**RECORD NO. 18-1042**

# IN THE
# United States Court of Appeals
## FOR THE FOURTH CIRCUIT

ORUS ASHBY BERKLEY, *et al.*,

*Plaintiffs - Appellants,*

v.

MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,

*Defendants - Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

## OPENING BRIEF OF APPELLANT

Justin M. Lugar
Cynthia M. Kinser
Monica T. Monday
GENTRY LOCKE
900 Sun Trust Plaza
10 Franklin Road, SE
P. O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300
jlugar@gentrylocke.com
kinser@gentrylocke.com
monday@gentrylocke.com

*Counsel for Appellants*

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1042 Caption: Orus Berkley v. Mountain Valley Pipeline, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Orus Ashby Berkley, Kathy & James Chandler, Constantine & Patti Chelpas, Martin & Dawn Cisek,
(name of party/amicus)

Roger & Rebecca Crabtree, Estial & Edith Echols, George Lee Jones, Robert and Patricia Morgan,
Margaret McGraw Slayton Living Trust, Thomas and Bonnie Triplett
who ~~is~~ are the appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Justin M. Lugar Date: 1/11/2018

Counsel for: Appellants

## CERTIFICATE OF SERVICE

**********

I certify that on 1/11/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

by CM/ECF:
Mark E. Frye
Seth M. Land
Wade M. Massie
(attorneys for Mountain Valley Pipeline, LLC)

Robert Solomon
(attorney for Federal Energy Regulatory Commission and Neil Chatterjee in his official capacity)

by e-mail
Beth Pacella
beth-pacella@ferc.gov
(attorney for Federal Energy Regulatory Commission and Neil Chatterjee in his official capacity

s/Justin M. Lugar
(signature)

1/11/2018
(date)

# TABLE OF CONTENTS

Page

# TABLE OF AUTHORITIES

## CASES

## STATUTES

## INTRODUCTION

This case is about meaningful judicial review, or the lack thereof. The Landowners in this case were before the district court and are now before this Court because they have nowhere else to go. These Landowners cannot have their day in court because an independent agency of the executive branch, the Federal Energy Regulatory Commission ("FERC"), has barred the doors to the courthouse. By virtue of an amendment to the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, FERC wields the awesome power of eminent domain and, by operation of law, conveys that power to private natural gas companies when it approves a pipeline project. But the Landowners here, and other property owners affected by proposed interstate natural gas pipelines, have no forum in which to meaningfully challenge the NGA's eminent domain provisions if jurisdiction does not lie in the district court.

First and foremost, FERC provides no review for challenges to its grant of eminent domain to natural gas companies under the NGA. FERC disclaims any jurisdiction to decide a challenge to the NGA's eminent domain provisions, and goes so far as to publicly proclaim that it lacks power to deny a natural gas company the power of eminent domain if it approves a project. Under the NGA, once a project is approved by FERC through issuance of a Certificate of Public

Convenience and Necessity ("Certificate"), the power of eminent domain ***automatically*** conveys to the natural gas company.

Though FERC itself openly states that it is not an Article III court and will not pass on the constitutionality of the NGA or its eminent domain procedures, FERC contends that such claims are subject to the NGA's exclusive statutory review scheme. While disclaiming the power and discretion to decide such claims, FERC nevertheless absorbs any and all challenges it can within the review provisions of section 717r of the NGA. Under this exclusive review scheme, challenges to a final FERC order must first be pursued through a petition for rehearing. The NGA provides that FERC has 30 days to rule on any petition for a rehearing, and if FERC fails to take any action, the law deems the petition denied. Only after exhausting the rehearing provisions can one proceed to judicial review in the Court of Appeals.

Herein lies the trap. FERC will not decide the sorts of claims the Landowners have brought here, but FERC argues that the Landowners' claims must proceed through the FERC rehearing process on the ultimate path to judicial review. But FERC does not rule on a rehearing petition until after a natural gas company obtains easements, condemns all outstanding properties, and begins (and sometimes completes) construction of the pipeline. Instead, FERC avoids the 30-day period outlined by Congress, purports to "grant" the petition for rehearing "for

further consideration" and then does nothing until any complaints about FERC's process (or any intertwined constitutional claims) are rendered essentially moot. By the time the Landowners get to any court, if they ever get to court, the deed is done and it cannot realistically be undone. FERC and the natural gas company profit and any opportunity for a change to an unconstitutional system is eradicated.

Similarly, even once FERC issues a Certificate and the power of eminent domain, Landowners cannot substantively challenge the grant of that power through condemnation proceedings in federal district court. Courts across the country have repeatedly held that Landowners cannot challenge the constitutionality of the NGA's eminent domain provisions within a condemnation proceeding because such proceedings are limited to the scope and price of any easement, not whether the authority to condemn was lawfully obtained or conveyed in the first place.

Presented with a scenario that blocks access to the courts at every turn, the Landowners here brought suit in the Western District of Virginia, asserting claims that fall well outside of the statutory review scheme envisioned by Congress. And despite the guidance offered by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the district court found that it did not possess subject matter jurisdiction because of the NGA's review scheme. The district court was wrong and that error must be corrected. Otherwise, the Landowners here, and

others similarly situated throughout the country, will never have the opportunity to assert these important constitutional rights and challenge the almighty power of government and big business. All the Landowners seek here is what the law provides: their day in court. Accordingly, the district court's order should be vacated and this case remanded to proceed on the merits.

## STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The district court possessed jurisdiction under 28 U.S.C. §1331. On January 9, 2018, the court entered final judgment. On the same date, January 9, 2018, the Landowners filed a timely notice of appeal from the final judgment. This Court's jurisdiction over the Landowners' appeal rests on 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in its application of the *Thunder Basin* framework and finding that Congress implicitly divested the district court of subject matter jurisdiction over the Landowners' claims.
2. Whether the district court erred in finding that the Landowners' challenges inhered in the FERC process and thus were subject to the NGA's review provisions set forth in 15 U.S.C. § 717r.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Orus Ashby Berkley, James and Kathy Chandler, Theodore and Patti Chlepas, Martin and Dawn Cisek, Roger and Rebecca Crabtree, Estial "Earl" and Fern Echols, George Jones, Robert and Patricia Morgan, the Margaret McGraw Slayton Living Trust, and Thomas and Bonnie Triplett (collectively the "Landowners") own real property in Virginia and West Virginia in the path of a FERC-approved 42-inch private natural gas pipeline known as the Mountain Valley Pipeline. Mountain Valley Pipeline, LLC ("MVP") is a private joint venture between several large energy companies that are also the sole subscribers to the pipeline. MVP seeks to construct its privately-owned, privately-operated, and privately-subscribed 303.5-mile, 42-inch high pressure natural gas pipeline from Wetzel County, West Virginia to Transcontinental Gas Pipeline Company's ("Transco") Zone 5 compressor station 164 in Pittsylvania County, Virginia. MVP's project plans to cross each of the Landowners' properties.[1] The stated purpose of the pipeline is to transport fracked natural gas from the Marcellus and Utica shale formations through the steep slopes of the Appalachian mountains, across the George Washington National Forest and the Appalachian Trail, through

[1] In addition to requiring temporary easements for construction, the Landowners here, and other affected property owners, will be affected by both temporary and permanent access roads.

countless watersheds serving the residents of West Virginia and Virginia, to connect to existing pipeline networks for shipment of cheap gas to the southeastern United States.

This proposed pipeline carries real and long-lasting effects for the Landowners. For instance, the Chlepas own and operate an organic apiary and bee preserve, and derive their living from their land. Months of construction and an access road could destroy in a matter of moments what has taken years to build. The Chandlers' property will be bisected by the pipeline, rendering access to roughly half of their property at worst impossible and at best impractical. Similarly, the farm where George Lee Jones was born will be forever scarred and irrevocably split in half after seven generations of consistent stewardship by the Jones family. These sorts of changes permanently alter the Landowners' ability to enjoy and use their property as they deem fit. Injuries to these Landowners' property rights cannot be made whole as trees cannot be uncut, springs cannot be "un-sunk," and Archaic-period archaeological sites cannot be re-examined and preserved. That is why it is especially important that the Landowners here obtain their day in court *before* their land is irreparably taken from them and forever changed against their wishes.

## II. THE REGULATORY SCHEME, FERC, AND MVP

FERC[2] is the federal agency responsible for regulating the transportation and sale of natural gas in interstate commerce pursuant to the provisions of the NGA. 15 U.S.C. § 717. Among other things, FERC is tasked with monitoring and adjusting rates and charges, and regulating storage of natural gas. Most importantly in this case, FERC is the body responsible for vetting and approving any new proposed interstate natural gas pipelines. 15 U.S.C. § 717f(c), 717f(e).

By operation of law, when FERC grants a Certificate to a natural gas company by finding that the project is "in the public convenience and necessity," it conveys the power of eminent domain to that Certificate holder. 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas … it may acquire the same by exercise of the right of eminent domain…."). FERC itself has repeatedly stated that it possesses no discretion to grant or deny eminent domain power. *See Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion to deny a certificate

[2] The original agency tasked with regulating the sale and transport of natural gas in interstate commerce was the Federal Power Commission. In 1977, Congress passed the Department of Energy Organization Act, and the Federal Power Commission was essentially renamed as FERC. *See* 42 U.S.C. § 7134 (2018).

holder the power of eminent domain."); *Sawgrass Storage, LLC*, 138 F.E.R.C. P61, 180 (2012), *vacated on other grounds*, 146 F.E.R.C. P61, 133 (2014) ("If the Commission finds that a proposed project is required by the public convenience and necessity, it cannot withhold the right of eminent domain."). Thus, the power of eminent domain ***automatically*** transfers to a natural gas company that holds a Certificate under the NGA.

Once a natural gas company obtains a Certificate, it may then initiate condemnation proceedings "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). In this case, FERC issued a Certificate to MVP on October 13, 2017 and little more than a week later, MVP filed condemnation suits against literally hundreds of landowners in Virginia and West Virginia.[3] MVP is in the process of seeking early entry to these properties in an effort to obtain the requisite authority from FERC and other regulatory agencies to begin tree felling and earth moving activities.

[3] *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Vir et al*, Case No. 7:17-cv-00492-EKD (filed October 24, 2017); *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, and Summers, West Virginia et al*, Case No. 2:17-cv-04214 (filed October 24, 2017); *Mountain Valley Pipeline, L.L.C. v. Simmons et al*, Case No. 1:17-cv-00211-IMK (filed December 8, 2017).

## III. THE LANDOWNERS' COMPLAINT AND PROCEEDINGS IN THE DISTRICT COURT

Nearly three months prior to FERC granting MVP a Certificate, the Landowners filed suit in the United States District Court, Western District of Virginia, Roanoke Division, and sought a declaration, *inter alia*, that Congress engaged in an overly broad delegation of the power of eminent domain under the NGA, that FERC's sub-delegation of the power of eminent domain to MVP under the NGA is unconstitutional, and that FERC's automatic grant of the power of eminent domain pursuant to an unconstitutional standard is also unconstitutional. JA 12-80. The Landowners simultaneously sought a preliminary and permanent injunction to prohibit FERC from granting MVP the power of eminent domain under 15 U.S.C. § 717f(h) and to prevent MVP from claiming or exercising any power of eminent domain under the same provision. JA 81-125.

MVP and FERC moved the district court to dismiss the Landowners' complaint for lack of subject matter jurisdiction, each claiming that the Landowners were required to submit their complaints within the NGA regulatory scheme, first to FERC and then to the Court of Appeals via 15 U.S.C. § 717r. JA 126-158, 178-202. The Landowners argued that their claims fall outside the scope of FERC's jurisdiction and expertise, and were properly brought to the federal district court pursuant to 28 U.S.C. § 1331.

The district court, however, found that: (1) the Landowners' claims "inhere" in a FERC order and are thus subject to the exclusive review provisions of the NGA and; (2) even if the Landowners' claims fall outside NGA's exclusivity provisions, Congress implicitly divested the district court of jurisdiction pursuant to the Supreme Court's framework in *Thunder Basin*, 510 U.S. 200. JA 532-547. For those reasons, the district court dismissed Counts I-III, holding that it lacked subject matter jurisdiction. *Id.* The Landowners voluntarily dismissed with prejudice Count IV of their Complaint, the district court entered final judgment, and on the same day, the Landowners filed their Notice of Appeal.

## SUMMARY OF ARGUMENT

This Court should reverse the decision below for the following reasons:

The NGA does not divest the district court of subject matter jurisdiction, implicitly or explicitly. Under the analytical framework developed by Supreme Court in the *Thunder Basin* line of cases, it is clear in this case that Congress never intended to divest the district court of subject matter jurisdiction over the Landowners' claims regarding the automatic grant of eminent domain under the NGA.

That Congress never envisioned such a divestment is confirmed by the fact that absent jurisdiction in the district court, the Landowners have no path to judicial review, much less meaningful judicial review. FERC disclaims

jurisdiction over the claims asserted by the Landowners here and admits that it lacks the discretion or power to excise a grant of eminent domain from the grant of a Certificate. The Landowners, in turn, cannot challenge the grant of eminent domain within the FERC process. Even if the Landowners could challenge the grant of eminent domain within the review provisions of the NGA, FERC administers its rehearing proceedings in a manner that delays access to the Court of Appeals until *after* a natural gas company has condemned properties and constructed the pipeline. By the time Landowners can access the Court of Appeals, irreparable damage is done, and for all practical purposes, the Landowners' challenges are rendered moot.

The Landowners are also precluded from asserting claims concerning the unlawful grant of eminent domain within condemnation proceedings. District courts across the nation have been unwavering in limiting the issues in condemnation proceedings to the scope of the taking and the amount of just compensation. Lack of a forum in which to assert these important constitutional claims is precisely what the Supreme Court sought to prevent in *Thunder Basin* and its progeny.

The record is also clear that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case. The challenges asserted by the Landowners in this case focus not on the policies,

procedures, or analysis of some issue by FERC or even a decision by FERC, but instead center on extra-agency "root" constitutional questions that Congress never intended to be included in agency review. None of the cases relied upon by the district court support its finding that Congress implicitly intended for the Landowners' claims to be subject to the NGA's review provisions. The claims asserted in this case neither "inhere" in the regulatory scheme nor are the claims "intertwined" with agency review.

Instead, under the *Thunder Basin* line of cases, the Landowners' claims here are "wholly collateral" to the regulatory scheme, and every party in this action recognizes that FERC offers no expertise vis-à-vis the claims at issue in this case. And though each aspect of the *Thunder Basin* analysis independently weighs in favor of finding jurisdiction appropriate in the district court, taken as a whole, there can be no doubt that the Landowners' claims here do not fall within the review scheme envisioned by Congress. In this case, jurisdiction lies in the district court.

## ARGUMENT

### *Standard of Review*

An appellate court reviews "de novo a district court's dismissal of a complaint for lack of subject-matter jurisdiction." *Bennett v. United States SEC*, 844 F.3d 174 (4th Cir. 2016) (quoting *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 241 (4th Cir. 2004)).

## I. UNDER THE *THUNDER BASIN* FRAMEWORK, CONGRESS NEVER INTENDED TO DIVEST THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OF THE LANDOWNERS' CLAIMS

### A. The *Thunder Basin* Framework

The Supreme Court has recognized two ways in which Congress may divest a federal district court of federal-question jurisdiction under 28 U.S.C. § 1331. First, Congress may expressly divest the district court of original jurisdiction. *Bennett*, 844 F.3d at 178 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 5 (2000)).[4] Second, Congress may divest a federal district court of jurisdiction under 28 U.S.C. § 1331 through creation of a "statutory scheme of administrative adjudication and delayed judicial review…." *Bennett*, 844 F.3d at 178 (citing *Thunder Basin*, 510 U.S. at 207). Even where there is a statutory scheme at play, "[p]rovisions for agency review do not restrict judicial review ***unless*** the statutory scheme displays a fairly discernible intent to limit jurisdiction,

[4] Though the district court appears to have made some finding that the NGA expressly divests the district court of jurisdiction, there can be no doubt that the NGA does no such thing. To expressly divest a federal district court of jurisdiction over certain claims, Congress must "plainly bar[] § 1331 review … irrespective of whether the individual challenges the agency's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds." *Shalala*, 529 U.S. at 10. In *Shalala*, the statute was explicit: "no action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." *Shalala*, 529 U.S. at 10 (quoting section 405(h) of the Social Security Act). Unlike the express divestment of district court jurisdiction under section 1331 at issue in *Shalala*, the NGA provides no such language. Accordingly, to the extent the district court found an express divestment under the NGA, it committed error.

and the claims at issue are of the type Congress intended to be reviewed within the statutory structure." *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477, 489 (2010) (internal quotations omitted) (emphasis added). The Landowners' claims here are not the type Congress intended to be reviewed within the structure of the NGA, and Congress never intended to limit jurisdiction of a federal district court over the type of claims asserted in this case.

Where questions arise as to whether Congress impliedly divested a district court of jurisdiction, the Supreme Court has promulgated the two-step *Thunder Basin* framework to guide the analysis. First, as this Court has previously held, the reviewing court asks whether Congressional intent to implicitly divest the district court of jurisdiction is "fairly discernible in the statutory scheme." *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 207). Courts are directed to analyze "the statute's language, structure, and purpose" as well as the statute's "legislative history." *Bennett*, 844 F.3d at 181; *Thunder Basin*, 510 U.S. at 207 (stating that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, [] and whether the claims can be afforded meaningful review.") (internal citations omitted).

Second, this Court "ask[s] whether plaintiffs' claims are of the type Congress intended to be reviewed within this statutory structure." *Bennett*, 844

F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 212) (internal quotations omitted). The Court analyzes three key factors under this second step of the inquiry: (1) whether the statutory scheme forecloses all meaningful judicial review; (2) the extent to which the plaintiffs' claims are wholly collateral to the statute's review provisions; and (3) whether agency expertise could be brought to bear on the questions presented. *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15.

### B. The Landowners are Unable to Obtain Any Judicial Review, Much Less "Meaningful" Judicial Review

In *Bennett*, this Court recognized that "meaningful judicial review is the ***most important factor*** in the *Thunder Basin* analysis." 844 F.3d at 184, n.7 (emphasis added). The Supreme Court confirms that upholding district court jurisdiction is critical "particularly where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212-13. The Landowners here are unable to obtain any judicial review of their claims if the district court is divested of jurisdiction. And, even if the Landowners could obtain judicial review of their claims outside of the district court (which they cannot), there is no path to meaningful judicial review.

The Landowners are unable to obtain judicial review here because FERC possesses no discretion to grant or deny eminent domain power. *See e.g.*, *Midcoast Interstate Transmission*, 198 F.3d at 973; *Sawgrass Storage, LLC*, 138 F.E.R.C.

P61, at 180. Put another way, the power of eminent domain conveys automatically with FERC's issuance of a Certificate, leaving no opportunity for the Landowners to challenge that particular act. *See* 15 U.S.C. § 717f(h). And even if the Landowners lodged their claims within the FERC processes, FERC bypasses Congress' 30 day mandatory period by granting a rehearing for further consideration while condemnation proceedings ensue and the pipeline is constructed. By the time FERC denies a request for rehearing, the pipe is in the ground and it is meaningless to seek review in the Court of Appeals. Likewise, the Landowners are precluded from bringing any challenge to a natural gas company's power of eminent domain within condemnation proceedings.

### 1. FERC Does Not Provide a Forum for the Landowners' Claims and Cannot Provide the Relief Sought

Because the NGA automatically confers the power of eminent domain once a natural gas company obtains a Certificate, FERC's grant of eminent domain to a company such as MVP can never, as a matter of law, be challenged before FERC. While FERC contends that its process determines that a project is in the public interest, there is no opportunity for FERC to make any independent decision about the grant of the power of eminent domain because FERC cannot approve a project without automatically granting that power via issuance of a Certificate. There is simply no forum for the Landowners here, or in any other case, to challenge the grant of eminent domain. The fact that there is no forum or opportunity to

challenge a grant of eminent domain before FERC, standing alone, illustrates that the Landowners' claims here fall outside the statutory review scheme envisioned by Congress and outlined in the NGA.[5]

Stated in terms of the relief sought, because FERC does not possess the discretion to grant or deny eminent domain powers under the NGA, it necessarily follows that FERC is precluded by law from granting any relief to the Landowners within the FERC process, even if the claims pleaded were raised before FERC. Because FERC cannot grant any relief to the claims pleaded, the claims will never be subject to a final order as required by the NGA's "exclusive" jurisdiction provisions. 15 U.S.C. § 717r. Again, FERC does not have the power to adjudicate a challenge to the provisions of section 717f(h); therefore, such challenges are not subject to the administrative process and cannot be subject to its exclusive jurisdiction provisions.

Remarkably, FERC itself recognizes and agrees with the Landowners that it cannot and will not hear challenges regarding the automatic grant of eminent domain powers. At the hearing before the district court, FERC's counsel stated the following:

> We do agree with plaintiffs in one respect. My agency, while it's a federal agency, it's obviously not an Article III court. Obviously, ***we don't sit in judgment on the constitutionality of any federal statute***

[5] The first step in the *Thunder Basin* framework will be analyzed more fully below.

> ***that we administer***. Rather, we make necessary public interest, public convenience, and necessity findings.

JA 480-481 (emphasis added). Likewise, FERC's Certificate issued to MVP notes that "such 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." JA 357. MVP concedes the same: "Now, it's, of course, true, as Mr. Solomon said, that his agency doesn't generally decide constitutional issues. But the Court of Appeals do." JA 498.

What FERC and MVP ignore, and for good reason, is the fact that the Court of Appeals can only hear challenges to a final order issued by FERC. 15 U.S.C. § 717r(b). FERC lacks jurisdiction and the power to determine the claims presented here; therefore, the Landowners' claims never enter the administrative process or obtain access to even delayed judicial review under 15 U.S.C. § 717r.

Like this Court recognized in *Bennett*, where the regulatory body "had not undertaken regulatory action that would yield a reviewable Commission order or rule, the petitioners would have had to challenge a Board rule at random or bet the farm by voluntarily including a sanction in order to trigger § 78y's mechanism for administrative and judicial review." 844 F.3d at 180 (quoting *Free Enterprise*, 561 U.S. at 490). For all of the reasons discussed above, FERC has not, and cannot, undertake action regarding the Landowners' challenges to section 717f(h) of the NGA, and thus the Landowners' claims cannot be subjected to the NGA's

administrative review scheme. Likewise, there is no judicial review of the grant of the power of eminent domain.

### 2. FERC's Rehearing Process is Far From Meaningful: The Result is Preordained

Even if FERC could exercise jurisdiction and make findings that could be challenged in the Court of Appeals after exhausting administrative remedies under section 717r, FERC has unilaterally barred the doors to timely, meaningful judicial review. As detailed above, the NGA requires parties, before obtaining judicial review of any FERC order, to seek rehearing from the agency. 15 U.S.C. § 717r(a). Upon submission of a rehearing request, FERC may grant or deny the request or abrogate or modify its order, even without a hearing. *Id.* Congress commanded action within 30 days; otherwise, by operation of law, the request would be deemed denied and parties could proceed to the Court of Appeals. *Id.*

What has become common knowledge in the pipeline industry is that FERC administers the rehearing and review process in a manner designed to block access to the courts. Though Congress explicitly provided that FERC has 30 days to consider a petition for rehearing, FERC bypasses Congressional mandate by issuing an order that purports to grant a rehearing.[6] But FERC's so-called "decision" granting a rehearing is a pretense: the order granting a rehearing is

[6] These orders are commonly referred to as "tolling orders" by practitioners in this area of the law.

issued only "for the limited purpose of further consideration." *See* Order Granting Rehearing for Further Consideration, No. CP16-10, 20171213- 3061 (Dec. 13, 2017) (available at https://elibrary.ferc.gov/IDMWS/search/fercgensearch.asp).[7] But FERC does not actually engage in any "further consideration" or entertain any further submissions from interested parties. Instead, while the Landowners in this case wait to exhaust their administrative remedies, FERC authorizes the pipeline company to proceed with construction.[8]

An analysis conducted by Appalachian Mountain Advocates in support of its recently filed Petition for Extraordinary Writ to stay the order "granting" rehearing entered in the MVP matter, reveals that "FERC has used tolling orders in 99 percent of its gas pipeline orders in the last eight years to shield itself from timely judicial scrutiny." *See* Petition for Extraordinary Writ in *In re Appalachian Voices, et al.*, No. 18-1006, at p. 5 (D.C. Cir. Jan. 8, 2018); *see also* Exhibit G to Petition for Extraordinary Writ.

---

[7] FERC's purported "decision" provides in part: "In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained." *Id.*

[8] At the time of filing, FERC has granted MVP the right to proceed with certain construction of access roads and site preparation for compressor stations in West Virginia.

FERC's practices and procedures are an anathema to any reasonable notion of meaningful judicial review. Such delays raise the possibility that FERC can effectively render the instant challenge moot, or at least practically moot, by authorizing MVP to construct a $3.7 billion project while FERC sits on its decision regarding rehearing until the project is complete. Certainly, no entity, private or public, would place a $3.7 billion bet without some assurance from FERC that any meaningful challenge would not stop or delay construction and operation of a pipeline. The fact is that neither MVP, nor any other natural gas company, has to place a bet and take the risk. Instead, FERC has engineered a "solution" to the problem of being required to provide a route to meaningful judicial review. Under this system of Gordian knots, it is the Landowners here who are required to literally "bet the farm … before testing the validity of the law," a scenario that the Supreme Court has unambiguously held is not "a 'meaningful' avenue of relief." *Free Enterprise*, 561 U.S. at 490-91 (citing *Thunder Basin*, 510 U.S. at 212); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996).

### 3. The Landowners Cannot Obtain Relief in Condemnation Proceedings

It is also well-established that "the role of the district court in NGA eminent domain cases extends solely to examining the scope of the certificate and ordering

the condemnation of property as authorized in that certificate." *Columbia Gas Transmission Corp. v. B.J. Props. New Mkt., LLC*, 2008 U.S. Dist. LEXIS 45305, at *6 (W.D. Va. June 9, 2008) (citing *Guardian Pipeline, LLC v. 295.49 Acres of Land*, 2008 U.S. Dist. LEXIS 35818 (E.D. Wis. 2008)); *Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 339 (D. N.H. 1998); *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence County, R.I.*, 749 F. Supp. 427, 430 (D. R.I. 1990) ("The District Court's role is to evaluate the scope of the certificate and to order condemnation of property as authorized in the certificate.")). The district court's jurisdiction in condemnation proceedings does not extend to any challenges to the NGA's transfer of the power of eminent domain under 15 U.S.C. § 717f(h). Therefore, the Landowners cannot have their current claims heard by a federal district court in the ongoing condemnation proceedings.

**4. Conclusion**

Even if section 717r could offer a path to relief (which it cannot), the Landowners in this action should not be forced to literally bet their farms, their homes, and their peace of mind. These Landowners did not seek to be regulated by some executive body in Washington, D.C. that is tasked with regulating the sale and transport of natural gas in interstate commerce. These Landowners are not

seeking some congressionally-created right, benefit, or entitlement. Instead, these Landowners seek only their day in court in an effort to protect the fundamental constitutional right to be secure in their private property and be left alone. They have no other avenue of relief outside of the district court, much less any meaningful avenue of relief as required by *Thunder Basin*. Since "meaningful judicial review" is the "most important" aspect of the *Thunder Basin* inquiry, this Court's inquiry could focus entirely on this prong and ample evidence exists to reverse the district court. Nevertheless, a full *Thunder Basin* analysis confirms the same: the district court possesses subject matter jurisdiction here.

### C. The Language, Structure, Purpose, and Legislative History of the NGA Did Not Implicitly Divest the District Court of Jurisdiction Over Foundational Constitutional Questions Posed by the Landowners

Though the Landowners lack any access to meaningful judicial review here, it is nevertheless clear that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case. As noted at the district court hearing repeatedly, the challenges lodged by the Landowners focus not on the policies, procedures, or analysis of some issue by FERC or even a decision by FERC, but instead center on extra-agency "root" constitutional issues that Congress never intended to be included in agency review. *See Free Enterprise*, 561 U.S. at 491 (stating that the petitioner's claims in *Thunder Basin* were

"statutory; at root … they arose under the Mine Act….") (quoting *Thunder Basin*, 561 U.S. at 214-15) (internal quotations omitted)).

An important question for purposes of understanding and analyzing Congress' intent then, under both *Thunder Basin* and *Free Enterprise*, is whether the claims, statutory, constitutional, or otherwise arise under the statutory scheme. The majority in *Elgin* refused to draw a distinction between a challenge "on the ground that the statute requiring it is unconstitutional" versus a challenge based "on any other ground." *Elgin*, 567 U.S. 13. However, in *Elgin*, as well as in *Thunder Basin* and *Bennett*, the claims alleged by each of the plaintiffs "arose under" the statutory scheme, and were therefore "at root" within the statutory scheme by their very nature, even if the claims presented included constitutional issues. For example, in *Thunder Basin*, the Court stated that the petitioner's constitutional claims "turn on a question of statutory interpretation ***that can be meaningfully reviewed under*** the Mine Act." 501 U.S. at 216 (emphasis added). Put another way, the "only constitutional issue was a matter of timing" of the FERC rehearing. *Elgin*, 567 U.S. at 32 (Alito, J. dissenting).

However, in *Free Enterprise*, the Supreme Court found that the exclusive review provisions of 15 U.S.C. § 78y did not divest the district court of subject matter jurisdiction, in part, because the claims did not arise under the statutory scheme at issue. The Court noted that the "petitioners object to the Board's

existence, not to any of its auditing standards." *Free Enterprise*, 561 U.S. 477, 490. Stated differently, the Court found it important that the petitioners' claims did not arise under the statutory scheme but outside of the statutory scheme altogether. And while the primary reason the Court in *Free Enterprise* found subject matter jurisdiction centered on the fact that the petitioners could not obtain meaningful judicial review, the fact that the challenge levied by the petitioners fell outside the statutory scheme itself was nevertheless an important additional factor weighing in favor of district court jurisdiction, just as it is here. *Id.* at 490-92.

Furthermore, the statutory scheme at issue in *Elgin* was starkly different than the NGA scheme at issue here and the scheme at issue in *Free Enterprise*. For example, the statutory scheme in *Elgin*, the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 *et seq.*, was specifically created to "replace an outdated patchwork of statutes and rules that afforded employees the right to challenge employing agency actions in district courts across the country." *Elgin*, 567 U.S. at 14-15 (quoting *United States v. Fausto*, 484 U.S. 439, 444-45 (1988)). Permitting judicial review for "covered employees" outside of the statutory scheme created by Congress would create the same exact scenario Congress sought to avoid in passing the legislation, namely to rid the system of "inconsistent decision-making and duplicative judicial review." *Elgin*, 567 U.S. at 14.

Congress passed the CSRA in the wake of the Watergate scandal in order to dismantle the U.S. Civil Service Commission and replace it with three new agencies, the Office for Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority. *See* 92 Stat. 1111, *et seq.* The final version of the CSRA spans some 117 single-spaced pages and painstakingly outlines powers such as the Special Counsel's investigatory powers (§ 1206), and procedures for removal or suspension of an employee for "more than 14 days, reduction in grade or pay, or furlough for 30 days or less." *See* 92 Stat. 1134, *et seq.*; 5 U.S.C. § 7511, *et seq.* The detailed statutory scheme provides a host of options for review, depending on one's status, the action at issue, and which body or bodies may possess review power depending on one's status and the action at issue. *See, e.g.*, 5 U.S.C. §§ 7511, 7512, 7513, 7703.

The statutory scheme outlined by the NGA bears little, if any, resemblance to the nuanced and detailed procedures of the CSRA. And, unlike the CSRA, the NGA was not specifically designed to preclude piecemeal litigation by the thousands of federal employees in various jurisdictions; indeed, nothing in the NGA or its legislative history points to any intent by Congress to address similar concerns in the realm of regulating interstate natural gas companies. Instead, the NGA provides that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal

regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary and in the public interest." Natural Gas Act of 1938, 52 Stat. 821. Notably, the original NGA provided a statutory scheme for delayed judicial review, but the original NGA did not include a provision delegating the power of eminent domain. 52 Stat. 831-32 (section 19); 52 Stat. 825 (section 7(c)).

As the above discussion illustrates, the elaborate and massive statutory framework under the CSRA evinces Congress' clear intent to include in its scheme a whole host of claims that might potentially arise in the employment context, including constitutional claims. By contrast, the NGA evinces a statutory scheme that holds as its sole purpose regulation of the transportation and sale of natural gas in interstate commerce. The NGA's review provisions, as outlined in the original 1938 Act, provided an exclusive review system for "any party to a proceeding ***under this Act*** aggrieved by an order issued by the Commission…." 52 Stat. 831 (emphasis added).

It was not until 1947 that Congress saw fit to delegate the power of eminent domain ***automatically*** upon issuance of a Certificate. *See* 61 Stat. 459. Indeed, it is hard to imagine that Congress could have even contemplated that a party should bring a constitutional challenge to a delegation that had not yet occurred within the statutory scheme outlined in 1938 that remains unchanged to this day. And there is

simply no evidence in the congressional record or otherwise indicating that when Congress amended the NGA in 1947 to include the current eminent domain provisions found at 15 U.S.C. § 717f(h), that Congress intended that a challenge to that delegation as overly broad should be heard as a challenge to a "proceeding *under this Act.*" Such a conclusion would make little practical sense, particularly where one can only seek review of a final order of the Commission, which is wholly separate and distinct from seeking judicial review of an overly broad congressional act committed in 1947.

It is also important that "none of the cases relied upon by defendants" or the district court for that matter, "presented the *precise* constitutional challenges that plaintiffs raise…." JA 538 (emphasis in original). This challenge is unique, not only among cases relating to the NGA, but to other statutory schemes, because the core of the Landowners' challenge arises under the delegation doctrine. *See, e.g.*, *Whitman v. American Trucking Association*, 531 U.S. 457, 474-75 (2001) ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."). The distinctiveness of this case, particularly in the context of the NGA, is illustrated in the half dozen or so cases relied upon by the district court and the Appellees which define the contours of the sort of FERC action that falls within the statutory scheme envisioned by Congress in 1938 and in 1947. Furthermore, the NGA or

NGA-like cases cited by the district court in section II.A. of its opinion, and which are discussed in detail below, do just the same: they define the contours of the sort of FERC action that falls within the statutory scheme envisioned by Congress, and reinforce the conclusion that the Landowners' claims do not "inhere" in some FERC action or "arise under" the exclusive review scheme. For all of the reasons described above and those that will be discussed below, the intent of Congress to divest the district court of jurisdiction over the challenges here is not "fairly discernible in the statutory scheme." The district court possesses subject matter jurisdiction under 28 U.S.C. § 1331.

### 1. Congress Never Envisioned the Landowners' Claims To Be Reviewed Within Section 717r

Though Congressional intent is lacking under the first step of the *Thunder Basin* framework, it is also apparent that the Landowners' claims are not of the type Congress intended to be reviewed within the statutory structure of the NGA. As discussed above, the structure and practice of FERC under the NGA "forecloses all meaningful judicial review," the most important factors under *Thunder Basin*. *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15. Second, the Landowners' claims are wholly collateral to the review provisions contained in section 717r. Finally, FERC offers no expertise on whether Congress set forth adequate intelligible principles when it amended the NGA to delegate the power of

eminent domain in 1947. Likewise, FERC has no expertise to offer on the practical effect of its exercise of a power it never lawfully obtained.

### D. The Landowners' Challenges Are Wholly Collateral to the Regulatory Review Scheme

For many of the reasons articulated above, it is clear that the Landowners' challenges are "wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 181; *see also Thunder Basin*, 510 U.S. at 212-15. To recap, FERC confesses that it does not have the power or jurisdiction to review challenges to Congress' delegation of the power of eminent domain under section 717f(h) or to even make any independent determination of whether to convey the power of eminent domain to a natural gas company. That is because the claims asserted by the Landowners in this action do not arise under or inhere in any controversy governed by the NGA's review provisions. Indeed, not only is judicial review unavailable to the Landowners under section 717r, FERC also bars the doors to the courthouse by sidestepping explicit instructions from Congress to make decisions on rehearings within 30 days. Each of these conclusions, as supported by the analysis above, equally and independently illustrate the fact that the Landowners' challenges here are wholly collateral to the regulatory review scheme envisioned in section 717r.

In its Memorandum Opinion, the district court hinged its analysis of the "wholly collateral" factor on the following quote from *Bennett*: "Claims are not

wholly collateral when they are the vehicle by which [plaintiffs] seek to reverse agency action." JA 545; 188 F.3d 186-87. Notably, this Court also recognized in *Bennett* that "the reference point for determining whether a claim is 'wholly collateral' is not free from ambiguity." *Id.* at 187. As a result, this Court has noted that its reading of the factor "reduces the factor's independent significance." *Id.* Furthermore, this Court in *Bennett* also recognized a second reading of the "wholly collateral" factor, namely "whether a claim is wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 186 (citing *Elgin*, 567 U.S. at 15). Though the district court opted for the first reading in *Bennett*, under either reading, the Landowners' claims are "wholly collateral" in nature.

In its opinion, the district court contends that the Landowners here conceded that their goal was to reverse FERC's action of granting the Certificate for MVP: "plaintiffs admitted as much at argument, in that they conceded that if they were successful on their constitutional claims, the FERC order would be invalidated, at least insofar as it conveyed to MVP eminent domain authority." JA 545. While the Landowners did in fact argue "that a natural consequence may be to invalidate that part of the order where eminent domain automatically conveys," the Landowners' position is clear that "the original delegation itself is invalid; so the consequences of that are the actions subsequent are also invalid" but "[it] wouldn't necessarily mean that the Commission's order as a whole is invalid because there's

… 160-some pages of information of different parts of FERC's competence here, but the provisions of eminent domain that were conveyed without any intelligible principles would be invalid, yes, one part of that order." JA 519-520.

The district court's application of the "wholly collateral" standard in this case, however, highlights the problem with such a narrow reading of *Thunder Basin* and its progeny. Under the limited reading employed in *Bennett*, any challenge at all that has the *effect* of invalidating some agency action could never be wholly collateral. This makes little practical sense on the facts before the Court at present, and given the facts of *Bennett*, likely explains why the Court opted to treat this prong of the analysis as if it were identical to a collateral attack on a judgment. In *Bennett*, the plaintiff did "seek to affect the merits of the SEC proceeding" because "her true concern [wa]s a sanction." *Bennett*, 844 F.3d 184, n.8. Bennett sought to avoid responsibility and a sanction for misdeeds; whereas here, the Landowners proactively seek to enforce their constitutionally recognized and sacred right to private property. A potential effect of enforcing a constitutional right (*e.g.*, invalidation of the automatic grant of eminent domain under the NGA to FERC and then to MVP in this case) should not drive the jurisdictional analysis. Indeed, this Court recognizes that fact in *Bennett* by reducing the independent significance of the "wholly collateral" prong. *Id.* at 187.

The better reading of *Thunder Basin* and its progeny is that this element asks "whether a claim is wholly collateral to the statute's review provisions." *Bennett*, 844 F.3d at 186 (citing *Elgin*, 567 U.S. at 15). That reading of *Thunder Basis* is borne out by examining the factual situation present here and the situations in *Free Enterprise*, *Mathews v. Eldridge*, *McNairy v. Haitian Refugee Center, Inc.*, and *Kreschollek*. For example, in *Free Enterprise*, the plaintiffs were not required to pursue their constitutional claims through the very body which they claimed should not even exist. 561 U.S. at 490-91. In *Mathews*, the Supreme Court held that a constitutional challenge to an administrative process could be brought in federal district court even where the plaintiff was still required to proceed through the administrative process to reclaim a benefit that had been stripped away. 424 U.S. at 327-332. The Court in *McNairy* similarly found that challenges to an administrative process in general, as opposed to an action seeking "review on the merits of a denial of a particular application," did not divest a district court of general federal-question jurisdiction. 498 U.S. at 494. Finally, in *Kreschollek*, the Third Circuit found that "Kreschollek's attempt to seek a declaration of his right to a pretermination hearing is in no way inimical to the purpose of the [Longshoreman] Act and its amendments." 78 F.3d at 874.

Under any reading of "wholly collateral," the Landowners' claims here qualify as such. Undoubtedly, the Landowners are generally aggrieved by the

Certificate FERC issued to MVP, but the Landowners and the various community organizations to which they belong continued to submit to FERC what is FERC's for decision and maintain that subject matter jurisdiction of their current constitutional claims lies in the district court, regardless of any ancillary impact that the court's ruling could have on MVP's or any other natural gas company's power of eminent domain under a Certificate. The letter and spirit of the *Thunder Basin* line of cases commands that the Landowners' claims here be viewed as wholly collateral to the statutory review scheme of the NGA.

### E. The District Court Correctly Found, and MVP and FERC Admit, that the Landowners' Claims Fall Well Outside of FERC's Experience and Expertise

The final factor to analyze under the second prong of the *Thunder Basin* framework focuses on whether the claims at issue fall within the particular expertise and experience of FERC. First, the district court correctly found that "FERC does not have expertise in ruling on constitutional questions, nor could it rule on whether authority was unconstitutionally delegated to it." JA 545-546. Second, FERC conceded at the motions hearing and in the MVP Certificate that it could not and would not analyze, evaluate, or pass judgment on the Landowners' claims in this case because FERC is not an Article III court. *See* JA 480-481; JA 357. MVP admitted the same. JA 498. There is no dispute that the third and final

factor supports the Landowners' position that the district court possesses subject matter jurisdiction in this case.

**F. Conclusion**

Application of the *Thunder Basin* framework leads to one conclusion: that subject matter jurisdiction lies in the district court because Congress did not impliedly divest the district court of jurisdiction by enacting the so-called "exclusive" review provision of the NGA. Critically, the most important factor of the *Thunder Basin* analysis, meaningful judicial review, weighs heavily in favor of the Landowners. In this case, FERC cannot adjudicate the Landowners' claims, and FERC then locks the courthouse doors by sitting on petitions for rehearing until after the pipeline is built. Standing alone, the fact that the Landowners will never obtain meaningful judicial review is enough to reverse the district court's dismissal, but taken as a whole, the *Thunder Basin* factors overwhelmingly favor the Landowners.

The Landowners' claims are wholly collateral to the FERC process, and even if the Landowners succeed on the merits, the relief sought is limited to declaratory and injunctive relief only on the grant of eminent domain. The district court, FERC, and MVP all concede that FERC's expertise does not offer any assistance with the Landowners' claims, and review of the NGA and its implementation by courts firmly establishes that Congress never intended for the

Landowners' claims to fall within section 717r. The district court possesses subject matter jurisdiction, and the case should be remanded to proceed on its merits.

## II. THE DISTRICT COURT'S ANALYSIS WAS FUNDAMENTALLY FLAWED BECAUSE THE DISTRICT COURT MISUNDERSTOOD THE NATURE OF THE LANDOWNERS' CLAIMS AND THE SCOPE OF THE NGA'S "EXCLUSIVE" REVIEW SCHEME

### A. The Landowners' Claims Do Not Inhere In or Arise Out of the NGA

In its Memorandum Opinion, the district court misapplied the applicable standard where there is a question as to whether Congress implicitly excised certain claims from judicial review under 28 U.S.C. § 1331. JA 535-540. Where there is no express jurisdictional bar imposed by Congress in a regulatory scheme, courts have been directed to apply the *Thunder Basin* analysis to determine whether Congress implicitly divested a district court of jurisdiction. Here, the district court focused on a host of NGA and NGA-like cases ostensibly in support of the proposition that the Landowners' claims in this case either "inhere" in the controversy or are not "wholly collateral" to the issues before FERC. While these questions properly arise in the context of a *Thunder Basin* analysis, the district court extracted statements from these cases without conducting a robust analysis within the proper framework. Indeed, when the cases cited by the district court are analyzed fully within the facts of the particular case and weighed appropriately

within the *Thunder Basin* framework, it is clear that the Landowners' claims in this case are not the sort of claims Congress intended to be heard within the NGA's regulatory review scheme. Without exception, the cases relied upon by the district court illustrate that the Landowners' claims here are not the sort of claims that Congress implicitly sought to channel through administrative review under FERC. And while these cases are discussed separately in the first prong of the *Thunder Basin* framework, the analysis within this section of the Landowners' arguments bolsters the fact that Congress did not display a fairly discernible intent to limit jurisdiction over the Landowners' claims in this case.

### 1. The "Exclusive" Review Provisions of the NGA Do Not Apply to the Landowners' Claims

In its Memorandum Opinion, the district court pointed to several cases for the proposition that section 717r of the NGA is an expansive and exclusive review scheme. JA 536. That proposition is not wrong *per se*, but it is an oversimplification of the statutory scheme as it applies here.

The district court first cited *Consolidated Gas Supply Corp v. Federal Energy Regulatory Commission*, 611 F.2d 951 (4th Cir. 1979), where the Fourth Circuit reversed the district court's exercise of jurisdiction and grant of injunctive relief in favor of Consolidated Gas. In this pre-*Thunder Basin* case, Consolidated Gas sought injunctive relief related to a show cause order issued by FERC regarding volumetric limitations imposed during a national natural gas shortage.

Unlike the constitutional challenges to Congress' delegation of the power of eminent domain at issue in the present case, Consolidated Gas sought judicial review in the district court on issues that it admitted fell squarely within the expertise of FERC and section 717r's review provisions. Specifically, Consolidated Gas stated that its action sought to "preserve this Court's jurisdiction over the issues on appeal … as a protective measure." *Id.* at 975. Unlike the situation in *Consolidated Gas*, the Landowners here have brought challenges to a Congressional action, not to an action of FERC limited to, or dependent upon, a particular FERC order. Accordingly, *Consolidated Gas* offers little insight into the issue of implicit divestment of jurisdiction on collateral constitutional claims addressed nearly two decades later by the Supreme Court in *Thunder Basin*.

Some four decades prior to the *Thunder Basin* decision, the Supreme Court decided *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), another case the district court cited here. In *City of Tacoma*, the Supreme Court analyzed the interplay between federal preemption and licensing of a power plant under the Federal Power Act. The case focused on whether a federal license to construct and operate a power plant granted to the City of Tacoma under the Federal Power Act, as well as the conferral of the federal power of eminent domain, gave the City power to take a state-owned fish hatchery when state law was silent on the issue. *Id.* at 333. In effect, the issue brought to the federal district court centered on

whether the Federal Power Commission had lawfully performed its functions in granting the license to the City of Tacoma. *Id.* at 337. The Taxpayers of Tacoma contended that state law had not been adequately considered by the Federal Power Commission in evaluating the City's license application. In finding that the district court did not possess jurisdiction, the Supreme Court stated that the statutory scheme at issue "necessarily precluded *de novo* litigation between the parties of all issues *inhering* in the controversy…." *Id.* at 336 (emphasis added).

In *City of Tacoma*, the challenge mounted by the plaintiffs inhered in the controversy in the most direct manner conceivable; it directly challenged the internal decision-making process of the Federal Power Commission. Thus, it comes as no surprise that the Supreme Court found that Congress, so long as it is "acting within its constitutional powers," may establish an administrative review scheme where access to the courts is delayed. *Id.* But, the Court in *City of Tacoma* expressly limited its analysis to the timing of ultimate "judicial review of administrative orders" within an applicable statutory scheme and did not consider, much less address, an issue that was not before the court: whether a challenge to the Congressional act of delegation as overly broad inheres in a controversy centered only on a challenge to a particular administrative order. *Id.*

As discussed in more detail above, nothing about the Landowners' challenges inhere in a controversy about how FERC made its determinations in

granting MVP, or any other natural gas company, a Certificate. Indeed, the Landowners here challenge the notion that Congress was properly "acting within its constitutional powers" in the first place, not whether FERC properly applied its own policies and standards in issuing a Certification to MVP. Accordingly, *City of Tacoma*, read fully and in its proper context, does not stand for the proposition that the Landowners' challenge inheres in some administrative controversy, but reinforces that the Landowners' challenge falls far outside FERC's administrative process and exclusive judicial review procedures set forth in the NGA.

The same holds true for the district court's reliance on *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989). In another pre-*Thunder Basin* non-binding case, the issue before that court was whether a state court injunction granted in favor of Oklahoma City under state law could lawfully issue where FERC determined that the project fell within FERC's jurisdiction as an interstate project and was subject to the NGA's judicial review procedures. At its very core, the ruling in *Williams* centered on whether the project was interstate or intrastate, a question that fell squarely within FERC's regulatory scheme and the exclusive jurisdiction procedures under the NGA. Whether a natural gas project is interstate or intrastate is a factual question to be decided during the FERC application process, and FERC is free to exercise its discretion in making a finding

on this point, a type of discretion that does not translate to the issue of eminent domain.

The Tenth Circuit's opinion found that a state court injunction proceeding to challenge FERC's finding was an impermissible collateral challenge to the FERC process, not because *all* issues necessarily inhere in a controversy with FERC (a conclusion that would be absurd on its face), but because factual determinations about the nature of the project as interstate were properly within the scope of FERC's lawful powers. Accordingly, the challenge at issue, though brought as a collateral challenge in state court, fell within the regulatory regime outlined by the NGA, had been challenged within the administrative process itself, and therefore jurisdiction outside of the exclusive review provisions of the NGA could not be maintained. Much like the Supreme Court's dicta in *City of Tacoma*, the language cited and relied upon by the district court from *Williams* is limited to issues arising within, or inhering, in a controversy raised within the FERC process itself. Such language should not, and cannot, be read to apply to the issue before this Court, whether a challenge to a Congressional act as overly broad falls outside section 717r of the NGA.

There can be no doubt that section 717r of the NGA generally applies to all issues inhering in, or arising under FERC's regulatory process. But even where an issue inheres in the controversy, *Thunder Basin* instructs that other factors may

weigh against divesting a district court of jurisdiction. Though the cases discussed above offer some insight into the genesis of the *Thunder Basin* framework discussed in detail above and what it means for an issue to inhere in a FERC controversy, the cases do not address the situation before this Court and must be viewed in their appropriate context.

### 2. The Cases Cited by the District Court Demonstrate that the Landowners' Claims Do Not Inhere in a FERC Order

The district court cites several non-binding cases for the proposition that the Landowners' claims here "inhere" in a FERC order, the MVP Certificate. These cases include *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602 (6th Cir. 2010), *Maine Council of Atlantic Salmon Federation v. National Marine Fisheries Service*, 858 F.3d 690 (1st Cir. 2017), *Hunter v. FERC*, 569 F. Supp. 2d 12 (D.D.C. 2008), *Pub. Util. Dist. No. 1 v. FERC*, 270 F. Supp. 2d 1 (D.D.C. 2003), *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 U.S. Dist. LEXIS 91944 (D. Mass. July 15, 2015). Notably, none of these cases apply a *Thunder Basin* framework, and each of the cases ostensibly makes a finding that the issue or controversy arises under the NGA or inheres in a controversy that falls squarely within FERC's ambit.

First, the district court points to *Am. Energy Corp.* for the proposition that "exclusive means exclusive" under section 717r of the NGA. But the Sixth Circuit recognized that the claims brought by American Energy stemmed from "the belief

that FERC did not adequately consider the safety risks and business interruptions that the coal companies would face from the pipeline…." *Am. Energy Corp.*, 622 F.3d at 605. Questions arising from or inhering in the statutory realm covered by the NGA and FERC's own rules are challenges that fall within the exclusive review provisions of 717r. The Sixth Circuit noted that not only did FERC address American Energy's specific complaints within the FERC certification process itself, but also at the rehearing and at the time of the court's opinion, the same issues were on appeal to the D.C. Circuit. *Id.* at 605-606. Put simply, American Energy did not levy any challenges that were not ordinarily subject to FERC review and consideration, much less any challenge that remotely compares to a challenge to an overly broad Congressional delegation of power under the NGA.

Similarly, in *Maine Council*, the Appellants complained of FERC's issuance of a Certificate for a power plant where the Appellants did not agree with FERC's view of biological opinions issued from the Fisheries Service under the Endangered Species Act. *Maine Council*, 858 F.3d at 692. As the First Circuit rightly pointed out, the biological opinions "were by any measure inherent in the statutory process for consideration of the license modifications." *Id.* at 693 (internal quotations omitted). There can be little doubt that issues surrounding whether FERC properly analyzed biological opinions in assessing the

environmental impact of a project fall squarely within the statutory scheme envisioned by Congress in enacting the NGA.

Third, in *Hunter v. FERC*, the D.C. district court found that it lacked subject matter jurisdiction where the Plaintiff "concede[d], in essence, that judicial review of a FERC order must be brought in the circuit courts," but nevertheless challenged a FERC Order to Show Cause in district court instead of before FERC. *Hunter*, 569 F. Supp. 2d at 15. The court in *Hunter* also found that "Hunter essentially seeks to challenge FERC's interpretation and application of its anti-manipulation enforcement authority as opposed to challenging that it is disregarding a statutory mandate." *Id.* at 16. Hunter's claim was "so intertwined" with FERC's Order to Show Cause because the key allegation made by Hunter was that FERC had misapplied and exceeded the bounds of its own intra-agency rules. Hunter's challenge, then, was not a challenge to congressional action or to some applicable constitutional standard, but to FERC's internal actions and decision-making processes, and provides support only for the notion that a challenge to FERC's implementation of its own procedures and policies is properly brought pursuant to the exclusive judicial review mechanisms unique to the type of order.

Likewise, *Pub. Util. Dist. No. 1 v. FERC* provides nothing new or helpful to the issues before this Court. In that case, the district court declined jurisdiction where the plaintiff sought "review of the FERC's April 23, 2003 Order denying the

plaintiff's request that Chairman Wood and Commissioner Brownell recuse themselves from further consideration of the plaintiff's case." *Pub. Util. Dist. No. 1*, 270 F. Supp. 2d at 4. The plaintiff's challenge centered on alleged violations of FERC's regulations by two commissioners, a matter that is routinely and appropriately before FERC to decide, much like district courts are competent in the first instance to handle recusal motions and determinations of jurisdiction. *Id.* at 9. Like the other cases cited by the district court, *Pub. Util. Dist. No. 1* dealt with a challenge to some decision-making process of FERC and not an extra-agency constitutional challenge like the case here.

Fifth, the district court points to *Town of Dedham v. FERC* as yet another example where a district court declined to exercise subject matter jurisdiction "even in cases where the challenge is not a direct challenge to the order." JA 537.[9] Much like the cases discussed above, however, the court in *Town of Dedham* determined that it lacked subject matter jurisdiction because the Town was challenging FERC's decision granting a pipeline company a Notice to Proceed with construction on certain segments of the line. 2015 U.S. Dist. LEXIS 91993, at *5. The question of whether FERC properly or improperly issued a Notice to Proceed, however, derives from the application of internal FERC rules and

[9] Though the district court did not analyze *Town of Dedham* in the context of *Thunder Basin*, it appears that the district court cites *Town of Dedham* in relation to the "wholly collateral" element of the *Thunder Basin* framework.

procedures which fall within the purview of section 717r of the NGA. According to the district court, the Town's immediate relief could be sought under the All Writs Act in the Court of Appeals in anticipation of future jurisdiction by the Court of Appeals under the review provisions in section 717r of the NGA. *Id.* Again, no decision by FERC is at issue in this case, and *Town of Dedham* is of limited value here.

Finally, the district court references two cases that involve "constitutional (or like) challenges where the courts held they lacked jurisdiction due to the NGA's judicial review provision." JA 539. *See e.g., Adorers of the Blood of Christ v. FERC*, No. 17-cv-3163, 2017 U.S. Dist. LEXIS 161721 (E.D. Pa. September 28, 2017); *Adorers of the Blood of Christ v. FERC*, No. 17-3163, 2017 U.S. App. LEXIS 25215 (3d Cir. 2017);[10] *Lovelace v. United States*, No. 1:15-cv-30131-MAP, 2016 U.S. Dist. LEXIS 192225 (D. Mass. Feb. 18, 2016).

Though the district court characterized *Adorers* as presenting a constitutional (or like) challenge, the plaintiffs in that case claimed that the FERC order at issue violated a statute, the Religious Freedom Restoration Act, 41 U.S.C. §§ 2000bb, *et seq.* The plaintiffs in *Adorers*, a religious order of Roman Catholic women,

[10] The Third Circuit did not consider an appeal on the merits; rather, the Adorers moved the Third Circuit to enter an injunction pending appeal. The Third Circuit denied the motion "[f]or essentially the reasons given by the District Court in dismissing Appellants' claims for lack of jurisdiction…." 2017 U.S. App. LEXIS 25215, at *2.

invoked a statute that conveyed a "claim or defense in a judicial proceeding," the applicability of which rightly could have been debated and analyzed within the applicable FERC proceedings. *Adorers*, 2017 U.S. Dist. LEXIS 161721, at *5-6. Indeed, "[d]isputes as to the propriety of FERC's proceedings, findings, orders, or reasoning, must be brought to FERC by way of request for rehearing." *Steckman Ridge GP, LLC v. Exclusive Natural Gas Storage Easement Beneath 11.078 Acres*, 2008 U.S. Dist. LEXIS 71302, *11 (W.D. Pa. Sept. 19, 2008) (addressing challenges to a FERC order in the context of condemnation proceedings). The district court in *Adorers* ultimately found that FERC could have considered, analyzed, and addressed the plaintiffs' statutory claims within the FERC process, thus the claims "inhere in the controversy" and were subject to the NGA's review procedures. *Adorers*, 2017 U.S. Dist. LEXIS 161721, at *12.

The district court also pointed to *Lovelace v. United States* as an example of a challenge to an impending FERC decision that involved a Fifth Amendment takings claim. 2016 U.S. Dist. LEXIS 192225 (D. Mass. Feb. 18, 2016). In *Lovelace*, the plaintiffs' main argument centered on whether the proposed pipeline, which had not yet been certificated, was primarily being built for export, and hence for a non-public use under the Fifth Amendment. *See* Transcript of Hearing, p. 21, ECF Doc. 39 in Case No. 3:15-cv-30131-MAP. At the hearing on jurisdiction, among other issues, the plaintiffs effectively requested the district court to dismiss

its action so it could complain to FERC, which had yet to respond to the plaintiffs' concerns about exportation of gas: "with that document in hand I go to FERC and I say I'm raising the issue here… Then I can go to the First Circuit Court of Appeals and say we raised the issue and Judge Ponsor threw us out saying this, you didn't raise the proper issue and then I can take it back to FERC." Transcript at p. 26.

Importantly, Judge Ponsor remarked that "I think that the Natural Gas Act *absolutely strips judges* in my position of *any ability under any theory* to get involved in the process of determining whether a natural gas pipeline is going to be built and if so, where and how." Transcript, p. 27 (emphasis added). This blanket statement, coupled with the district court's lack of any reference to the *Thunder Basin* framework, is instructive. Though styled as a constitutional challenge, the plaintiffs' claims focused on the issue of where gas was to be shipped, a question well within the structure and expertise of FERC to answer. The clear issue that had yet to be addressed by FERC in *Lovelace* was where gas might be shipped and for what purposes, not whether Congress' original delegation of the power of eminent domain was overly broad in the first place. *Lovelace* simply does not help the analysis here.

It bears reemphasis that "none of the cases relied upon by defendants" or the district court for that matter, "presented the *precise* constitutional challenges that plaintiffs raise…." JA 538 (emphasis in original). And while each case discussed

above assists with exploring the contours of the NGA, none of the cases offer real guidance on the question of whether the NGA implicitly divests the district court of § 1331 jurisdiction where the plaintiffs challenge a Congressional act. Instead, the cases discussed above reinforce that the Landowners' challenges here are unique, not within the statutory purpose of the NGA's review provisions, and are wholly collateral to the issues inhering in the FERC order and process at issue. Jurisdiction was proper in the district court.

## CONCLUSION STATING PRECISE RELIEF SOUGHT

For all of the foregoing reasons, the Landowners respectfully request this Court reverse the judgment of the district court holding that it lacked subject matter jurisdiction under 28 U.S.C. § 1331 and dismissing Counts I-III of the Landowners' Complaint, and remand this case to the district court for further proceedings.

Respectfully submitted,

/s/ Justin M. Lugar
Justin M. Lugar
Cynthia M. Kinser
Monica T. Monday GENTRY LOCKE
900 Sun Trust Plaza
10 Franklin Road, SE
P. O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300
jlugar@gentrylocke.com
kinser@gentrylocke.com
monday@gentrylocke.com
*Counsel for Appellants*

## REQUEST FOR ORAL ARGUMENT

The Appellant requests leave to present oral argument in support of its position.

/s/ Justin M. Lugar
Justin M. Lugar
Cynthia M. Kinser
Monica T. Monday GENTRY LOCKE
900 Sun Trust Plaza
10 Franklin Road, SE
P. O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300
jlugar@gentrylocke.com
kinser@gentrylocke.com
monday@gentrylocke.com
*Counsel for Appellants*

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS**

1. This brief has been prepared using:

X Fourteen point, proportionally spaced, serif typeface (such as CG Times or Times New Roman, NOT sans serif typeface such as Arial). Specify software name and version, type face name, and point size below (for example, WordPerfect 8, CG Times, 14 point):

Microsoft Word, Times New Roman, 14 point

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, the brief contains

11,796 Words (give specific number of words; may not exceed 13,000 words for opening or answering brief); **OR**

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

/s/ Justin M. Lugar

Justin M. Lugar
Cynthia M. Kinser
Monica T. Monday GENTRY LOCKE
900 Sun Trust Plaza
10 Franklin Road, SE
P. O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300
jlugar@gentrylocke.com
kinser@gentrylocke.com
monday@gentrylocke.com
*Counsel for Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2018, I caused this brief to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Wade W. Massie
Mark E. Frye
Seth M. Land
PENNSTUART
208 East Main Street
P.O. Box 2288
Abingdon, VA 24212-2288
*Counsel for Appellee*
*Mountain Valley Pipeline, LLC*

Robert H. Solomon
Beth G. Pacella
FEDERAL ENERGY REGULATORY COMMISSION
888 1st Street, NE
Washington, DC 20426
(202) 502-6048
robert.solomon@ferc.gov
beth.pacella@ferc.gov
*Counsel for Appellees Federal Energy Regulatory Commission*
*And Neil Chatterjee*

/s/ May Serafim
Lantagne Legal Printing
801 East Main Street, Suite 100
Richmond, VA 23219
(804) 644-0477