

ORAL ARGUMENT SCHEDULED FOR OCTOBER 4, 2019

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

Nos. 18-1128, *et al.* (consolidated)

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**SUPPLEMENTAL BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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September 30, 2019

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INTRODUCTION

Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”) submits this supplemental brief in response to the Court’s September 24, 2019 order directing the parties to address whether *In re: PennEast Pipeline Co., LLC*, No. 19-1191, *et al.*, -- F.3d ---, 2019 WL 4265190 (3d Cir. Sept. 10, 2019), “renders this case no longer ripe for review at this time.” In *PennEast*, the Third Circuit held that the Eleventh Amendment barred condemnation cases brought by PennEast in federal district court in New Jersey to gain access to property owned by the State or its agencies.

The Commission recently filed a supplemental brief in response to a similar order issued by a panel of this Court in another case concerning FERC certification of a natural gas pipeline under the Natural Gas Act, 15 U.S.C. § 717f. *See Atlantic Coast Pipeline, LLC, et al. v. FERC*, Nos. 18-1224, *et al.* (Sept. 13, 2019) (order directing parties to address *Cowpasture River Preservation Ass’n v. Forest Service*, 911 F.3d 150 (4th Cir. 2018)). In its supplemental brief, the Commission explained that FERC certificate orders remain valid even if other governmental agency authorizations are invalidated by reviewing courts and that judicial review could proceed. FERC Supp. Br. 3-4, Nos. 18-1224, *et al.*, ECF No. 1807437 (filed Sept. 20, 2019) (“FERC Atlantic Coast Supp. Br.”).

Likewise, the Third Circuit’s decision in *PennEast* does not affect the validity of the certificate of public convenience and necessity issued by the Commission for the pipeline project. Accordingly, as described more fully below, the Commission orders on review remain unaffected by the Third Circuit decision, and oral argument may proceed as scheduled on October 4.

BACKGROUND

The Commission orders on review here conditionally authorize PennEast to construct a natural gas pipeline through Pennsylvania and New Jersey. *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (“Certificate Order”), JA 1, *on reh’g*, 164 FERC ¶ 61,098 (2018) (“Rehearing Order”), JA 76.

After the Commission issued the Certificate Order, PennEast filed condemnation cases in the U.S. District Court for the District of New Jersey to gain access to property along the pipeline route in New Jersey, including properties owned, at least in part, by the State of New Jersey or its agencies. *PennEast*, 2019 WL 4265190, at *1; *see also* 15 U.S.C. § 717f(h) (“When any holder of a [FERC] certificate . . . 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 [for pipeline construction], it may acquire the same by the exercise of the right of eminent domain” in federal district court or state court).

The federal district court granted PennEast’s application for orders of condemnation and for preliminary injunctive relief. *PennEast*, 2019 WL 4265190, at *1. On appeal, the Third Circuit vacated the district court’s decision, holding that “New Jersey’s sovereign immunity has not been abrogated by the [Natural Gas Act], nor has there been . . . a delegation of the federal government’s exemption from the State’s sovereign immunity.” *Id.*

IMPLICATIONS OF THIRD CIRCUIT *PENNEAST* DECISION

The Third Circuit’s *PennEast* ruling that the Eleventh Amendment bars PennEast’s condemnation proceedings against the State of New Jersey in federal court does not invalidate the Commission’s certificate of public convenience and necessity. *See* FERC Atlantic Coast Supp. Br. 3-4 (courts have recognized that

Commission may issue certificates conditioned upon later receipt of necessary permits; invalidation of permits issued by other agencies does not invalidate Commission’s certification); *see also, e.g., Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (Commission’s issuance of a certificate for the Mountain Valley Pipeline “did not hinge” on other federal agency permits vacated by the Fourth Circuit in a different case).

While the Commission explained in its supplemental brief in *Atlantic Coast Pipeline* that, while judicial review could proceed, as a prudential matter, there are “special circumstances and uncertainty associated with the Fourth Circuit’s decision in *Cowpasture* and the petitions for *certiorari* pending before the Supreme Court,” FERC Atlantic Coast Supp. Br. 4, the prudential considerations at issue here do not rise to the level of those present in *Atlantic Coast Pipeline*.

First, the U.S. Solicitor General and the pipeline have filed petitions for *certiorari* in *Atlantic Coast Pipeline*, seeking Supreme Court review of an important statutory question at issue in *Cowpasture*. *See U.S. Forest Serv., et al. v. Cowpasture River Pres. Ass’n, et al.*, S. Ct. No. 18-1584; *Atlantic Coast Pipeline, LLC v. Cowpasture River Pres. Ass’n, et al.*, S. Ct. No. 18-1587 (distributed for October 1, 2019 conference). Second, the amount of land covered by the Third Circuit decision relative to the Project at issue is different than the portion of land

affected by the Fourth Circuit’s *Cowpasture* decision. *Cowpasture* implicates the entire length of the Appalachian Trail, which extends from Maine to Georgia. *See* U.S. Forest Service, Reply Br. at 8 on Pet. for Writ of Certiorari in No. 18-1584 (“The FERC-approved route crosses underneath the Appalachian Trail within a national forest, and . . . the court of appeals’ decision categorically bars the Forest Service from granting a pipeline right-of-way through federal lands in national forests traversed by the Trail.”); *see also id.* at 10 (“[A]s a practical matter, any alternative route must still cross the Appalachian Trail and thus would likely have effects on the Trail’s surrounding landscape that are comparable to the FERC-approved route.”).

If PennEast develops and proposes route variations around the portion of the pipeline route that would traverse State-owned land implicated by the Third Circuit decision, Commission authorization, including, potentially, additional environmental review, may be required. *See* FERC Atlantic Coast Supp. Br. 5. But any such potential of additional Commission review should not matter because here State Petitioners have raised only discrete legal issues, e.g., the state of the record that the Commission relied on to support its conclusions under NEPA and the Natural Gas Act. *See* N.J. Opening Br. 11-13, 25 (arguing that FERC erred by relying “exclusively” on PennEast’s contracts with affiliates to support a finding of market need and by setting an initial rate “without reference to current market

conditions,” and that FERC’s reliance on “substantially incomplete information” in the Environmental Impact Statement was arbitrary and capricious); *see also Energy Future Coalition v. EPA*, 793 F.3d 141, 146 (D.C. Cir. 2015) (“It is well-established that claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.” (quotations omitted)); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (“In determining the fitness of an issue for judicial review we look to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency’s action is sufficiently final.” (quotations omitted)).

That being the case, even if the Commission later acts on some route variation that PennEast may later propose, there is no indication that any of State Petitioners’ claims here will be either different or no longer at issue in a way that would render this appeal no longer fit for decision. And, in any event, the *PennEast* decision has no impact whatsoever on the issues raised by Non-State Petitioners.

With respect to oral argument, in *Atlantic Coast Pipeline*, the Court directed supplemental briefing on ripeness issues one month prior to oral argument. Here, New Jersey Petitioners filed their motion for abeyance 11 days before oral

argument, without prior notice to the Commission, and supplemental briefs are due just four days before argument.

Accordingly, the Commission submits that oral argument in this matter should proceed as scheduled on October 4. Counsel for the Commission will be prepared to address any questions concerning ripeness and fitness for review at argument.

Respectfully submitted,

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September 30, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) and this Court's September 24, 2019 order providing that supplemental briefs not exceed 2,500 words, because this brief contains 1353 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 30th day of September, 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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