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

**PennEast Pipeline Company, LLC** : **Docket No. RP20-41-000**

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# PETITION FOR REHEARING OF DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER OF THE COMMISSION'S ORDER ON PETITION FOR DECLARATORY ORDER

## INTRODUCTION

Pursuant to section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(a), and Rule 713 of the Federal Regulatory Energy Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713, Delaware Riverkeeper Network and the Delaware Riverkeeper (collectively, "DRN") respectfully request rehearing of the Commission's "Order on Petition for Declaratory Order," issued January 30, 2020 in the above-captioned proceeding ("Declaratory Order"). The Declaratory Order sets forth the Commission's "belief" that section 7(h) of the NGA empowers natural gas companies to exercise eminent domain over lands in which States hold an interest.[1] This "belief" is an inappropriate, unfounded legal conclusion directly contrary to the holding of the Third Circuit Court of Appeals in *In re PennEast Pipeline Co., LLC*, 938 F.3d 96,

[1] Declaratory Order, p. 49.

99 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019)(the "Third Circuit Decision" or "*In re PennEast*").[2]

Under the NGA, FERC has a clearly defined role. It is tasked with regulating the construction and operation of interstate natural gas pipelines. If FERC determines that a natural gas pipeline project should proceed, it issues a certificate of public convenience and necessity. *Twp. of Bordentown, New Jersey v. Fed. Energy Regulatory Comm'n*, 903 F.3d 234, 243–44 (3d Cir. 2018). FERC has no role in the exercise of eminent domain and no role in the conduct or outcome of any eminent domain proceedings. FERC has no role in the determination of constitutional issues of eminent domain and no role in analyzing the Eleventh Amendment to the United States Constitution.

Despite this, the Commission has stepped outside the bounds of its statutorily-defined role and, in a naked display of favoritism, issued an unwarranted Declaratory Order advocating for the legal position of PennEast Pipeline Company, LLC ("PennEast Pipeline"). No longer a dispassionate arbiter of pipeline projects and the public good, the Commission revealed itself in the Declaratory Order as a full-throated supporter of PennEast Pipeline and other

[2] "[W]e hold that the NGA does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity." *In re PennEast Pipeline Co., LLC*, 938 F.3d at 112–13.

pipeline companies, leaving DRN, and the thousands of individuals it represents, to wonder who will protect their important interests.

Not only did the Commission overstep its bounds in issuing the Declaratory Order, it did so in a remarkable manner, making unsupported legal arguments, citing to cases that do not stand for the proposition for which they were offered, and failing even to mask the Commission's contempt for the Third Circuit's decision.[3] The Commission was wrong to issue the Declaratory Order and wrong to take positions in that order that have no basis in the law.

The Declaratory Order is improper, ill-advised, outside the limits of Commission power and authority, and unsupported by law. DRN respectfully requests a rehearing and that the Declaratory Order be vacated.

## I. BACKGROUND

### A. Procedural History of the Instant Matter

On October 4, 2019, PennEast Pipeline filed a Petition for Declaratory Order and Request for Expedited Action, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191004-5170 (Oct. 4, 2019) ("Petition").[4] DRN, among others,

[3] For example, in a show of pique, the Commission actually compares the effect of the Third Circuit's decision on the natural gas industry to the effect of the French Revolution on the French nobility. Declaratory Order, p. 42, fn. 216.

[4] PennEast filed its Petition on October 4, 2019. On October 10, 2019, the Commission published notice of PennEast's request in the Federal Register. *Federal Energy Regulatory Commission, Docket No. RP20–41–000, PennEast Pipeline Company, LLC; Notice of Petition for Declaratory Order,* 84 Fed. Reg. 54,600 (Oct. 10, 2019). The Commission required that all comments, protests, or opposition be filed by 5:00 pm Eastern Time on October 18, 2019. *Id.*

timely moved to intervene.[5] The motion to intervene was granted automatically pursuant to 18 C.F.R. § 385.214.[6] DRN filed its Protest on October 18, 2019.[7] The Commission issued the Declaratory Order on January 30, 2020. This Petition for Rehearing is timely filed. 18 C.F.R. § 385.713(b).

### B. Relevant Procedural History of the PennEast Pipeline Project

On January 19, 2018, the Commission issued a certificate of public convenience and necessity for the PennEast Project ("PennEast Project"), an approximately 116-mile natural gas pipeline project designed to run from Luzerne County, Pennsylvania to Mercer County, New Jersey.[8] PennEast alleged, which allegation was denied by the State of New Jersey, that PennEast sought agreement with the State to acquire easements for the portions of its proposed pipeline route that would cross land in which New Jersey holds a property interest.[9] When agreement was not reached, PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey ("District Court").[10] New Jersey moved to dismiss, asserting its sovereign immunity under the Eleventh

[5] Declaratory Order, pp. 5, 50.
[6] Declaratory Order, p. 5.
[7] DRN filed a comment under DRN letterhead and a protest pleading. The same text follows the introductory paragraph in both the comment and protest. The comment and protest are referred to herein collectively as the "Protest."
[8] Declaratory Order, p. 2.
[9] Declaratory Order, p. 2.
[10] New Jersey alleged that PennEast had not attempted to contract with the State for its property interests. *In re PennEast Pipeline Co., LLC,* 938 F.3d at 101.

Amendment of the United States Constitution. The District Court denied the Motion.[11]

New Jersey timely appealed the District Court's ruling to the Third Circuit Court of Appeals.[12] By Opinion issued September 10, 2019, the Third Circuit vacated the District Court's order insofar as it condemned New Jersey's property interests, and granted preliminary injunctive relief with respect to those interests. The matter was remanded to the District Court for dismissal of claims against the State.[13] The Third Circuit held that nothing in the NGA allowed a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity.[14]

### C. Delaware Riverkeeper Network

The Delaware Riverkeeper is the leader of DRN, a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. This area includes 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania, and Delaware, and it is within this region that a portion of PennEast's proposed pipeline construction activity will take place. New Jersey-owned lands that PennEast has tried to

[11] *In re PennEast Pipeline Co., LLC*, 938 F.3d at 101.
[12] *In re PennEast Pipeline Co., LLC*, 938 F.3d at 102.
[13] *In re PennEast Pipeline Co., LLC*, 938 F.3d at 113.
[14] *In re PennEast Pipeline Co., LLC*, 938 F.3d at 112–13.

condemn for its proposed pipeline fall within this region.[15] The interests of DRN are set out more fully in DRN's motions to intervene filed in this docket and incorporated by reference herein. *See* Maya K. van Rossum, the Delaware Riverkeeper, Motion to Intervene, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191015-5020 (Oct. 13, 2019); Delaware Riverkeeper Network Motion to Intervene, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191015-5021 (Oct. 13, 2019).

## II. SPECIFICATION OF ERRORS

1. Was the Commission's issuance of the Declaratory Order in error where such issuance violated the Commission's own Rules of Practice and Procedure?

**YES**. In violation of the Commission's own guidance, the Declaratory Order does not terminate a controversy, does not remove uncertainty regarding a matter within the Commission's jurisdiction, is not a binding policy statement, and provides no direction to the public or to Commission staff. *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61157, 62025 (May 15, 2008).

[15] Since 1992, DRN has had a strong community-based monitoring program. With the onslaught of fracking and pipeline infrastructure expansion, communities have been seeking to document related impacts. DRN has assisted many communities in Pennsylvania, New Jersey, New York, and beyond with their efforts to serve as watchdogs over pipeline construction. As part of this effort, DRN professional staff and volunteer monitors have documented conditions along, *inter alia*, New Jersey-owned lands.

2. Does the Commission's issuance of the Declaratory Order violate the separation of powers doctrine?

**YES**. In issuing the Declaratory Order to dispute the Third Circuit's holding over four months after the decision in *In re PennEast*, the Commission is acting as though it were a court of higher authority and not a part of the executive branch. There is no legitimate reason for the Commission's action. The undisputed heart of the issue before the courts in the instant matter is an analysis of the requirements of the Eleventh Amendment to the Constitution, an issue well outside the role of the Commission.

3. Was it error for the Commission to claim that the Declaratory Order will be accorded *Chevron* deference?

**YES**. *Chevron* deference comes into play only as a consequence of statutory ambiguity, and then *only* if there was an implicit delegation of authority to the agency. There is no ambiguity in the NGA with regard to federal delegation of eminent domain power. Further, FERC does not hold, exercise, administer, or review eminent domain power. No authority has been delegated by Congress to FERC to make rules on the exercise of eminent domain or to fill in any statutory gaps.

4. Was it error for the Commission to claim deference of any kind for the Declaratory Order?

**YES**. Declaratory Orders of the Commission, unlike declaratory orders of a court, are legally ineffectual and deserve no deference.

5. Was it error for the Commission to issue an after-the-fact Declaratory Order disagreeing with the holding of *In re PennEast* when the Commission had every opportunity to participate in the federal proceedings?

**YES**. The Commission's issuance of a legally irrelevant after-the-fact Declaratory Order disagreeing with the Third Circuit, when the Commission all along had the opportunity to articulate its interpretation in the federal proceedings, is inappropriate.

6. Was it error for the Commission to conclude that section 7(h) of the NGA empowers certificate holders to exercise the federally-delegated powers of eminent domain to condemn property in which States hold an interest?

**YES**. Since abrogation of a State's sovereign immunity upsets the fundamental balance between the Federal Government and the States, placing a considerable strain on the principles of federalism, the only permissible way to abrogate a State's Eleventh Amendment sovereign immunity is with unmistakably clear textual language in the body of the statute. Congressional intent to abrogate may not be divined from similar statutes or from legislative history. The NGA lacks the unmistakably clear textual language that would permit certificate holders

to abrogate State sovereign immunity and exercise the right of eminent domain to condemn properties in which States hold an interest.

## III. ARGUMENT

The Commission plays a significant role under the NGA, reviewing applications for natural gas pipeline projects, publishing notices, holding hearings, accepting comments and letters, and issuing certificates of public convenience and necessity to natural gas pipeline companies, all for the purpose of serving the public interest. However, once the Commission has performed its work and issued the certificates, its role changes. Section 7(h) of the NGA delegates the federal government's right of eminent domain to acquire the right-of-way for the project to the "holder of a certificate of public convenience and necessity." 15 U.S.C.A. § 717f (c). The Commission does not hold, exercise, administer, or review eminent domain power.

The holding of *In re PennEast* is as follows: PennEast Pipeline's eminent domain condemnation suits affecting New Jersey property interests are barred by the immunity guaranteed to the States under the Eleventh Amendment of the United States Constitution. *In re PennEast*, 938 F.3d at 100. As the Commission does not hold, exercise, administer, or review eminent domain power and does not have the right, power, or expertise to analyze or make pronouncements about constitutional issues, the Commission's issuance of the Declaratory Order to the

contrary was inappropriate and in error. Further, the case law is uncontroverted. The only permissible way for Congress to abrogate a State's Eleventh Amendment sovereign immunity is with unmistakably clear textual language in the body of the statute. The NGA lacks that unmistakably clear textual language.

### A. The Issuance of the Declaratory Order is Procedurally Improper

The issuance of the Declaratory Order was procedurally improper on several grounds. It violated the Commission's own guidelines, violated the separation of powers doctrine, does not qualify either for *Chevron* deference or deference of any kind, and is a naked attempt, after the fact, to dispute the holding of the Third Circuit in *In re PennEast* in order to improperly aid one party to the litigation.

#### 1. The Declaratory Order Is Inappropriate Under the Commission's Own Guidelines

The Commission has set forth the following guidance on declaratory orders:

> ***Any person seeking to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction*** may file a request for a declaratory order under Rule 207(a)(2) of the Commission's rules of practice and procedure. The declaratory order process can be very useful to persons seeking reliable, definitive guidance from the Commission. Recent declaratory orders have addressed such issues as the extent of the Commission's jurisdiction over a natural gas gatherer, permissible actions under section 305(a) of the FPA, and triggering events to make an entity a "public utility" under the Public Utility Holding Company Act of 2005. As with other formal Commission actions, ***a declaratory order represents a binding statement of policy that provides direction to the public and our staff*** regarding the statutes we administer and the implementation and enforcement of our orders, rules and

> regulations. A declaratory order is therefore the most reliable form of guidance available from the Commission.

*Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61157, 62025 (May 15, 2008)(emphasis added). *See also*, 18 C.F.R. § 385.207(a)(2).

In issuing the Declaratory Order, the Commission violated its own guidance. PennEast Pipeline sought a declaratory order under Rule 207 of the Commission's Rules of Practice and Procedure.[16] Such requests are for persons "seeking to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction." *Id.* Even under the most generous reading of PennEast's Petition, there is nothing therein presented to the Commission that would allow the Commission to "terminate a controversy" or "remove uncertainty regarding a matter within the Commission's jurisdiction" by way of declaratory order. The Commission does not have jurisdiction over eminent domain proceedings or controversies. There was no controversy that the Commission could terminate and no uncertainty within the power of the Commission to remove. Indeed, the "controversy" was a legal, constitutional matter before the courts and the "uncertainty" was resolved by the Third Circuit which issued its opinion on September 10, 2019.

[16] Petition, p. 2.

It is not in dispute that the Commission has no jurisdiction over eminent domain issues. The Commission itself has recognized this principle in a ruling related to the PennEast Pipeline project: "Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court." *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, P 33 (2018) (citing *Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at P 35 (2017) (citing *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at PP 68, 70 (2017) (explaining that "[t]he Commission does not oversee the acquisition of property rights through eminent domain proceedings")).

The Commission attempts to walk back that statement now that the Third Circuit has ruled in a way the Commission did not expect, but its attempt is unconvincing.[17] Indeed, it is a half-hearted attempt with no support or logic. The Commission explains that it made the above statement in the context of a request by New Jersey that the Commission limit the land on which PennEast Pipeline may exercise eminent domain. The Commission properly declined to do so because, as it once recognized, "[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court." *Id*. It is irrelevant whether the Commission is being asked to expand or limit eminent domain

[17] Declaratory Order, ¶ 12.

powers. Issues of eminent domain are outside the realm of Commission powers, duties and responsibilities.

Commission guidance further provides that "a declaratory order represents a binding statement of policy that provides direction to the public and our staff." *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61157, 62025 (May 15, 2008). The Declaratory Order in the instant matter represents no such thing. The Commission cannot issue a binding policy statement that is directly contrary to a holding of the Third Circuit Court of Appeals. Neither can the Commission's dislike of a court's holding serve as "direction to the public or the Commission's staff."

The Commission provides no clear rationale for its violation of its own guidance. The Declaratory Order does not terminate a controversy, does not remove uncertainty regarding a matter within the Commission's jurisdiction, is not a binding policy statement, and provides no direction to the public or to Commission staff. If anything, the Commission's Declaratory Order has created controversy. The Declaratory Order violates the Commission's guidelines and it must be vacated.

### 2. The Declaratory Order Violates the Separation of Powers Doctrine

Article III, Section 1 of the United States Constitution provides that the "judicial Power of the United States" is vested exclusively in the federal courts.

Central to the judicial power is "the duty of interpreting [the laws] and applying them in cases properly brought before the courts." *Patchak v. Zinke*, 583 U. S. ___, ___, 138 S. Ct. 897, 904-05 (2018) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U. S. 447 (1923)). Almost since the founding of our nation, it is a hallmark of constitutional law that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803); *see also Wayman v. Southard*, 23 U.S. 1 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"). "The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers." *Miller v. French*, 530 U.S. 327, 341, 120 S. Ct. 2246, 2255 (2000).

The Commission is part of the executive branch whose duty is to execute the law, not to construe it. In the instant matter, the judiciary has, as required by the Constitution, construed the law and issued its opinion in *In re PennEast*. The Third Circuit held as follows:

> We will vacate because New Jersey's sovereign immunity has not been abrogated by the NGA, nor has there been – as PennEast argues – a delegation of the federal government's exemption from the State's sovereign immunity. The federal government's power of eminent domain and its power to hale sovereign States into federal court are separate and distinct. In the NGA, Congress has delegated the former. Whether the federal government can delegate its power to override a State's Eleventh Amendment immunity is, however, another matter

> entirely. While there is reason to doubt that, we need not answer that question definitively since, ***even if a delegation of that sort could properly be made, nothing in the text of the NGA suggests that Congress intended the statute to have such a result. PennEast's condemnation suits are thus barred by the State's Eleventh Amendment immunity.*** We will therefore vacate the District Court's order with respect to New Jersey's property interests and remand the matter for the dismissal of any claims against New Jersey.

*In re PennEast Pipeline Co., LLC*, 938 F.3d at 99–100 (emphasis added).

There can be no doubt that the court has construed the law. It did not ask for nor need the input of FERC in order to do so. The Third Circuit considered and understood that its ruling in *In re PennEast* could alter the way in which the natural gas industry is operating. However, courts are not free to change the law in furtherance of the needs of one of the parties before it. As the Third Circuit stated, this "is an issue for Congress, not a reason to disregard sovereign immunity. To be sure, such a change would alter how the natural gas industry has operated for some time. But that is what the Eleventh Amendment demands." *In re PennEast*, 938 F.3d at 113. The Third Circuit understands its role in our constitutional system of government. No matter the practical outcome, it is not the place of the courts to make the law, only to say what the law is. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result. This allows both of our branches to adhere to our respected, and respective, constitutional roles." *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004)(internal citation omitted).

In issuing the Declaratory Order to dispute the Third Circuit's holding over four months after the decision in *In re PennEast*, the Commission is acting as though it were a court of higher authority and not a part of the executive branch. There is no legitimate reason for the Commission's action. The Commission gives short shrift to separation of powers concerns claiming that the Declaratory Order declines to address constitutional issues.[18] The Commission may so claim, but the words of the Declaratory Order belie that claim. For example, the very conclusion of the Commission involves constitutional issues: "We hereby confirm our strong belief that section 7(h) of the NGA empowers natural gas companies to exercise eminent domain over lands in which states hold an interest."[19] *See also* Declaratory Order, ¶ 32 ("We believe it is evident that Congress, in delegating to certificate holders its power of eminent domain, provided broad eminent domain authority in order to achieve the objectives of the NGA *without interference from states*.")(emphasis added); Declaratory Order, ¶ 41 ("…it is reasonable to interpret the absence of limitation in that provision as authorization for a certificate holder to condemn state land when necessary.") Whether or not the federal power of eminent domain delegated to a natural gas company under the NGA can be used by such company to condemn State property interests is, indisputably, a constitutional

[18] Declaratory Order, ¶ 14.
[19] Declaratory Order, ¶ 66.

issue. The Commission's claim that it is not addressing constitutional issues in the Declaratory Order is transparently untrue.

Further, the issues *have already been decided* in a court of law. There can be no reason for the Commission to issue the Declaratory Order months after the Third Circuit's decision other than to engage in an attempt to aid PennEast Pipeline in an appeal of the Third Circuit's decision to the Supreme Court[20] or to attempt to improperly influence potential litigation in other circuits. As stated by Commissioner Glick in his dissent, "It is not appropriate for the Commission to issue a declaratory order in an effort to buttress a private party's litigation efforts."[21] The Commission forgets its place in our constitutional system and oversteps its bounds. The Declaratory Order violates the separation of powers and it must be vacated.

### 3. The Commission's Declaratory Order is Not Accorded *Chevron* Deference

The Commission further tries to justify its issuance of an inappropriate Declaratory Order by claiming that its order will merit *Chevron* deference.[22] A

[20] The Declaratory Order was issued on January 30, 2020, two business days prior to the deadline for PennEast Pipeline to file a Petition for Writ of Certiorari with the United States Supreme Court (February 4, 2020). By U.S. Supreme Court Letter entered February 3, 2020, PennEast Pipeline was granted an extension of time to and including March 4, 2020 to file its petition. General Docket, Third Circuit Court of Appeals, Docket #19-1191.
[21] Declaratory Order, Dissent, ¶ 4.
[22] Declaratory Order, ¶ 15.

simple review of Chevron deference shows this to be a false claim. The United States Supreme Court has found that *Chevron* deference

> is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

*Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006)(internal citation omitted). Further, "*Chevron* deference comes into play of course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency." *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 9 (D.C. Cir. 2002).

First, the Third Circuit in *In re PennEast* emphatically held that there is no statutory ambiguity in the NGA with regard to federal delegation of eminent domain powers to private parties to condemn a State's property interest:

> ***[C]ongressional intent to abrogate state sovereign immunity must be "unmistakably clear in the language of the statute*."** *Blatchford*, 501 U.S. at 786, 111 S.Ct. 2578 (citation omitted) … In short, ***nothing in the text of the statute even "remotely impl[ies] delegation[.]"*** *Blatchford*, 501 U.S. at 786, 111 S.Ct. 2578.

*In re PennEast Pipeline Co., LLC*, 938 F.3d at 111, 112 (emphasis added).

The very issuance of the Declaratory Order is premised on the Commission's false assertion that "[b]ecause the Third Circuit did not hold that its construction follows from the unambiguous terms of the statute, its construction of the NGA does not foreclose a subsequent or different Commission interpretation of

that statute."[23] Unfortunately for the Commission's argument, the Third Circuit *did hold* that its construction followed from the unambiguous terms of the statute. The Third Circuit unequivocally stated that in order to abrogate the sovereign immunity of the States, a statute must contain "unmistakably clear" language that it is doing so. The Third Circuit held that nothing in the text of the NGA even remotely implies delegation. *Id*. The Third Circuit did not struggle with ambiguities or ponder the intent of Congress in the passage of NGA section 7(h). It found that under the unambiguous terms of the NGA, the language required to abrogate a State's sovereign immunity did not exist. As the Third Circuit's decision was based on the unambiguous terms of the statute, that decision *does* "foreclose a subsequent or different Commission interpretation of that statute."[24]

Secondly, even if there were statutory ambiguity, which the Third Circuit has emphatically stated there is not, to qualify for *Chevron* deference, there would also need to be an implicit delegation of authority in the NGA to FERC to construe eminent domain authority. Without question, there is no such delegation under the NGA, and the Commission points to no such delegation in its Declaratory Order. FERC does not hold, exercise, administer, or review eminent domain power. No authority has been delegated by Congress to FERC to make rules on the exercise of

[23] Declaratory Order, ¶ 15.
[24] Declaratory Order, ¶ 15.

eminent domain or to fill in any statutory gaps. FERC has stated as much on more than one occasion.

> Under section 7(h) of the NGA, once 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, regardless of the status of other authorizations for the project.
>
> …
>
> [T]he Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of NGA section 7(h), … are matters for the applicable state or federal court.

*Mountain Valley Pipeline, LLC Equitrans, L.P.*, 163 FERC ¶ 61197, at ¶¶ 66, 76 (June 15, 2018). *See also Californians for Renewable Energy, Inc. (Care)*, 135 FERC ¶ 61158, 61931 at ¶ 19 (May 19, 2011)("The Commission is not the appropriate forum in which to adjudicate property rights."); *Atl. Coast Pipeline, LLC Dominion Transmission, Inc. Piedmont Nat. Gas Co., Inc.*, 161 FERC ¶ 61042 at ¶ 66 (Oct. 13, 2017)("The Commission itself, however, does not confer eminent domain powers.").

The Commission's claim of *Chevron* deference is entirely unsupported. The Commission's simple reference to the existence of the *Chevron* case without any analysis of the law of *Chevron* deference and its application to the facts of the instant matter is woefully inadequate.[25] Indeed, the strong inference is that the

[25] Declaratory Order, ¶ 15.

Commission is aware that it has no legally supported basis for claiming *Chevron* deference for the Declaratory Order. There is no ambiguity in the NGA with regard to federal delegation of eminent domain power. No authority has been delegated by Congress to FERC to make rules on the exercise of eminent domain or to fill in any statutory gaps. As Commissioner Glick noted,

> [q]uestions about the scope of a private party's right to commence an action in federal or state court are not issues that Congress would have given this Commission to decide. Instead, the obvious venue to address those questions in the first instance is those courts themselves.[26]

The claim of the Commission that Declaratory Order will warrant *Chevron* deference is entirely unsupported and contrary to law.

### 4. Declaratory Orders of the Commission Are Entitled to No Deference and Are of No Legal Import

Not only is the Declaratory Order not entitled to *Chevron* deference, it is entitled to no deference at all and carries no legal weight. As the Supreme Court has explained, '[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.' *Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014). Further, courts have held that unlike a declaratory order of a court, a

[26] Declaratory Order, Dissent, ¶ 7.

declaratory order of FERC is "of no legal moment" and would be legally ineffectual. *Indus. Cogenerators v. F.E.R.C.*, 47 F.3d 1231, 1235 (D.C. Cir. 1995). In *Indus. Cogenerators*, the court noted that the declaratory order of FERC was "like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action." *Id.* *See also Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d at 391 ("Exelon points to FERC's Letter, which Exelon requested from FERC after receiving an unfavorable ruling from the PUC. While this FERC-issued document is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter.")

### 5. ***In re PennEast*** **Creates No Uncertainty As To The Proper Role Of The Commission In Condemnation Proceedings**

The Commission states in the Declaratory Order that "the Third Circuit's opinion creates sufficient uncertainty as to the proper role of the Commission in condemnation proceedings such that it is appropriate for us to address these issues in this order."[27] The Commission provides no support for this bald statement and it is entirely contrary to the facts and the law. There is no uncertainty as to the proper role of the Commission in condemnation proceedings; it has none. The Commission issues a certificate of public convenience to a natural gas company and that company pursues eminent domain issues, if any.[28] The Commission has

[27] Declaratory Order, ¶ 15.
[28]

no power and no role in condemnation proceedings. It is entirely without basis for the Commission to suggest otherwise.

### 6. A Declaratory Order Is Not An Appropriate Alternative To Participation By The Commission In Judicial Proceedings

It is clear from the Declaratory Order that the Commission does not like the decision of the Third Circuit in *In re PennEast*. However, the Commission had ample opportunity to appropriately share its interpretation of the NGA as part of the judicial process, but it chose not to participate in *In re PennEast*. While the litigation was proceeding through the federal courts, the Commission had the opportunity to seek intervention to inform and defend any interpretation of the NGA and the eminent domain authority that a FERC certificate confers on recipient pipeline companies considering State sovereignty and States' rights. Alternatively, the Commission could have sought leave to submit an amicus brief. The Commission did none of those things. As explanation or excuse for its failure to participate, the Commission states that "it would be impractical for the Commission to intervene in every federal court proceeding involving an interstate pipeline company."[29] Such statement belies reality. No one suggested that the Commission should intervene in every federal court proceeding involving an interstate pipeline company. *In re PennEast* is no run-of-the mill appeal of a

[29] Declaratory Order, ¶ 19.

Commission decision. To the contrary, it is a high profile federal case on its way to the Supreme Court.

The Commission also curiously claims that:

> any brief filed by Commission staff as amicus curiae would not have benefitted from the Commission's articulation of a formal interpretation of NGA section 7(h) and the critical role that provision has in the Commission's successful administration of the NGA's 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.'[30]

This excuse for the Commission's failure to participate in *In re PennEast* is also unsupported. The Commission fails to explain in the Declaratory Order what possible reason there could be for a difference in the Commission's "articulation of a formal interpretation of NGA section 7(h)" during the federal litigation as opposed to such articulation at the time of the issuance of the Declaratory Order. Section 7(h) of the NGA has not changed. The role of FERC as provided in the NGA has not changed and neither has the absence of any role of FERC in eminent domain proceedings changed. In sum, the law, regulations, and background facts in the instant matter have not changed at all between the time of the federal litigation and the time of the issuance of the Declaratory Order. What has changed is that PennEast Pipeline lost its argument before the Third Circuit and the Commission has, rhetorically speaking, missed the boat. The Commission had

[30] Declaratory Order, ¶ 19.

every opportunity to weigh in. It chose not to. Its issuance of a legally irrelevant after-the-fact Declaratory Order disagreeing with the Third Circuit, when the Commission all along had the opportunity to articulate its interpretation in the federal proceedings, is suspect. Weighing in at this time, after the courts have ruled on the proper interpretation of the law, is a clear effort to circumvent the authority of the judiciary to interpret our nation's laws and determine their proper implementation and enforcement by other branches of government.

There is no question that the Declaratory Order carries no weight, is of no legal significance, is entitled to no deference, and stands in direct contradiction to the Third Circuit decision. Given the confusion and waste of judicial resources that likely will occur as pipeline companies and perhaps FERC itself attempt to rely on this legally irrelevant document, it is the responsibility of the Commission to vacate the Declaratory Order.

### B. The Commission's Finding That Congress Unambiguously Intended Section 7(h) of the NGA to Apply to State Lands is "dead wrong."[31]

"Dead wrong." These are serious words, especially when used by a Commissioner to describe the conclusions of the majority in the Declaratory Order. But the words are apt. The Declaratory Order reveals a Commission that desperately, indeed passionately, wants section 7(h) of the NGA to be interpreted

[31] Declaratory Order, Dissent, ¶ 8.

as permitting natural gas companies to exercise eminent domain power over lands in which States have property interests. It is perhaps these strong feelings that led the Commission to not only issue an inappropriate Declaratory Order, but to offer entirely unsupported legal conclusions therein. It is obvious that the Commission has a preferred outcome. It goes to great lengths, including citing to cases that do not stand for the proposition for which they are offered and misrepresenting irrelevant legislative history, to reach its pre-ordained conclusions. Indeed, Commissioner Glick, in dissent, decries the "ends-oriented reasoning" in the Declaratory Order which he found to be "both deeply troubling and, frankly, a discredit to the agency."[32]

### 1. The NGA Does Not Contain the Unmistakably Clear Textual Language Required to Abrogate State Sovereign Immunity.

Without question, the Eleventh Amendment is at the heart of the matter, and all issues in this case rest upon its foundation. Despite its protestation to the contrary, the Commission does address constitutional issues in the Declaratory Order, but because it fails to apply the precepts of the Eleventh Amendment, all of its arguments fail.

[32] Declaratory Order, Dissent, ¶ 23.

Eleventh Amendment principles are incontrovertible. The Eleventh Amendment provides the States with sovereign immunity[33] which means that the States are not subject to suit unless they have consented to such suit.[34] Congress can abrogate the sovereign immunity of the States, allowing them to be subject to suits by private parties. However, since such an abrogation "upsets the fundamental balance between the Federal Government and the States, placing a considerable strain on the principles of federalism," the Supreme Court has held that Congress can abrogate the sovereign immunity of the States "'only by making its intention to do so ***unmistakably clear*** in the language of the statute' in question." *In re PennEast*, 938 F.3d at 107 (citing *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989)(emphasis added). "'Unmistakable' clarity is a high bar, and one that must be cleared without resort to nontextual arguments." *Id.* "***When Congress chooses to subject the States to federal jurisdiction, it must do so specifically***." *Id.* (emphasis added).

> To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero, supra*, 473 U.S., at 242, 105 S.Ct., at 3147.

[33] *In re PennEast*, 938 F.3d at 103 citing to *'Puerto Rico Aqueduct*, 506 U.S. at 146."
[34] *In re PennEast*, 938 F.3d at 103 citing to 9 *Blatchford*, 501 U.S. at 779, 111 S.Ct. 2578 (quoting *Port Auth. Trans–Hudson Corp. v. Feeney*, 495 U.S. 299, 310, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990))."

*Dellmuth v. Muth*, 491 U.S. at 227–28.

In *Dellmuth*, the plaintiff was a parent of a handicapped child and sued both the school district and the Commonwealth of Pennsylvania under the Education of the Handicapped Act ("EHA") alleging that the child's individualized education program was inappropriate and that the Commonwealth's administrative proceedings had violated the procedural requirements of the EHA. *Dellmuth*, 491 U.S. at 226. The District court found the school district and the Commonwealth jointly and severally liable. On appeal, the Third Circuit affirmed the judgment against the Commonwealth, concluding that "the text of EHA and its legislative history leave no doubt that Congress intended to abrogate the 11th amendment immunity of the states." *Dellmuth*, 491 U.S. at 227.

The Third Circuit based its abrogation holding on three factors. First, the preamble to the EHA references the States, stating that it is in the national interest for the federal government to assist the States in meeting the needs of handicapped children. Second, the EHA's judicial review provision permits parties to bring a civil action in state court or in a district court of the United States. Third, in an amendment to the EHA, the Act's provision for a reduction of attorney fees was stated not to apply "if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there

was a violation of this section. 20 U.S.C. § 1415(e)(4)(G) (1982 ed., Supp. V)." *Dellmuth*, 491 U.S. at 228.

Much like PennEast Pipeline and the Commission in the instant matter, the plaintiff in *Dellmuth* argued that the EHA could not function if States were to retain their immunity and argued that amendments to another statute, the Rehabilitation Act, was evidence of congressional intent to abrogate State sovereignty in the EHA. *Dellmuth*, 491 U.S. at 228-229.

Each and every argument of plaintiff failed. The Supreme Court reversed. "Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute.' *Atascadero,* 473 U.S., at 242, 105 S.Ct., at 3147." *Dellmuth*, 491 U.S. at 230. An example of explicit abrogation of the Eleventh Amendment can be found in the Rehabilitation Act:

> "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of [several enumerated provisions] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d–7(a)(1) (1982 ed., Supp. IV).

*Dellmuth*, 491 U.S. at 229-230. Neither the EHA nor the NGA contain the required language explicitly abrogating the Eleventh Amendment immunity of the States.

Further, even if such explicit abrogation language had been used, "Congress may abrogate state sovereign immunity only pursuant to a valid exercise of federal power." *In re PennEast*, 938 F.3d at 108. Sovereign immunity may not be abrogated under the Commerce Clause, "and because Congress enacted the NGA pursuant to that Clause, the statute cannot be a valid congressional abrogation of sovereign immunity." *In re PennEast*, 938 F.3d at 105.

All of the Commission's arguments in the Declaratory Order on legislative history, the intent of Congress, comparisons with the Federal Power Act, and historical practice and procedure of FERC are of no import. DRN will address each such argument in turn but, as the Supreme Court stated in *Dellmuth*, such "contentions are beside the point." *Dellmuth*, 491 U.S.at 230. The clear textual language required to abrogate State sovereign immunity simply does not exist in the NGA, and all other arguments are meaningless.

### 2. The Text of the NGA Does Not Support the Commission's Arguments

The Commission begins the argument section of the Declaratory Order by setting forth the well-known construct of section 7(h) of the NGA. Once the Commission has determined that the construction of a pipeline is in the public convenience and necessity, it issues a certificate to the pipeline company. That certificate provides the holder with the right to acquire the lands necessary for the construction, using eminent domain power delegated to it by the federal

government if necessary. If the value of lands condemned is greater than $3,000 the condemnation proceeding may be heard in United States district court.[35]

The Commission finds it "critical" that NGA section 7(h) contains no language limiting the exercise of eminent domain based on the status of the property's owner as a State.[36] The Commission has it entirely backwards. A State's sovereign immunity does not need to be reaffirmed in any and every statute passed by Congress. To the contrary, the States *have* sovereign immunity under the Eleventh Amendment to the Constitution and it can only be abrogated by unmistakably clear textual language in the statute. *Dellmuth,* 491 U.S. at 227. The critical point is that the NGA lacks the unmistakably clear textual language required to abrogate State sovereign immunity. The lack of that language in the NGA is fatal to PennEast Pipeline's attempts to exercise federal eminent domain power to condemn State property.

### 3. Judicial Precedent and Commission Decisions Do Not Support the Commission's Arguments

The Commission next discusses judicial review of NGA section 7(h). The first case cited, *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950), is entirely irrelevant to the issue at hand. It does not in any way address State sovereign immunity or the delegation of federal eminent domain

[35] Declaratory Order, ¶ 31.
[36] Declaratory Order, ¶ 34.

power to a private party to condemn State land. *Thatcher* held that the transportation of natural gas across State lines for interstate distribution and interstate sales in States far removed from the point of production constitutes interstate commerce. *Id.*

The Commission also cites to a State court case that is likewise of no value to consideration of the issues here. *Parkes v. Nat. Gas Pipe Line Co. of Am.*, 1952 OK 157, 207 Okla. 91, 249 P.2d 462 does not involve State land. It merely reaffirms that federal eminent domain power under the NGA cannot be restricted or prevented by State legislation.

Apparently at a loss to find any federal or State court decisions to support its views, the Commission cites to *Tenneco Atlantic*, 1 FERC at 65,203-04, one of its own ALJ decisions issued over 40 years ago. The ALJ in *Tenneco* expressed a belief that "there is nothing in Section 7(h) that compels a reading of the language 'owner of property' to exclude a state…. It is reasonable to include a state within the plain meaning of that term, since states own land."[37] The ALJ then attempted to divine congressional intent by comparing the NGA to the Federal Power Act.[38] As Commissioner Glick stated in dissent, "a single ALJ opinion issued three decades after the relevant amendments [cannot] tell us much, if anything, about the extent

[37] Declaratory Order, ¶ 36 (citing *Tenneco Atlantic*, 1 FERC at 65,203-04).
[38] Declaratory Order, ¶ 36 (citing *Tenneco Atlantic*, 1 FERC at 65,203-04).

of the eminent domain authority that Congress intended to convey in section 7(h)."[39]

The ALJ's attempts to divine congressional intent on the meaning of the NGA by comparing it with provisions of the Federal Power Act are all to no avail. First, as is abundantly clear from Supreme Court precedent and from the Third Circuit's decision in *In re PennEast*, a State's sovereign immunity cannot be abrogated without unmistakably clear textual language within the act itself. Second, as more fully set forth in the next section herein, absent the unmistakably clear textual language abrogating State sovereignty, the divining of congressional intent is entirely irrelevant. *Tenneco Atlantic*, a 40-year-old ALJ decision, has no authority or persuasiveness in the face of *In re PennEast* and Supreme Court precedent to the contrary. *See Dellmuth v. Muth*,, 491 U.S. 293; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234; *In re PennEast*, 938 F.3d 96.

Finally, the Commission cites to another one of its own ALJ decisions, *Islander East Pipeline Co. v. Algonquin Gas Transmission Co.*, 102 FERC ¶ 61054 (Jan. 17, 2003). In *Islander East*, the Commission "found the Eleventh Amendment did not apply to NGA section 7(h) eminent domain proceedings because condemnation actions do not constitute 'any suit in law or equity' under

[39] Declaratory Order, Dissent, ¶ 12.

the Eleventh Amendment."[40] The Third Circuit completely dismissed the relevance of *Islander East*, finding it to be "an outlier and one that was reached with little, if any, analysis. More importantly, ***it is flatly wrong***." *In re PennEast*, 938 F.3d at 111 (fn. 19)(emphasis added). "FERC did not deign to explain what type of suit a condemnation action under the NGA is, if not a suit at law or equity. And the drafters of the Eleventh Amendment evidentially meant that term to be all-encompassing." *Id.*

That the Commission in the Declaratory Order still clings to the validity of *Islander East* in light of the Third Circuit stating that it is unpersuasive, flatly wrong and owed no deference, is evidence of the dearth of any legal support for the Commission's position that certificate holders can condemn State land under the NGA.

In sum, the Commission's position in support of PennEast Pipeline that certificate holders may condemn State lands under eminent domain power delegated by the federal government is entirely unsupported by any legal authority.

#### 4. <u>The Legislative History of the NGA and FPA Section 21 Are Irrelevant</u>

In the Declaratory Order, the Commission spends over a page citing to the Senate Report on section 7(h) of the NGA.[41] This cited legislative history does

[40] Declaratory Order, ¶ 38.
[41] Declaratory Order, ¶ 40.

little but set forth the reasoning behind the need for federal eminent domain power for certificate holders. The delegation of federal eminent domain power to certificate holders was deemed necessary to avoid a patchwork of differing State eminent domain practices and procedures. In some States, eminent domain power was not available to a pipeline company if the pipeline was proposed only to travel through the State without providing a benefit to the public of that State.[42] The Senate Report does not once discuss the abrogation of sovereign immunity of the States with regard to the condemnation of State-owned property by a certificate holder. Despite this, the Commission takes a large, unsupported leap of logic to claim that, based on the Senate Report, "it is reasonable to interpret the absence of limitation in that provision as authorization for a certificate holder to condemn state land when necessary…"[43] This conclusion is not supported by logic or by law. As Commissioner Glick properly noted, "nothing about that defined problem – states seeking to force interstate natural gas pipelines to deliver gas within their borders – or Congress's solution – a federal right of eminent domain – says anything about the scope of that federal right of eminent domain or the entities against which it can be exercised."[44] *See also In re PennEast*, 938 F. 3d at 113 (fn.20) ("As for the legislative history, it demonstrates that Congress intended to

[42] Declaratory Order, ¶ 40 (citing S. Rep. No. 80-429, at 1-4).
[43] Declaratory Order, ¶ 41.
[44] Declaratory Order, Dissent, ¶ 16.

give gas companies the federal eminent domain power. *See* S. Rep. No. 80-429, at 2-3 (1947) (discussing need to grant natural gas companies the right of eminent domain to ensure the construction of interstate pipelines). But it says nothing about Congress's intent to allow suits against the States.")

The Commission also tries to divine congressional intent by comparing the evolution of eminent domain provisions under the NGA and section 21 of the FPA.[45] The Commission notes that under the Energy Policy Act of 1992 "Congress amended FPA section 21 to restrict a licensee's ability to exercise eminent domain to acquire state-owned land" while it left section 7(h) of the NGA unchanged.[46] The Third Circuit found this unpersuasive. The history of Eleventh Amendment jurisprudence can explain the difference between the NGA and the FPA. In *Pennsylvania v. Union Gas Co.*, the Supreme Court concluded that "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." 491 U.S. 1, 22, (1989), *overruled by Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996). *Union Gas* was overruled eight years later by *Seminole Tribe*. Prior to *Union Gas*, and after *Seminole Tribe*, Congress could safely presume that suits against the States were automatically barred. It was only during the *Union Gas* period, from 1989 to 1996, where it was

[45] Declaratory Order, ¶¶ 42-44.
[46] Declaratory Order, ¶ 42.

understood that Congress had the power to abrogate State sovereign immunity pursuant to the commerce clause, that Congress needed to be "careful to address state sovereign immunity when drafting legislation." *In re PennEast*, 938 F.3d at 113(fn. 20). The NGA and Section 7(h) were enacted in 1938 and 1947, respectively. *Id.* The FPA, however, was amended during the period between *Union Gas* and the overruling of *Union Gas* by *Seminole Tribe*, a period in which Congress would have needed to specifically protect a State's sovereign immunity when passing legislation under its commerce clause powers. *Id.* As Commissioner Glick states "the fact that Congress subsequently sought to limit the scope of eminent domain under the FPA sheds little light on what Congress intended when it enacted section 7(h) of the NGA roughly 45 years earlier."[47] The Commission's attempt to extrapolate congressional intent with regard to the NGA based on what Congress did or didn't do with the FPA fails.

In any case, the divining of congressional intent – through the FPA or otherwise – is irrelevant where the law requires that in order to abrogate a State's sovereign immunity, the statute in question must contain unmistakably clear textual language specifying the intent to abrogate. *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). The Supreme Court has entirely rejected the use of legislative history to determine congressional intent in matters touching on the abrogation of

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States' Eleventh Amendment sovereign immunity. The logic of doing so is inescapable:

> Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

*Id*.

*Ergo*, what did or did not happen with regard to the FPA and amendments to the FPA have no relevance whatsoever to the question of whether the NGA permits the exercise of eminent domain by certificate holders over property in which States hold an interest. The Commission's resort to comparisons of the NGA with the FPA is similar to the unsuccessful attempt made by the plaintiff in *Dellmuth* to use the amendments to the Rehabilitation Act and congressional support therefore as evidence of congressional intent to abrogate State sovereign immunity in suits brought pursuant to the EHA. The Supreme Court found that all such arguments "are beside the point" because "we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute.' *Atascadero*, 473 U.S., at 242, 105 S.Ct., at 3147." *Dellmuth*, 491 U.S. at 230. In the instant matter, the Commission's arguments on the legislative history of the NGA and FPA section 21 are likewise "beside the point." The NGA simply does not contain the required unmistakably clear language of abrogation.

This holding of the Supreme Court in *Dellmuth* also obviates any reliance by the Commission in the Declaratory Order on *City of Tacoma vs. Taxpayers of Tacoma*, 37 U.S. 320 (1958), a case decided under the provisions of the FPA. The Commission mistakenly states that *Tacoma* "directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21." *Tacoma* does not address this issue.

> At the threshold of this controversy petitioner, the City, asserts that, under the express terms of s 313(b) of the Act, 16 U.S.C. s 825l(b), this question has been finally determined by the decision of the Court of Appeals and this Court's denial of certiorari; and that respondents' cross-complaints, and proceedings thereon, in the subsequent bond validation suit in the Washington courts have been only impermissible collateral attacks upon the final judgment of the Court of Appeals.

*City of Tacoma*, 357 U.S. at 334 (internal citations omitted). The Court agreed with the City and the case was decided on procedural grounds. The holding of the Court was that the cross-complaints of the State of Washington were "impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals." *Tacoma*, 37 U.S. at 341. The final judgment of the Court of Appeals stated that "[c]onsistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." *Tacoma*, 37 U.S. at 340 (internal

citation omitted). *Tacoma* simply does not stand for the proposition for which the Commission offers it.

Additionally, even if *Tacoma* had stood for the proposition that FPA section 21 permitted the abrogation of State sovereignty – which it does not – such provides no support for the abrogation of State sovereign immunity in the NGA. The NGA simply lacks the unmistakably clear language required for abrogation of State sovereign immunity. *Dellmuth*, 491 U.S. at 230.

### 5. The Commission Exaggerates The Impact of *In re PennEast*; Regardless of Impact, It Is Not the Role of the Courts to Make the Law, Only to Interpret the Law as Written

The Commission warns in the Declaratory Order that *In re PennEast* will have profoundly adverse impacts on the natural gas transportation system "and will significantly undermine how the natural gas transportation industry has operated for decades."[48] Such statements are alarmist and are in no way legally relevant. As Commissioner Glick noted in his dissent, "it is not clear just how 'profound[]' or 'adverse' those effects will actually turn out to be."[49] The primary effect of *In re PennEast* may be to encourage natural gas companies to cooperate and

[48] Declaratory Order, ¶ 56.
[49] Declaratory Order, Dissent, ¶ 24.

coordinate better with the relevant States.[50] Further, it is far from clear that requiring coordination would negatively affect pipeline development.

> After all, until recently, the Commission interpreted section 401 of the Clean Water Act to create essentially the same type of state-level veto authority that the majority now sees in the Third Circuit's decision. And notwithstanding that effective veto, the development of interstate pipelines did not exactly grind to a halt.[51]

Finally, it is not up to the courts to alter their holdings based upon what the courts think would be best for the natural gas companies or for any other litigant. The Courts simply interpret the law as written. If the holding of a case is unpopular or even catastrophic, it is for Congress to fix the law, not the courts. As the Supreme Court has explained:

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles.

*Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004). *See also Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 501 (1988)("[U]nenacted approvals, beliefs, and desires are not laws."); *Pavelic & LeFlore v. Marvel Entm't*

[50] Declaratory Order, Dissent, ¶ 25.
[51] Declaratory Order, Dissent, ¶ 25.

*Grp.*, 493 U.S. 120, 126 (1989)("Our task is to apply the text, not to improve upon it.").

## IV. CONCLUSION

The Commission's issuance of the Declaratory Order was procedurally improper as it violated both the Commission's own guidelines on the issuance of such orders and the doctrine of separation of powers. Further, contrary to the unsupported contentions of the Commission, the Declaratory Order does not warrant *Chevron* deference or deference of any kind. The Commission had ample opportunity to participate in the federal court proceedings in *In re PennEast*. It neglected to do so. Its issuance of an after-the-fact Declaratory Order to dispute the holding of the Third Circuit is little more than an improper and ill-disguised attempt to aid one litigant in an appeal of the Third Circuit's decision to the Supreme Court and elevate the advocacy of an administrative agency over the proper legal analysis and determination of the judiciary.

In addition to being procedurally improper, the Declaratory Order's substantive arguments are contrary to established law. In order to determine whether Congress has abrogated a State's Eleventh Amendment sovereign immunity, courts apply "a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth*, 491 U.S.

at 227–28 (*citing Atascadero*, 473 U.S. at 242). The NGA fails the simple but stringent test. The NGA contains no unmistakably clear language abrogating State sovereign immunity. The Declaratory Order is procedurally improper and entirely unsupported by law. The Declaratory Order must be vacated.

## V. COMMUNICATIONS

Communications and correspondence regarding this proceeding should be served upon the following individuals:

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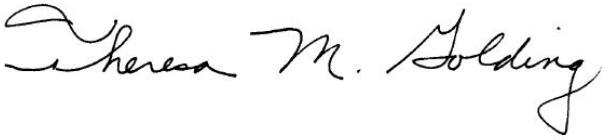
Date: February 26, 2020

Respectfully submitted,



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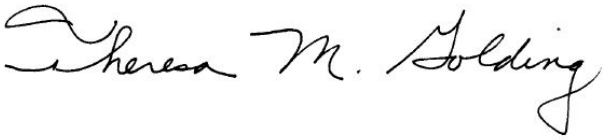
## CERTIFICATE OF SERVICE

Wherefore on this day, I caused to be served the foregoing document electronically on all parties on the Commission's electronic service list in this proceeding.

Date: February 26, 2020

Respectfully submitted,



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