stay, *Transcontinental Gas Pipe Line Co., LLC*, 160 FERC ¶ 61,042 (Aug. 31, 2017), Accession No. 20170831-3088.

[21] Order on Rehearing, *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017), Accession No. 20171206-3073.

[22] Transcontinental submitted a declaration in its summary judgment briefing from Aaron Blair, a "Senior Land Representative"

and third requirements. The company filed condemnation complaints pursuant to Rule 71.1 in four separate actions against the Landowners on February 15, 2017.[23]

Having met the three requirements of § 717f(h), Transcontinental moved for partial summary judgment on February 20, 2017, in the Hilltop, Hoffman, and Mohn condemnation actions and on February 22, 2017, in the Like condemnation action.[24] Transcontinental also requested an injunction giving immediate access for the purpose of conducting a survey in the Hilltop and Hoffman actions and claimed immediate entitlement based on the existence of the FERC order.[25] On April 6, 2017, the District Court denied the motion for an injunction under the NGA because it had not yet determined the merits of Transcontinental's condemnation action, though it granted Transcontinental limited survey access pursuant to Pennsylvania state law.[26] The court held that it would have been premature to grant such an injunction at that time given that the Landowners in related cases had not yet

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for Transcontinental's parent company, Williams Partners, L.P., establishing that it had made these offers, and there was also testimony to that effect at the preliminary injunction hearing. A609 (Blair Declaration); A1049 (Blair testimony).

[23] A130, A1537, A1709, A1832.

[24] A130, A1538, A1833, A1709.

[25] A679.

[26] A679, A680.

finished briefing the summary judgment motions.[27] The court noted that if Transcontinental later established its right to condemn, the court would be able to use its equitable power to award preliminary injunctive relief.[28]

After briefing on the summary judgment motions concluded, Transcontinental filed an omnibus motion for preliminary injunction on June 28, 2017.[29] The Landowners responded on July 14, 2017.[30] On June 30, 2017, the District Court scheduled oral argument on the motions for July 17 and 20, 2017. At oral argument, a witness for Transcontinental testified that construction was planned to begin in the fall of 2017 and that it would need access to the rights of way by August 18,[31] or else it would suffer various harms.[32] The Landowners cross-examined Transcontinental's witness,[33] and all four Landowners testified.[34] The Landowners' testimony included statements that they had all participated in the FERC administrative process.[35] Counsel for Landowners presented argument that the

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[27] A680.

[28] A679.

[29] A685.

[30] A135, A1541, A1712, A1835.

[31] A953-54, A957.

[32] A957-961.

[33] A963.

[34] A1068, A1110, A1152, A1184.

[35] A1108 (Hilltop), A1124-25 (Hoffman), A1158-59 (Mohn), A1191 (Like).

taking constituted a "quick take" and that it violated separation of powers principles.[36]

On August 23, 2017, the District Court granted Transcontinental's motions for partial summary judgment and omnibus motion for a preliminary injunction.[37] The court found no dispute that Transcontinental met the three requirements for seeking eminent domain under the NGA and held that the company was therefore entitled to the entry of partial summary judgment.[38] The court addressed the Hilltop/Hoffman Landowners' due process claims and ruled that they were essentially attacks on the FERC certificate, and were therefore outside the court's jurisdiction.[39] The court added that, even if it were to exercise jurisdiction, it would find that the Hilltop/ Hoffman Landowners had received "adequate due process" because they had participated in oral argument, had filed a request for rehearing with FERC, and had filed an appeal in the D.C. Circuit Court of Appeals.[40] The Hilltop/Hoffman Landowners had also argued that FERC's tolling order deprived them of due process because it indefinitely extended FERC's time limit to rule on their Motion for Rehearing and Stay. The court rejected this argument on the grounds that mere delay in the

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[36] A1202-10, A1214-16.

[37] A35; A20-28, A75-82, A97-103, A114-21; A18-19, A73-74, A95-96, A112-13.

[38] A41-42.

[39] A42.

[40] A44.

adjudication of a claim does not amount to a deprivation.[41] The court then addressed the Like/Mohn Landowners' claim that because the FERC certificate was conditioned on certain requirements, some of which had not yet been met, the certificate could not be used to exercise eminent domain. As the NGA does not require FERC certificate holders to satisfy all the certificate's conditions before exercising eminent domain, and because the certificate itself contained no such requirement, the District Court rejected this argument.[42]

On the basis of this review, the court held that Transcontinental had met the four factor test for a preliminary injunction. Under that test, the movant must demonstrate: 1) that there is reasonable probability of success on the merits, 2) that there will be irreparable harm to the movant in the absence of relief, 3) that granting the injunction will not result in greater harm to the nonmoving party, and 4) that the public interest favors granting the injunction.[43] The first two factors are the "most critical."[44] On the first prong, it found that "Transco[ntinental] ha[d] already succeeded on the merits."[45] The court quoted our decision in

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[41] A46-47.

[42] A48-49.

[43] *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017).

[44] *Id.* at 179. If the first two "gateway" factors are met, the court "then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

[45] A51.

Columbia Gas Transmission, LLC v. 1.01 Acres. In that case, we affirmed the grant of partial summary judgment in an action for condemnation and the grant of a preliminary injunction, noting that there was "no remaining merits issue" because the District Court had already ruled that the gas company had the right to the easements by eminent domain.[46]

On the second prong, the District Court found that Transcontinental would suffer irreparable harm in the form of construction delays, inability to complete surveys required to satisfy environmental conditions, risk of non-compliance with shipper contracts, and monetary harm.[47]

On the third prong, the District Court noted again that Transcontinental already had the substantive right to possession and the only question was "the timing of the possession."[48] If the permits to build certain pipeline sections on the Landowners' property were eventually denied, the Landowners would have legal recourse to recover their property.[49]

Finally, on the public interest prong, the District Court noted the project's potential to provide the general public "throughout a vast area of the country" with

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[46] 768 F.3d 300, 315 (3d Cir. 2014).

[47] A53-54. The project is at an advanced stage. FERC has issued a series of Notices to Proceed on the construction of the project, and Transcontinental states in its brief that only 23% of the construction remains to be completed.

[48] A54.

[49] A55.

access to natural gas, and found that "the mere fact that [certain subscribers] will have access to export facilities does not mean that they will in fact export the natural gas out of the country." [50] The District Court noted also that FERC had found the project to be in the public interest, which further tipped this factor in favor of Transcontinental.[51]

The Landowners appealed.

II

As the grant of partial summary judgment did not end the litigation as to all claims and all parties, only the grant of the preliminary injunction is before us.[52] We have jurisdiction over the appeal of the injunction under 28 U.S.C. § 1292(a). The Landowners, however, do not bring a standard appeal of a preliminary injunction, reviewable for abuse of discretion. The Landowners contest only the constitutionality of the lower court's procedure, not the application of the four-factor

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[50] The Hilltop/Hoffman Landowners point out that the project is designed to generate 1,700,002 dekatherms per day, and they argue that of this amount, 850,000 dekatherms, which is just barely under 50%, will go to one shipper, Cabot Oil & Gas, which plans to export this entire amount.

[51] A56-57.

[52] *Andrews v. United States*, 373 U.S. 334, 340 (1963).

preliminary injunction test.[53] Therefore, we review their claims *de novo*.[54]

III

The Landowners ask us to hold that the procedure followed by the District Court—grant of partial summary judgment, awarding possession of the rights-of-way, followed by equitable relief in the form of preliminary injunction—is unconstitutional. The Landowners argue that such a procedure is an unconstitutional grant of "quick take" eminent domain power, the type of eminent domain that allows for immediate possession. Congress granted "quick take" eminent domain power to government actors in the Declaration of Taking Act (DTA),[55] but the NGA neither contains nor incorporates such a provision. The Landowners argue that since Congress did not grant natural gas companies "quick-take" eminent domain power in the NGA, the court cannot, in effect, grant such powers on its own; doing so usurps the legislature's authority. The question before us then is whether Congress, in passing the NGA, intended to remove the judiciary's access to equitable remedies to enforce an established substantive right. Put another way, did Congress intend to forbid immediate access to the necessary rights of way when it granted only

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[53] A56.

[54] *Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 159 (3d Cir. 2016).

[55] 40 U.S.C. § 3114.

standard condemnation powers to natural gas companies?

A

We begin with the Landowners' premise: that the District Court effected a "quick-take." As an initial matter, eminent domain is a legislative power, but Congress can delegate it to other governmental actors[56] or to private actors "execut[ing] works in which the public is interested."[57]

Congress generally does this by delegating the power of eminent domain. There are two primary types of eminent domain at the government's disposal. One is "quick take," permitted by the DTA, 40 U.S.C. § 3114, in which the government files a "declaration of taking" that states the authority for the taking, the public use,

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[56] *E.g.*, 33 U.S.C. § 594 (providing the Secretary of the Army the authority to acquire land, through eminent domain proceedings, "needed for a work of river and harbor improvements duly authorized by Congress").

[57] *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878); *see also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 321 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function."); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 321 (1893). The Landowners acknowledge the existence of judicial takings, citing *Stop the Beach Renourishment, Inc. v. Florida Dep't Enviro. Protection*, 560 U.S. 702, 713-14 (2010)), but maintain that only Congress can grant eminent domain powers. *See Secombe v. Milwaukee & St. P.R. Co.*, 90 U.S. 108, 117-18 (1874) ("[T]he mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature.").

and an estimate of compensation. Upon depositing the estimated compensation, title vests automatically with the United States. The other is standard condemnation, permitted by 40 U.S.C. § 3113, in which title passes and the right to possession vests after a final judgment and determination of just compensation. The procedures for standard condemnations are set forth in Fed. R. Civ. P. 71.1. The NGA is an example of a grant of eminent domain power from Congress to a private actor to condemn land for public use, but it only embodies the second type—standard condemnation power, not "quick take."[58]

In the case before us, Transcontinental followed standard condemnation procedure. The company filed condemnation complaints under Rule 71.1, not a declaration of taking. Rule 71.1 has requirements that go beyond the DTA.[59] Transcontinental followed these procedures by filing condemnation complaints under Rule 71.1; it then established its substantive right to the property by filing for summary judgment. Only after the District Court granted summary judgment in Transcontinental's favor did it grant injunctive relief. Transcontinental also posted bond at three times the appraised value of the rights of way, as required by the

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[58] *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 820-21 (4th Cir. 2004) (citing *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. at 406).

[59] *E.g.*, a condemnation complaint that explains the authority for the taking, the uses for the property, a description sufficient to identify the property, the interests to be acquired, and each owner; notice and personal or publication service; and procedures for the determination and payment of just compensation.

orders of condemnation.[60] If Transcontinental had in fact exercised "quick take," it would have simply filed a declaration of taking with an estimate of compensation; title would have vested automatically. Here, unlike in a "quick take" action, Transcontinental does not yet have title but will receive it once final compensation is determined and paid.[61] Unlike in a "quick take" action, the Landowners had the opportunity to brief the summary judgment motions and participate in the preliminary injunction hearing. The different procedures and opportunities for participation distinguish

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[60] *See* A22, A99, A116, A77. We note that the Landowners have not received any of this money. Rule 71.1(c)(4) allows the court to "order any distribution of a deposit that the facts warrant." At least one court has interpreted this provision to apply only after the final determination of just compensation. *UGI Sunbury LLC v. A Permanent Easement for 71.7575 Acres*, 16-cv-788, 2016 WL 7239945, at *2 n.14 (M.D. Pa. Dec. 15, 2016). In *UGI Sunbury*, the court interpreted an Advisory Committee note on this section, which states that the sentence "enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established," to mean that distribution can *only* occur after just compensation is determined. Such a reading conflicts with subsection (j)(2), which provides that "[i]f the compensation finally awarded to a defendant exceeds the amount distributed to that defendant," the court must recoup the deficiency from the plaintiff, and the reverse is true if the final amount awarded is less than the amount distributed. Such a scheme would be unnecessary if deposits never occurred before final determination of just compensation. In sum, while it does not seem to be common practice to distribute compensation upon posting of the bonds, in cases presenting hardship to landowners, the court's hands may not be tied.

[61] *Danforth v. United States*, 308 U.S. 271, 284-85 (1939).

the grant of the injunction here from an exercise of "quick take" power.

B

The Landowners contend, nevertheless, that even if the procedure below was not *technically* an exercise of "quick take" eminent domain, the use of a preliminary injunction *amounted to* a "quick take." However, the technical distinctions they seek to elide are, in the end, meaningful distinctions in the law. According to the Landowners, there is a difference between the substantive right to access that arises under the NGA, and the substantive right to *immediate* access, which only Congress can authorize. The Like/Mohn Landowners argue that granting injunctive relief for immediate possession is in itself a substantive right of eminent domain that a court cannot confer in the absence of Congressional authorization. There is, however, no case law to support the proposition that an injunctive right of immediate possession is a substantive right, conferrable only by Congress. The fact that "quick take" power exists does not prohibit other kinds of immediate access. The only substantive right at issue is the right to condemn using eminent domain, conferred by Congress in the NGA. The District Court found that Transcontinental had obtained that right.[62] The preliminary injunction merely hastened the enforcement

[62] *See Seymour v. Freer*, 75 U.S. 202, 213-14 (1868) (property rights "distinct from the legal ownership . . . constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked").

of the substantive right—it did not create any new rights.[63]

The Like/Mohn Landowners portray Transcontinental as a customer who pays for 90% of an item and then takes it home, but Transcontinental did not have 90% of a right to the rights of way—it had the whole right. The Hilltop/Hoffman Landowners argue that the fact that title to the property had not yet been transferred is immaterial; it is the grant of the preliminary injunction that is the essence of the "quick take" power. To the contrary, we conclude that the equitable means by which Transcontinental's possession vested through the preliminary injunction differed in significant ways from "quick take" under the DTA. We decline the invitation to conflate the two processes. These are not trivial differences of procedure or paperwork.

The cases relied on by the Landowners are easily distinguishable as they involve gas companies that failed to obtain the crucial substantive right to condemn before seeking a preliminary injunction. In one, *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*,[64] the Ninth Circuit held that a preliminary injunction was not appropriate because the company did not obtain an order of condemnation. While the gas company argued that it was guaranteed success on the merits due to its FERC

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[63] *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945) (issuing preliminary injunction "appropriate to grant intermediate relief of the same character as that which may be granted finally").

[64] 550 F.3d 770 (9th Cir. 2008).

certificate and the fact that it met the § 717f(h) factors, at the time it sought equitable relief it had no right to condemn.[65] The Ninth Circuit explicitly endorsed the procedure of first obtaining an order of condemnation (as Transcontinental did here through partial summary judgment) followed by a request for preliminary injunction.[66]

The Seventh Circuit's *Northern Border* decision is similar.[67] There, the gas company moved for immediate possession before the district court issued a decision on the merits of its eminent domain proceeding. Since the company had only the FERC certificate, the court denied its request: "A preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought. . . . [The company has] an entitlement that will arise at the conclusion of the normal eminent domain process" but not the right of immediate access.[68] The Landowners place much emphasis on the recognition in *Northern Border* that the NGA does not incorporate "quick take" authority under state law or under the DTA and on the statement in *Northern Border* that the NGA "does not create an entitlement to immediate possession of the land."[69] Both those statements are true: the NGA does not incorporate "quick take" authority and does not on its own

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[65] *Id.* at 773, 777.

[66] *Id.* at 777.

[67] *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998).

[68] 44 F.3d at 471.

[69] *Id.* at 471, 472 (citation omitted).

create an entitlement to immediate possession. But *Northern Border* is clearly distinguishable because of the gas company's failure to "obtain an order determining that it had the right to condemn before it sought a preliminary injunction. . . . Without having that right in substantive law determined, the company could not invoke equity."[70]

The Landowners also suggest that due process, the Fifth Amendment, or some combination of the two require payment of just compensation before a condemnor can take possession. Such an argument directly contradicts established law that "due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken."[71] In addition, compensation need not be paid contemporaneously with the taking; instead, the Fifth Amendment requires only that a provision for payment must be available.[72] Thus the Landowners'

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[70] *Sage*, 361 F.3d at 827-28.

[71] *Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *see also Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006) ("[W]hen the alleged deprivation is effectively a physical taking, procedural due process is satisfied so long as private property owners may pursue meaningful postdeprivation procedures to recover just compensation."); *Collier v. City of Springsdale*, 733 F.2d 1311, 1314 (8th Cir. 1984).

[72] *See Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990).

reliance on *Kirby Forest Industries v. United States*,[73] *Cherokee Nation v. Southern Kansas Railway Co.*,[74] and *Atlantic Seaboard Corp. v. Van Sterkenburg*[75] is

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[73] 467 U.S. 1 (1984). *Kirby* explained how Rule 71.1 operates in standard condemnation proceedings, where the "practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price." *Id.* at 4. The central question in *Kirby* was how to determine the date on which a taking should be deemed to occur, a question that affected the amount of interest due on a condemnation proceeding award.

[74] 135 U.S. 641 (1890). The act at issue in *Cherokee* provided for full compensation "before the railway shall be constructed," though the Court also stated that the Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.* at 659. The Court noted that it could sometimes be difficult to judge whether a particular provision was "sufficient to secure the compensation" to which a landowner is entitled under the Constitution, but that it had no trouble finding the statute at issue constitutional. *Id.*

[75] 318 F.2d 455 (4th Cir. 1963). The gas company in this case followed the condemnation procedures of Rule 71.1, and after the determination of just compensation, announced that it wished to proceed immediately with the construction of the pipeline. *Id.* at 459-60. It is not clear why the gas company chose to wait until after the just compensation phase to seek possession. In any event, the court upheld an order permitting the company to pay the award and begin using the easement because "[i]nherently . . . the condemnation court possesses the power to authorize *immediate entry* by the condemnor upon the condemned premises . . . . There is no valid reason why an owner . . . should be allowed, by a fruitless and meritless appeal, to postpone indefinitely the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps irreparable, damage, all without risk of further loss or injury to the owner." *Id.* at 460 (emphasis added). The case is distinguishable because the gas company completed

misplaced. None of these cases lend support to the Landowners' argument that Transcontinental's right to possession of the properties will not vest until Transcontinental has exercised its option to buy the properties at the adjudicated price.

The Landowners go on to contend that because the NGA does not grant "quick take" power, the statute does not permit immediate possession.[76] They make this argument without any explanation for why a district court's authority to issue a preliminary injunction should disappear when a condemnation proceeding has been filed. Nothing in the NGA suggests either explicitly or implicitly that the rules governing preliminary injunctions should be suspended in condemnation proceedings.

Historically, the NGA, when first enacted, did countenance a wide variety of eminent domain procedures because it required district courts to conform "as nearly as may be" with the eminent domain procedure of the state in which the property was situated. The

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condemnation procedures before seeking possession, but even so, *Atlantic Seaboard*'s recognition of an "inherent[]" power to authorize "immediate entry" more squarely helps Transcontinental.

[76] For example, the Hilltop/Hoffman Landowners cite to *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County*, 706 F.2d 1312 (4th Cir. 1983). In that case, the Fourth Circuit upheld a quick take because Congress explicitly made the DTA available to the transit authority. It did not do so in the NGA. The case does not address the use of injunctions to permit immediate possession, and we do not find the case to be persuasive evidence that the NGA prohibits such injunctions.

state procedures protected landowners to a varying degree.[77] Reliance on state eminent domain procedures ended with the adoption of Rule 71.1 (previously numbered 71A), which created a nationally uniform approach to eminent domain proceedings, and which, because it conflicted with § 717f(h), superseded the state-conformity language in the NGA.[78] Courts now generally agree that condemnation proceedings under the NGA should follow Rule 71.1.[79]

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[77] In states with no specific pipe line condemnation statutes, courts made do with laws intended for private utilities in general. *E.g.*, *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485, 487-88 (W.D.S.C. 1950) ("[A]ll that is needed to make the grant effective is a State court procedure which meets the requirements of due process and which can be reasonably utilized . . . . The [state] procedure . . . meets these requirements. It furnishes due process. With its Clerks' juries, composed of the landowners' neighbors, to pass upon the compensation originally, and with the right of appeal therefrom to the Common Pleas Court with a de novo jury trial, the procedure affords every protection to the landowner." (citations omitted)).

[78] *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 344 F.3d 693, 694 (7th Cir. 2003) ("Congress may itself decide that procedural rules in statutes should be treated as fallbacks, to apply only when rules are silent. And it has done just this. . . . Thus Rule 71A(h) prevails: its nationally uniform approach conflicts with the conformity-to-state-practice approach of § 717f(h), and under [the Rules Enabling Act's supersession clause] the statutory rule 'shall be of no further force or effect.' ") (citing *Henderson v. United States*, 517 U.S. 654 (1996)); *see also United States v. 93.970 Acres of Land*, 360 U.S. 328, 333 n.7 (1959) (holding similar language in another statute "clearly repealed by Rule 71A").

[79] *Northern Border Pipeline Co.*, 344 F.3d at 694; *Sage*, 361 F.3d at 822; *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1375 (11th Cir. 1999) ("It is clear to us that Rule 71A was promulgated to override a number of confusing federal

Moreover, we see no reason to read a repeal of Rule 65, governing preliminary injunctions, into the NGA. In fact, subsection (a) of Rule 71.1 incorporates the other Federal Rules of Civil Procedure—including the preliminary injunction rule, Rule 65—in condemnation proceedings to the extent Rule 71.1 does not govern. We do not so easily exterminate equitable remedies.

In so holding, we find the Fourth Circuit opinion in *East Tennessee Natural Gas Co. v. Sage*[80] persuasive. There, the landowners argued "that Congress does not intend for gas companies to gain immediate possession because it has not granted statutory quick-take power to gas companies as it has to government officers who condemn property in the name of the United States."[81] But the court held that this argument "overlooks the preliminary injunction remedy provided in the Federal

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eminent domain practice and procedure provisions, such as that of 15 U.S.C. § 717f(h), and to provide a unified and coherent set of rules and procedures to be used in deciding federal eminent domain actions."). *But see Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 110-11 (3d Cir. 2018) (noting that the NGA ensures the occurrence of "a hearing that itself affords due process" with respect to the taking because the statute provides that eminent domain actions conform with the practice and procedure of such actions in the courts of the state where the property is situated); *contra Township of Bordentown, NJ v. FERC*, Nos. 17-1047, 17-3207, 2018 WL 4212061, at *18 n.21 (3d Cir. Sept. 5, 2018) (NGA "requires district courts to attempt to mirror the state courts' condemnation proceedings").

[80] 361 F.3d 808.

[81] *Id.* at 824.

Rules."[82] Rule 71.1 "provides . . . that the regular rules of procedure apply to any subject not covered by the special rule."[83] Thus, there was no reason why equitable relief "in the form of immediate possession" would be "barred in a condemnation case."[84] As the *Sage* court noted, the landowners, in their attempts to protect themselves from immediate possession, seemed to assume that the preliminary injunction process was somehow less protective of their interests than "quick take" procedures. The court held, however, that when condemning land under the NGA, "a gas company that seeks immediate possession has a much stiffer burden than the government does under the DTA" because the gas company must first establish the substantive right to condemn and then prevail on the four factors considered in preliminary injunctions.[85]

Under either procedure, a "quick take" or condemnation under Rule 71.1, landowners are protected from the possibility of initial underpayment; with standard condemnation plus preliminary injunction, if the company does not pay the difference within a reasonable time, it will be liable for trespass.[86] The Landowners claim that *Sage* did not address the separation of powers arguments they bring here, but a panel of the Fourth Circuit recently followed *Sage* and persuasively

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 825-26.

[86] *Id.* at 825 (citing *Cherokee Nation*, 135 U.S. at 660).

demonstrated that the opinion did in fact consider separation of powers principles.[87] And this Court, too, albeit with less discussion, has ruled that where summary judgment is properly granted on a condemnation complaint, a preliminary injunction is appropriate as well. We effectively granted immediate access on the basis that the gas company had demonstrated success on the merits and strong arguments on the other prongs of the preliminary injunction test.[88]

As the preliminary injunction was permitted by the Rules, permitted by the NGA, and did not amount to a grant of "quick take" eminent domain power in either name or substance, the court did not usurp legislative power or otherwise overstep the boundaries of its judicial power. We therefore see no violation of the

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[87] *Columbia Gas Transmission, LLC v. 76 Acres, More or Less*, 701 F. App'x 221, 231 n.7 (4th Cir. 2017) (rejecting landowners' argument that "*Sage* is distinguishable because it did not mention the words 'separation of powers' " in part because *Sage* explicitly rejected the assertion "that only Congress can grant the right of immediate possession").

[88] *Columbia Gas v. 1.01 Acres*, 768 F.3d at 315-16. We note that district courts around the country have implemented the procedure, relying on the Circuit decisions like *Sage*. *See Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 0.03 Acres*, 17-cv-565, 2017 WL 3485752, at *4 (M.D. Pa. Aug. 15, 2017) ("It is commonplace for district courts to order immediate possession after FERC has taken a lengthy period of time determining whether or not to issue a certificate of public convenience and necessity.") (collecting cases). *See also Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362 (8th Cir. 2014) (no abuse of discretion in granting pipeline's immediate use and possession following FERC certificate and grant of summary judgment and preliminary injunction).

principle of separation of powers in the District Court's procedure.

The Hilltop/Hoffman Landowners argue separately that the District Court's procedure deprived them of any meaningful opportunity to challenge FERC's public use determination. This argument also fails.

First, and most importantly, the Hilltop/Hoffman Landowners do not dispute that they had the opportunity to raise their concerns with FERC and did in fact do so;[89] sought stays of the construction, which were denied;[90] and sought rehearing,[91] which was also denied on December 6, 2017.[92] Before the order denying rehearing, the Landowners appealed to the D.C.

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[89] Hilltop/Hoffman Landowners submitted 9 comments to FERC. Like/Mohn Landowners submitted 47 comments.

[90] Order Denying Stay, *Transcontinental Gas Pipe Line Co., LLC*, 160 FERC ¶ 61,042 (Aug. 31, 2017), Accession No. 20170831-3088.

[91] Request for Rehearing and Motion for Stay of Certain Landowners (Mar. 6, 2017), Accession No. 20170306-5123; Petition for Rehearing of Lynda Like of Order Issuing Certificate for the Atlantic Sunrise Project and Request for Stay of Certificate (Mar. 6, 2017), Accession No. 20170306-5204; Petition for Rehearing of Follin Smith and Blair and Megan Mohn of Order Issuing Certificate for the Atlantic Sunrise Project and Request for Stay of Certificate (Mar. 6, 2017), Accession No. 20170306-5202.

[92] Order on Rehearing, *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017), Accession No. 20171206-3073. The D.C. Circuit denied the landowners' request for a stay pending the appeal of the FERC Order. *Allegheny Def. Project v. Fed. Energy Regulatory Comm'n*, Nos. 17-1098, 17-1128, 17-1263, 18-1030, 2018 WL 1388557 (D.C. Cir. Feb. 16, 2018) (*per curiam*).

Circuit Court, where the case is pending.[93] The NGA explicitly provides that neither a request for rehearing before FERC nor judicial review can stay the effectiveness of a FERC certificate.[94]

In sum, the Hilltop/Hoffman Landowners are attacking the underlying FERC order, but review of the underlying FERC order is only properly brought to FERC on rehearing and then to an appropriate circuit court, as the Hilltop/Hoffman Landowners are pursuing. We lack jurisdiction to hear collateral attacks on the FERC certificate, which contained a finding that the project was for public use.[95] Neither the District Court nor this Court in this case may entertain arguments such as those brought by the Hilltop/Hoffman Landowners that FERC unduly credited self-serving statements by Transcontinental and ignored the potential that the project might have been intended to provide companies with greater access to the higher priced overseas market.[96]

V

The Landowners do not appeal the preliminary injunction based on an abuse of discretion in the District Court's analysis and so have waived that argument on appeal. Even so construed, their petition lacks merit.

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[93] Nos. 17-1128, 18-1030.

[94] 15 U.S.C. § 717r(c).

[95] 15 U.S.C. § 717r(b) (appeal of the certificate allowed in the circuit where the gas company is located or in the D.C. Circuit).

[96] Hilltop/Hoffman Brief at 37, 38.

Transcontinental clearly showed success on the merits and would have been harmed if the injunction were denied.

For the above reasons, we hold that the NGA's grant of standard condemnation powers to natural gas companies does not preclude federal courts from granting equitable relief in the form of a preliminary injunction when gas companies have obtained the substantive right to condemn and otherwise qualify for equitable relief. Because the Landowners fail to recognize the District Court's equitable power to enter preliminary injunctions once substantive rights are determined, their appeals lack merit. We therefore affirm the orders of the District Court, granting the motions for preliminary injunctions.

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

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1201606900000, et al, Defendants.	CIVIL ACTION NO. 17-715
TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 1.33 ACRES, TEMPORARY EASEMENTS FOR 2.28 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1202476100000, 4160 MAIN STREET, CONESTOGA, PA 17516, et al, Defendants.	CIVIL ACTION NO. 17-720

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 0.94 ACRES AND TEMPORARY EASEMENTS FOR 1.61 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1203589400000, SICKMAN MILL ROAD, et al, Defendants.	CIVIL ACTION NO. 17-722
TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENTS FOR 2.76 ACRES IN MANOR TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 4100300500000, 3049 SAFE HARBOR ROAD, MANOR TOWNSHIP, LANCASTER, PA, et al, Defendants.	CIVIL ACTION NO. 17-723

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 1.02 ACRES AND TEMPORARY EASEMENTS FOR 1.65 ACRES IN WEST HEMPFIELD TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 3000462100000, et al, Defendants.	CIVIL ACTION NO. 17-1725

MEMORANDUM OPINION

Schmel J. [J.L.S] **August 23, 2017**

I. INTRODUCTION

Plaintiff, Transcontinental Gas Pipeline Company, LLC ("Transco"), is involved in a project to construct and operate a natural gas pipeline running through five states, including a portion of Lancaster County, Pennsylvania. Before the Court is the Motion for Partial Summary Judgment of Plaintiff in the four of the five above-captioned cases.[1] Defendant/landowners

[1] On July 7, 2017, this Court granted Plaintiff's Motion for Partial Summary Judgment in case number 17-1725 as unopposed, but declined to grant Plaintiff's Motion for Preliminary Injunction as to the landowners in that matter, the Adorers of the Blood of Christ ("Adorers"). Accordingly, this opinion will address

Hilltop Hollow Limited Partnership, Hilltop Hollow Partnership, LLC, General Partner to Hilltop Hollow Limited Partnership ("Hilltop"), Stephen Hoffman ("Hoffman"), Blair and Megan Mohn ("Mohn") and Lynda Like ("Like") all filed oppositions to Plaintiff's Motions for Partial Summary Judgment. Plaintiff filed replies, and argument was held on said motions.

Also before the Court is Transco's Motions for Preliminary Injunction as to the four landowners above, as well as Adorers of the Blood of Christ, United States Province ("Adorers"). The landowners in question have opposed Plaintiff's Motions for Preliminary Injunction, and an evidentiary hearing was held on said motions. For the following reasons, I find that Plaintiff has the substantive right to condemn the properties in question and Plaintiff's Motions for Partial Summary Judgment are granted. Further, I find that Plaintiff has the right to immediate possession of the properties in question and Plaintiff's Motions for Preliminary Injunction are granted.

II. MOTIONS FOR PARTIAL SUMMARY JUDGMENT

A. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.

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the Motions for Partial Summary Judgment in case numbers 17-715, 17-720, 17-722, and 17-723. It will also dispose of the Motion for Preliminary Injunction in those four cases, as well as 17-1725.

R. Civ. Proc. 56(c). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact," *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." *Pignataro v. Port Auth. of N.Y. and N.J.*, 593 F.3d 265, 268 (3d Cir. 2010) (*citing Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

B. FACTUAL BACKGROUND

On March 31, 2015, Transco filed an application with the Federal Energy Regulatory Commission ("FERC") under section 7(c) of the Natural Gas Act, 15

U.S.C. § 717f(c), and Part 157 of the FERC's regulations for a certificate of public convenience and necessity for its project to construct and operate a natural gas pipeline in Pennsylvania, Maryland, Virginia, North Carolina and South Carolina. On October 22, 2015, FERC mailed a letter to affected landowners, describing the project and inviting them to participate in the environmental review process. (FERC Order, ¶ 68.) On May 5, 2016, FERC issued a draft Environmental Impact Statement, setting a public comment period from May 12, 2016 to June 27, 2016. (FERC Order, ¶ 72.) FERC staff held four public comment meetings between June 13 and 16, 2016, at which over 200 speakers commented. (*Id*.) FERC also received over 560 written comments in response to the draft EIS. (*Id*.)

On October 13, 2016, FERC sent a letter to landowners regarding two alternative pipeline routes, and allowed a special 30 day comment period, during which time it received 25 letters regarding the proposed alternatives. (FERC Order, ¶ 73.) On November 3, 2016, FERC issued for comment a draft General Conformity Determination. (FERC Order, ¶ 74.) On December 30, 2016, FERC issued a final Environmental Impact Statement. (FERC Order, ¶ 75.) Thereafter, on February 3, 2017, FERC issued an order granting Transco a certificate of public convenience and necessity to construct, install, modify, operate, and maintain the Project known as the Atlantic Sunrise pipeline. (David Sztroin Declaration, ¶ 13.) In order to construct, install, operate and maintain the FERC-approved

project, Transco needs to obtain rights of way as described and depicted as Exhibit A attached to the Complaint in each of the above matters and as Exhibit B attached to the Sztroin declaration. (Sztroin Dec., ¶ 2, 17.) These rights of way conform to the pipeline route reviewed and approved by the FERC in the order of February 3, 2017. (Sztroin Dec., ¶ 18.) The value of the Rights of Way sought in each of the above matters is claimed by the respective Landowners to be in excess of $3,000, as each Landowner has rejected an offer by Transco to purchase the rights of way for more than $3,000. (Declaration of Aaron Blair, ¶¶ 8, 9.)

The FERC Certificate lists timely and untimely intervenors. To be considered a timely intervenor, a landowner was required to file a motion to intervene within two weeks of April 15, 2015, when notice of Transco's application was published in the *Federal Register*. Landowner Stephen Hoffman timely intervened and Gary and Michelle Erb (owners of Hilltop Hollow) also intervened, albeit untimely, in the FERC proceeding as party intervenors. (FERC Order, Appendix A and B.) Although they did not intervene in the FERC proceedings, Landowners Blair and Megan Mohn and Lynda Like submitted comments to FERC regarding the project during the public comment period.

C. DISCUSSION

The Natural Gas Act permits the holder of a certificate of public convenience and necessity issued by FERC to use eminent domain to acquire rights of way

necessary to construct, operate and maintain a project as approved by the FERC Order. 15 U.S.C. § 717f(h). Courts have held that the NGA authorizes a party to exercise the federal power of eminent domain if it meets the three-prong test set forth in the statute:

1) The party must hold a FERC Certificate of Public Convenience and Necessity;

2) The party has not been able to acquire the property rights required to construct, operate and maintain a FERC-approved pipeline by agreement with the landowners; and

3) The value of the property sought to be condemned is more than $3,000.

Columbia Gas Transmission, LLC v. 1.01 Acres, 768 F.3d 300, 304 (3d Cir. 2014); *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres*, No. 08-168, 2008 WL 4346405, at *12-*13 (W.D. Pa. Sept. 19, 2008); *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 364 (8th Cir. 2014); *Millennium Pipeline Co., L.L.C. v. Certain Permanent and Temporary Easements*, 777 F.Supp.2d 475, 479 (W.D. N.Y. 2011); *aff'd* 552 F.App'x 37 (2d Cir. 2014).

In the above matters, there is no dispute that Transco holds a FERC certificate, that it has been unable to acquire the property rights in question to construct, operate and maintain the FERC-approved pipeline by agreement with the landowners, and that the value of the properties in question is greater than $3,000. However, the landowners have opposed the entry of partial summary judgment in this matter and

present several arguments in opposition to Transco's exercise of eminent domain. Landowners Hilltop and Hoffman argue that they have been denied their due process rights under the Fifth Amendment to the United States Constitution and that Plaintiff therefore does not have the authority to condemn the Rights of Way. Landowners Like and Mohn argue that the FERC order is a "conditioned" order without "force or effect" and that the Rights of Way being condemned exceed the scope of the FERC order. As discussed below, I find that all of these arguments are unpersuasive. Landowners cannot establish any genuine issue of material fact as to the three conditions set forth in the Natural Gas Act required prior to the exercise of eminent domain by Transco; therefore, Plaintiff is entitled to the entry of partial summary judgment in this matter.

1. HILLTOP HOLLOW AND HOFFMAN

Hilltop Hollow and Hoffman ("Hilltop") do not dispute the fact that Transco has a FERC certificate, has been unable to acquire the rights of way that it needs to construct its pipeline, and that the value of the property in question is over $3,000. Rather, Hilltop argues that its due process rights under the Fifth Amendment are being violated.

First, Hilltop argues that this Court has jurisdiction in this matter beyond the issue of fair compensation. Hilltop admits that "FERC's procedures and the Natural Gas Act provide that substantive challenges to the Certificate Order be directed in the first instance

to FERC," but then argues that the "importance of Hilltop's right to due process and the de facto finality of the proposed taking," should overrule the FERC provisions that prohibit substantive challenges in this Court.[2]

This argument is incorrect. Hilltop's claims of due process violations are in fact attacks on the FERC order itself, disguised as constitutional claims. It is widely accepted that the validity of a FERC Order can only be challenged in front of FERC, and then in the United States Court of Appeals for the District of Columbia Circuit. It is important that this precedent be followed so large pipeline projects cannot be challenged in many forums, so as to establish a sole final arbiter for the decisions. In *Tennessee Gas Pipeline Co. v. 104 Acres of Land More of Less*, 749 F.Supp. 427 (D.R.I. 1990), the court set forth the limitations of a federal district court in reviewing FERC Certificates of Public Convenience and Necessity pursuant to the Natural Gas Act. It stated:

> United States District Courts have a limited scope of review under Section 7(h) of the Natural Gas Act. Disputes over the reasons and procedure for issuing certificates of public convenience and necessity must be brought to the Federal Energy Regulatory Commission

[2] I note that Hilltop also argues that since FERC presently has only one member, it lacks a quorum to address its request for rehearing. However, on August 3, 2017, the United States Senate confirmed two additional members of FERC. Therefore, FERC now has a quorum and this argument of Hilltop is moot and will be disregarded.

> for hearing. 15 U.S.C. § 717f(b). The District Court's role is to evaluate the scope of the certificate and to order condemnation of property as authorized in the certificate. *See Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255, 262 (10th Cir.1989) ("Judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues."), *cert denied*, 497 U.S. 1003, 110 S.Ct. 3236, 111 L.Ed.2d 747 (1990); *Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F.Supp. 366 (E.D.La.1990) ("review of FERC orders are to be made only to United States Circuit Courts of Appeal"). District Courts, therefore, are limited to jurisdiction to order condemnation of property in accord with a facially valid certificate. Questions of the propriety or validity of the certificate must first be brought to the Commission upon an application for rehearing and the Commissioner's action thereafter may be reviewed by a United States Court of Appeals.

Id. at 430. *See also Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, 2008 WL 4346405, at *4 (W.D. Pa. Sept. 19, 2008) ("Under the statutory framework, there is no appeal of a FERC decision save to the appropriate Court of Appeals. Disputes as to the propriety of FERC's proceedings, findings, orders, or reasoning, must be brought to FERC by way of request for rehearing. Appeals may thereafter be brought before a U.S. Court of Appeals only.")

Clearly, abundant case law states that the jurisdiction of this court in this type of proceeding is to order condemnation only. Hilltop has failed to cite any case that supports its proposition that this Court has jurisdiction in this matter to independently address the validity of the FERC order. Therefore, I find that this Court lacks the jurisdiction to address any sort of attack on the FERC order itself, constitutional or otherwise.

Next, Hilltop argues that it has not been afforded its due process right to challenge whether the project serves a public purpose. It is undisputed in this matter that Hilltop participated in the pre-deprivation hearing, filed a request for rehearing a FERC, and filed a challenge to the FERC order in the United States Court of Appeals for the District of Columbia Circuit. As discussed above, this is the proper forum in which to challenge the validity of a FERC order. Although Hilltop's request for rehearing is pending in front of FERC, the NGA provides that the filing of a request for rehearing shall not, unless specifically ordered by FERC, operate as a stay of the certificate order. 15 U.S.C. § 717r(c); *see Tenn. Gas Pipeline Co*., 749 F.Supp. at 431 ("Applications for rehearing by three public utility companies are presently before the commission. However, the Natural Gas Act directs that an application for a rehearing shall not operate as a stay of the Commission's order unless specifically ordered by the Commission or by a reviewing Court of Appeals.")

Hilltop received adequate due process at the FERC level, and on appeal. Its attempt to claim due

process violations to this Court is a collateral attack to the FERC order, which is not permitted. Any challenge to the substance and/or validity of the order belongs in front of FERC. "The district court's function under the statute is not appellate, but rather, to provide for enforcement." *Sabal Trail Transmission, LLC v. +/- 0.14 Acres of Land*, 2016 WL 3189010 at *2 (M.D. Fl. June 8, 2016).

Further, the specific collateral attack that Hilltop presents here, i.e., that the FERC order does not serve a public purpose, has been rejected by other courts. *See Constitution Pipeline Co., LLC v. A Permanent Easement for 1.52 Acres*, 2015 WL 12556149, at *3 (N.D.N.Y. Feb. 26, 2015) ("[D]efendants argue that the FERC Order does not support a public purpose . . . plaintiff correctly points put that once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court."). In addition, to the extent Hilltop is arguing that the process by which FERC granted the certificate is deficient, that type of attack has also been rejected. *See Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F.Supp. at 430 (finding that disputes over the procedures for issuing certificates of public convenience and necessity must be brought to the FERC for rehearing, and thereafter to a federal court of appeals).

In addition, I find that even if this Court did have jurisdiction to consider Hilltop's constitutional arguments, which it does not, no due process violations

have occurred. Hilltop presents two arguments regarding their constitutional due process rights.[3] First, they argue that due process requires an in-person evidentiary hearing prior to the issuance of the FERC order, or prior to condemnation. Second, they argue that FERC's issuance of a Tolling Order which extends FERC's time to decide Hilltop's request for rehearing and a stay violates their due process rights, will address both arguments below.

First, reject Defendant's argument that due process requires an in-person evidentiary hearing before a FERC order can be issued. In the instant matter, FERC issued the Order after a "paper hearing," meaning Hilltop and other affected landowners submitted written objections during the certificate review and comment period, Hilltop claims that it is entitled to an in-person hearing on this matter, and argues that the lack of such a hearing violates its right to be heard. However, the NGA does not require an in-person evidentiary hearing. "FERC's choice whether to hold an evidentiary hearing is generally discretionary." *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C.Cir.2010). "In general, FERC must hold an evidentiary hearing only when a genuine issue of material fact exists, and even then, FERC need not conduct such a hearing if [the disputed issues] may be adequately resolved on

[3] Hilltop also argues that because FERC lacks a quorum, they have no effective means to challenge the FERC Order, and its due process rights are therefore being violated, As discussed above, FERC has a quorum as of August 3, 2017, Therefore, this argument is moot.

the written record." *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C.Cir.1994) (internal citations and quotation marks omitted) (alteration in original). *See also Minisink Residents for Envtl. Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 114 (D.C. Cir. 2014). Clearly, FERC was not required to hold an in-person evidentiary hearing in this matter, and the fact that they granted the Order after a paper hearing does not result in a due process violation.

In addition, federal courts have found that, for purposes of a taking, due process only requires that reasonable notice and an opportunity to be heard is provided in the compensation stage of the proceedings. *See Collier v. City of Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984); *Presley v. City of Charlottesville*, 464 F.3d 480, 489 (4th Cir. 2006).[4]

Next, Hilltop argues that FERC's tolling order deprives them of their due process rights because it "indefinitely" extends FERC's "time limit to rule on [Landowners'] Motion for Rehearing and stay." In response, Transco argues that the issuance of the Tolling Order does not deprive Hilltop of a protectable due process, and therefore it is not entitled to due process protections. I find Transco is correct. Although a cause of action constitutes a protectable property interest for

[4] I find that Hilltop's reliance on *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) and *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) in support of their argument that they are entitled to a pre-deprivation judicial hearing is misplaced, as neither case addresses a taking under the Natural Gas Act and both are clearly distinguishable from the instant set of facts.

the purposes of evaluation of due process violations, mere delays in the adjudication of a claim do not amount to a deprivation of property. *See Council of & for the Bline of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) ("In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.") (emphasis in original); *see also Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983) (finding that plaintiff's property right, while delayed, was not extinguished, and that no deprivation of property interest occurred). The reconstituted FERC, now with a quorum to act, has the ability to address Hilltop and the other landowners' claims for relief. Accordingly, Hilltop's due process claims must fail.

2. LIKE AND MOHN

Landowners Lynda Like and Brian and Megan Mohn ("Like and Mohn") do not dispute that FERC issued an order granting a certificate of public convenience and necessity, that the value of the rights of way sought exceed $3,000, that Transco has been unable to obtain the Rights of Way in question from the landowners, and that the Rights of Way being condemned conform to the pipeline route that was contained in the FERC order. Accordingly, they are clearly unable to present any genuine issues of material fact regarding Transco's substantive right to condemn. Like and Mohn instead argue that the FERC order is a "conditional order" that is "without force and effect" and that

the rights of way being condemned exceed the scope of the FERC order. I find both of these arguments to be unpersuasive.

Like and Mohn argue that FERC can condition a FERC order on "reasonable terms and conditions" as the public convenience and necessity may require pursuant to the NGA. They further argue that because the FERC order for the project in this matter incorporated many conditions, some of which have not yet been met, Transco is not permitted to exercise eminent domain. However, the NGA does not contain a requirement that the holder of a FERC certificate satisfy all conditions of said certificate prior to the exercise of eminent domain. Rather, the FERC order specifically stated that "[o]nce a natural gas company obtains a certificate of public convenience and necessity, it may exercise the right of eminent domain in a U.S. District Court or a state court." FERC Order, ¶ 67. Courts have repeatedly rejected similar arguments that a pipeline company cannot exercise eminent domain because a FERC Order is conditioned. *See, e.g.*, *Constitution Pipeline*, 2015 WL 12556145, at *2 (rejecting argument that pipeline company could not exercise eminent domain until it had obtained certain permits required prior to construction as conditions of the certificate order because the FERC had not expressly made such permits a condition to exercising eminent domain); *Columbia Gas Transmission, LLC v. 370.393 Acres*, 2014 WL 5092880, at *4 (D. Md. Oct. 9, 2014) (rejecting argument that pipeline company had failed to comply with certain conditions listed in the FERC certificate arid finding

that claims that a company is not in compliance with the FERC certificate must be brought to FERC, not the court); *Portland Natural Gas Transmission Sys. v. 4.83 Acres*, 26 F.Supp.2d 332, 336 (D.N.H. 1998) ("Compliance with FERC conditions cannot be used as a defense to the right of eminent domain and cannot be cited to divest the court of the authority to grant immediate entry and possession to the holder of a FERC certificate); *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F.Supp. 427, 433 (D.R.I. 1990) (holding that "requirements in the FERC order arise after ownership of the rights of way are obtained and do not operate as a shield against the exercise of eminent domain power").

Like and Mohn cite *Delaware Dept. of Natural Resources and Environmental Control v. FERC*, 558 F.3d 575, 579 (D.D.C. 2009), and *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61015, at 61055 (2010), for the proposition that Transco cannot condemn the property in question based on the FERC order because it is "an incipent authorization without force or effect." However, neither of these cases supports the landowners' argument that a pipeline company cannot exercise eminent domain if the certificate order contains conditions. Rather, both *Delaware Dept. of Natural Resources* and *Ruby Pipeline* address the fact that conditioned certificate orders do not authorize *construction* to start.

The FERC certificate in question does, in fact, contain prerequisite conditions, some of which remain unmet at this time. However, the landowners do not cite to, nor have I located, any case that holds that Transco's exercise of eminent domain is prohibited

until the conditions in the FERC certificate are met, Lacking any such case law, I will not order such an extreme outcome. It is true that there are conditions in the FERC certificate that Transco will need to meet prior to commencing actual construction of the pipeline, but the fulfillment of these conditions is not a prerequisite to Transco's exercise of eminent domain. Furthermore, those conditions must be met before any construction begins.

Like and Mohn also argue that the rights of way being condemned exceed the scope of the FERC order. In particular, Like and Mohn take issue with the fact that the Complaint states Transco seeks to acquire rights of way that include the right to "alter, repair, change the size of, replace and remove" the pipeline. Complaint, ¶1(f). At oral argument in this matter, counsel for the landowners indicated a particular concern with the language that allows Transco to "change the size of" the pipeline, arguing that this would allow Transco to expand the pipeline beyond the right of way authorized by the FERC order. This argument is clearly incorrect, because the description of the rights of way in the Complaints in these matters expressly limits the rights of way being condemned to those rights "approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15 138 000, 158 FERC ¶ 61,125 (2017)." Based upon this description, the rights of way that are being condemned in this matter are not subject to being increased in size. However, out of an abudance of caution, I will limit the rights being sought by Transco

in this regard to the right to alter, repair, **change but not increase the size of**, replace and remove the pipeline.

III. MOTIONS FOR PRELIMINARY INJUNCTION

A. LEGAL STANDARD

Once Transco has established that it has a substantive right to condemn the property at issue, a court "may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction" pursuant to Rule 65 of the Federal Rules of Civil Procedure. *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004). A party seeking a preliminary injunction must prove four factors: 1) a reasonable probability of success on the merits; 2) irreparable harm to the movant in the absence of relief; 3) granting the preliminary injunction will not result in greater harm to the nonmoving party; and 4) the public interest favors granting the injunction. *American Exp. Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). In *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), the Third Circuit recently clarified the preliminary injunction standard:

> A movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and

> that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.

Reilly, 858 F.3d at 179.

B. DISCUSSION

After analysis of the four factors set forth above with regard to the five landowners currently before me, I find that the factors favor the entry of a preliminary injunction in favor of Transco.

1. Likelihood of Success on the Merits

First, Transco has already succeeded on the merits. A preliminary injunction in a condemnation case is unlike preliminary injunctions in other types of civil matters because the plaintiff requests a decision on the merits of the matter at the same time. As explained by the Third Circuit:

> This is not a "normal" preliminary injunction, where the merits will await another day. In those situations, the probability of success is not a certainty such that weighing the other factors is paramount. Here, there is no remaining merits issue; we have ruled that Columbia has the right to the easements by eminent domain. The only issue is the amount

> of just compensation – which will definitely be determined on remand, but the result of which can have no affect [sic] on Columbia's rights to the easement.

Columbia Gas Transmission, LLC v. 1.01 Acres, 768 F.3d at 315. Further, all three Pennsylvania district courts within the Third Circuit have held that the grant of a preliminary injunction is appropriate when a FERC certificate holder has established the substantive right to condemn a property, subject to a future determination of just compensation. *Constitution Pipeline Company, LLC v. A Permanent Easement for 1.92 Acres*, 2015 WL 1219524 at *4 (M.D. Pa. Mar. 17, 2015); *Steckman Ridge*, 2008 WL 4346405, at *18; *Columbia Gas Transmission Corp. v. An Easement*, 2006 WL 401850, at *3. Therefore, given my determination above that Transco has the substantive right to condemn the properties at issue, the likelihood of success on the merits has been established. Accordingly, this factor favors Transco.

2. Irreparable Harm

Second, Transco will suffer irreparable harm if a preliminary injunction is not granted. In their opposition to the preliminary injunction, the defendants make several arguments. They argue that the project in question is already delayed and will not be completed in time for the 2017-18 winter heating season, that the project still has numerous conditions that need to be satisfied before construction can begin, so the timeliness of the project does not depend on

immediate possession of the properties in question and that the monetary losses Transco will incur if the project is delayed do not constitute irreparable harm.

These arguments are insufficient to defeat the claims of irreparable harm put forth by Transco. First, Transco argues that a construction delay itself is irreparable harm and it cannot even begin construction in Pennsylvania until it has survey access and has satisfied relevant pre-construction conditions. Numerous courts have agreed that construction delays in building these types of pipelines constitute irreparable harm. *See, e.g., Constitution Pipeline Co. v. A Permanent Easement for 0.42 Acres*, 2015 WL 12556145, at *5 (holding that pipeline company would be irreparably harmed without immediate possession because it would be unable to begin construction in time to allow the project to be completed by the in service date); *Steckman Ridge*, 2008 WL 436405, at *17 (holding that pipeline company would be irreparably harmed without immediate possession because it would suffer undue delay and be in non-compliance with the in service date required by the FERC Certificate). Admittedly, Transco has already missed the deadline to have the pipeline in service by the 2017-18 winter heating season as contained in the Order. (Sztroin testimony, July 17, 2017.) However, Transco argues that the date the pipeline will commence operation will continue to be pushed back if possession is not granted by August 18, 2017. Mr. Sztroin testified that every delay has a "domino effect" that delays the entire project further.

Further, Mr. Sztroin testified that Transco must have possession by August 18, 2017 in order to avoid specific construction delays. According to Mr. Sztroin, possession is necessary so Transco can complete surveys that are required to satisfy certain pre-construction conditions. In addition, he testified that construction is limited in some places by environmental conditions. In order to complete construction and ensure compliance with shipper contracts, he testified that Transco must have possession by August 18, 2017, to complete the surveys necessary on endangered and threatened wildlife that can only be done during certain times each year.

In addition, Transco argues that it will suffer irreparable harm in the manner of monetary loss if a preliminary injunction is not granted. Transco alleges that non-possession of the properties at issue here will cause it to lose $500,000 per month, and will delay revenue of $33,000,000 per month, This argument was supported by the testimony of Mr. Sztroin. Further, Sztroin testified about the costs of "move-arounds" in linear pipeline construction if crews cannot access a particular property.

I find that Transco has sufficiently proven that it will suffer irreparable harm if it does not obtain possession of the properties at issue. As recently stated by the Honorable Matthew W. Brann of the U.S. District Court for the Middle District of Pennsylvania, in addressing different properties located along the same pipeline project:

> In sum, the Atlantic Sunrise Project is large in both scope and geography, spanning five states. "The magnitude of the Project requires a complex and coordinated construction process, with work activities being performed in sequential phases." *Sabal Trail Transmission, LLC v. +/- 0.41 Acres of Land in Hamilton Cty. Florida*, 2016 WL 3188985, at * 3 (M.D. Fla. June 8, 2016). Each piece of the construction puzzle depends on the prior piece timely placed. Untimeliness in one small part of this enormous project would result in a domino effect on the timeliness of all other areas of the project.

Transcontinental Gas Pipeline Company, LLC v. Permanent Easement for 3.70 Acres, No. 17-CV-628, Memorandum Opinion, ECF no. 27 (M.D. Pa., Aug. 9, 2017). The irreparable harm factor weighs strongly in favor of Transco.

3. Harm to the Nonmoving Party

Granting Transco's preliminary injunction will not result in greater harm to the landowner, despite Defendants' arguments to the contrary. As determined above, Transco has the substantive right to possession. Therefore, Transco will eventually obtain possession of the properties at issue; the only question is the timing of possession. It is natural for some landowners to want to delay possession as long as possible, but there is no legal basis for further delay. As stated by the Court in *Constitution Pipeline Co.*, 2015 WL 12556145, at *5, "[a]ny injury to defendant will arise from the

[Natural Gas Act] and the FERC Order, and will occur regardless of whether the Court grants a preliminary injunction to [the pipeline company]. In the exercise of its discretion, the Court finds that the harm alleged by defendants weighs less heavily than the harms alleged by plaintiff." *Constitution Pipeline Co.*, 2015 WL 12556145, at *5. "Nothing indicates that the defendants will suffer any greater harm by allowing [the pipeline company] to possess the property immediately instead of after trial and the determination of just compensation." *Columbia Gas Transmission LLC v. 0.85 Acres*, 2014 WL 4471541, at *7.

Defendants Like and Mohn argue that they face a risk of harm because the project lacks certain permits and if their property is taken and the permits are eventually denied, they will have lost their property with no means to recover it. I find this contention to be incorrect, as the landowners would have legal recourse if this unlikely event would occur. *See USG Pipeline Co. v. 1.74 Acres*, 1 F.Supp.2d 816, 825-26 (E.D. Tenn. 1998) (granting immediate possession because even if the FERC Order is overturned by FERC or some other court with jurisdiction over it, the properties could be restored substantially to their prior condition and landowners could seek damages in trespass.) Like and Mohn also argue that they will be irreparably harmed because Plaintiff may mobilize its equipment on their properties and remove trees prior to construction approval. This argument is unpersuasive, because this conduct will either occur now or after just compensation has been determined. I find this alleged harm to

be outweighed by Plaintiff's risk of harm in not obtaining immediate possession.

Defendant Adorers argue they will suffer harm that implicates their fundamental rights to free exercise of religion and ownership of property if Transco is granted immediate possession. Adorers claim that they "exercise their religious beliefs by, among other things, coxing for and protecting the land they own," and that their efforts to "preserve the sacredness of God's Earth" are integral to the practice of their faith. However, the Adorers have failed to establish how Transco's possession of the right of way on their land will in any way affect their ability to practice their faith and spread their message. They have not presented one piece of evidence that demonstrates how their religious beliefs will be abridged in any way. Clearly, the harm alleged by Transco outweighs this harm alleged by the Adorers. Additionally, Transco will post sufficient bonds upon the grant of the preliminary injunction; therefore, any amount of money damages any landowner may suffer will be secure and a remedy will be available. Accordingly, this factor weighs in favor of Transco.

4. Public Interest

Lastly, granting the preliminary injunction is in the public interest, as the project will provide the general public throughout a vast area of the country with access to the Marcellus Shale natural gas supplies for heating their homes and other purposes. Defendants

Hilltop and Hoffman argue that much of the natural gas that will be carried by the pipeline is intended for exportation, and therefore, not in the public interest. However, this argument is speculative. Hilltop argues that 87% of the Project's capacity is currently subscribed to by four gas production companies that will have direct access to export facilities, but the mere fact that these companies will have access to export facilities does not mean that they will in fact export the natural gas out of the country. This argument is too speculative for me to find that this factor weighs in favor of the landowners.

"Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices." *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d at 830, *citing Clark v. Gulf Oil Corp*., 570 F.2d 1138, 1145-46 (3d Cir. 1977). Congress and FERC have found that interstate natural gas projects, and this project in particular, are in the public interest. Accordingly, this factor also weighs in favor of Transco.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Motions for Partial Summary Judgment and for Preliminary Injunction are granted. Plaintiff shall post a bond with the Clerk of Court for each property in accordance with the Court's Order. Appropriate orders will follow.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENTS FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1201606900000, 415 HILLTOP DRIVE, CONESTOGA, CONESTOGA TOWNSHIP, LANCASTER COUNTY, PA HILLTOP HOLLOW LIMITED PARTNERSHIP 203 SIDEHILL TERRACE WILLOW STREET, PA 17584 HILLTOP HOLLOW PARTNERSHIP, LLC GENERAL PARTNER OF HILLTOP HOLLOW LIMITED PARTNERSHIP 203 SIDEHILL TERRACE WILLOW STREET, PA 17584	CIVIL ACTION – LAW Docket No. 5:17-CV-00715

LANCASTER FARMLAND TRUST 125 LANCASTER AVENUE STRASBURG, PA 17579	:
AND ALL UNKNOWN OWNERS,	:
Defendants.	:

ORDER

AND NOW, this 23rd day of August, 2017, upon consideration of Plaintiff's Omnibus Motion for Preliminary Injunction for Possession of Rights of Way by August 18, 2017 Pursuant to the Natural Gas Act and Federal Rules of Civil Procedure 71.1 and 65, and the accompanying documents, Defendants' opposition thereto, and Plaintiff's Reply, and after a hearing and oral argument being held, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** as follows:

(1) Transcontinental Gas Pipe Line Company, LLC ("Transco") has the substantive right to condemn the following easements and rights of way (collectively referred to as the "Rights of Way"):

a. Permanent rights of way and easements of 2.14 acres, as described as "Area of Proposed CPLS R/W #1," "Area of Proposed CPLS R/W #2," and "Area of Proposed CPLS R/W #3" in Exhibit A attached hereto, for the purpose of constructing, operating, maintaining, altering, repairing, changing but not increasing the size of, replacing and removing a pipeline

and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves, cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its by-products, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with the right to construct, maintain, operate, repair, alter, replace and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors, rectifiers, power lines, cables, deep well anode and anode ground beds under, upon, and over the permanent right of way and easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent

right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

b. Temporary easements of 3.59 acres, as described as "Area of Proposed Temporary Work Space #1," "Area of Proposed Temporary Work Space #2," Area of Proposed Temporary Work Space #3," "Area of Proposed Temporary Work Space #4," "Area of Proposed Temporary Work Space #5," and "Area of Proposed Temporary Work Space #6" in Exhibit A attached hereto, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

(2) Upon filing the bond required below, beginning August 18, 2017, Transco is granted access to, possession of and entry to the Rights of Way for all

purposes allowed under the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017);

(3) In the event of a violation of this Order by Defendants, such as interference with Transco's possession of the Rights of Way by Defendants or by third parties who are authorized by Defendants to be on the Property, the U. S. Marshal Service, or a law enforcement agency it designates, shall be authorized to investigate and to arrest, confine in prison and/or bring before the Court any persons found to be in violation of this Order and in contempt of this Order, pending his/her compliance with the Court's Order.

(4) Transco shall post a bond in the amount of $70,710.00 as security for the payment of just compensation to Defendants.

(5) Transco shall record this Order in the Office of the Recorder of Deeds for Lancaster County, Pennsylvania.

BY THE COURT

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENT FOR 1.33 ACRES AND TEMPORARY EASEMENTS FOR 2.28 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1202476100000, 4160 MAIN STREET, CONESTOGA, PA 17516 LYNDA LIKE A/K/A LINDA LIKE 4160 MAIN STREET CONESTOGA, PA 17516 AND ALL UNKNOWN OWNERS, Defendants.	CIVIL ACTION – LAW Docket No. 5:17-CV-00720

ORDER

AND NOW, the 23rd day August, 2017, upon consideration of Plaintiff's Omnibus Motion for Preliminary Injunction for Possession of Rights of Way by

August 18, 2017 Pursuant to the Natural Gas Act and Federal Rules of Civil Procedure 71.1 and 65, and the accompanying documents, Defendant's opposition thereto, and Plaintiff's Reply, and after a hearing and oral argument being held, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** as follows:

(1) Transcontinental Gas Pipe Line Company, LLC ("Transco") has the substantive right to condemn the following easements and rights of way (collectively referred to as the "Rights of Way"):

a. A permanent right of way and easement of 1.33 acres, as described as "Area of Proposed CPLS R/W" in Exhibit A attached hereto, for the purpose of constructing, operating, maintaining, altering, repairing, changing but not increasing the size of, replacing and removing a pipeline and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves, cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its byproducts, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with a right of way and easement to construct, maintain, operate, repair, alter, replace, and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors, rectifiers, power lines, cables, deep well anode

and anode ground beds under, upon, and over the permanent access easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

b. Temporary easements of 2.28 acres, as described as "Area of Proposed Temporary Work Space #1" and "Area of Proposed Temporary Work Space #2" in Exhibit A attached hereto, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

(2) Upon filing the bond required below, beginning August 18, 2017, Transco is granted access to, possession of and entry to the Rights of Way for all purposes allowed under the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017);

(3) In the event of a violation of this Order by Defendants, such as interference with Transco's possession of the Rights of Way by Defendants or by third parties who are authorized by Defendants to be on the Property, the U. S. Marshal Service, or a law enforcement agency it designates, shall be authorized to investigate and to arrest, confine in prison and/or bring before the Court any persons found to be in violation of this Order and in contempt of this Order, pending his/her compliance with the Court's Order.

(4) Transco shall post a bond in the amount of $40,440.00 as security for the payment of just compensation to Defendants.

(5) Transco shall record this Order in the Office of the Recorder of Deeds for Lancaster County, Pennsylvania.

BY THE COURT

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENT FOR 0.94 ACRES AND TEMPORARY EASEMENTS FOR 1.61 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1203589400000, SICKMAN MILL ROAD BLAIR B. MOHN AND MEGAN E. MOHN 356 SAND HILL ROAD CONESTOGA, PA 17516 AND ALL UNKNOWN OWNERS, Defendants.	CIVIL ACTION – LAW Docket No. 5:17-CV-00722

ORDER

AND NOW, this 23rd day of August, 2017, upon consideration of Plaintiff's Omnibus Motion for Preliminary Injunction for Possession of Rights of Way by August 18, 2017 Pursuant to the Natural Gas Act and

Federal Rules of Civil Procedure 71.1 and 65, and the accompanying documents, Defendants' opposition thereto, Plaintiff's Reply, and after a hearing and oral argument being held, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** as follows:

(1) Transcontinental Gas Pipe Line Company, LLC ("Transco") has the substantive right to condemn the following easements and rights of way (collectively referred to as the "Rights of Way"):

a. A permanent right of way and easement of 0.94 acres, as described as "Area of Proposed CPLS R/W" in Exhibit A attached hereto, for the purpose of constructing, operating, maintaining, altering, repairing, changing but not increasing the size of, replacing and removing a pipeline and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves, cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its byproducts, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with the right to construct, maintain, operate, repair, alter, replace and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors, rectifiers, power lines, cables, deep well anode and anode ground beds under, upon, and over the

permanent right of way and easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

b. Temporary easements of 1.61 acres, as described as "Area of Proposed Temporary Work

> Space #1" and "Area of Proposed Temporary Work Space #2" in Exhibit A attached hereto, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

(2) Upon filing the bond required below, beginning August 18, 2017, Transco is granted access to, possession of and entry to the Rights of Way for all purposes allowed under the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017);

(3) In the event of a violation of this Order by Defendants, such as interference with Transco's possession of the Rights of Way by Defendants or by third parties who are authorized by Defendants to be on the Property, the U. S. Marshal Service, or a law enforcement agency it designates, shall be authorized to investigate and to arrest, confine in prison and/or bring before the Court any persons found to be in violation of this Order and in contempt of this Order, pending his/her compliance with the Court's Order.

(4) Transco shall post a bond in the amount of $62,340.00 as security for the payment of just compensation to Defendants.

(5) Transco shall record this Order in the Office of the Recorder of Deeds for Lancaster County, Pennsylvania.

BY THE COURT

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENTS FOR 2.76 ACRES IN MANOR TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 4100300500000, 3049 SAFE HARBOR ROAD, MANOR TOWNSHIP, LANCASTER, PA 17551 STEPHEN D. HOFFMAN 3049 SAFE HARBOR ROAD MILLERSVILLE, PA 17551 AND ALL UNKNOWN OWNERS, Defendants.	CIVIL ACTION – LAW Docket No. 5:17-CV-00723

ORDER

AND NOW, this 23rd day of August, 2017, upon consideration of Plaintiff's Omnibus Motion for

Preliminary Injunction for Possession of Rights of Way by August 18, 2017 Pursuant to the Natural Gas Act and Federal Rules of Civil Procedure 71.1 and 65, and the accompanying documents, Defendant's opposition thereto, Plaintiff's Reply, and after a hearing and oral argument being held, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** as follows:

(1) Transcontinental Gas Pipe Line Company, LLC ("Transco") has the substantive right to condemn the following easements and rights of way (collectively referred to as the "Rights of Way"):

a. A permanent right of way and easement of 2.02 acres, as described as "Area of Proposed CPLS R/W" in Exhibit A attached hereto, for the purpose of constructing, operating, maintaining, altering, repairing, changing but not increasing the size of, replacing and removing a pipeline and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves, cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its byproducts, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with a right of way and easement to, construct, maintain, operate, repair, alter, replace and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors,

rectifiers, power lines, cables, deep well anode and anode ground beds under, upon, and over the permanent access easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

b. Temporary easements of 2.76 acres, as described as "Area of Proposed Temporary Work Space #1" and "Area of Proposed Temporary Work Space #2" in Exhibit A attached hereto, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

(2) Upon filing the bond required below, beginning August 18, 2017, Transco is granted access to, possession of and entry to the Rights of Way for all purposes allowed under the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017);

(3) In the event of a violation of this Order by Defendants, such as interference with Transco's possession of the Rights of Way by Defendants or by third parties who are authorized by Defendants to be on the Property, the U. S. Marshal Service, or a law enforcement agency it designates, shall be authorized to investigate and to arrest, confine in prison and/or bring before the Court any persons found to be in violation of this Order and in contempt of this Order, pending his/her compliance with the Court's Order.

(4) Transco shall post a bond in the amount of $41,910.00 as security for the payment of just compensation to Defendants.

(5) Transco shall record this Order in the Office of the Recorder of Deeds for Lancaster County, Pennsylvania.

BY THE COURT

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENTS FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA; HILLTOP HOLLOW LIMITED PARTNERSHIP; HILLTOP HOLLOW PARTNERSHIP, LLC GENERAL PARTNER OF HILLTOP HOLLOW LIMITED PARTNERSHIP; and LANCASTER FARMLAND TRUST, Defendants.	:	No. 5:17-cv-00715

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENTS FOR 2.76 ACRES IN MANOR TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA; and STEPHEN HOFFMAN, Defendants.	:	No. 5:17-cv-00723

OPINION
Plaintiff's Omnibus Motion for Preliminary Injunction – Denied

Joseph F. Leeson, Jr. **April 6, 2017**
United States District Judge

I. Introduction

Plaintiff Transcontinental Gas Pipeline Company, LLC ("Transco") is involved in a project to operate and construct a natural gas pipeline running through five states, including a portion of Lancaster County, Pennsylvania. The Federal Energy Regulatory Commission (FERC) issued a certificate on February 3, 2017, authorizing the construction and operation of the pipeline. Transco thereafter filed fourteen complaints in condemnation in this Court seeking to acquire the rights-of-way on Defendants' properties. Presently pending in two of these actions is Transco's Omnibus

Motion for Preliminary Injunction. For the reasons set forth below, a determination as to whether Transco has a right to condemn, which must be established before the Court may grant injunctive relief, would be premature. Regardless, Transco has failed to show that it will suffer irreparable harm because it may obtain access to Defendants' property to conduct surveys pursuant to 26 Pa. Cons. Stat. § 309. The Omnibus Motion for Preliminary Injunction is denied, but Transco will be granted limited access pursuant to § 309.

II. Legal Standard – Motion for Preliminary Injunction

To prevail on a motion for a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits;[1] (2) a likelihood of suffering irreparable harm without the injunction;[2] (3) the

[1] For a natural gas company "to establish a right to condemn, the following elements must be proved: (1) [the company] has been issued a certificate of public convenience and necessity; (2) [the company] has been unable to acquire the needed land by contract with the Defendants; and (3) [t]he value of the subject property claimed by the owner exceeds $ 3,000.00." *Steckman Ridge GP, LLC v. Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, No. 08-168, 2008 U.S. Dist. LEXIS 71302, at *39-40 (W.D. Pa. Sept. 19, 2008) (citing 15 U.S.C. § 717f(h) of the Natural Gas Act of 1938 (NGA)).

[2] "[O]f critical importance, 'the irreparable harm requirement contemplates the inadequacy of alternate remedies available to the plaintiff.'" *Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) (quoting *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978, 982 (W.D. Tenn. 2006)). "[I]rreparable harm is not demonstrated when there are available alternatives even when the alternatives

balance of equities weighs in the moving party's favor; and (4) the public interest favors the injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The moving party bears the burden of showing that each of these four factors tips in its favor. *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) ("The 'failure to establish any element . . . renders a preliminary injunction inappropriate.'" (quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999))). "A preliminary injunction is an extraordinary remedy never awarded as a matter of right," *Winter*, 555 U.S. at 24, and is reserved for "limited circumstances," *Kos Pharm., Inc. v. Andrx Corp*. 369 F.3d 700, 708 (3d Cir. 2004).

III. Findings of Fact[3]

"In granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action," Fed. R. Civ. P. 52(a)(2), which requires the court to "find the facts specially and state its conclusions of law separately," Fed. R. Civ. P. 52(a)(1). While "Rule 52 does not require hyper-literal adherence," findings of fact and conclusions of law

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are less convenient." *Corbett v. United States*, No. 10-14106, 2011 U.S. Dist. LEXIS 38531, at *14 (S.D. Fla. Mar. 1, 2011).

[3] These findings of fact, which are made after an independent review of the record, including all exhibits and briefs filed in regard to the Omnibus Motion for Preliminary Injunction, are drawn from the two sides' proposed findings of fact and conclusions of law. *See* No. 17-715, ECF Nos. 25, 28; No. 17-723, ECF Nos. 18, 21.

must be delineated in such a manner that does not leave an appellate court "unable to discern what were [the court's] intended factual findings." *See In re Frescati Shipping Co.*, 718 F.3d 184, 197 (3d Cir. 2013); *see also* 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579 (3d ed. 2008) ("The district court should state separately its findings of fact and conclusions of law without commingling them. . . ."). Accordingly, this Court's findings of facts pertinent to the disposition of Transco's Motion follows.

1. Transco is an interstate natural gas transmission company that will be the operator of a proposed natural gas pipeline that will cross Defendants' respective properties. Sztroin Decl. ¶¶ 3, 6, ECF No. 6-6 (No. 17-715); Hoffman Aff. ¶¶ 5-7, 11, ECF No. 23 (No. 17-723); Erb Aff. ¶¶ 6-7, ECF No. 30 (No. 17-715); *Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (Feb. 3, 2017) (hereinafter FERC Order).

2. Defendants Stephen and Dorothea Hoffman reside at 3409 Safe Harbor Road, Manor Twp., Millersville, Lancaster County, PA 19551. They own approximately 110 acres and have lived there for approximately 10 years. Hoffman Aff. ¶ 2.

3. The appraised value of the Hoffmans' property is $13,970. Pl.'s Hr'g Ex. 17.[4]

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[4] Plaintiff submitted additional exhibits in support of the Omnibus Motions for Preliminary Injunction at the hearing on March 20, 2017.

4. Defendants Gary and Michelle Erb, the principals of Defendant Hilltop Hollow Limited Partnership, live at 415 Hilltop Rd., Conestoga Twp., Conestoga, Lancaster County, PA 17516. They own about 72 acres and have lived there for approximately seven years. The Erbs' property is also enrolled in the Lancaster Farmland Trust. Erb Aff. ¶ 2.

5. The appraised value of the property on Hilltop Road is $23,570. Pl.'s Hr'g Ex. 17.

6. Transco's proposed current route for the pipeline crosses both aforementioned properties, running close to their homes. Hoffman Aff. ¶¶ 5-7, 11; Erb Aff. ¶¶ 6-7; FERC Order.

7. In 2015, Transco submitted an application under section 7(c) of the NGA, seeking a certificate of public convenience and necessity authorizing Transco to construct and operate the pipeline project. FERC Order.

8. The project involves approximately 199.5 miles of pipeline running through Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. Sztroin Decl. ¶¶ 3, 6.

9. FERC issued a certificate on February 3, 2017, authorizing the construction and operation of this pipeline. FERC Order.[5]

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[5] For the reasons discussed below, this Court offers no opinion, at this time, as to the validity of this certificate in light of Defendants' due process challenges.

10. Transco entered into a contract with its shippers that requires the project be completed and in service for the 2017-2018 winter heating season, or as soon as commercially practicable thereafter. Sztroin Aff. ¶ 10, ECF No. 7-4 (No. 17-715).[6]

11. Between February 15, 2017, and March 7, 2017, Transco filed multiple condemnation complaints in this Court, claiming immediate entitlement to rights-of-way across the properties based on the FERC Order. *See* Nos. 5:17-cv-711 to -723 (E.D. Pa. filed Feb. 15, 2017); No. 5:17-cv-1010 (E.D. Pa. filed Mar. 7, 2017).

12. Between February 20, 2017, and February 22, 2017, Transco filed an Omnibus Motion for Preliminary Injunction, seeking injunctive relief granting Transco immediate possession of the rights-of-way in each case.

13. Transco alleges that in order to complete the pipeline project on time, it must have survey access to the properties by March 20, 2017. Sztroin Aff. ¶ 12.

14. The FERC Order imposes environmental conditions on the project, at least twelve of which require access to the rights-of-way to conduct field surveys and the submission of additional documentation to FERC based on the results of the surveys. Sztroin Aff. ¶¶ 14-16.

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[6] To avoid confusion between the Declaration of Sztroin attached to the Motion for Summary Judgment ("Sztroin Decl.") from the Declaration attached to the Omnibus Motion for Preliminary Injunction, this Court will refer to the later as "Sztroin Aff."

15. There are limited, seasonal windows of time during which certain surveys, such as threatened and endangered species surveys, may occur. Sztroin Aff. ¶ 17.

16. If Transco misses those windows, it may have to wait until the following year to complete the surveys. Sztroin Aff. ¶ 17.

17. Some of these surveys have taken an average of two to three months to complete. Sztroin Aff. ¶ 17.

18. Transco alleges that if the project is delayed it will suffer approximately $500,000 in additional costs each month, may lose up to $1.1 million in revenues each day, and will lose customer confidence if unable to provide service to its shippers by the promised date. Sztroin Aff. ¶¶ 33-35.

19. Between February 20, 2017, and March 17, 2017, Transco filed a Motion for Partial Summary Judgment in all pending cases, seeking orders of condemnation pursuant to the NGA to provide Transco with the substantive right to condemn the rights-of-way sought on the properties in the FERC Order.

20. The motions for partial summary judgment, although filed separately in each case, are almost identical and are based on substantially the same facts.

21. Transco entered into stipulations with Defendants in eight cases to grant Transco access to and entry upon the rights-of-way of their properties for the sole purpose of conducting the surveys required by the FERC Order. *See*, *e.g.*, ECF No. 27 (No. 17-711).

22. Pursuant to the stipulations, Transco agreed to withdraw its Omnibus Motion for Preliminary Injunction in those cases.

23. Transco also agreed in the stipulations in four of the cases to extend the time for Defendants to respond to the motions for partial summary judgment until April 15, 2017. *See*, *e.g.*, ECF No. 16 (No. 17-714).

24. Defendants in the above-captioned cases have opposed the Complaints, the Omnibus Motion for Preliminary Injunction, and the motions for partial summary judgment, raising complex questions of constitutional law regarding the FERC Order and proceedings.

25. On March 16, 2017, Transco's cases were reassigned to the Undersigned.

26. A hearing on the Omnibus Motion for Preliminary Injunction was held on March 20, 2017.

IV. Conclusions of Law

In the NGA, Congress granted condemnation power to private corporations. *See E. Tenn. Nat'l Gas Co. v. Sage*, 361 F.3d 808, 821-25 (4th Cir. 2004) (citing 15 U.S.C. § 717f(h)). The general procedure in such cases is that a gas company applies for a certificate of public convenience and necessity from FERC to build and operate a new pipeline. *Id.* at 818-19. Once a certificate is issued, the NGA empowers the company to exercise the right of eminent domain to acquire the lands needed for the project. *Id.* The company usually

enters negotiations with landowners to acquire their property, but if these negotiations are unsuccessful, the company may institute condemnation proceedings, asking the court to enter an order of condemnation declaring that the company has the substantive right to condemn the property in the FERC certificate. *See Kirby Forest Indus. v. United States*, 467 U.S. 1, 3-6 (1984); *E. Tenn. Nat'l Gas Co.*, 361 F.3d at 820-25.

A condemnation action can take three paths: (1) straight condemnation, (2) quick-take, and (3) legislative taking. *Id.* In a straight condemnation action, the plaintiff (gas company) files a complaint setting forth its authority for the taking, the use for which the property is being taken, a description identifying the property, the interest to be acquired, and a designation of the owners. *Id.* The court determines how much compensation is due to the landowner and once that amount is tendered, the right to possession passes. *Id.* The second method of taking provides the government with a more expeditious procedure, requiring the filing of a declaration of taking that sets forth the authority for the taking, the public use for which the land is taken, and an estimate of just compensation. *Id.* Once the estimated amount is deposited with the court, the government is authorized to take immediate possession of the condemned property. *Id.* Finally, a legislative taking occurs when Congress exercises the power of eminent domain directly by, for example, enacting a statute. *Id.*

Here, Transco followed the first path by filing condemnation complaints pursuant to the NGA and

Federal Rule of Civil Procedure 71.1. However, in its motions for partial summary judgment, Transco seeks an order of condemnation declaring that it has the substantive right to condemn. The Omnibus Motion for Preliminary Injunction then asks the Court to grant Transco immediate possession prior to a determination of just compensation. This is not an avenue recognized by the NGA. *See E. Tenn. Nat'l Gas Co*, 361 F.3d at 822-23 (concluding that the NGA "contains no provision for quick-take or immediate possession").

Nevertheless, once Transco has established its right to condemn, the Court may use its equitable power to award preliminary injunctive relief. *See Id.* (holding that a court has the power to grant equitable relief after the gas company establishes a substantive right to condemn). Until it is determined that Transco has the authority to condemn Defendants' property, however, this Court is without jurisdiction to grant Transco's Omnibus Motion for Preliminary Injunction. *See Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 308 (3d Cir. 2014) (explaining that once it is determined that a gas company has the right to eminent domain over the property sought from the landowners, the court will conduct a preliminary injunction analysis); *Mid-Atlantic Express, LLC v. Balt. Cty.*, 410 F. App'x 653, 657 (4th Cir. 2011) (holding that because the company did not have the authority to condemn the property, "the district court was without jurisdiction to enter the preliminary injunction"); *Transwestern Pipeline Co., LLC v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir. 2008) (holding that "a district court

lacks authority to grant a preliminary injunction under Rule 65 if the party does not have a substantive right to the injunction" and that the gas company's "substantive right to condemn the affected parcels accrues only through the issuance of an order of condemnation by the district court"); *E. Tenn. Nat'l Gas Co*, 361 F.3d at 823 (concluding that a "federal court has the power to grant equitable relief, but this power is circumscribed by the venerable principle that 'equity follows the law' " (citations omitted)).

A decision on Transco's substantive right to relief is premature. Although Transco's Partial Motion for Summary Judgment and Omnibus Motion for Preliminary Injunction are fully briefed and ripe for disposition in the two above-captioned cases, the summary judgment motions are not ripe[7] in four other related cases because Transco granted those Defendants additional time to prepare their responses. Transco's motions in all these cases are substantially identical, and any decision by this Court addressing the validity of the FERC Order, which is the first step in determining whether Transco has a substantive right to condemn any of the properties, will therefore likely apply to all the pending cases. Because the Court has not had the benefit of reviewing briefs from Defendants in all the related cases, there is the possibility of inconsistent decisions. This delay is of Transco's own making as it

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[7] *See Cluck-U Corp. v. Docson Consulting, LLC*, No. 1:11-CV-1295, 2011 U.S. Dist. LEXIS 96638, at *2 n.1 (M.D. Pa. Aug. 29, 2011) (explaining that a motion is not ripe for review until the nonmoving party has had an opportunity to file a brief).

stipulated to the extension of time for Defendants to respond in the other cases. Consequently, this Court will not render a decision on Transco's substantive right to condemn at this time.[8]

The fact that the validity of the FERC Order raises difficult questions of constitutional law further counsels against resolving this issue definitively in the rushed atmosphere of a request for immediate injunctive relief, without full briefing from all interested parties. *See Sovereign Order of St. John of Jerusalem-Knights of Malta v. Messineo*, 572 F. Supp. 983, 990 (E.D. Pa. 1983) (holding that the existence of difficult legal questions of law may create sufficient doubt about the probability of plaintiff's success to justify denying a preliminary injunction); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 605 (D. Del. 1971) ("A Court should not decide doubtful and difficult questions on a motion for a preliminary injunction."); *Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F. Supp. 1210, 1213 (N.D. Cal. 1969) ("On an application for a preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.").

Moreover, even if Transco has a right to condemn, it has not shown that it will be irreparably harmed because it has an alternative remedy to obtain the immediate relief it needs. *See McHenry v. Comm'r of Internal Revenue*, No. 1:10-cv-00021, 2011 U.S. Dist. LEXIS

[8] "This time" amounts to a matter of weeks, as the summary judgment motions should be fully briefed by the end of April.

77977, at *8 (D.V.I. 2011) ("[T]he availability of an adequate alternative remedy generally precludes a finding of irreparable harm sufficient to warrant injunctive relief."); *Curtis 1000 v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995) ("Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary."). By withdrawing its Omnibus Motion for Preliminary Injunction in those cases in which it entered into stipulations with the landowners to obtain access to the properties to conduct surveys, Transco has essentially conceded that it will not suffer irreparable harm if granted survey access.[9] Pennsylvania law

[9] Notably too, Transco's claimed irreparable harm is in the nature of additional costs, diminished revenues, and loss in customer confidence, all of which are not the types of harms that usually suffice for an injunction to issue. *See Checker Cab of Phila. Inc. v. Uber Techs., Inc.*, 643 F. App'x 229, 232 (3d Cir. 2016) (concluding that the plaintiff failed to show that it was entitled to a preliminary injunction because the only harm alleged "is the loss of customers," which "is a purely economic harm that can be adequately compensated with a monetary award following adjudication on the merits"). Further, Transco's alleged additional costs and loss in customer confidence with its shippers if unable to complete the project on time appears to be a self-inflicted harm because Transco entered into this contract with suppliers before knowing whether it would need to initiate formal condemnation proceedings. These alleged harms may have been avoidable. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable." (citing 11A Charles A. Wright, Federal Practice & Procedure § 2948.1 pp. 152-53 (1995)); *San Francisco Real Estate Investors v. Real Estate Inv. Trust*, 692 F.2d 814, 818 (1st Cir. 1982) (concluding that the alleged harm caused by investor apprehension over the litigation was largely "self-inflicted" and "entirely avoidable").

provides a procedure for which Transco can obtain survey access. *See* 26 Pa. Cons. Stat. § 309 (providing that, upon notice to the landowner, "the condemnor or its employees or agents shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals"). Consequently, Transco's Omnibus Motion for Preliminary Injunction is denied.

Although Transco sought injunctive relief under the NGA, this Court will grant Transco limited survey access to the properties pursuant to § 309. In applying § 309, this Court recognizes the potential conflict between the conformity clause in the NGA, which can be found at 15 U.S.C. § 717f(h),[10] and Rule 71.1(a) of the Federal Rules of Civil Procedure.[11] The conformity clause was repealed by Rule 71.1, but only insofar as it required federal courts to conform state procedures to secure a condemnation. *See United States v. 93.970 Acres*, 360 U.S. 328, 333 n.7 (1959); *Guardian Pipeline,*

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[10] Section 717f(h) provides in part that "[t]he practice and procedure in any action or proceeding [to exercise the right of eminent domain] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated."

[11] Rule 71.1(a) provides: "[t]hese rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." "The purpose of Rule [71.1] is to provide a uniform procedure for condemnation in the federal district courts." Fed. R. Civ. P. 71.1 advisory committee's note ("Rule 71[.1] affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain . . . and supplants all statutes prescribing a different procedure.").

L.L.C. v. 295.49 Acres of Land, more or less, 2008 U.S. Dist. LEXIS 35818, at *43-44 (E.D. Wis. Apr. 11, 2008) (concluding that because Rule 71.1 addressed the subject of condemnation procedure, the conformity clause in the Natural Gas Act was preempted and does not apply to any state *mandated* procedures). Section 309, however, does not deal with the steps that must be followed to secure a condemnation and its use in a federal condemnation proceeding is therefore not prohibited by Rule 71.1, nor does it conflict with Rule 71.1.

Congress has prescribed that "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). However, "there is no federal law that deals specifically with entries to survey property, so there is nothing to preempt state law in such a proceeding." *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 367 (8th Cir. 2014); *Sabal Trail Transmission, LLC v. 72 Acres of Land*, No: 5:16-cv-162, 2016 U.S. Dist. LEXIS 62857, at *6 (M.D. Fla. May 12, 2016) (concluding that "federal law does not provide a right to survey, so there exists no conflict between state law and federal law"). Although some courts have been of the belief that Rule 71.1 prohibits the federal courts from applying any state laws in the area of eminent domain, *see*, *e.g. Tenn. Gas Pipeline Co. v. Garrison*, No. 3:10-CV-1845, 2010 U.S. Dist. LEXIS 94422, at *7-8 (M.D. Pa. Sept. 10, 2010) (concluding that because the plaintiff filed for condemnation under the NGA that it could not use Pennsylvania's Eminent

Domain Code to gain pre-condemnation access to the land), "the NGA certainly does not operate to completely preempt state eminent domain law," *Bowyer v. Rover Pipeline, LLC*, No. 1:16CV203, 2017 U.S. Dist. LEXIS 8892, at *8 (N.D. W. Va. Jan. 23, 2017) (explaining that the NGA only "preempts state law when the two are in conflict").

V. Conclusion

Considering that the same Omnibus Motion for Preliminary Injunction, which is the subject of the instant opinion, was filed by Transco in twelve related actions, along with substantially identical motions for partial summary judgment, four of which are not yet ripe in light of the stipulated extensions of time entered into between those Defendants and Transco, this Court will not render a decision on Transco's right to condemn at this time. Regardless, Transco has failed to show that it will suffer irreparable harm if not granted injunctive relief because it has an alternative remedy under Pennsylvania law to obtain the survey access it needs. Accordingly, the Omnibus Motion for Preliminary Injunction is denied, but, pursuant to § 309, Transco is granted access to and entry upon the rights-of-way, as defined in the respective complaints, for the sole purpose of conducting surveys required under the FERC Order.

Appropriate orders will follow.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

App. 99

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-3075, 17-3076, 17-3115 & 17-3116

TRANSCONTINENTAL GAS PIPE LINE CO, LLC

v.

PERMANENT EASEMENTS FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1201606900000; ET AL.

Hilltop Hollow Limited Partnership & Hilltop Hollow Partnership, LLC; Stephen D. Hoffman; Lynda Like; Blair B. Mohn and Megan E. Mohn,

Appellants

(E.D. Pa. Nos. 17-cv-00715, 17-cv-00723, 17-cv-00720 & 17-cv-00722)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ,

KRAUSE, RESTREPO, BIBAS, PORTER, *ROTH, and *FISHER, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ JANE R. ROTH
Circuit Judge

Dated: December 13, 2018
PDB/cc: All Counsel of Record

* Votes of the Honorable Jane R. Roth and D. Michael Fisher are limited to panel rehearing only.

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

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Wayne, PA 19087-5569

Attorneys for Plaintiff Transcontinental Gas Pipe Line Company, LLC

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENT; FOR 2,76 ACRES IN MANOR TOWNSHIP LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 4100300500000, 3049 SAFE HARBOR ROAD, MANOR TOWNSHIP, LANCASTER, PA 17551	CIVIL ACTION – LAW Docket No. _____

STEPHEN D. HOFFMAN
3049 SAFE HARBOR ROAD
MILLERSVILLE, PA 17551

AND ALL UNKNOWN OWNERS

Defendants.

VERIFIED COMPLAINT IN CONDEMNATION OF PROPERTY PURSUANT TO FED. R. CIV. P. 71.1

Plaintiff, Transcontinental Gas Pipe Line Company, LLC, for its causes of action against Defendants, Permanent Easement for 2.02 Acres and Temporary Easements for 2.76 Acres in Manor Township, Lancaster County, Pennsylvania, Tax Parcel Number 4100300500000, Stephen D. Hoffman, and All Unknown Owners, states as follows:

1. The following definitions are used in this Complaint:

a) "**Transco**" shall mean Transcontinental Gas Pipe Line Company, LLC, a Delaware limited liability company with a principal place of business at 2800 Post Oak Boulevard, Houston, Texas 77251-1396.

b) "**FERC**" shall mean the Federal Energy Regulatory Commission.

c) "**FERC Order**" shall mean the Order issued by the FERC on February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), authorizing

the Atlantic Sunrise Project and granting Transco a certificate of public convenience and necessity.[1]

d) "**Project**" shall mean the Atlantic Sunrise Project which was reviewed and approved by the FERC by its issuance of the FERC Order.

e) "**Property**" shall mean:

That property in Manor Township, Lancaster County, Pennsylvania, described in the Deed dated April 18, 2006, recorded in the Office of the Recorder of Deeds of Lancaster County at Instrument Number 5519364, and known as Tax Parcel Number 4100300500000.

f) "**Rights of Way**" shall mean the following easements and rights of way on the Property that are necessary to install and construct the Project:

i. A permanent right of way and easement of 2.02 acres, as described as "Area of Proposed CPLS R/W" in Exhibit A to the Verified Complaint, for the purpose of constructing, operating, maintaining, altering, repairing, changing the size of, replacing and removing a pipeline and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves,

[1] The FERC Order is a matter of public record that is subject to judicial notice under Fed. R. Evid. 201. A true and correct copy of the relevant excerpts of the FERC Order will be attached as Exhibit A to Transco's Motion for Partial Summary Judgment. The full FERC Order is available at https://www.ferc.gov/CalendarFiles/20170203163124-CP15-138-000.pdf.

cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its byproducts, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with a right of way and easement to construct, maintain, operate, repair, alter, replace and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors, rectifiers, power lines, cables, deep well anode and anode ground beds under, upon, and over the permanent access easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without

first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

ii. Temporary easements of 2.76 acres, as described as "Area of Proposed Temporary Work Space #1" and "Area of Proposed Temporary Work Space #2" in Exhibit A to the Verified Complaint, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

g) "**Appraised Value**" shall mean the fair market value of the Rights of Way sought to be condemned, as set forth in an appraisal prepared by an independent appraiser retained by Transco. The appraisal values the Rights of Way sought to be condemned at $13,970.00.

h) "**Landowner**" shall mean Stephen D. Hoffman, the owner of the Property on which Transco

is seeking to acquire the Rights of Way; the Landowner is an individual residing at 3049 Safe Harbor Road, Millersville, PA 17551.

i) "**Interest Holders**"[2] shall mean; None known.

j) "**Defendants**" shall collectively refer to the Landowner, Interest Holders, and any Unknown Owners.

PARTIES, JURISDICTION AND VENUE

2. Transco is the Plaintiff and will be the operator of the proposed pipeline facilities being constructed and modified in connection with the Project.

3. Defendants are the Landowner, Interest Holders, and all Unknown Owners of the Property on which Transco is seeking to acquire the Rights of Way.

4. This is a civil action brought under Federal Rule of Civil Procedure 71.1 by Transco for the taking of the Rights of Way on the Property that are necessary to install and construct pipeline facilities as part of the Project.

5. Transco's authority to maintain the action in this Court derives from the Natural Gas Act, 15

[2] Transco has not yet verified the identity, property interest and service address of any persons that may hold a mortgage, lien or judgment of record against the Property. In accordance with Fed. R. Civ. P. 71.1(c)(3) and 71.1(f), Transco will amend its Complaint to name any such interest holders prior to any hearing on compensation.

U.S.C.A. §§ 717a, *et seq*. (the "Natural Gas Act"). Section 717f(h) states in relevant part:

> **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, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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 practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C.A. § 717f(h) (emphasis added).

6. Venue is appropriate in the Eastern District of Pennsylvania because the Property is located in Lancaster County, within the District.

7. On February 3, 2017, the FERC issued the FERC Order to Transco approving the Project, authorizing Transco to construct and operate approximately 199.5 miles of pipeline composed of (a) Central Penn Line North, which is 58.7 miles of 30-inch diameter natural gas pipeline running from Columbia County, Pennsylvania to Susquehanna County, Pennsylvania; (b) Central Penn Line South, which is 127.3 miles of new 42-inch diameter natural gas pipeline running from Lancaster County, Pennsylvania to Columbia County, Pennsylvania; (c) Chapman Loop, which is 2.5 miles of new 36-inch diameter pipeline looping in Clinton County, Pennsylvania; (d) Unity Loop, which is 8.5 miles of new 42-inch diameter pipeline looping in Lycoming County, Pennsylvania; and (e) replacement of 2.5 miles of 30-inch diameter pipeline in Prince William County, Virginia; together with associated appurtenant facilities and appurtenant aboveground facilities, such as valves, cathodic protection, communication towers, and internal inspection device launchers and receivers. FERC Order, ¶¶ 5, 6.

8. The Project also includes the construction and operation of two new compressor stations in Wyoming County, Pennsylvania and Columbia County, Pennsylvania; two new meter stations in Susquehanna County, Pennsylvania and Wyoming County, Pennsylvania and three new regulator stations in Luzerne, Columbia,

and Lancaster Counties in Pennsylvania, with interconnecting piping; additional compression and related modifications to three existing compressor stations in Lycoming County, Pennsylvania, Columbia County, Pennsylvania and Howard County, Maryland; minor modifications at existing compressor stations in Maryland, Virginia and North Carolina to allow for bi-directional flow; installation of supplemental odorization, odor detection and odor masking/deodorization equipment at various aboveground facilities in North Carolina and South Carolina; modification to an existing meter station in Pennsylvania and additional piping to an adjacent new meter station; and installation of ancillary facilities such as valves, cathodic protection, communication towers, and internal inspection device launchers and receivers. FERC Order, ¶¶ 7, 8.

9. Transco is the holder of a certificate of public convenience and necessity issued by the FERC – the FERC Order.

10. Under the Natural Gas Act, the holder of a certificate of public convenience and necessity has the power to condemn land for a federally approved natural gas pipeline project if:

(a) the company has been granted a Certificate of Public convenience and Necessity from the FERC,

(b) the company has been unable to acquire the needed land by contract with the owner, and

(c) the value of the property at issue is claimed by the landowner at more than $3,000.

15 U.S.C. § 717f(h); *see Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 304 (3d Cir. 2014); *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 827-28 (4th Cir. 2004).

11. Transco meets these three requirements, as detailed below.

TRANSCO IS A HOLDER OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

12. On March 31, 2015, Transco filed an application with the FERC under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) and Part 157 of the FERC's regulations for a certificate of public convenience and necessity for its Project to construct and operate the Project in Pennsylvania, Maryland, Virginia, North Carolina and South Carolina. The Project will provide an incremental 1.7 million dekatherms (Dth) per day of year round firm transportation capacity from the Marcellus Shale production area in northern Pennsylvania to Transco's existing market areas to meet the growing demand for natural gas in the Mid-Atlantic and southeastern markets.

13. Transco's Project underwent an extensive review process. The FERC evaluated the public need for the Project (referred to as the "public convenience and necessity" under Section 7(c) of the Natural Gas Act), and completed a thorough review of environmental

impacts and operational considerations before issuing the FERC Order authorizing the Project.

14. The public was notified of the Project and provided multiple opportunities to comment as outlined in the FERC Order, paragraphs 68, 70, 71-75:

a) On April 4, 2014, FERC staff granted Transco's request to use the pre-filing process in Docket No. PF14-8-000. As part of the pre-filing review, on July 18, 2014, FERC issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Atlantic Sunrise Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI). The NOI was published in the *Federal Register* on July 29, 2014,[3] and mailed to nearly 2,500 interested parties, including federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; affected property owners; other interested parties; and local libraries and newspapers. The NOI briefly described the project and the environmental review process, provided a preliminary list of issues identified by FERC staff, invited written comments on the environmental issues that should be addressed in the draft EIS, listed the date and location of four public scoping meetings[4]

[3] 79 Fed. Reg. 44,023 (2014).

[4] FERC staff held the public scoping meetings between August 4 and 7, 2014, in Millersville, Annville, Bloomsburg, and Dallas, Pennsylvania.

to be held in the project area, and established August 18, 2014, as the deadline for comments;

b) Transco filed its project application on March 31, 2015. On October 22, 2015, FERC staff mailed a letter to landowners potentially affected by the path of several proposed project reroutes under evaluation. The letter was mailed to over 300 affected property owners, government officials, and other stakeholders. The letter briefly described the proposed alternative routes, invited newly affected landowners to participate in the environmental review process, and opened a special 30-day limited scoping period;

c) FERC staff issued the draft Environmental Impact Statement (EIS) for the project on May 5, 2016, which addressed the issues raised during the scoping period and up to the point of publication. Notice of the draft EIS was published in the *Federal Register* on May 12, 2016, establishing a 45-day public comment period ending on June 27, 2016.[5] The draft EIS was mailed to the environmental mailing list for the project, including additional interested entities that were added since issuance of the NOI. FERC staff held four public comment meetings between June 13 and 16, 2016.[6] Approximately 203 speakers provided oral comments regarding the draft EIS at these meetings and FERC also received over 560 written comments from federal, state, and local agencies; Native American tribes;

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[5] 81 Fed. Reg. 29,557 (2016).

[6] FERC staff held the public comment meetings in Lancaster, Annville, Bloomsburg, and Dallas, Pennsylvania.

companies/organizations; and individuals in response to the draft EIS. In addition, FERC received over 900 nearly identical letters. The transcripts of the public comment meetings and all written comments on the draft EIS are part of the public record for the project;

d) On October 13, 2016, FERC staff mailed a letter to landowners potentially affected by two alternative pipeline routes identified following the issuance of the draft EIS. The letter was mailed to 56 potentially affected property owners, government officials, and other stakeholders. The letter briefly described the proposed alternative routes, invited potentially affected landowners to participate in the environmental review process, and opened a special 30-day comment period. FERC staff received 25 comment letters from individuals regarding the proposed alternative;

e) On November 3, 2016, FERC issued for comment a draft General Conformity Determination, which assessed the potential air quality impacts associated with construction of the project in accordance with NEPA, the Clean Air Act, and the Commission's regulations.[7] The Pennsylvania Department of Environmental Protection (PADEP), Clean Air Council, Lebanon Pipeline Awareness, Sierra Club Pennsylvania Chapter, Concerned Citizens of Lebanon County, Lancaster Against Pipelines, and Elise Kucirka Salahub filed timely comments on the draft General

[7] The draft General Conformity Determination is publicly available at: https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14391786.

Conformity Determination. The final General Conformity Determination addressed all the comments received prior to the close of the comment period on December 5, 2016[8]; and

f) On December 30, 2016, FERC staff issued the final EIS for the project which was published in the *Federal Register* on January 9, 2017.[9] The final EIS addresses timely comments received on the draft EIS.[10] The final EIS was mailed to the same parties as the draft EIS, as well as to newly identified landowners and any additional parties that commented on the draft EIS.[11] The final EIS addresses geology; soils; water resources; wetlands; vegetation; wildlife and fisheries; special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and aboveground site alternatives and minor route variations incorporated into the project's design.

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[8] The final General Conformity Determination is publicly available at: https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20170117-3039.

[9] 82 Fed. Reg. 2,344 (2017).

[10] Volume III of the final EIS includes responses to comments on the draft EIS received through the close of the comment period on June 27, 2016, and responses to additional comments received between June 28 and November 14, 2016, that raised new issues not previously identified prior to the close of the comment period. Any new issues raised after November 14, 2016, which were not previously identified, are addressed in this order.

[11] The distribution list is provided in Appendix A of the final EIS.

15. The FERC held public meetings and noticed the certificate application and EIS for the Project as referenced above, and considered hundreds of comments from various parties, including federal, state, and local agencies, conservation groups and landowners, before issuing the FERC Order.

16. When evaluating applications for certificates to construct new pipeline facilities, the FERC takes guidance from the Certificate Policy Statement, Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128 (2000), further certified, 92 FERC ¶ 61,094 (2000).

> The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

FERC Order, ¶ 20.

17. On February 3, 2017, the FERC approved the Project and issued the FERC Order.

18. The FERC Order authorizes Transco, among other things, to construct and install the new and modified pipeline facilities described above in Lancaster County, Pennsylvania.

19. The Rights of Way on the Property are required to construct, install, operate and maintain the pipeline facilities approved in the FERC Order.

20. The Rights of Way are more fully depicted and identified in the drawings attached hereto as Exhibit A, which are incorporated by reference.

21 The Rights of Way sought to be acquired on the Property were reviewed and approved by FERC.

22. In issuing the FERC Order, the FERC considered the impact on landowners and communities along the route of the Project. The FERC concluded that the Project "has been designed to minimize impacts on landowners and the surrounding communities." FERC Order, ¶ 25.

23. The FERC concluded that "[b]ased on the benefits that Transco's project will provide, the absence of adverse effects on existing customers and other pipelines and their captive customers, and the minimal adverse effects on landowners or surrounding communities, we find, consistent with the Certificate Policy Statement and NGA section 7(c), that the public

convenience and necessity requires approval of Transco's proposal, subject to the conditions discussed below." FERC Order, ¶ 33.

24. Accordingly, Transco has a valid FERC Order covering the Rights of Way sought in this Action.

25. Transco has satisfied the first condition for the exercise of eminent domain under Section 7(h) of the Natural Gas Act.

TRANSCO HAS BEEN UNABLE TO ACQUIRE THE RIGHTS OF WAY BY AGREEMENT

26. Transco, by its agents, contacted Landowner numerous times for the purpose of negotiating the acquisition of the Rights of Way.

27. A copy of the appraisal setting forth the Appraised Value was provided to the Landowner.

28. Transco offered an amount that is higher than the Appraised Value.

29. Landowner rejected, or otherwise did not accept, Transco's offer.

30. Transco is unable to acquire the Rights of Way by contract or to agree on the compensation to be paid for the Rights of Way with the Landowner.

31. Accordingly, Transco has satisfied the second condition required prior to the exercise of eminent domain under Section 7(h) of the Natural Gas Act.

TRANSCO HAS OFFERED AT LEAST $3,000 FOR THE RIGHTS OF WAY

32. Transco offered to pay Landowner at least $3,000 for the Rights of Way.

33. Transco has satisfied the third condition required prior to the exercise of eminent domain under Section 7(h) of the Natural Gas Act.

34. Transco has satisfied all statutory requirements and is authorized to exercise eminent domain under Section 7(h) of the Natural Gas Act.

WHEREFORE, Transco requests that the Court issue an Order and demands judgment against the Rights of Way and Defendants, as follows:

(1) An Order of Condemnation that Transco has the substantive right to condemn the Rights of Way;

(2) Fix the compensation to be paid to Defendants for the Rights of Way;

(3) Grant title to the Rights of Way to Transco; and

(4) Any other lawful and proper relief.

Respectfully submitted,

SAUL EWING LLP

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Attorneys for Plaintiff Transcontinental Gas Pipe Line Company, LLC

Dated: February 15, 2017

VERIFICATION

I, David Sztroin, verify that I am authorized to make this Verification on behalf of Transcontinental Gas Pipe Line Company, LLC, and that the facts set forth in the foregoing Verified Complaint in Condemnation are true and correct to the best of my knowledge, information and belief. I understand that I am making this Verification subject to the penalties of 28 U.S.C. § 1746 relating to unsworn falsification to authorities. I verify under penalty of perjury under the

laws of the United States of America that the foregoing is true and correct.

/s/ David Sztroin
David Sztroin

Date: February 15, 2017