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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

PENNEAST PIPELINE COMPANY,  
LLC,  
One Meridian Boulevard, Suite 2C01  
Wyomissing, PA 19610

Plaintiff,

vs.

A PERMANENT EASEMENT FOR  
0.73 ACRES ± IN DELAWARE  
TOWNSHIP, HUNTERDON  
COUNTY, NEW JERSEY, TAX  
PARCEL NO. 1007-32-4;

NEW JERSEY CONSERVATION  
FOUNDATION, JERSEY CENTRAL  
POWER AND LIGHT COMPANY,  
AT&T CORPORATION,  
TOWNSHIP OF DELAWARE, THE  
STATE OF NEW JERSEY,  
DEPARTMENT OF  
ENVIRONMENTAL PROTECTION;

AND ALL UNKNOWN OWNERS,  
Defendants.

**DOCKET NO: 3:18-cv-01756**

Civil Action

**PURSUANT TO THE LOCAL RULES, DEFENDANT SOUGHT AND RECEIVED  
PERMISSION FROM CHAMBERS TO FILE THIS BRIEF SINCE IT EXCEEDS 40  
PAGES.**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	2
LEGAL.....	8
 <u>Point I</u>	
PennEast’s Request For Judgment on Count One of The Complaint Must be Made By Way of Motion For Summary Judgment.....	8
 <u>Point II</u>	
PennEast Is Not Entitled to Preliminary Relief in the Form of Immediate Access to and Possession of Rights of Way.....	12
 A. PennEast Has Failed to Demonstrate a Likelihood of Success on the Merits.....	
1. FERC Has Not Made A Final Determination of Public Use Upon Which Condemnation Could Proceed Under the Fifth Amendment.....	12
2. The PennEast Order Does Not Issue a Certificate of Public Convenience and Necessity That Could Trigger the Operation of Section 717f(h).....	15
3. PennEast Cannot Demonstrate That Defendants’ Property Is “Necessary” to the Construction of the PennEast Project, As Required by Section 717f(h) of the Natural Gas Act.....	17
4. The PennEast Order is a Non-Final Order with No Force or Effect.....	21
5. PennEast Has Not Established That It Could Not Acquire The Rights of Way by Contract or Agree on Just Compensation.....	22
6. PennEast Did Not Negotiate in Good Faith.....	24
 B. PennEast Will Not Be Irreparably Injured if Preliminary Relief Is Not Granted.....	
1. An In-Service Date Is Not A Mandate to PennEast to Build.....	28

2. There Are No Documents Before This Court To Support Any Alleged Breach of Contract Claim.....	31
3. The Unsubstantiated Injury That PennEast Has Alleged Would be Compensable With Monetary Damages And Thus Not Irreparable for the Purposes of Preliminary Relief.....	31
4. PennEast’s Alleged Losses Resulting From Delays Was Factored Into Its 14% Rate of Return on the Project.....	32
C. Granting PennEast Preliminary Relief Will Harm Interested Persons.....	34
1. Defendants would suffer a non-compensable injury.....	35
D. The Public Interest Weighs Against Granting PennEast Preliminary Relief.....	39
<u>Point III</u>	
Defendants Are Entitled to Take Discovery.....	41
CONCLUSION.....	44

**TABLE OF AUTHORITIES (Continued)****CASES****Page**

<i>Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.</i> , 360 U.S. 378 (1959) .....	16
<i>Berman v. Parker</i> , 348 U.S. 26 (1954) .....	14, 15
<i>Caplan v. Fellheimer Eichen Braverman &amp; Kaskey</i> , 68 F.3d 828 (3d Cir. 1995) .....	30
<i>Carole Media LLC v. New Jersey Transit Corp.</i> , 550 F.3d 302 (3d Cir. 2008) .....	14
<i>Carpenter Tech. Corp. v. City of Bridgeport</i> , 180 F.3d 93 (2d Cir. 1999) .....	34
<i>CIENA Corp. v. Jarrard</i> , 203 F.3d 312, 315 (4th Cir. 2000) .....	41
<i>Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.</i> , 768 F.3d 300 (3d Cir. 2014), <i>cert. denied sub nom. Brown v. Columbia Gas Transmission, LLC</i> , 135 S. Ct. 2051 (2015) .....	9, 32
<i>Columbia Gas Transmission Co., LLC v. 10.5068 Acres, More or Less in York Cty.</i> , No. 1:15-CV-0360, 2015 WL 1470698 (M.D. Pa. Mar. 31, 2015) .....	42
<i>E. Tenn. Nat. Gas Co. v. Sage</i> , 361 F.3d 808 (4th Cir. 2004) .....	8, 9
<i>Federal Power Comm'n v. Texaco, Inc.</i> , 377 US 33, 41–42 (1964) .....	38
<i>First English Evangelical Lutheran Church v. County of Los Angeles</i> , 482 U.S. 304, 314 (1997). .....	12
<i>F.M.C. Stores Co. v. Borough of Morris Plains</i> , 100 N.J. 418, 426 (1985). .....	25
<i>Gas Transmission Nw., LLC v. 15.83 Acres of Permanent Easement</i> , 126 F. Supp. 3d 1192 (D. Or. 2015) .....	19
<i>Georgia v. Chattanooga</i> , 264 U.S. 472 (1924) .....	
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984) .....	34
<i>Instant Air Freight Co. v. C.F. Air Freight, Inc.</i> , 882 F.2d 797 (3d Cir. 1989) .....	27
<i>Jersey City Redevelopment Agency v. Costello</i> , 252 N.J. Super. 247, 257 (App. Div.), <i>cert. denied</i> , 126 N.J. 332 (1991) .....	25

<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005) .....	14
<i>Kos Pharm., Inc. v. Andrx Corp.</i> , 369 F.3d 700, 708 (3d Cir. 2004) .....	12
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005) .....	14
<i>Margate City, New Jersey v. United States Army Corps of Engineers</i> , No. CV 14-7303 (RMB/JS), 2015 WL 9918411, at *6 (D.N.J. Jan. 15, 2015) .....	30
<i>Mid-Atlantic Express, LLC v. Balth. Cty.</i> , 410 F. App'x 653 (4th Cir. 2011) .....	26
<i>Millennium Pipeline Co. v. Certain Permanent &amp; Temp. Easements</i> , 777 F. Supp. 2d 475 (W.D.N.Y. 2011). .....	9
<i>Minard Run Oil Co. v. U.S. Forest Serv.</i> , 670 F.3d 236 (3d Cir. 2011) .....	31
<i>Monarch Chem. Works, Inc. v. Exxon</i> , 452 F. Supp. 493 (D. Neb. 1978) .....	34
<i>Mt. Valley Pipeline, LLC v. Simmons</i> , 2018 U.S. Dist. LEXIS 17394 (N.D. Va. Feb. 2, 2018) .....	10
<i>Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate, &amp; Maintain a 42-Inch Gas Transmission Line Across Props. in the Ctys. of Nicholas, Greenbrier, Monroe &amp; Summers</i> , No. 2:17-cv-04214, 2018 WL 1004745, at *1 (S.D. W. Va. Feb. 21, 2018) .....	19
<i>Panhandle E. Pipe Line Co. v. FERC</i> , 613 F.2d 1120 (D.C. Cir. 1979) .....	17
<i>PennEast Pipeline Co., LLC v. A Permanent Easement for 1.74 Acres</i> , No. 3:18-cv-01603-BRM-DEA (D.N.J. Mar. 20, 2018) .....	16
<i>N. Nat. Gas Co. v. FERC</i> , 827 F. 2d 779 (D.C. Cir. 1987) .....	10, 19
<i>Nexus Gas Transmission, LLC v. City of Green</i> , 2017 U.S. Dist. LEXIS 212652 (N.D. Ohio. Dec. 28, 2017) .....	10, 19
<i>Panhandle E. Pipe Line Co. v. FERC</i> , 613 F. 2d 1120 (D.C. Cir. 1979) .....	17
<i>RLR Investments LLC v. Town of Kearny</i> , 386 F. App'x 84 (3d Cir. 2010) <i>Tenn. Gas Pipeline Co. v. 0.018 Acres of Land in the Twp. of Vernon</i> , No. 10-4465 (JLL), 2010 WL 3883260 (D.N.J. Sept. 28, 2010) .....	
<i>Sabal Trail Transmission, LLC v. Real Estate</i> , 2016 U.S. Dist. LEXIS 75572 .....	11

<i>Spartacus, Inc. v. Borough of McKees Rocks</i> , 694 F.2d 947, 949 (3d Cir. 1982). . . . .	37
<i>Tioronda, LLC v. New York</i> , 386 F. Supp. 2d 342 (S.D.N.Y. 2005) . . . . .	
<i>Transcontinental Gas Pipeline Co., LLC v. Permanent Easements for 2.14 Acres</i> , No. 17-cv-00715, 2017 WL 1283948 (E.D. Pa. Apr. 6, 2017) . . . . .	24
<i>Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres, Temp. Easements for 5.45 Acres &amp; Temp. Access Easement for 2.12 Acres in Pine Grove Twp.</i> , 709 Fed. Appx. 109 (3d Cir. 2017) . . . . .	10
<i>Transwestern Pipeline co., LLC v. 17.19 Acres</i> , 550 F.3d 770 (9th Cir. 2008) . . . . .	9, 19
<i>WBI Energy Transmission, Inc. v. Easement &amp; Right-Of-Way Across: Twp. 2 S.</i> , 2017 U.S. Dist. LEXIS 17956 . . . . .	11
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7, 23 (2008) . . . . .	35

#### **Statutes**

15 U.S.C. § 717f(h) (2012)	
15 U.S.C. § 717s (2012)	

#### **Regulations**

18 C.F.R. § 157.20 (2017)	
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#### **Secondary Sources**

Thomas W. Merrill & Henry E. Smith, <i>Property: Principles and Policies</i> (3d ed. . . . . 2017)	15
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**PRELIMINARY STATEMENT**

This Court should reject PennEast's attempt to circumvent the law and attack the public interest. PennEast, a private corporate conglomerate, comes before this Court having failed to establish the statutory predicate that could allow it to exercise eminent domain authority to take public and private lands—much less do so on an expedited basis. PennEast would have this Court believe that it must put aside one of its primary functions—protecting individuals' constitutional rights through meaningful judicial review—and blindly serve as a rote mechanism for transferring property from those who guard it for the public interest to serve its own private interests. PennEast threatens *decades* of the State of New Jersey's and non-profit land trusts' work and resources spent protecting the very lands it seeks to condemn. And, as set out below, PennEast cannot meet any of the required bases for the preliminary injunction it seeks, much less all of those bases, as this Court must require.

PennEast does not hold a final FERC Certificate of Public Convenience and Necessity upon which it could ask this Court to determine that it possesses a right to condemn. Nonetheless, without even moving for summary judgment to establish such a right, PennEast asks this Court to order permanent condemnation of both state and non-profit-owned conservation lands for a pipeline that it is not authorized to construct. This Court should not permit such an overreaching use of PennEast's very conditional FERC certificate to essentially exercise such unconditional eminent domain powers. Even more egregiously, without offering any evidence, PennEast avers that its financial interest will be harmed unless this Court concedes to its demands to immediately grant permanent condemnation of those precious open space and ecological resources. Both the State of New Jersey and Defendants herein represent the public interest. These interests would be

significantly harmed if this Court were to sidestep its critical function as the guardian of individual property rights and upend decades of conservation work for a private corporate project that is unlikely to ever be able to use the lands it now seeks to possess, because it lacks the required authorizations to construct its project. PennEast has not met its burden before this Court of showing that the scope of its conditional authorization permits what interests it seeks to condemn, and, as such, this Court should deny it preliminary relief on that basis.<sup>1</sup>

### **STATEMENT OF FACTS**

PennEast is a private limited liability company under the State of Delaware's laws and is managed by UGI Energy Services, LLC. See PennEast Pipeline Company, LLC, 162 FERC ¶ 61,053 (Jan. 19, 2018) (Order Issuing Certificate, hereinafter referred to as "Order") at ¶3. On September 24, 2015, PennEast filed its application with the Federal Energy Regulatory Commission ("FERC") for a Certificate of Public Convenience and Necessity ("CPCN") pursuant to Section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. 717 et seq., to construct and operate a new natural gas pipeline in Pennsylvania and New Jersey. Order, ¶ 1. The proposed 36-inch-diameter pipeline would run 116 miles, stretching from Luzerne County, Pennsylvania, to Mercer County, New Jersey and includes a compressor station and three proposed lateral pipes ("Project"). *Id.*; *see also* Order, ¶ 5. The pipeline route as planned will adversely affect properties that the Defendants either own in their entirety or on which they hold a conservation easement or restriction and in which the State also shares an interest.

On January 19, 2018, FERC issued its nascent Order making a conditional finding

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<sup>1</sup> Defendants herein also join the arguments set before the Court in the State's filing dated March 20, 2018, to the extent consistent with the points raised herein.

of public convenience and necessity for PennEast's Project, subject to, among other things, the State of New Jersey's Clean Water Act review. App. A to Order, ¶10. FERC regards CPCNs such as the one issued by its Order as an "incipient authorization without current force or effect." *Crown Landing LLC*, 117 FERC ¶ 61,209, at 62,106 (2006) (order denying rehearing and issuing clarification). The CPCN is also subject to and conditioned upon PennEast's receipt of all other pending federal and state authorizations, and, as such, is extremely limited, prohibiting PennEast from commencing construction of the Project. *See* Order at 81 ¶B(3). These essential missing authorizations include, among others, a Section 401 Water Quality Certification ("WQC") under the Clean Water Act, 33 U.S.C. §1341, from the New Jersey Department of Environmental Protection ("NJDEP"), wetlands permits from NJDEP, and the National Historic Preservation Act Section 106 review, which requires FERC to complete a consultation process with affected states and tribes, stakeholders, and the Advisory Council on Historic Preservation.

FERC further conditioned its own findings on the gathering of outstanding environmental data and subsequent analysis of reviewing environmental agencies "as described and conditioned herein." Order at 81 ¶ A. These authorizations are necessary before any construction on the project can begin and are critical analyses to be weighed in any final public convenience and necessity determination.

The State of New Jersey has the authority to approve the required 401 WQC, to approve it with significant conditions, or deny the Certification. On February 1, 2018, New Jersey denied Section 401 Clean Water Act certification to the PennEast project. Dow Certification ¶6. PennEast has stated its intention to reapply. There are currently no permit applications pending before NJDEP for wetlands or Section 401 approvals. New

Jersey's decision on any future applications could substantially change the pipeline's route or prevent its construction altogether. *See* State Def.'s Br. Seeking Dismissal And In Opp'n To Prelim. Inj. Appl. at 43, *PennEast Pipeline Co., LLC v. A Permanent Easement for 1.74 Acres*, No. 3:18-cv-01603-BRM-DEA (D.N.J. Mar. 20, 2018) (hereinafter "New Jersey brief") ("Considering so little survey work has taken place, it is likely the pipeline route could ultimately be changed prior to construction to avoid environmental and historic resources. Such changes would shift the geographic Rights-of-Way PennEast now seeks and possibly move the Project off a particular property entirely.").

The route may also substantially change depending on the completion of the National Historic Preservation Act Section 106 review process. These potential changes would significantly impact what land is necessary for the pipeline's construction, perhaps making Defendants' land (or any of the over one hundred property condemnations PennEast filed) no longer "necessary." Finally, the route outlined in FERC's nascent order may also change because, as mandated in paragraph 215 of the FERC Order, FERC requires PennEast to investigate the possible alternative interconnect delivery as follows:

The final EIS evaluates an alternate site for the interconnection with Transco at a site approximately 2.1 miles southwest of the proposed interconnection. PennEast filed an analysis of this alternative on November 23, 2016. The primary advantage of this alternative is that it would eliminate about 2.5 miles of the proposed pipeline within Hopewell Township, New Jersey, where the pipeline would cross residential areas, farmlands, a portion of planned Hopewell Township affordable housing, and a parcel planned for a Hopewell Township emergency services facility. PennEast states that the Transco Interconnect Alternative would not meet the project's delivery needs as negotiated with Transco. We believe that an alternative interconnect on the same Transco pipeline approximately 2.1 miles from the proposed interconnect may be similar enough to the proposed delivery point to allow the alternative to meet the project's delivery needs, and warrants further analysis. Therefore, we require in Environmental Condition 13 that, prior

to construction, PennEast provide additional details on the feasibility of incorporating the Transco Interconnect Alternative site.

FERC Order, ¶ 215 (emphasis added and internal citations omitted). PennEast has not provided FERC or this Court with any information or data to satisfy FERC's outstanding mandate regarding this alternative route. If FERC confirms this as a viable alternative, that will invalidate the basis for condemning approximately 20 properties sought in these proceedings.

FERC reviewed PennEast's request for authorization to construct and operate a single 36 inch pipeline for the transportation of natural gas. PennEast did not seek permission, nor did FERC approve or even consider whether PennEast may ship any other commodity through the pipe. The Order does not permit PennEast to "change the size of" the pipeline or to transport any commodity other than natural gas. App. A to Order, ¶4. PennEast, however, offered to purchase the following rights in a Right of Way Agreement sent to almost every property owner:

construct, maintain, operate, repair, replace, relocate or alter the size of pipelines, and install additional lines within the same right-of-way, without interruption of service, and remove or abandon pipelines for transporting gas or fluids, whether hydrocarbon or nonhydrocarbon, to install below and above-ground drips, valves, meters, cathodic protection, fiber optic cable, electric lines, data acquisition and telecommunication lines and devices, and other facilities and appurtenances (collectively, "Facilities") within the Right-of-Way, as may be required, together with all other rights necessary or convenient for the enjoyment of the right, privileges and easement;

Declaration of Patricia Ruby, Exh. B; Declaration of Michele S. Byers, Exh. B .

PennEast's final offer, made weeks before it filed the instant Complaint, did not limit the rights it was seeking to those rights evaluated in in the conditional FERC authorization.

.Declaration of Patricia Ruby, ¶ 13; Declaration of Michele S. Byers, , ¶21Ex

The conditional CPCN provides that its authorization is good for two years, and, if PennEast pursues its project, provides that PennEast should therefore complete its construction within two years from January 19, 2018. Order, ¶219(B)(1). FERC routinely and promptly approves requests for extensions of time for construction windows, known as “in-service” dates, such as the one contained in the PennEast Order. *See* Declaration of Jon Wellinghoff at ¶12 (“Wellinghof Decl.”). FERC included an in-service date in the PennEast Certificate. The in-service date is not a deadline for the completion and operation of the pipeline. FERC has routinely granted extensions of the in-service date to certificate holders. *See* Wellinghoff Decl. at 9–11 (certifying that denials of in-service dates are extremely rare and listing thirty extensions that have been granted since 2010). FERC often grants requests for extensions within days of the request, and without notice or hearing, within days of the simple request. *See* Duggan Decl., ¶2.; *see also infra* at Point II.B.1.

PennEast’s Complaints did not provide any agreements with its vendors or contractors to the Court to support its alleged financial damages arising from breach of contract claims. The State of New Jersey submitted declarations to support the financial harms conservation lands and programs would suffer from a preliminary injunction granting the relief PennEast seeks. N.J. Brief at 1 (“For a period spanning more than six decades, the citizens have voted to support and the State of New Jersey has spent billions of taxpayer dollars permanently preserving precious scarce, unique undeveloped lands for recreation, conservation and farmland uses.”); *see also, e.g., Yeane Cert.* New Jersey is the most densely populated state in the nation. The undeveloped lands at issue here are a rare and scarce resource that the State and its citizens have gone to enormous lengths to

protect, and the State has declared that “premature condemnation and destruction of these preserved and protected lands would significantly harm the State and its citizens and monetary damages would be inadequate.” N.J. Brief at 41.

The Order is subject to multiple rehearing requests before FERC, authorized pursuant to 18 C.F.R. § 385.713, and requests for motions to stay its effect. On February 12, 2018, Defendant New Jersey Conservation Foundation filed a joint stay–rehearing request. As set out above, the State of New Jersey and others have also submitted requests for a rehearing to FERC. FERC has 30 days to act on the request for a rehearing and motion for a stay.

On February 6, 2018, PennEast filed a Verified Complaint in this matter and moved for a Preliminary Injunction, premised on FERC’s incipient authorization. PennEast pled the substantive right to condemn property as its First Count of the Verified Complaint, and included this final relief in the form of Order submitted to this Court. PennEast is seeking possession to perform surveys and tests, and partial judgment on Count One of its Complaint. Defendants have not had an opportunity to conduct discovery on the merits of the right to take Defendants’ property.

## ARGUMENT

### POINT I

#### **PennEast's Request For Judgment on Count One of The Complaint Must be Made By Way of Motion For Summary Judgment.**

In contravention of existing law, PennEast moved this Court for a Preliminary Injunction without first establishing any right to condemn Defendants' lands. PennEast should have moved by Summary Judgment to obtain an order of condemnation declaring that it has the substantive right to condemn prior to receiving preliminary injunctive relief to gain access to the property. As a procedural matter, PennEast failed to comply with this requirement, and this Court should dispose of PennEast's request on that basis alone.<sup>2</sup> The Natural Gas Act ("NGA") contains no provision for quick-take or immediate possession. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822–23 (4th Cir. 2004). While the NGA provides that a holder of a certificate of public convenience and necessity may acquire property necessary to construct the pipeline "by the exercise of eminent domain in the district court," it puts a series of qualifications and limits on that exercise. 15 U.S.C. § 717f(h).<sup>3</sup>

In doing so, the NGA states that "the practice and procedure in any action or proceeding for that purpose . . . shall conform . . . with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." *Id.* Subsequently, Federal Rule of Civil Procedure Rule 71.1 was promulgated to govern condemnation actions in federal courts. Rule 71.1 does not provide procedures for allowing early possession. When determining the effect of this Federal Rule on

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<sup>2</sup> And as a substantive matter, as set out in Point II below, it could not.

<sup>3</sup> See Point II.A. below, describing the kind of certificate to which this provision attaches.

condemnation proceedings under the NGA, the *Sage* court found that it did not provide the right of quick take in NGA proceedings. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004) (“The Advisory Committee that drafted Rule 71A was well aware of the statutes . . . giving the government the right of immediate possession . . . . [T]he committee considered, but decided against, including procedures in Rule 71A for exercising this right. [Note: Rule 71A was restyled as rule 71.1 in 2007].”).

Since there is no “quick-take” or right to “immediate possession” in the Natural Gas Act, Courts have routinely held that in order for a gas company to obtain the immediate right of possession through a preliminary injunction, an order granting possession must first be issued. *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. Balth. 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) (ruling that “a district court lacks authority to grant a preliminary injunctions under Rule 65 if the party does not have a substantive right to the injunction” and the gas company’s “substantive right to condemn the affected parcels only through the issuance of an order of condemnation by the district court”); *E. Tenn. Nat’l Gas Co.*, 361 F.3d at 823 (ruling 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)).

Several district court opinions further support that a substantive right to take is

required before immediate access can be provided pursuant to a preliminary injunction, and summary judgment is the manner in which to obtain such a finding. For example, in *Transcontinental Gas Pipeline Co., LLC v. Permanent Easement for 2.59 Acres*, 2017 U.S. Dist. LEXIS 43087 (M.D. Pa. Mar. 24, 2017), plaintiff filed a motion for partial summary judgment on the substantive right to take, along with a separate motion for a preliminary injunction to gain immediate access to the property. *Id.* at 2. A hearing was held on both motions on the same day. *Id.* The court granted the summary judgment motion in favor of plaintiff. *Id.* at 8. Then, it analyzed the issue of access under a preliminary injunction. The court noted that “Plaintiff must first establish that it has a substantive right to condemn the property at issue. Once a substantive right has been found, a court ‘may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction’ pursuant to Federal Rules of Civil Procedure 65 . . . .” *Id.* One of the key findings to support the standard for issuance of a preliminary injunction is likelihood of success on the merits. To provide that element of the analysis, the court relied on its partial summary judgment order providing plaintiff the right to condemn. *Id.*

In *Mt. Valley Pipeline, LLC v. Simmons*, 2018 U.S. Dist. LEXIS 17394 (N.D. Va. Feb. 2, 2018), plaintiff sought to condemn certain temporary and permanent easements necessary for the construction and operation of an interstate natural-gas pipeline. *Id.* at 6. To facilitate the project, plaintiff moved for an order for partial summary judgment regarding its right to condemn the easements, *and* to enter a preliminary injunction allowing it to access and possess the property prior to paying just compensation. *Id.* Prior to deciding the application for a preliminary injunction, the court analyzed the issue of Plaintiff’s right to take, ruling in Plaintiff’s favor. *Id.* at 20–21; *accord Nexus Gas*

*Transmission, LLC v. City of Green*, 2017 U.S. Dist. LEXIS 212652 (N.D. Ohio. Dec. 28, 2017) (granting pipeline company's motion for a preliminary injunction after deciding contemporaneously filed motion for partial summary judgment on substantive right to take property); *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way Across: Twp. 2 S.*, 2017 U.S. Dist. LEXIS 17956 (D. Mont. Feb. 8, 2017) (deciding plaintiff's substantive right to take prior to analyzing issue of access rights pursuant to request for preliminary injunction; *Sabal Trail Transmission, LLC v. Real Estate*, 2016 U.S. Dist. LEXIS 75572 (M.D. Ga. June 10, 2016) (plaintiff filed a motion for partial summary judgment to establish its right to condemn easements across 19 properties and a motion for preliminary injunction to grant it immediate possession of the easements).

PennEast pled the substantive right to condemn property as its First Count of the Verified Complaint, and included this final relief in the form of Order submitted to this Court. PennEast is not only seeking possession to perform surveys and tests, but partial judgment on Count One of its complaint without allowing the Defendants an opportunity to conduct discovery on the merits of the right to take. The Court should deny PennEast's improperly sought request for a finding of the right to condemn property and require PennEast to file a motion for partial summary judgment on Count One of its Complaint. PennEast's request for a preliminary injunction must be denied on this procedural basis alone.

## POINT II

### **PennEast Is Not Entitled to Preliminary Relief in the Form of Immediate Access to and Possession of Rights of Way.**

If the Court does not dispose of PennEast's request for a preliminary injunction on PennEast's procedural failure discussed in Point I above, the Court should nonetheless find that PennEast is not entitled to the extraordinary remedy of a preliminary injunction because it cannot demonstrate: "(1) a likelihood of success on the merits; (2) that [it] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (a preliminary injunction is an extraordinary remedy that should only be granted in limited circumstances if the party has satisfied each of these four prongs). PennEast has failed to provide this court with evidence supporting any of the prongs of its request.

#### **E. PennEast Has Failed to Demonstrate a Likelihood of Success on the Merits.**

##### **7. FERC Has Not Made A Final Determination of Public Use Upon Which Condemnation Could Proceed Under the Fifth Amendment.**

The Fifth Amendment's Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1997). Before private property can be taken, the taking must be shown to serve a public purpose. Here, FERC has not made a final finding of public purpose. FERC's conditional finding of public convenience and necessity in the Certificate, *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018) (hereinafter "Order"), which forms the basis for PennEast's condemnation complaint, is subject to and conditioned on PennEast's receipt

of all pending federal and state authorizations. In fact, both FERC and conditional certificate holders view these kinds of non-final certificates as “incipient authorizations, without current force or effect.” *See, e.g., Crown Landing LLC*, 117 FERC ¶ 61,209, at 62,106 (2006) (order denying rehearing and issuing clarification) (“Our order is an incipient authorization without current force and effect, since it does not yet allow Crown Landing to begin the activity it proposes.”); *see also* Mot. to Dismiss Pets. for Review for Lack of Jurisdiction at 5, *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Jan. 26, 2018) (“The Certificate Order here is not final agency action. The rehearing requests by Appalachian Voices and other parties, which are pending before the Commission, rendered the Certificate Order non-final.”). PennEast still lacks Clean Water Act review, including a Section 401 WQC from the NJDEP, wetlands permits from NJDEP, and the National Historic Preservation Act (“NHPA”) Section 106 review, which requires FERC to complete a consultation process with affected states and tribes, stakeholders, and the Advisory Council on Historic Preservation.<sup>4</sup> FERC therefore was unable to make anything more than a nascent finding that the PennEast project was in the public convenience and necessity; indeed, it was an explicitly conditional finding, with the certificate authority dependent on the actual gathering of outstanding environmental data and subsequent analysis of reviewing environmental agencies “as described and *conditioned* [in the Order].” Order at 81. FERC seeks to condemn what the scope of the certificate authorizes. In this case, that is exactly nothing.

Plaintiff PennEast repeatedly asserts that the only remaining issue in this case is the amount of compensation Defendants will receive. But that is simply wrong.

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<sup>4</sup> *Id.* at 172. Other outstanding authorizations are needed as well, such as Army Corps Section 404 permits and Delaware River Basin Commission approval. *See* Order at 122, App. A 30.

Compensation cannot remedy an unconstitutional taking of land that does not satisfy the Fifth Amendment's public purpose requirement. As the Supreme Court has explained, "If a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. *No amount of compensation can authorize such action.*" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (emphasis added). Despite the broad deference generally given to the government's decision to exercise the power of eminent domain, "there are prescribed constitutional limitations of which a state [or, in this case, a private corporation] may run afoul." *Margate City v. U.S. Army Corps of Eng'rs*, No. CV 14-7303 (RMB/JS), 2015 WL 9918411, at \*6 (D.N.J. Jan. 15, 2015). By filing this condemnation suit, PennEast fails to recognize that FERC's finding of public convenience and necessity is only conditional and incipient, and, therefore, must be definitively established by the legally required public interest assessment under the Clean Water Act, before public use can be confirmed and it would be proper to take land in exchange for just compensation.<sup>5</sup>

There is no context in which a conditional public use determination has been upheld as a valid basis for eminent domain. "*Once the question of the public purpose has been decided, the amount and character of land to be taken . . . rests in the discretion of the legislative branch.*" *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (quoting *Berman v. Parker*, 348 U.S. 26, 35–36 (1954)) (emphasis added); *see also Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) ("[T]he means of executing the project [resulting in a taking] are for [the legislature] alone to determine, *once the*

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<sup>5</sup> PennEast concedes that this is a matter for the courts, and not for FERC, to address. *See* Motion for Leave to Answer and Answer to Requests for Rehearing and Answer to Requests for Stay or PennEast Pipeline Co. at 13–14, Docket No. CP15-558-001 (Mar. 7, 2018).

*public purpose has been established.*” (emphasis added) (quoting *Berman*, 348 U.S. at 33)). *Kelo*, *Berman*, and *Carole Media* all recognize that the public use analysis must be final before any other action is taken in an eminent domain proceeding.

Since eminent domain is a governmental power, it cannot be exercised by a private person unless there has been a valid delegation of eminent domain authority to that person.<sup>6</sup> The eminent domain authority that Congress can delegate is authorized by the Constitution, and the Constitution requires a finding of public use before land can be taken. Congress cannot dispatch of the public use requirement when it delegates this authority. A conditional finding of public convenience and necessity is not the same as a finalized public use determination. This finalized finding has not been made here, and PennEast cannot take land without it. Any attempts to take land with a conditional finding of public convenience and necessity would violate the Fifth Amendment of the Constitution.

**8. The PennEast Order Does Not Issue a Certificate of Public Convenience and Necessity That Could Trigger the Operation of Section 717f(h).**

The Natural Gas Act requires FERC to determine, prior to issuing a Certificate, that a particular pipeline project is “*required* by the present or future public convenience and necessity; otherwise such application *shall be denied*.” 15 U.S.C. § 717f(e) (emphasis added). PennEast’s conditional Certificate fails to meet this standard because FERC did not make that final determination. Defendants do not ask this court to rule on the validity of the conditional Certificate, as FERC has jurisdiction over an application for rehearing. *See id.* § 717r(a). Nevertheless, a determination of whether or not this Order issues a

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<sup>6</sup> Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 1172 (3d ed. 2017).

Certificate that could trigger the operation of Section 717f(h) is essential to assess PennEast's likelihood of success on the merits.

To ensure that the Commission had the power to circumscribe the scope of the authorizations it granted under Section 717f(e) of the Natural Gas Act, Congress provided, in relevant part, "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." In its implementing regulations, the Commission has established a list of terms and conditions that attach when the Commission grants a Certificate of Public Convenience and Necessity to construct a new pipeline under the Natural Gas Act. *See* 18 C.F.R. § 157.20 (2017). These conditions impose important limitations with respect to timing, transferability, notice, and technical limits on operation pressure.

While the NGA authorizes FERC to issue Certificates "with such reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. § 717f(e), legislative history and case law indicate that the NGA authorizes FERC only to impose "conditions" on pipeline activity that relate to these types of limitations, and conditions concerning economic provisions, such as rates and recovery.<sup>7</sup> These create final certificates with conditions—not certificates with only nascent/conditional *findings*

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<sup>7</sup> *See* Declaration of Wellinghoff, ¶¶6-12 (describing the inclusion of an in-service date as a type of condition imposed on certificates); *see also* *Federal Power Comm'n v. Hunt*, 376 U.S. 515, 526, n.3 (1964) ("Clearly, the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce. Moreover, the Commission has long recognized this obligation and has required modification of many tariff and contract provisions as a condition to the granting of a certificate. The existence of broad discretionary power in the Commission to condition temporary certificates appears to us to be vital to its ability to hold the line in pricing."); *Federal Power Comm'n v. Texaco, Inc.*, 377 US 33, 41-42 (1964) ("[T]he Commission under s 7(e) is required to control the terms and conditions under which natural gas companies, such as respondent, may initiate sales at wholesale of natural gas in commerce.") (internal citation omitted); *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 389-91 (1959); *N. Nat. Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987).

of public necessity that depend on other federal authorizations bearing on the fundamental inquiry of whether a project is in the public interest.<sup>8</sup> Such Orders issuing certificates cannot serve as a proper basis for triggering Section 717f(h) of the Natural Gas Act.<sup>9</sup>

**9. PennEast Cannot Demonstrate That Defendants' Property Is "Necessary" to the Construction of the PennEast Project, As Required by Section 717f(h) of the Natural Gas Act.**

To set an appropriate constitutional limit on its delegation of eminent domain authority via the Natural Gas Act, Congress also limited that delegation to “the *necessary* right-of-way to construct, operate, and maintain a pipe line [sic] . . . and the *necessary* land . . . for the location of . . . stations or equipment *necessary* to the proper operation of such pipe line.” 15 U.S.C. § 717f(h) (2012) (emphasis added).<sup>10</sup> FERC’s Order issued a *conditional* Certificate to the PennEast Project; and its nascent finding of public convenience and necessity was itself subject to the Project’s eventual receipt of a WQC from the State of New Jersey pursuant to Section 401 of the Clean Water Act and completion of the process required by Section 106 of the NHPA. Both of these authorizations are necessary before any construction on the project can start, but even more importantly, are critical analyses to be weighed in any final public convenience and

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<sup>8</sup> See *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1131–32 (D.C. Cir. 1979); *N. Nat. Gas*, 827 F.2d at 780–81. Again, this language regarding attaching reasonable conditions is from a 1942 amendment to the Natural Gas Act and as such, could not have contemplated that the *finding* itself of public interest and necessity could be conditioned on the critical public interest analyses later required under the Clean Water Act, Clean Air Act, and Coastal Zone Management Act. Act of Feb. 7, 1942, Pub. L. No. 77-444, 56 Stat. 83.

<sup>9</sup> While the Order acknowledges that its finding of public convenience and necessity is subject to acquiring later additional analysis that could alter this finding (via outstanding permit processes and consultations), it then fails to ensure that this Order remains an “incipient authorization, without current force or effect.” *Crown Landing LLC*, 117 FERC ¶ 61,209, at 62,106 (Nov. 17, 2006) (order denying rehearing and issuing clarification). While FERC readily asserts that limitation in legal proceedings, FERC’s practice violates the Natural Gas Act.

<sup>10</sup> At the time that this condemnation power was added to the Natural Gas Act for those who had been awarded Certificates of Public Convenience and Necessity, Congress had not yet conceived of the Clean Water Act, the Clean Air Act, the Coastal Zone Management Act.

necessity determination.<sup>11</sup>

Here, the missing Section 401 WQC is so critical to the finding of public convenience and necessity that land cannot be deemed “necessary” before the NJDEP analysis under Section 401 is complete. If New Jersey decides not to approve the required 401 certificate—or to approve it only with significant conditions—this could substantially change the pipeline’s route or prevent its construction altogether. *See* State Def.’s Br. Seeking Dismissal And In Opp’n To Prelim. Inj. Appl. at 43, *PennEast Pipeline Co., LLC v. A Permanent Easement for 1.74 Acres*, No. 3:18-cv-01603-BRM-DEA (D.N.J. Mar. 20, 2018) (“Considering so little survey work has taken place, it is likely the pipeline route could ultimately be changed prior to construction to avoid environmental and historic resources. Such changes would shift the geographic Rights-of-Way PennEast now seeks and possibly move the Project off a particular property entirely.”).

Land cannot be “necessary” when pending approvals before other state and federal agencies may require a route change or preclude the pipeline’s construction entirely, such that the land will not be used for construction, operation, or maintenance of a pipeline. The route may also substantially change depending on the completion of the Section 106 process. In turn, these potential changes would significantly impact what land is necessary for the pipeline’s construction, perhaps making Defendants’ land (or any of the *over* one hundred property condemnations PennEast filed) no longer “necessary.” Additionally, 717f(h) does not allow for the use of eminent domain to collect information needed to fulfill the

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<sup>11</sup> Other outstanding authorizations are needed as well, such as Army Corps Section 404 permits and Delaware River Basin Commission approval. *See* Order at 122, App. A 30.

outstanding conditions required to grant the certificate—the eminent domain power of 717f(h) is limited to the *construction, operation and maintenance* of pipelines.<sup>12</sup> Eminent domain cannot flow from a Certificate conditioned on the issuance of permits from state or local agencies at some point in the future.

Courts have explained that parties seeking an eminent domain order under the NGA “must, at minimum, meet the requirements of § 717f(h), which include showing: ‘(1) that it holds a FERC certificate authorizing the relevant project, (2) *that the land to be taken is necessary to the project*; and (3) that the company and the landowners have failed to agree on a price for the taking . . . .’”<sup>13</sup> PennEast fails to meet the first prong, *see* Point II.A, *infra*, and PennEast’s articulation of the requirements omits the critical second prong,<sup>14</sup> in conflict with both the clear statutory text of the NGA and its application by the courts. In doing so, PennEast cites *Transcontinental Gas*,<sup>15</sup> but, as explained *supra*, that decision’s analysis should not control here, as it explicitly disclaimed being cited as binding precedent and relied heavily on *Columbia Gas*, which involved very different factual circumstances. The prongs articulated in *Transwestern* and cited repeatedly in

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<sup>12</sup> 15 U.S.C. 717f(h)

<sup>13</sup> *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located In Maricopa Cty.*, 550 F.3d 770, 776 (emphasis added) (9th Cir. 2008) (quoting *Nat’l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 405, 416 (W.D.N.Y. 2000)); *see also Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate, & Maintain a 42-Inch Gas Transmission Line Across Props. in the Ctys. of Nicholas, Greenbrier, Monroe & Summers*, No. 2:17-cv-04214, 2018 WL 1004745, at \*1 (S.D. W. Va. Feb. 21, 2018) (“Once FERC issues a certificate, the certificate holder has the power of eminent domain over *properties that are necessary* to complete an approved project and that the holder has been unable to acquire by agreement. (emphasis added)); *Nexus Gas Transmission, LLC v. City of Green*, No. 5:17CV2062, 2017 WL 6624511, at \*2 (N.D. Ohio Dec. 28, 2017); *Gas Transmission Nw., LLC v. 15.83 Acres of Permanent Easement*, 126 F. Supp. 3d 1192, 1196–97 (D. Or. 2015); *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011).

<sup>14</sup> *See* PennEast Brief at 7 (“The NGA authorizes PennEast to exercise eminent domain under the circumstances presented here, where the FERC has issued an Order finding that the Project serves the public’s interest, where PennEast, has been unable to obtain access to or possession of the Rights of Way by agreement with the Landowners, and where the amount claimed by the owners for the Rights of Way exceeds \$3,000.”).

<sup>15</sup> Brief at 12–13 (citing *Transcontinental Gas*, 2017 WL 4005011, at \*2).

courts across the country—which require that the land condemned be necessary to the project—are the correct application of the NGA’s language and constitute requirements that PennEast cannot meet.

The Hopewell Township Alternate route is a prime example of how the route may change under FERC’s non-final order, setting aside PennEast’s failure to obtain requisite ancillary federal authorizations, which could result in no land being “necessary.” In paragraph 215 of the FERC Order, FERC discusses a possible alternative interconnect delivery as follows:

The final EIS evaluates an alternate site for the interconnection with Transco at a site approximately 2.1 miles southwest of the proposed interconnection. PennEast filed an analysis of this alternative on November 23, 2016. The primary advantage of this alternative is that it would eliminate about 2.5 miles of the proposed pipeline within Hopewell Township, New Jersey, where the pipeline would cross residential areas, farmlands, a portion of planned Hopewell Township affordable housing, and a parcel planned for a Hopewell Township emergency services facility. PennEast states that the Transco Interconnect Alternative would not meet the project’s delivery needs as negotiated with Transco. We believe that an alternative interconnect on the same Transco pipeline approximately 2.1 miles from the proposed interconnect may be similar enough to the proposed delivery point to allow the alternative to meet the project’s delivery needs, and warrants further analysis. *Therefore, we require in Environmental Condition 13 that, prior to construction, PennEast provide additional details on the feasibility of incorporating the Transco Interconnect Alternative site.*

Verified Complaint, Exh. B, FERC Order, ¶ 215 (emphasis added and internal citations omitted). PennEast has failed to provide this either FERC or this Court with any information or data to satisfy FERC’s outstanding mandate regarding this alternative route, a route which, when confirmed as a viable alternative, will invalidate any arguable basis for condemning approximately 20 properties sought in these proceedings.<sup>16</sup>

**10. The PennEast Order is a Non-Final Order with No Force or Effect.**

By FERC's own admission, its Order, which is subject to rehearing requests before FERC by Defendants and others, is not a final order. FERC describes Certificates such as the one at issue here, variously as "not final agency action," or "incipient authorizations with no current force or effect." *See* Mot. to Dismiss Pets. for Review for Lack of Jurisdiction at 5, *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Jan. 26, 2018) ("The Certificate Order is not final agency action. The rehearing requests by Appalachian Voices, Blue Ridge, and other parties, which are pending before the Commission, rendered the Certificate Order non-final."). PennEast asks the court to allow it to exercise final condemnation authority based on FERC's Order, which is conditioned and dependent on substantive and significant uncertainties. *See* Order at 82. FERC's Order therefore was limited to finding only that the PennEast project was "in" the public convenience and necessity "as described and conditioned [in the Order]," and said that the certificate authority was explicitly conditioned on the actual gathering of those environmental data and later analysis of reviewing environmental agencies. *Id.* at 81. As stated previously, PennEast lacks numerous authorizations required to begin construction on the project, most notably a Section 401 WQC from NJDEP and the completion of the process required by Section 106 of the NHPA.

New Jersey could well deny PennEast the required Section 401 WQC, grant it, or approve it only with significant conditions. All three possibilities illustrate the substantial uncertainty regarding the pipeline's eventual route or whether it will be built at all. The Section 106 process may similarly compel PennEast to amend the route. These changes may impact what land is necessary for the pipeline's construction. Land is not "necessary" when pending approvals before other state and federal agencies

may require a route change or preclude the pipeline's construction entirely, such that the land will not be used for construction, operation, or maintenance of a pipeline. Given the substantial uncertainty surrounding the eventual route of the pipeline, this court should deny PennEast's request. It would be imprudent to grant PennEast full possession of land under these circumstances, especially where the hardship PennEast points to may be resolved with mere access (as opposed to possession) of the land. As FERC itself has stated, "it is solely within the province of a court considering a request to grant eminent domain to determine if and when an eminent domain order should issue." Brief for Respondent Fed. Energy Regulatory Comm'n at 88, *Catskill Mountainkeeper v. FERC*, No. 16-345, -361 (2d Cir. Sept. 12, 2016).

**11. PennEast Has Not Established That It Could Not Acquire The Rights of Way by Contract or Agree on Just Compensation.**

The FERC Order is clear—the Commission only reviewed PennEast's request for authorization to construct and operate a single 36 inch pipeline for the transportation of natural gas. PennEast did not seek permission, nor did FERC approve or even consider whether any other commodity may be shipped through the pipe. To satisfy the second requirement of section 717f(h) of the NGA,<sup>17</sup> PennEast has the burden of proving it could not acquire the right to place a 36 inch natural gas pipeline on Defendants' property and could not agree to the compensation for this limited right. PennEast has failed to meet its burden of proof on this issue.

In relevant part, the NGA 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

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<sup>17</sup> PennEast's inability to satisfy the first prong, that it holds a certificate that can trigger operation of 717f(h) is discussed above at Point II.A. And PennEast's failure to demonstrate that the lands are necessary for a right of way to construct or operate a natural gas pipeline is discussed at Point II.A.3.

property to the *compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line* or pipe lines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h) (emphasis added). PennEast did not seek to purchase the limited rights described in the incipient FERC Order. Rather, PennEast attempted to use the threat of eminent domain to extort much more from the affected property owners. In almost every case, PennEast offered to purchase the following rights by sending a Right of Way Agreement to almost every property owner seeking the following rights:

construct, maintain, operate, repair, replace, relocate or *alter the size of pipelines*, and *install additional lines* within the same right-of-way, without interruption of service, and remove or abandon pipelines for *transporting gas or fluids*, whether hydrocarbon or nonhydrocarbon, *to install* below and above-ground drips, valves, meters, cathodic protection, *fiber optic cable, electric lines, data acquisition and telecommunication lines and devices*, and *other facilities and appurtenances* (collectively, “Facilities”) within the Right-of-Way, as may be required, *together with all other rights necessary or convenient for the enjoyment of the right, privileges and easement;*

Declaration of Patricia Ruby, Exh. B.

PennEast attempted to obtain by contract rights that greatly exceeded the rights it described when it sought FERC approval. FERC did not ever consider granting PennEast even the nascent right to place additional pipelines on private property to transport fluids, or run electrical lines to and from newly installed poles, or install telecommunication facilities. PennEast tried to take advantage of the property owners, warning of condemnation under an immediately impending “certificate,” to obtain rights well in excess of anything it could ultimately be granted under its FERC application. PennEast now comes before this Court alleging it satisfied the requisite statutory standard of showing that it could not purchase the limited rights contemplated by FERC’s incipient

Order—ones that in reality, PennEast never tried to buy.

PennEast’s final offer, made weeks before the Complaint was filed, did not limit the rights it was seeking to those rights evaluated in the conditional FERC Order. This fact is not in dispute. As a result, PennEast cannot show it tried to purchase by contract the rights necessary to ultimately construct this nascent pipeline. At a minimum, Defendants should be permitted to take discovery on this issue. *See* Section II.D.1 *infra*.

## 12. PennEast Did Not Negotiate in Good Faith.

To the extent PennEast’s minimal efforts may be seen as negotiations, they certainly do not rise to the level of good faith negotiation as that requirement exists in New Jersey. Section 717f(h) of the Natural Gas Act states that “[t]he practice and procedure in any action or proceeding for [condemnation under § 717f(h)] 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 . . . .” 15 U.S.C. § 717f(h). Federal Courts look to state law when addressing substantive rights in condemnation cases. *See Transcontinental Gas Pipeline Co., LLC v. Permanent Easements for 2.14 Acres*, No. 17-cv-00715, 2017 WL 1283948, at \*6 (E.D. Pa. Apr. 6, 2017) (collecting cases). Because Rule 71.1 of the Federal Rules of Civil Procedure does not address good faith negotiations for property rights, this Court should look to New Jersey law which clearly and definitively articulates the applicable standard. New Jersey’s Eminent Domain Law provides:

Whenever any condemnor shall have determined to acquire property pursuant to law, including public property already devoted to public purpose, but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause, the condemnation of such property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in

the manner provided by this act; provided, however, that no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession *through bona fide negotiations* with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid *and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated*, and such other matters as may be required by the rules. . . . In no event shall such offer be less than the taking agency's approved appraisal of the fair market value of such property. . . .

N.J.S.A. 20:3-6 (emphasis added).

The New Jersey Eminent Domain Act imposes strict requirements on a government entity seeking condemnation, such as the “overriding obligation to deal forthrightly and fairly with property owners in condemnation actions.” *Jersey City Redevelopment Agency v. Costello*, 252 N.J. Super. 247, 257 (App. Div.), *cert. denied*, 126 N.J. 332 (1991). In other words, government must “turn square corners” in dealing with the public. *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 N.J. 418, 426 (1985). This mandate is “not of form, but of high moral principle for violation of which redress should be liberally given.” *Cty. of Morris v. 8 Court St. Ltd.*, 223 N.J. Super. 35, 39 (App. Div. 1988), *cert. denied*, 111 N.J. 572 (1988). Consequently, the government

may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.

[*F.M.C. Stores Co.*, 100 N.J. at 427.]

Given how stringent New Jersey's requirements are for governmental exercise of condemnation powers, it is unsurprising that New Jersey law provides that a private corporation is subject to even more strenuous standards and greater limits when seeking authority to exercise delegated condemnation authority. New Jersey substantive

condemnation law comports with the Natural Gas Act in finding no right of “quick take” for private corporations, although it accords this right to public entities. *See* N.J.S.A. § 20:3-15 (providing that “this article [governing quick-take condemnation] shall not apply to individuals or private corporations vested with the authority of condemnation”); *Monmouth Cty. v. Wissell*, 68 N.J. 35, 41–42 (1975) (“[N.J.S.A. § 20:3-15] provides that the right to immediate possession shall not apply to individuals or private corporations vested with the authority of condemnation. An examination of all the underlying enabling statutes involving individuals or private corporations reveals that none are vested with the authority to obtain possession prior to the completion of the condemnation proceedings.”). The strong distinctions that New Jersey substantive law creates between private and public potential condemnors should inform this Court’s decision making when denying PennEast preliminary injunction based on its scant and unsupported record of “negotiations.”

This Court should adopt New Jersey state substantive law protections and require PennEast to negotiate in accordance with the standards articulated therein. Here, PennEast did not come close to meeting this standard. Even under the standard provided by the NGA, which implicitly requires PennEast to have attempted to negotiate a contract for the purchase of the subject property, PennEast has failed to comply. PennEast refused to engage in meaningful negotiations with affected landowners, including the State of New Jersey. *See* Letter from David C. Apy, Assistant Attorney Gen., State of N.J. Office of the Attorney Gen., to Jeffrey D. England, Project Manager, PennEast Pipeline Project (Feb. 2, 2018). PennEast unilaterally set a deadline to accept offers without providing a reasonable amount of time to consider the offers or obtain necessary information not provided by PennEast. *Id.* PennEast refused to disclose how it

came up with its offer until the final minute and only when certain select property owners demanded to see the appraisal after the final offer was made without one having been provided. PennEast attempted to use the threat of eminent domain to coerce property owners to sell more rights than PennEast would ever be entitled to take under a final FERC Order. And as set out in Part III.A.1., the scope of the current FERC Order does not authorize the project or construction thereof—it only authorizes PennEast to continue seeking approvals from other agencies.<sup>18</sup>

**F. PennEast Will Not Be Irreparably Injured if Preliminary Relief Is Not Granted.**

To establish irreparable injury, a plaintiff must show an impending harm that “cannot be redressed by a legal or an equitable remedy following a trial.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). PennEast cannot make the “clear showing of immediate irreparable injury” required to obtain extraordinary relief in the form of a preliminary injunction. *Figueroa v. Precision Surgical, Inc.*, 423 F. App’x 205, 210 (3d Cir. 2011) (citing *Ammond v. McGahn*, 532 F.2d 325, 329 (3d Cir. 1976)). An injunction “may not be used simply to eliminate a possibility of a remote future injury . . . .” *Abraham v. Del. Dep’t of Corr.*, 331 F. App’x 929, 932 (3d Cir. 2009) (citing *Cont’l Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)). Courts in this Circuit have also insisted “that the risk of irreparable harm must not be speculative.” *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 488 (3d Cir. 2000). PennEast cannot satisfy this Court’s high standard for

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<sup>18</sup> PennEast’s “Contracted Right-of-Way Agent,” Jan-Michael J. White, appears to have acknowledged this fact. See Duggan Cert. Exh. 9 (“The court filing is currently to gain access to the tracts who have denied survey permission. We need to conduct all surveys before moving forward with condemnation.”).

unequivocally showing immediate, irreparable harm, upon which an injunction could be premised. Moreover, any harm PennEast alleges would be self-inflicted. If in fact it has executed any construction contracts,<sup>19</sup> it did so in the absence of necessary authorizations, and any harms it suffers are therefore self-inflicted and not irreparable. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) (holding that self-inflicted harms are not irreparable); *see also Anonymous Oxford Health Plan Member with ID No. 95278903\*01 v. Oxford Health Ins., Inc.*, No. CIV. 12-2367 DMC MF, 2012 WL 2087425, at \*3 (D.N.J. June 8, 2012) (“Plaintiff’s attempt to show irreparable harm in this matter is undercut by a number of factors. First, it is well settled that self-created harms can not be considered irreparable harms for the preliminary injunction inquiry. *See, e.g., Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir.1995).”); *Margate City*, 2015 WL 9918411, at \*10 (holding that the harm resulting to a party by that party’s decision to proceed with a project without first ensuring lawful title was a self-inflicted harm and was therefore due less weight).

### **1. An In-Service Date Is Not A Mandate to PennEast to Build.**

PennEast attempts to show immediate and irreparable harm by portraying the “in-service date” as a command from FERC to build its project, and accomplish such by a date certain. But far from FERC requiring PennEast to be built, the in-service date provides that if PennEast chooses to proceed with its project, and can obtain the additional authorizations required to do so, it must adhere to the reasonable schedule that it proposed, and FERC adopted. As such, the in-service date is simply FERC’s inclusion of PennEast’s anticipated length of project completion, to ensure that its nascent

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<sup>19</sup> As set out in Point III below, PennEast has not demonstrated that it has such contracts.

authorization does not languish indefinitely while an applicant sits on its rights. Nor does the in-service date function as a hard deadline for project completion, because FERC can and routinely does grant extensions upon simple request. *See* Declaration of Jon Wellinghoff at 9–11 (certifying that “The Commission staff routinely grants extensions of time of the in-service date for facilities that have been issued a Certificate for Public Convenience and Necessity from the Commission.”)). FERC has cited the need to obtain federal permits as a reason for granting these extensions, among myriad other reasons. The approvals are often granted within days of the request, and without notice or hearing. For example, FERC granted extensions of the in-service deadlines in the following four projects, sometimes within days of the request:

<b>Pipeline Project</b>	<b>Date of Request</b>	<b>Date of Approval</b>	<b>Days Between Request and Approval</b>	<b>Original Time</b>	<b>Extension</b>
Columbia	9-28-15 <sup>20</sup>	9-30-13 <sup>21</sup>	2 days	2 years	2 years
Iroquois	7-26-16 <sup>22</sup>	8-2-16 <sup>23</sup>	7 days	2 years	2 years
Perryville	9-19-16 <sup>24</sup>	10-12-16 <sup>25</sup>	23 days	5 years	1 year
Sabal	1-16-18 <sup>26</sup>	1-31-18 <sup>27</sup>	15 days	2 years	6 mo. To 3 years, 3 months

*See also* Wellinghoff Declaration, Exh. A (providing thirty examples of FERC’s granting

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<sup>20</sup> Duggan Declaration, Exh. 1.

<sup>21</sup> Duggan Declaration, Exh. 2.

<sup>22</sup> Duggan Declaration, Exh. 3.

<sup>23</sup> Duggan Declaration, Exh. 4.

<sup>24</sup> Duggan Declaration, Exh. 5.

<sup>25</sup> Duggan Declaration, Exh. 7.

<sup>26</sup> Duggan Declaration, Exh. 7.

<sup>27</sup> Duggan Declaration, Exh. 8.

extensions of in-service date upon applicant's request). Given the regularity with which extensions of time have been granted in the past and the fact that the Commission has recognized the need to grant extensions to allow the applicant to conclude judicial review and to obtain additional necessary approvals, PennEast cannot show any basis upon which it would fail to get an extension if it simply asked for one.<sup>28</sup> In other words, to the extent that PennEast's request for a preliminary injunction uses the in-service date to try to establish immediate irreparable injury, it "seeks simply to eliminate a possibility of a remote future injury." *Abraham*, 331 F. App'x at 932.

Finally, any harm PennEast would allegedly suffer because it failed to meet the in-service date in the conditional Order is self-inflicted. "If the harm complained of is self-inflicted, it does not qualify as irreparable." *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995); *see also Anonymous Oxford Health Plan Member with ID No. 95278903\*01 v. Oxford Health Ins., Inc.*, No. CIV. 12-2367 DMC MF, 2012 WL 2087425, at \*3 (D.N.J. June 8, 2012); *Margate City*, 2015 WL 9918411, at \*10. PennEast could have sought an in-service date further in the future, or asked for an extension based on the fact that it has not acquired necessary permits and the nascent order is subject to rehearing. Having failed to do so, PennEast cannot claim immediate and irreparable injury before this Court. The conditional Order's in-service date cannot bear the weight that PennEast seeks to assign it, and certainly cannot support PennEast's request for the extraordinary remedy of a preliminary injunction.

## **2. There Are No Documents Before This Court To Support Any Alleged Breach of Contract Claim.**

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<sup>28</sup> Such extensions are rarely ever denied. See Wellinghoff Declaration at ¶11 (Providing an example of circumstances in which FERC, without prejudice, denied the applicant's second request for an in-service date extension. The first extension had been granted, and FERC declined to grant a second, which would extend the construction deadline to a decade, because the applicant had commenced and then stopped construction for a period of years, essentially abandoning its project but seeking to keep the authorization open indefinitely.)

PennEast further fails to sustain its burden of showing immediate and irreparable injury when it alleges that if possession is delayed, PennEast would be forced to breach “contacts with subcontractors and vendors.” Brief at 20.<sup>29</sup> PennEast simply asserts these purported harms. It fails utterly to provide any evidence. Importantly, without any contracts or other relevant documentation before the Court, there is simply no way to determine the precise obligations under those contracts. For example, it well may be that there are *force majeure* covenants or other mechanisms that would allow PennEast to avoid damages.<sup>30</sup> PennEast bears the burden of proof on its allegations of harm. Having made only bald assertions with no documentary proof, PennEast should be put to its proofs and required to respond to Defendants’ request for discovery.

**3. The Unsubstantiated Injury That PennEast Has Alleged Would be Compensable With Monetary Damages And Thus Not Irreparable for the Purposes of Preliminary Relief.**

Because PennEast’s only alleged (but unsupported) harm stems from its hypothetical failure to meet the conditional order’s current in-service date, as set out above, it has not met even the bare minimum showing of harm. Moreover, “[a]s a general matter, ‘a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement. The only exception that exists is reserved for those few cases “where the potential economic loss is so great as to threaten the existence of the movant’s

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<sup>29</sup> Notably, PennEast’s Verified Complaint can only allege injury based on lack of access, not possession. See Verified Complaint at 17–18 (“PennEast will suffer irreparable harm absent the issuance of the requested preliminary injunction because delay in *accessing* the Property will substantially increase the risk that PennEast will be unable to timely complete the construction of facilities needed for the Project.” (emphasis added)).

<sup>30</sup> Nor should PennEast be allowed to rely on any self-inflicted damages from contracts prematurely signed. And PennEast does not appear to be even attempting to argue any harm that could stem from its precedent agreements, which are also not before the Court to support any claims of irreparable harm based thereon.

business,”<sup>31</sup> and is clearly inapplicable here. PennEast does not claim that such an exception could apply, nor could it—an in-service date delay poses no such threat to PennEast.

PennEast erroneously and repeatedly cites to *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300 (3d Cir. 2014), *cert. denied sub nom. Brown v. Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015), for the proposition that missing an in-service date can constitute an irreparable harm. *See* Brief at 20. The circumstances in *Columbia Gas* are quite different, and therefore not persuasive, on the issues in this case. The *Columbia Gas* pipeline had been granted a Certificate *two decades* earlier and was seeking to exercise its automatic authority under its blanket Certificate to replace existing, outdated pipeline that no longer met safety requirements. *Id.* at 303–05. Critically, this outdated, unsafe pipeline created “safety and potential liability” concerns independent of any economic losses that would accompany delay—a fact cited directly by the court in explaining why the general rule in *Minard Run* did not govern and the in-service date was to protect public safety. *Id.* at 316. No such safety or liability concerns exist here, where no pipeline has yet been constructed, and the injury PennEast claims is purely speculative but economic in alleged nature.<sup>32</sup>

#### **4. PennEast’s Alleged Losses Resulting From Delays Was Factored Into Its 14% Rate of Return on the Project.**

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<sup>31</sup> *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011) (citations omitted) (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009)).

<sup>32</sup> The other cases cited by PennEast for its irreparable harm claim, *see* Brief at 20, are all explicitly non-binding precedent or unpublished; while one involves the same, inapposite set of facts as *Columbia Gas*, 768 F.3d 300. *See Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, 709 Fed. Appx. 109, 110 (3d Cir. 2017) (“This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.”); *Columbia Gas Transmission Co., LLC v. 10.5068 Acres*, No. 1:15-CV-0360, 2015 WL 1470698 (M.D. Pa. Mar. 31, 2015); *Tenn. Gas Pipeline Co. v. 0.018 Acres of Land in the Twp. of Vernon*, No. 10-4465 (JLL), 2010 WL 3883260 (D.N.J. Sept. 28, 2010). PennEast brings forth no facts or evidence to support its claims.

On March 7, 2018, PennEast filed a reply to various requests for rehearing of FERC's non-final, conditional Order, including one from the N.J. Rate Counsel. (Duggan Cert., Exh. 10). The N.J. Rate Counsel objected to the 14% return allowed by FERC. PennEast, in responding to N.J. Rate Counsel's objection to such a high rate of return, stated:

Substantial evidence in the record of this proceeding demonstrates that, as a greenfield pipeline and new entrant in the market, and based on other considerations specific to this Project, PennEast faces a higher level of financial risk than existing pipelines undergoing NGA Section 4 proceedings. These risks include development and construction risks associated with a new pipeline project such as the *impact of permitting delays* and construction cost overruns, as well as *likely litigation (including already-pending cases) challenging state and federal permits and other approvals*.

Duggan Cert., Exh. 10 (emphasis added). As such, it is clear that the potential delays caused by litigation and obtaining approvals were factored into the exceedingly high rate of return awarded by FERC, and that PennEast understands that calculus. Moreover, PennEast went into this project with its eyes wide open to its flaws and cannot now ask for such extreme relief as a preliminary injunction.

For example, if a New Jersey developer entered into a contract knowing that it could take 18 to 24 months to get development approvals, this Court should not and would not grant the developer a preliminary injunction to allow the developer to start building before he or she obtained approvals simply because the start date of the project will not be for 18 to 24 months. The only damage caused by the *foreseeable* delays is the start date for the cash flow for the project. Many projects are delayed by the approval process, but no other party gets special relief (a 14% rate of return) like pipeline companies. This Court should not further give this private company the extraordinary relief of a preliminary injunction based on anticipated costs and risks for which the

company will be generously compensated.

**G. Granting PennEast Preliminary Relief Will Harm Interested Persons.**

This Court is charged with ensuring that a proposed taking passes constitutional muster. *Hawaii Hou. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). Because PennEast's demand fails to do so, landowners caught in PennEast's crosshairs will suffer harm from the violation of their rights under the Takings Clause of the Fifth Amendment. This Court need not even wade into FERC findings to adequately protect the targeted landowners. It need only recognize that FERC's Certificate Order is non-final, conditional, incipient, and of no force or effect and that, as such, it is an insufficient basis on which to allow a private party to exercise eminent domain.

Under the Constitution, landowners have the right to exclude others from their land unless the government approves the seizure of the land with substantial evidence of a public use.<sup>33</sup> Thus, a private party may not take another's land without lawful permission from either the landowner or the government.<sup>34</sup> This is exactly what will happen to Defendants here. It does not matter that Defendants will be compensated for their land. Several courts have held that a violation of property rights constitutes irreparable harm.<sup>35</sup>

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<sup>33</sup> Merill & Smith, *supra* note 6, at 1171 ("This power of compulsory transfer is obviously an exception to the ordinary rules associated with property ownership. The ordinary rule is. . . [i]f B wants A's property, B must obtain A's consent to a transfer of property.").

<sup>34</sup> *Id.* at 1172 ("Eminent domain is a governmental power, and hence cannot be exercised by a private person unless there has been a valid delegation of eminent domain authority to that person.").

<sup>35</sup> See, e.g., *Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005) (holding that deprivation of an interest in real property, and damage to sensitive vegetation and wetlands that would result from wrongful condemnation, constitutes irreparable harm); *Monarch Chem. Works, Inc. v. Exxon*, 452 F. Supp. 493, 502 (D. Neb. 1978) (holding condemnation of land can result in irreparable injury).

**1. Defendants would suffer a non-compensable injury.**

The balance of equities in this case clearly favors the non-moving party. The undocumented and purely economic injuries asserted by PennEast pale beside the harm to Defendants' constitutional right not to have their property taken without a final finding of public purpose. Thus, even if PennEast could demonstrate irreparable harm and likelihood of success on the merits, which it cannot, a preliminary injunction is improper. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (finding a preliminary injunction improper despite assuming irreparable harm and likelihood of success, where the public interest and the harm to the nonmoving party if an injunction were granted outweighed the harm to the moving party in the absence of a preliminary injunction).

Here, the harm to the nonmoving party is a violation of the party's constitutional rights under the Fifth Amendment. The Fifth Amendment to the United States Constitution prohibits the taking of private property except 1) for public use and 2) with just compensation. U.S. Const. amend. V. The Defendants do not contend that PennEast cannot or would not give just compensation for the property they seek to take; however, PennEast's ability to meet the public use prong depends upon its ability to obtain a certificate of public convenience and necessity. Because the certificate that FERC has granted has only a conditional finding of public convenience and necessity, the public use prong of the Fifth Amendment will not be satisfied unless and until the State of New Jersey protects the public interest by considering whether or not the PennEast could satisfy the Clean Water Act. If PennEast is allowed to take the properties without satisfying the public use prong of the Fifth Amendment, Defendants will be injured in a way that monetary damages could not compensate. To say, as PennEast might, that just compensation granted to Defendants would repair their injury would be to read the public

use requirement out of the Fifth Amendment entirely. Only one prong of that amendment is about money.

The proposition that a constitutional violation would constitute a significant and irreparable harm is hardly novel. In *Elrod v. Burns*, the Supreme Court found that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” 427 U.S. 347, 373 (1976). If there is a difference between a violation of the First Amendment and a violation of the Fifth Amendment in the context of a preliminary injunction, it is that the words that go unsaid because of the First Amendment violation might be said later, while the land that PennEast now seeks to take will be gone forever.

Irreparable, constitutional harms have been inflicted on defendants in similar circumstances before. Like PennEast, the Constitution Pipeline company was granted a Certificate of Public Convenience and Necessity subject to its ability to obtain a permit under section 401 of the Clean Water Act. *See Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 149 FERC ¶ 61199, 62203 (Dec. 2, 2014). The pipeline company then failed to obtain its 401WQC. *See Constitution Pipeline Co., LLC v. New York State Dep’t of Env’tl. Conservation*, 868 F.3d 87 (2d Cir. 2017). However, by the time New York State denied the project a 401 permit because it could not be constructed without significant damage to state water quality, the pipeline had already taken private land. *See Constitution Pipeline Co., LLC v. A Permanent Easement for 0.67 Acres & Temp. Easement for 0.68 Acres in Summit, Schoharie Cty., N.Y.*, No. 1:14-CV-2023 NAM, 2015 WL 1638477 (N.D.N.Y. Feb. 21, 2015). PennEast should not be permitted to inflict a similar constitutional and non-compensable injury here.

In addition to the Fifth Amendment violations that would occur if a preliminary

injunction is granted, the court should consider the particular environmental harms that will impact not only the defendants, but third parties as well. “The trial court may also consider the possibility of harm to other interested persons from the grant or denial of the injunction, as well as harm to the public interest.” *Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 949 (3d Cir. 1982). In this case, the State of New Jersey is such an interested party and would be harmed by the loss of lands that were set aside for their ecological value, *see* State Defendant’s Brief Seeking Dismissal and in Opposition to Preliminary Injunction Application at 38, *PennEast Pipeline Co., LLC. v. A Permanent Easement for 1.74 Acres and Temp. Easement for 2.24 Acres in Hopewell Twp.*, No. 3:18-cv-01603-BRM-DEA (D.N.J. Mar. 20, 2018). As the State of New Jersey has explained in its own filing, “[f]or a period spanning more than six decades, the citizens have voted to support and the State of New Jersey has spent billions of taxpayer dollars permanently preserving precious scarce, unique undeveloped lands for recreation, conservation and farmland uses. That investment is now under threat of being undermined by PennEast . . . .” *Id.* at 1. These undeveloped lands are a rare and scarce resource in so densely populated a state, that New Jersey and its citizens have gone to enormous lengths to protect, and “premature condemnation and destruction of these preserved and protected lands would significantly harm the State and its citizens and monetary damages would be inadequate.” *Id.* at 41. The State’s assertion that the environmental harms it stands to suffer are non-compensable has been recognized by the Supreme Court. “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Village of*

*Gambell*, 480 U.S. 531, 545 (1987).

In an effort to avoid the fundamental Fifth Amendment questions in this case PennEast attempts to distract this Court by pointing to cases like *Columbia Gas*. The *Columbia Gas* court held that the balance of equities in that particular use of eminent domain under the Natural Gas Act favored the pipeline, which was obtaining approvals to conduct safety maintenance on its deteriorating pipeline under the original blanket certificate. *See Columbia Gas*, 768 F.3d at 316 (“[T]he safety risks associated with a delay in the replacement work and acquisition of the easements will increase daily. . . . [T]he Pipeline may fail, collapse, explode, or leak, causing bodily and property injury or death and/or leaving the residents of York County without gas service.” (internal quotation marks omitted)). Moreover, in that case, the pipeline already had a Certificate of Public Convenience and Necessity that was not subject to additional federal authorizations that had bearing on the determination of public convenience and necessity. *Columbia Gas Transmission Corp.*, 29 N.Y.P.S.C. 1189 (July 20, 1989). The court held:

Moreover, the harm to the Landowners that will result if we grant Columbia’s preliminary injunctions is minimal. *Since we have already determined that Columbia has the right of eminent domain*, it is a certainty that the requested easements will be granted. The Fifth Amendment also guarantees that the Landowners will be justly compensated. The Landowners have not stated any concrete injury other than the loss of the easements over their land, which will definitely occur, whether or not we grant Columbia immediate possession of the easements.

*Columbia Gas*, 768 F.3d at 316 (emphasis added). Here, the Court is not balancing the public safety risks from delays in repairing a decades old deteriorating pipeline. Rather, the Court must protect the public by denying PennEast’s bid to immediately condemn lands based on a nascent certificate of public convenience and necessity that is contingent and subject to additional public interest review under the Clean Water Act.

Importantly, in *Columbia Gas*, none of the parties appeared nor raised the question of whether a nascent finding of public convenience and necessity could support a final condemnation—the condemnation took place under a final blanket certificate with all federal authorizations. *Columbia Gas* thus also has no bearing on the critical constitutional issue that this Court must examine. *See id.* at 308–14. This Court must protect Defendants’ constitutional rights by ensuring that it does not allow PennEast to condemn lands absent a proper and finalized finding of public use.<sup>36</sup> Defendants ask this court to guard their interests against an unconstitutional exercise of eminent domain where the private condemnor has only a nascent finding of public convenience and necessity in the form of a conditional Certificate that is only “an incipient authorization without current force and effect.” *Crown Landing LLC*, 117 FERC ¶ 61,209, at 62,106 (2006) (order denying rehearing and issuing clarification). For these reasons, the balance of equities weighs in favor of denying the preliminary injunction.

**D. The Public Interest Weighs Against Granting PennEast Preliminary Relief.**

The public interest weighs against granting PennEast a preliminary injunction. FERC’s conditional finding of public convenience and necessity nowhere requires immediate possession of the Property. The in-service date does not, as PennEast suggests, represent a federal mandate, *see supra* Point II.B.1, and PennEast will suffer no

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<sup>36</sup> FERC and PennEast acknowledges that federal court is the proper forum to address such concerns, having determined that review of its orders under 15 U.S.C. § 717r does not extend to determinations of the constitutionality of the exercise of eminent domain under the NGA, and that such constitutional matters are outside the scope of its jurisdiction. *See* Mot. for Leave to Answer & Answer to Requests for Reh’g & Answer to Requests for Stay of PennEast Pipeline Co. at 13–14, Docket No. CP 15-558-001 (Mar. 7, 2018) (“Any further arguments related to the Fifth Amendment’s Takings Clause are beyond the jurisdiction of the Commission and are within the province of the courts.”); *Atl. Coast Pipeline, L.L.C.*, 161 FERC ¶ 61,042, 2017 WL 4925429, at \*20 (Oct. 13, 2017) (order issuing Certificates) (“[S]uch a question is beyond our jurisdiction: only the courts can determine whether Congress’ action in passing section 7(h) of the NGA conflicts with the Constitution.”).

irreparable harm should the project be delayed beyond that date.

However, allowing immediate possession and the commencement of pipeline construction will harm landowners, particularly where, as here, significant issues remain outstanding that may prevent construction of the pipeline altogether or significantly change its route. Here, the State of New Jersey has denied PennEast's application for a 401 WQC and opposes PennEast's efforts to condemn the state's land, seeking to remove the proceedings to state court pursuant to the 11th Amendment of the Constitution. New Jersey Brief at 15. The public interest is not served by allowing a taking of private property which may not be necessary, in order to commence construction activities for a pipeline whose construction is not yet approved. Moreover as Defendants' properties are ones in which significant state and private conservation funds have been invested, the public interest clearly would be protected by denying PennEast's request for a preliminary injunction so that the Court may preserve the status quo and protect the fundamental rights at stake.

### POINT III

#### Defendants Are Entitled To Take Discovery

This Court should not even consider PennEast's request for preliminary injunction in light of the significant factual disputes. In the absence of discovery, the Court simply cannot resolve those issues. *See, e.g., KBG Holding Corp. v. Union Bank*, 56 Fed. App'x 111, 114 (4th Cir. 2003) ("The parties engaged in expedited discovery in preparation for the . . . hearings on the competing motions for preliminary injunction."); *CIENA Corp. v. Jarrard*, 203 F.3d 312, 315 (4th Cir. 2000) (remanding to give defendant an opportunity to conduct expedited discovery to defend on a preliminary injunction). Thus Defendants must be afforded an opportunity to conduct discovery through depositions, interrogatories, and document production on factual issues critical to Plaintiff's preliminary injunction and the right to take property.

PennEast asserts irreparable harm but offers not even a shred of evidence to support those allegations. Defendants must be permitted discovery on precedent agreements and allowed to analyze them for, inter alia, deadlines, extension provisions, force majeure clauses or damages covenants (liquidated damages) arising from any alleged breach of contract clause. Defendants also are entitled to review all contracts with contractors and vendors for the same provisions, as well as cost and damages calculations to confirm the alleged delay damages. Defendants also need to review records to determine whether these alleged harms were known to PennEast at the time it filed its application with FERC and what, if anything, was done to mitigate the harm.

"The power of eminent domain given to a holder of a certificate of public convenience and necessity, to obtain an easement for the underground storage of natural gas, extends only to the property located within the *geographical area designated on the*

*map or maps attached to the application* for the certificate of public convenience and necessity as required by 18 C.F.R. § 157.14(a)(6).” *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 578 F. Supp. 930, 932 (N.D. Ohio 1983) (emphasis added).<sup>37</sup> The final route approved by FERC is not before the Court. Thus, Defendants must be permitted to take discovery to determine whether the scope, nature, location, dimensions, and terms of the easements sought correspond to those conditionally approved by the FERC in the FERC Order. But Plaintiff describes the scope, nature, and location of the easements it seeks to condemn in very general terms in its Complaint. Exhibit A to the Complaint outlines the area of the proposed easement to be condemned. The FERC conditionally approved route must be compared to the vague survey documents attached to the complaint. Defendants may need to and should be entitled to hire experts to determine if the scope of the taking is within the areas even conditionally approved by FERC.

Pursuant to the NGA, if PennEast could satisfy the first prong of the requirement by showing it holds the kind of certificate upon which condemnation could proceed, PennEast would then be required to demonstrate that it could not acquire the properties it purports to require for the pipeline. As argued above, notwithstanding its assertions to the contrary, PennEast never tried to purchase by contract the property rights necessary to build the pipeline conditionally approved by FERC. Defendants should be able to take depositions of the land agents and PennEast representatives on this issue. Nor did PennEast ever disclose the basis for any offers of compensation made or whether those offers were intended to address (a) the rights conditionally approved by FERC in its

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<sup>37</sup> And as set out in Point II.A. above, there is a significant question regarding the scope of authorization contained in such a conditional certificate.

Order, or (b) rights to enter into other business ventures described including electrical lines, telecommunication lines, and other linear development. Neither has PennEast, a newly formed company, formed only for the purpose of building the pipeline, demonstrated its ability to pay just compensation for any property rights it ultimately acquires.

Moreover, the scope of the easements is in question and raises concerns regarding rights of way across and under roads and bridges that impact pre-existing rights granted to governmental entities. Defendants need to explore the scope of the easements and whether they will have impact on future road and infrastructure efforts.

PennEast was obligated to but failed to enter into bona fide negotiations with Defendants. For example, PennEast failed to disclose how they arrived at the pre-litigation offers. In addition, questions arise regarding the representations that PennEast representatives and land agents made to owners regarding whether PennEast would refrain from any effort to take any permanent rights of way until all surveys are done. Defendants must be permitted to take discovery on these foundational issues for any contemplated exercise of delegated eminent domain authority by this private entity.

Finally, PennEast makes much of its need for access rights but utterly fails to identify what it plans to do and where. PennEast is obligated to provide information regarding wetlands impacts, tree cutting, access routes, proposed borings or movement of heavy machinery. PennEast cannot simply assert a need for access without disclosing the exact nature of that access and its impact on privately owned and conservation lands.

**CONCLUSION**

For all of the foregoing reasons, the Court should deny PennEast's unsupported request for extraordinary relief in the form of a preliminary injunction. Rather the Court should protect Defendants' fundamental interests in protecting and preserving their property by ordering discovery regarding the critical questions that this Court must consider.

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