

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PennEast Pipeline Company, LLC

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Docket No. RP20-41-000

**MOTION TO INTERVENE AND COMMENTS OF THE
AMERICAN PUBLIC GAS ASSOCIATION
IN SUPPORT OF PETITION**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”) and the Notice of Petition for Declaratory Order, the American Public Gas Association (“APGA”) moves to intervene as a party in this proceeding and submits the following comments in support.¹

I. BACKGROUND

APGA is the national, non-profit association of publicly owned natural gas distribution systems, with over 730 members in 37 states. Overall, there are approximately 1,000 publicly owned systems in the United States. Publicly owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

On October 4, 2019, PennEast Pipeline Co., LLC (“PennEast”) filed a Petition for Declaratory Order and Request for Expedited Action (“Petition”). PennEast requests

¹ See 18 C.F.R. §§ 385.212, 385.214 (2019) and Notice of Petition for Declaratory Order, *PennEast Pipeline Co., LLC*, Docket No. RP20-41-000 (issued Oct. 4, 2019) (setting Oct 18, 2019 comment date).

that the Commission issue a declaratory order in response to the Third Circuit decision in *In re PennEast Pipeline Company, LLC*, which held that the Eleventh Amendment to the U.S. Constitution bars a certificate holder from bringing an action in federal court under Section 7(h) of the Natural Gas Act to condemn property in which a state or its agencies hold an interest.² PennEast notes that this decision disrupts the natural gas industry and was reached without the interpretive assistance of the Commission.³

PennEast requests that the Commission issue a declaratory order stating that:

(1) Under NGA Section 7(h), a certificate holder's authority to condemn "the necessary right-of-way to construct, operate, and maintain a [natural gas] pipeline" and the "necessary land or other property, in addition to right-of-way, for the location of compressor stations [and other associated equipment]," applies to property in which a state holds an interest;

(2) In NGA Section 7(h), Congress delegated the federal government's eminent domain authority to certificate holders; and

(3) In delegating the federal government's eminent domain authority in NGA Section 7(h), Congress necessarily delegated to certificate holders the federal government's exemption from claims of state sovereign immunity.⁴

PennEast requested that the Commission act on an expedited basis and issue their order by November 1, 2019.

II. MOTION TO INTERVENE

APGA members purchase interstate natural gas transportation services from pipelines as regulated by the Commission. These proceedings will affect its members because they are sometimes acquiring capacity from new interstate pipeline projects.

² *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019) ("Third Circuit Opinion").

³ Petition for Declaratory Order and Request for Expedited Action, *PennEast Pipeline Co., LLC*, Docket No. ER20-41-000 at 1 (filed Oct. 4, 2019).

⁴ *Id.* at 2.

APGA therefore has a direct and substantial interest in the outcome of this proceeding, and its interest cannot be adequately represented by another party.

III. COMMENTS IN SUPPORT OF PETITION

A. Summary

APGA supports PennEast's Petition generally, and also comments because of its alarm about the mounting threats to new energy infrastructure in the U.S. Much of this involves the fickle fate of federalism. New and seemingly bizarre legal claims of some states are impeding the Nation's public necessity of new energy infrastructure. Regional and insular interests of states should not be allowed to thwart the national interests as determined by this Commission as overseen by the federal courts.

To be clear, as local distribution utilities, APGA members do not rely upon the Natural Gas Act for the power of eminent domain. Those powers are conferred on local utilities by state laws. Yet the Third Circuit Opinion adversely affects the ability of local utilities to obtain new pipeline capacity and access to natural gas supplies now and into the future.

Although Congress has been less than clear about allowing some kinds of interstate infrastructure,⁵ the federal regulatory paradigm and amendment of the Natural Gas Act in 1947 was very clear and certain. Interstate pipelines could not be constructed in some instances without the use of eminent domain, so Congress

⁵ See, e.g., Gold, *Superpower: One Man's Quest to Transform American Energy* (2019) (chronicling the failure of an interstate transmission line designed to bring wind energy from Oklahoma, through opposition in Arkansas, to Tennessee).

amended the Act. APGA agrees with PennEast and disagrees with the Third Circuit's interpretation of congressional intent.⁶

Neither is the Third Circuit's speculation that there is a work around valid. History now shows why. The state of New Jersey is not interested in obtaining value for land interests; it appears to be making a political stand to satisfy landowners who disagree with the Commission's proper interpretation of the public convenience and necessity, and environmental advocates that wish to shut down fossil fuel use. Just days ago the state's governor announced by tweet to his followers that the New Jersey Department of Environmental Protection was denying PennEast's application for a Water Quality Certificate because the company "no longer has the legal authority to perform activities on 49 properties along the proposed pipeline" route after the Third Circuit Opinion. "My administration fought and won in court to stop the proposed ... pipeline. We are committed to transition New Jersey to 100% clean energy by 2050," the Governor said.

APGA is concerned that this new Third Circuit Opinion will be another barrier to necessary new natural gas infrastructure—adding to those put forward by NIMBYs and extreme environmentalists attempting to shut down fossil fuel use. APGA is on record as strongly opposing a single energy source policy that results in the end-use energy market becoming an all-electric society. The Third Circuit Opinion is a step toward that society. FERC should oppose that result and grant the petition promptly.

⁶ The Third Circuit held that there is no delegation to "private parties" of the federal government's exemption to the 11th Amendment. In so doing, it overlooked the context of the Natural Gas Act and the nature of heavily regulated interstate pipelines, as discussed below.

B. Legal Arguments

The primary legal questions posed by the Petition are: (1) Whether under NGA Section 7(h), a certificate holder's authority to condemn the necessary right-of-way to construct, operate, and maintain an interstate natural gas pipeline applies to property in which a state holds an interest; and (2) Whether, in NGA Section 7(h), Congress delegated the federal government's eminent domain authority to certificate holders.

The Commission should issue a declaratory order in accordance with the Petition because the decision issued by the Third Circuit conflicts with Commission precedent and its Congressional charge to administer the Natural Gas Act.⁷ Section 7(h) of the Natural Gas Act gives authority to a certificate holder to condemn the necessary right-of-way for FERC-certificated pipelines. This includes the authority to condemn property in which a state claims interest through the Courts. This authority should be maintained to ensure that there is a viable mechanism for certificate holders to enforce the right of eminent domain prescribed to them by Congress. A sudden change in a nearly 80-year practice immediately disrupts the development of infrastructure. The Commission should issue a declaratory order emphasizing its role in administering the Natural Gas Act to ensure that long-standing precedents are maintained.

The Third Circuit's holding on whether the Commission may delegate the federal government's power of eminent domain misses the point of the Natural Gas Act. In this context (versus the context of other precedents) the reading of the Third Circuit would require that the federal government construct and own interstate pipelines because of the purported need for it alone to trump state immunity under the Eleventh Amendment.

⁷ *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004).

But the historical context and text of the Natural Gas Act demonstrates that this is exactly what Congress did not wish to do. Rather, Congress determined that the Nation's public good required private entities to construct and own critical energy infrastructure and then empowered that by granting the power of eminent domain to those private owners. The delegation of the power of eminent domain is obviously necessary to the success of this structure. This paradigm would have been deemed absurd by Congress had it believed that private entities could not enjoy the power of eminent domain when states and not other private parties had an interest in the pertinent lands. There is no evidence that Congress desired to give the states a trump card. That is completely contrary to the Commerce Clause and the resulting Natural Gas Act.

Certainly Congress would not have contemplated the ability of landowners to evade the statute by granting the local state some sort of property interest in their land. Yet this is the upshot of the Third Circuit Opinion.

Moreover, certificated interstate natural gas pipelines are no simple private entity. They are quasi-utilities operating for the public interest as determined by the federal government. Their operations are heavily regulated in nearly every facet of its operations and are subject to considerable powers of oversight and enforcement.⁸

FERC should not stand by while the judicial branch in its very much post-hoc interpretations of federalism undoes what is clear in the Commerce Clause and the Natural Gas Act after some 60 years of constant interpretation. Such judicial overreach

⁸ Not lost on APGA—FERC has asserted jurisdiction over the construction of lines crossing state boundaries owned and operated by local governmental entities. *E.g., City of Toccoa, GA*, 125 FERC ¶ 61,048 (2008).

threatens the natural gas service to the communities across America that APGA members serve. Accordingly, APGA supports the petition and urges FERC to promptly rule to better inform the Third Circuit so that it will rehear its recent decision *en banc*. Any lengthy delay threatens necessary interstate natural gas pipeline projects for years, which would have an adverse impact on the citizens of this country.

IV. CONCLUSION

APGA entreats the Commission to issue a declaratory order as requested by PennEast.

Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION

By /s/ John P. Gregg

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CERTIFICATE OF SERVICE

I hereby certify that I have served this day copies of the foregoing on the official service list compiled by the Office of the Secretary in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, this 18th day of October, 2019.

/s/ John P. Gregg

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