171 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

PennEast Pipeline Company, LLC Docket No. RP20-41-001

ORDER DENYING REHEARING

(Issued May 22, 2020)

1. In this order, we deny rehearing of our January 30, 2020 order granting in part and denying in part a petition for declaratory order filed by PennEast Pipeline Company, LLC (PennEast).[1] In that order, we addressed the nature and scope of the eminent domain authority conferred to pipelines that have been granted a certificate of public convenience and necessity under the Natural Gas Act (NGA).

2. We issued the Declaratory Order in light of the recent Third Circuit decision finding that the NGA did not confer on pipeline certificate holders the right to condemn land in which states hold an interest.[2] In doing so, we determined that it was vitally important to provide our views on this issue of national significance, based on our decades of experience administering the NGA, given the profoundly adverse impacts of the Third Circuit's decision on the development of the nation's interstate natural gas transportation system. In our view, the Third Circuit's decision significantly undermines how the natural gas transportation industry has operated for decades.[3]

3. We found in the Declaratory Order that the text of NGA section 7(h),[4] as confirmed by the relevant legislative history, provides the holders of certificates of public convenience and necessity with broad eminent domain authority to condemn land, including land in which a state holds an interest, necessary to construct, operate, and

[1] *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 (2020) (Declaratory Order).

[2] *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019) (*In re PennEast*), *reh'g en banc denied* (Nov. 5, 2019).

[3] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 27, 56-65.

[4] 15 U.S.C. § 717f(h) (2018).

maintain a pipeline and appurtenant facilities.[5] We also explained that NGA section 7(h) does not authorize the Commission to condemn land on a certificate holder's behalf, as the Third Circuit had suggested, as an alternative way for pipelines to be routed through state lands.[6] However we declined to answer constitutional questions raised by the petition as being outside the Commission's jurisdiction.[7]

4. One party—the Delaware Riverkeeper Network (Riverkeeper)—filed a request for rehearing of the Declaratory Order on February 26, 2020. We deny rehearing for the reasons discussed below.

I. Background

5. On January 19, 2018, in Docket No. CP15-558-000, the Commission issued a certificate of public convenience and necessity for the PennEast Project.[8] Due to the inability to reach an agreement with New Jersey to acquire easements for the portions of its certificated pipeline route that would cross land in which New Jersey holds a property interest,[9] PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District Court) in order to obtain these and other

[5] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 25, 32, 48, 66.

[6] *See id.* PP 26, 49-53.

[7] *See id.* PP 27, 54-55.

[8] *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom. Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, *et al.* (first petition filed May 9, 2018) (argument held in abeyance on October 1, 2019, "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision").

[9] PennEast October 4, 2019 Petition (Petition) at 5-6. Riverkeeper states that New Jersey asserted in the Third Circuit case that PennEast did not attempt to contract with New Jersey to obtain the necessary rights-of-way. Riverkeeper February 26, 2020 Request for Rehearing at 4 n.10. The Third Circuit noted New Jersey's argument that "PennEast had failed to satisfy the jurisdictional requirements of the NGA by not attempting to contract with the State for its property interests." *In re PennEast*, 938 F.3d at 101. Whether PennEast satisfied the prerequisites for filing an eminent domain action was a matter, if raised, for the court to consider. Riverkeeper's argument is not relevant to the questions addressed in this proceeding.

necessary easements.[10] New Jersey claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation: two parcels in which New Jersey holds fee simple ownership interests, and forty parcels in which New Jersey claims nonpossessory property interests, including conservation easements and restrictive covenants mandating under state law a particular land use.[11] The District Court granted PennEast's application for orders of condemnation and rejected New Jersey's sovereign immunity argument.[12]

6. New Jersey appealed to the United States Court of Appeals for the Third Circuit (Third Circuit), which vacated the District Court's order, and held that the NGA does not abrogate New Jersey's sovereign immunity.[13] The Third Circuit found that while the NGA delegates eminent domain authority to certificate holders, it "does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity."[14] In the court's view, "there are powerful reasons to doubt the delegability of the federal government's exemption from Eleventh Amendment immunity,"[15] particularly when that delegation occurs through a statute enacted pursuant to the Commerce Clause.[16] However, the court consciously avoided that constitutional question[17] by holding that the text of the NGA failed to provide an "unmistakably clear"

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[10] Petition at 6.

[11] *Id.*

[12] *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, *12, 25 (D.N.J. Dec. 14, 2018).

[13] *In re PennEast*, 938 F.3d at 99. PennEast filed a petition for certiorari with the Supreme Court on February 18, 2020.

[14] *Id.* at 112-13; *accord id.* at 99-100; *see id.* at 111-12.

[15] *Id.* at 105; *accord id.* at 111; *see id.* at 100; *id.* at 107-11 (reviewing precedent).

[16] *Id.* at 105, 108 & nn.13, 15 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996)); *see also id.* at 108 & n.13 (explaining that *Seminole Tribe* abrogated *Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989)).

[17] *See id.* at 111 (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008) ("As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.")); *id.* at 111-12 (quoting *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (describing the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction

delegation of the federal government's exemption from Eleventh Amendment immunity.[18] Ultimately, the Third Circuit declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."[19]

7. On October 4, 2019, PennEast petitioned the Commission to issue a declaratory order providing the Commission's interpretation of three questions under NGA section 7(h):

1) Whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;

2) Whether NGA section 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and

3) Whether NGA section 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.[20]

8. On January 30, 2020, the Commission issued a Declaratory Order granting in part and denying in part PennEast's petition. Specifically, the Commission provided its interpretation, as the agency that administers the NGA, that NGA section 7(h) confers to certificate holders the federal government's eminent domain authority to condemn any land necessary to effectuate the certificate, including state land.[21] The order stated that the Commission—like its predecessor, the Federal Power Commission (FPC)—has held this view since its inception.[22]

9. The Declaratory Order also explained why we disagreed with the Third Circuit's suggestion that there is a "workaround" whereby the Commission itself may condemn

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of the statute is fairly possible by which the question may be avoided") (citation and alterations omitted)).

[18] *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *see id.* at 107-08 & n.12 (discussing *Dellmuth* and *Atascadero*).

[19] *Id.* at 112.

[20] *See* Petition at 2.

[21] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 28-48.

[22] *See id.* P 25 & n.108; *id.* P 36 & nn.148-50.

land needed for a certificated pipeline when a state holds an interest in such land.[23] As we explained, the Commission lacks the statutory authority and the administrative mechanisms needed to condemn state land on behalf of certificate holders.[24] Further, we declined to address the constitutional questions raised in the petition, namely, whether NGA section 7(h) delegates to certificate holders the federal government's exemption from state claims of sovereign immunity pursuant to the Eleventh Amendment.[25]

II. Procedural Matters

10. On March 17, 2020, PennEast filed a motion for leave to answer and answer to the request for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing "unless otherwise ordered by the decisional authority."[26] We are not persuaded to accept PennEast's answer and will, therefore, reject it.

III. Discussion

A. Threshold Issues

11. Riverkeeper raised three threshold issues that do not go to the merits of the Declaratory Order, asserting that: (1) the Commission may only issue declaratory orders "to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction;"[27] (2) the Declaratory Order violates the separation of powers doctrine;[28] and (3) agency declaratory orders are owed no deference.[29] These arguments have no merit and are easily resolved.

12. The Third Circuit's opinion created uncertainty about the entire regulatory scheme established under the NGA.[30] As the agency responsible for administering this Act, it is

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[23] *In re PennEast*, 938 F.3d at 113.

[24] Declaratory Order, 170 FERC ¶ 61,064 at PP 49-53.

[25] *Id.* PP 54-55.

[26] 18 C.F.R. § 385.213(a)(2) (2019).

[27] Request for Rehearing at 11.

[28] *Id.* at 7.

[29] *Id.* at 7-8.

[30] Since its adoption, the NGA has provided the regulatory scheme established by Congress to promote the orderly development of natural gas pipelines in interstate

entirely appropriate for this Commission to provide its views on this issue and on the far-reaching effects of the Third Circuit's opinion if allowed to stand. We do this not as an attempt to overrule the Third Circuit, but to provide our views based on our experience in administering the NGA. Furthermore, we believe that we are entitled to deference as to reasonable interpretations of our own regulations.[31] We address each of these issues in detail below.

1. Issuance of the Declaratory Order was Not a Violation of Commission Regulations

13. Riverkeeper asserts that the Commission, by issuing the Declaratory Order, violated its own guidance and regulations regarding declaratory orders,[32] claiming that the Commission may only issue declaratory orders "to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction."[33] Riverkeeper contends the Declaratory Order contravened Commission regulations because, in its view, no controversy or uncertainty has been presented to the Commission and the Commission lacks jurisdiction over the "eminent domain proceedings or controversies."[34]

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commerce so as to provide access to and the development of natural gas at just and reasonable rates. The amendment to the NGA in 1947 that provided a certificate holder with the sovereign power of eminent domain has been consistently applied against the states since its adoption. The decision of the Third Circuit would change over 70 years of precedent in applying NGA section 7. In addition, the Third Circuit's proposed "work around" of having the Commission condemn land on behalf of the applicant has no statutory basis, would expand the powers of the Commission, and would require Congress to both authorize and appropriate funding to engage in such acquisitions on behalf of certificate holders.

[31] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) ("Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law."); *see also* Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; *cf. PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994) (finding that EPA's interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

[32] Request for Rehearing at 6.

[33] *Id.* at 11.

[34] *Id.*

14. As the agency charged with administration of the NGA, the Commission may issue declaratory orders to interpret the NGA and any section therein.[35] Furthermore, we are entitled to deference as to reasonable interpretations of our own regulations.[36]

15. Riverkeeper asserts the Commission's authority to issue a declaratory order is narrow and limited.[37] But Rule 207 permits a party to petition for a declaratory order in order to "terminate a controversy or remove uncertainty,"[38] and "does not define what sort of uncertainty may be appropriate to justify a petition for declaratory relief."[39] The Commission has explained that a declaratory order "provides direction to the public and our staff *regarding the statutes we administer*."[40] Further, we continue to find that the Third Circuit's opinion——particularly the suggestion that there is there is a "work-around" through which the Commission itself may condemn property——created uncertainty and required the Commission to explain why such a work-around is neither feasible nor authorized under NGA section 7(h).[41] Accordingly, the Commission properly determined it was both appropriate and necessary to provide guidance on how section 7(h) was intended to operate and has been applied since 1947.[42]

16. Riverkeeper contends that "the 'controversy' was a legal, constitutional matter before the courts and the 'uncertainty' was resolved by the Third Circuit."[43] We disagree. The uncertainty that the Declaratory Order addressed was with respect to the Commission's interpretation of the language of section 7(h) and whether there is an

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[35] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; *cf. PUD*, 511 U.S. at 712 (finding that EPA's interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

[36] *See Kisor*, 139 S. Ct. at 2422 ("Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law.").

[37] Request for Rehearing at 11-13.

[38] 18 C.F.R. § 385.207(a)(2) (2019).

[39] Declaratory Order, 170 FERC ¶ 61,064 at P 16.

[40] *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) (emphasis added).

[41] Declaratory Order, 170 FERC ¶ 61,064 at P 49.

[42] *See id.* P 65.

[43] Request for Rehearing at 11.

administrative "work-around" to avoid the deleterious effects of the court's holding. Nothing in the Declaratory Order purports to address constitutional matters; indeed, the Declaratory Order expressly declined to address constitutional questions.[44]

17. Riverkeeper asserts that "[t]he Commission cannot issue a binding policy statement that is directly contrary to a holding of the Third Circuit."[45] However, the Declaratory Order is an interpretative action, not a policy statement (nor are policy statements binding). Even if the Third Circuit's decision conflicts with the Commission's interpretation of section 7(h), the Commission is still permitted to provide its interpretation of the statute it administers.[46] The Commission did not purport to overrule the court's decision, an action it has no authority to take. Rather, due to the potential for nationwide litigation and for confusion in the energy sector, we reached the legitimate conclusion that the interpretation by the Commission may benefit other courts where the issues raised here may arise as matters of first impression.[47] Indeed, another case pending in the United States Court of Appeals for the Fourth Circuit has raised the same issues addressed in the Third Circuit's decision.[48]

2. Issuance of the Declaratory Order Did Not Violate the Separation of Powers Doctrine

18. Riverkeeper asserts that the Declaratory Order violates the separation of powers doctrine,[49] contending that the Third Circuit's opinion "construed the law", and that the Commission, in issuing the Declaratory Order after the issuance of the Third Circuit's

[44] Declaratory Order, 170 FERC ¶ 61,064 at PP 14, 27, 39, 55.

[45] Request for Rehearing at 13.

[46] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (finding that an appellate court's prior interpretation of an ambiguous statutory provision did not preclude a federal agency from adopting a contrary reasonable interpretation in subsequent proceedings).

[47] *See id.*

[48] *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed 4th Cir., No. 19-2040, Sept. 20, 2019).

[49] Request for Rehearing at 7.

opinion "is acting as though it were a court of higher authority and not a part of the executive branch."[50]

19. Several parties raised separation of powers concerns in comments on PennEast's Petition, which we address in the Declaratory Order. Regarding such assertions, we state in the Declaratory Order that "[w]e have no authority to [']overrule['] a precedential opinion of a United States Court of Appeals."[51] As we explained, the purpose of the Declaratory Order was only to "set out the Commission's interpretation of a statute it administers[,]" not to somehow overturn, or otherwise undermine the Third Circuit's opinion;[52] nor was the Declaratory Order an attempt to "improperly influence potential litigation in other circuits[,]" as Riverkeeper contends.[53] Further, the Commission does not purport to decide any constitutional questions implicated by the petition.[54] Thus, we find that it is appropriate for the Commission to provide its interpretation of section 7(h), particularly given the statute's ambiguity and silence with respect to lands in which states hold an interest,[55] and reiterate our determination that providing this interpretation "does not implicate any separation of powers concerns."[56]

20. Protestors claim that, as a general rule, agency declaratory orders are owed no deference.[57] We disagree. Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.[58] Deference is appropriate "if the statute is silent or

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[50] *Id.* at 16.

[51] Declaratory Order, 170 FERC ¶ 61,064 at P 23.

[52] *Id.* P 23 ("[T]his order neither compels the Third Circuit to reverse its decision, nor compels New Jersey to consent to suit, nor compels any landowner to transfer its property. This order does nothing more than set out the Commission's interpretation of a statute it administers.").

[53] Request for Rehearing at 17.

[54] Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

[55] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

[56] Declaratory Order, 170 FERC ¶ 61,064 at P 15.

[57] Request for Rehearing at 7-8.

[58] Declaratory Order, 170 FERC ¶ 61,064 at P 15; *see City of Arlington v. FCC*,

ambiguous with respect to the specific issue[.]"[59] The Third Circuit held that NGA section 7(h) is silent with regard to whether "Congress intended to delegate the federal government's exemption from state sovereign immunity to private gas companies" and, for the purpose of avoiding a constitutional conflict, declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."[60] The Commission's interpretation of NGA section 7(h) stems from decades of experience in administering the comprehensive NGA regulatory scheme, and it is a reasonable interpretation of the text of NGA section 7(h), confirmed by the legislative history of that provision and the Federal Power Act (FPA) hydroelectric licensing provision on which NGA section 7(h) was modeled. In any event, whether our order warrants deference is matter for the courts to address: that question does not preclude us from issuing a declaratory order in response to a petition from a regulated entity.

21. Riverkeeper also asserts that the Third Circuit "held that there is no statutory ambiguity in the NGA with regard to federal delegation of eminent domain powers to private parties to condemn a State's property interest."[61] In doing so, Riverkeeper cites to the Third Circuit's discussion of the Supreme Court's *Blatchford* decision,[62] specifically the need for "unmistakably clear language in the statute" in order to abrogate state sovereign immunity. Riverkeeper improperly conflates whether there is ambiguity that permits an agency to interpret the statute it administers with the requirement for "unmistakably clear language" needed to indicate congressional intent to abrogate. As noted above, the Declaratory Order does not address the latter, i.e., whether section 7(h) abrogates a State's sovereign immunity.

22. Riverkeeper contends that the Commission does not "qualify for *Chevron* deference" when construing NGA section 7(h).[63] We disagree. As discussed in the Declaratory Order, the Commission has not disclaimed jurisdiction over every possible

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569 U.S. 290, 296, 307 (2013); *Brand X*, 545 U.S. at 982; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*).

[59] *Chevron*, 467 U.S. at 843.

[60] *In re PennEast*, 938 F.3d at 112; Declaratory Order, 170 FERC ¶ 61,064 at P 15 n.61.

[61] Request for Rehearing at 18.

[62] *In re PennEast*, 938 F.3d at 102 (citing *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775 (1991)).

[63] Request for Rehearing at 19.

issue that may be deemed "related to the acquisition of property rights by a pipeline."[64] The Commission acknowledges that Congress put the burden of executing condemnation proceedings on state and district courts through NGA section 7(h),[65] and the Commission has appropriately refused to adjudicate issues such as "the timing of acquisition or just compensation."[66] Nevertheless, the Declaratory Order was appropriate under our statutory mandate because it addresses the operation of NGA section 7(h) within the NGA's "comprehensive scheme of federal regulation."[67] While Riverkeeper may disagree with the Commission's interpretation,[68] it is nonetheless our duty to ensure the

[64] Declaratory Order, 170 FERC ¶ 61,064 at P 13.

[65] *See* 15 U.S.C. § 717f(h).

[66] Declaratory Order, 170 FERC ¶ 61,064 at P 13 n.47 (quoting *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018) and *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018)).

[67] *See id.* PP 19, 27 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963))) (internal quotation marks omitted); *see also* 15 U.S.C. § 717(b) (2018).

[68] *See* Request for Rehearing at 17 (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 23 (Glick, Comm'r, dissenting)). The dissent to this rehearing order states that reviewing courts need not defer to the Commission's interpretation of NGA section 7(h), arguing that "*Chevron* 'deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency." *Infra* P 4 (Comm'r Glick, dissenting). The dissent argues, however, that in construing section 7(h) "a reasonable person could find only ambiguity and questions left unanswered," *id.* P 1, so the dissent's objections necessarily turn on the argument that "the Commission has no role to play whatsoever in administering that provision," *id*. P 5. We disagree. The Commission administers the certification process under NGA section 7, which relies on the eminent domain authority granted to certificate holders under NGA section 7(h) to effectuate the federal regulatory scheme and give effect to the Commission's determination that a given pipeline route "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). We have found that nothing in any part of NGA section 7—including NGA section 7(h)—limits the Commission's authority to grant a certificate that crosses state-owned land or land over which a state asserts some lesser property interest. *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 32-34, 66. We think that the text of the statute, as further confirmed by the legislative history, compels only one conclusion. *Id.* P 32. But, to the extent that a reviewing court may find that NGA section 7 is ambiguous because it does not specifically discuss the Eleventh Amendment, the Commission's interpretation should be entitled to judicial deference in order to ensure the successful administration of

faithful execution of the NGA,[69] which includes the removal of uncertainty and termination of controversy.[70]

23. Additionally, Riverkeeper asserts that declaratory orders are not entitled to *Chevron* deference and do not have any legal weight. We disagree. Riverkeeper mistakenly bases this contention on the D.C. Circuit's decision in *Industrial Cogenerators v. FERC*,[71] arguing that "courts have held that unlike a declaratory order of a court, a declaratory order of FERC 'is of no legal' moment and would be legally ineffectual."[72] Riverkeeper, however, has taken language from that decision out of context. The quoted language was directed to the declaratory order at issue in that case, and it addressed whether the declaratory order was binding on specific parties. The D.C. Circuit's opinion continues with the following:

> The Commission nowhere purported to make the Declaratory Order binding upon the [Florida Public Service Commission], nor can we imagine how it could do so. *Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position*. It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position. *While such knowledge of the FERC's position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency's regulations* in an private enforcement action; and because that could only be a district court, this court cannot have pre-enforcement jurisdiction to review the Declaratory Order.[73]

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the federal regulatory scheme when confronted with a contrary interpretation that permits states to nullify the Commission's certificate authority through a collateral attack mounted in eminent domain proceedings.

[69] *See* 15 U.S.C. § 717(a).

[70] 18 C.F.R. § 385.207(a)(2).

[71] 47 F.3d 1231 (D.C. Cir. 1995).

[72] Request for Rehearing at 21-22 (quoting *Indust. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995)).

[73] *Indus. Cogenerators v. FERC*, 47 F.3d at 1235 (emphasis added).

Nothing in the D.C. Circuit's opinion suggests that the Commission's statutory interpretation, which may be articulated through the issuance of a declaratory order, is not entitled to deference. To the contrary, the D.C. Circuit recognizes that a Declaratory Order has to the "ability to persuade (*or to command the deference of*) a court that might later have been called upon to interpret the Act and the agency's regulations."[74] Further, Riverkeeper's reliance on purportedly contrary precedent concerning "opinion letters . . . policy statements, agency manuals, and enforcement guidelines" is misplaced[75] because, as previously stated, declaratory orders command deference. Indeed, the Supreme Court has applied deference to an agency's declaratory interpretations of a statute the agency administers.[76]

3. Issuance of the Declaratory Order, rather than Participation in the Third Circuit Proceeding, was an Appropriate Means of Addressing the Relevant Issues

24. Riverkeeper attempts to relitigate its claim that administrative agencies are not permitted to issue declaratory orders after court decisions unless they have participated in prior litigation.[77] As explained in the Declaratory Order, we disagree.[78] The Third Circuit's decision does not bind other courts of appeals or preclude the Commission from subsequently adopting a different interpretation of the statute.[79] As the Supreme Court

[74] *Id*. (emphasis added).

[75] *See* Request for Rehearing at 21 (quoting *Exelon Wind 1, L.L,C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) (quoting *Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000)).

[76] *See, e.g.*, *City of Arlington*, 569 U.S. at 307 (applying *Chevron* deference to the FCC's declaratory ruling regarding its own jurisdiction because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority"). The Commission, "*with like effect as in the case of other orders*, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (2018) (emphasis added).

[77] *See* Request for Rehearing at 8.

[78] Declaratory Order, 170 FERC ¶ 61,064 at P 19.

[79] *Brand X*, 545 U.S. at 982; *cf. United States v. Mendoza*, 464 U.S. 154, 158 (1984) (finding the doctrine of nonmutual offensive collateral estoppel inapplicable against non-private litigants).

has recognized, allowing a single court of appeals to bind all subsequent agency interpretations of a statute would "lead to the ossification of large portions of our statutory law."[80] Despite Riverkeeper's repeated contentions, neither the Administrative Procedure Act (APA) nor the Commission's regulations indicate that the Commission's authority to issue a declaratory order is contingent on its participation in litigation.[81] As we previously stated, it would be impractical for the Commission to intervene in every condemnation proceeding involving an interstate natural gas pipeline company.[82] Moreover, the issuance of a declaratory order provides the Commission's formal interpretation, as opposed to *ad hoc* litigation pleadings filed by Commission staff.[83] In issuing the Declaratory Order, the Commission complied with past agency practice as well as its statutory mandates under the APA and NGA.[84]

B. Congress Intended NGA Section 7(h) to Empower Certificate Holders to Condemn Lands in which the State Maintains an Interest

25. We now address the merits. Riverkeeper contends that the Declaratory Order's conclusion that Congress intended to grant broad eminent domain authority to certificate holders through NGA section 7(h) is "dead wrong."[85] We disagree.

26. First, Riverkeeper asserts that NGA section 7(h) lacks the unmistakably clear language necessary to abrogate Eleventh Amendment immunity.[86] Riverkeeper further contends that the Commission inappropriately looked to legislative history despite the "clear statement rule" and the Commission's recognition that NGA section 7(h) is silent

[80] *Brand X*, 545 U.S. at 983.

[81] *See* 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2).

[82] Declaratory Order, 170 FERC ¶ 61,064 at P 19.

[83] *Id.*

[84] *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

[85] Request for Rehearing at 25.

[86] *Id.* at 26-31.

with regard to the states.[87] To support this clam, Riverkeeper cites precedent under the Rehabilitation Act[88] and the Education of the Handicapped Act.[89]

27. Riverkeeper's argument fails for two reasons. First, the Declaratory Order did not need to consider the Eleventh Amendment clear statement rule, which instructs courts not to interpret a statute in a way that abrogates states' rights unless the statute unmistakably intends that result,[90] because the Commission assumes the constitutionality of the statutes it administers. Rather, the Commission's determination was confined to interpreting NGA section 7(h), using typical rules of construction, as further informed by the legislative history of NGA section 7(h) and FPA section 21.[91]

28. Second, employing the federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule. Though not addressing the specific 11th Amendment argument, we note for the purposes of statutory interpretation that the precedents cited by Riverkeeper are inapplicable here because they did not involve a grant of the federal eminent domain power, but rather a grant of authority for individuals to obtain monetary damages.[92] Since only the sovereign may confer the power of eminent domain, and the grant of eminent domain is express, there is no question as to the character of the power conferred.[93] Moreover, states are able to

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[87] *See* Request for Rehearing at 30.

[88] *See Atascadero*, 473 U.S. 234.

[89] *See Dellmuth*, 491 U.S. 223.

[90] *See id.*, 491 U.S. at 228; *Atascadero*, 473 U.S. at 242.

[91] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

[92] *Compare Dellmuth*, 491 U.S. at 232 (holding that "[t]he Eleventh Amendment bars respondent's attempt to collect tuition reimbursement") *and Atascadero*, 473 U.S. at 235, 247 (finding that "litigants seeking retroactive monetary relief under [29 U.S.C. § 794]" were barred by the Eleventh Amendment) *with Blatchford*, 501 U.S. at 785 (recognizing that, "[t]o avoid [the clear statement rule], respondents assert that [28 U.S.C.] § 1362 represents not an abrogation of the States' sovereign immunity, but rather a delegation to tribes of the Federal Government's exemption from state sovereign immunity") *and In re PennEast*, 938 F.3d at 112-13 (vacating because "sovereign immunity has not been abrogated by the NGA, nor has there been . . . a delegation of the federal government's exemption from the State's sovereign immunity").

[93] *Compare Blatchford*, 501 U.S. at 785-86, 788 (refusing to find delegation in a general "arising under" statute) *with Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) (upholding a private railroad corporation's condemnation of tribal land

raise any objections they have to the route set in a Commission certification proceeding during that proceeding, on rehearing, and on direct judicial review of the Commission's orders.[94] Accordingly, the Commission appropriately found the absence of limiting language in NGA section 7(h) supported its decision to consider the legislative history.

29. Riverkeeper additionally argues that the legislative history of the NGA and the FPA is irrelevant and inconclusive. The Declaratory Order explains why we disagree. As a threshold matter, Riverkeeper's assertion that the clear statement rule precludes interpretation of the legislative history is inapplicable to the instant case because this case involves a certificate holder's exercise of the federal power of eminent domain, not the abrogation of state sovereign immunity from suits for monetary damages. Riverkeeper asserts that the Commission took "a large, unsupported leap of logic" in finding that the Declaratory Order was supported by legislative history of NGA section 7(h).[95] The legislative history is replete with concern over state interference with the build-out of energy infrastructure, explaining Congress' decision to grant the federal eminent domain power to certificate holders, free from potential state interference.[96]

30. Riverkeeper further challenges our reference in the Declaratory Order to Congress' amendment of FPA section 21 to impose restrictions on holders of hydroelectric licenses ability to condemn state lands pursuant to the parallel grant of eminent domain authority under the FPA. As we explained, "the congressional choice to restrict private licensees' eminent-domain authority under FPA section 21—but not private certificate holders' authority under NGA section 7(h)—shows that Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21."[97]

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because "it is necessary that the United State government should have an eminent domain still higher than that of the state in order that it may fully carry out the objects and purposes of the constitution").

[94] *See* Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)); *see also infra* P 23.

[95] Request for Rehearing at 35.

[96] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 40-41; S. Rep. No. 80-429, at 4 (1947) ("If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.").

[97] Declaratory Order, 170 FERC ¶ 61,064 at PP 42-44.

31. Riverkeeper asserts that the Commission cannot "extrapolate congressional intent" regarding NGA section 7(h) from the legislative history of FPA section 21.[98] However, we consider the legislative history and judicial interpretations of statutory text that Congress "follow[ed] substantially" in the creation of NGA section 7(h) to be informative and persuasive.[99] Additionally, we do not find the fact that "[t]he FPA . . . was amended during the period between *Union Gas* and the overruling of *Union Gas* by *Seminole Tribe*" to be significant.[100]

32. We are likewise unpersuaded by Riverkeeper's challenge to the Commission's reliance on the Supreme Court's ruling in *City of Tacoma*, which involved a hydroelectric licensee's condemnation of state land. Riverkeeper asserts that the Supreme Court's decision was based on procedural grounds and did not address the merits of whether the licensee could condemn state land.[101]

33. We recognize that *City of Tacoma* was dismissed on procedural grounds due to it being an "impermissible collateral attack[] upon . . . the final judgment of the Court of Appeals,"[102] which had declined to interfere with the Commission's license order.[103]

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[98] Request for Rehearing at 37.

[99] S. Rep. No. 80-429, at 1. The Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016) (citation omitted) (recognizing provisions of the FPA and NGA to be "analogous"); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its "established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]" due to the relevant provisions being "substantially identical") (citations omitted).

[100] Request for Rehearing at 37. Riverkeeper submits that the forty-five years between the passage of NGA section 7(h) and the 1992 amendment of FPA section 21 detract from the Commission's position that the amendment elucidates Congress's intent as to the scope of the eminent domain authority provided for in NGA section 7(h) and FPA section 21 prior to its amendment. *Id.* (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 18 (Glick, Comm'r, dissenting)). We disagree and note that the Energy Policy Act of 1992 also amended portions of the NGA while leaving unchanged the language of NGA section 7(h).

[101] *Id.* at 39.

[102] *City of Tacoma*, 357 U.S. at 341.

[103] *State of Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391, 398 (9th Cir. 1953).

Nonetheless, the question presented to the Court was: "whether . . . the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued . . . under the Federal Power Act and more particularly [section] 21 thereof."[104] As stated in the Declaratory Order, "*City of Tacoma* emphasized that Congress intended to commit all questions associated with the issuance of a

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[104] *City of Tacoma*, 357 U.S. at 323. Despite the dissent's assertion that *City of Tacoma* "says nothing about the issue now before us[,]" *infra* P 8 (Glick, Comm'r, dissenting), we are not so eager to dismiss instruction from the Supreme Court. Moreover, we fail to see why raising a collateral attack to the Commission's certificate orders in an eminent domain proceeding is any more acceptable than other types of collateral attack on certificate orders that the federal courts routinely dismiss on the basis of the Supreme Court's decision in *City of Tacoma*. For example, the Third Circuit itself recently affirmed the dismissal of a complaint alleging that a pipeline certificate order violated the Religious Freedom Restoration Act, explaining that:

> Indeed, the Supreme Court has long held that the Federal Power Act's ("FPA"), statutory review scheme, 16 U.S.C. § 825*l*, which is materially identical to the NGA's, "necessarily preclude[s] de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review," and that challenges brought in the district court outside that scheme are therefore "impermissible collateral attacks." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 341 (1958); *see also Me. Council of the Atl. Salmon Fed. v. Nat'l Me. Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) ("The Supreme Court has made clear that the jurisdiction provided by [the Federal Power Act's jurisdictional provision] is 'exclusive,' not only to review the terms of the specific FERC order, but over any issue 'inhering in the controversy.'" (quoting *City of Tacoma*, 357 U.S. at 336).

Adorers of the Blood of Christ v. FERC, 897 F.3d 187, 197 (3d Cir. 2018) (footnotes and parallel citations omitted), *cert. denied*, 139 S. Ct. 1169 (2019); *see also, e.g.*, *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) ("Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding, *McCulloch* [*Interstate Gas Corp. v. Fed. Power Comm'n*], 536 F.2d [255,] at 913 [(10th Cir. 1976)] . . . . Moreover, the prohibition on collateral attacks applies whether the collateral action is brought in state court, *e.g.*, *City of Tacoma*, or federal court, *e.g.*, *McCulloch.*"); *Woodrow v. FERC*, No. 20-6 (JEB), slip op. at 9-10 (D.D.C. May 6, 2020) (dismissing several constitutional challenges to the Commission's pipeline authority, and citing, among numerous other collected cases, *City of Tacoma*, *Adorers of the Blood of Christ*, and *Williams*).

license—including the 'legal competence of the licensee' to condemn state land—to the Commission alone, with judicial review of the Commission's orders to take place exclusively in the relevant court of appeals or, following such direct review, in the Supreme Court[.]"[105]

34. In the Declaratory Order, the Commission cited to the Fifth Circuit's *Thatcher* decision, decided shortly after the enactment of NGA section 7(h). As the Commission explained, *Thatcher*[106] "resolved several other constitutional objections, including claims that NGA section 7(h) invaded authority reserved to the States under the Tenth Amendment."[107] Riverkeeper argues that *Thatcher* is inapplicable because it did not explicitly address the Eleventh Amendment. We never asserted otherwise and explicitly acknowledged this point in the Declaratory Order.,[108] However, the novel claim that section 7(h) did not confer the right to condemn state land required the Commission, like any adjudicator, to draw analogies, inferences, and comparisons to come to a determination. Drawing such inferences in these circumstances is neither improper nor unusual. In that regard, *Thatcher* appropriately informed the Commission regarding implementation of NGA section 7(h), as the Fifth Circuit upheld the constitutionality of Congress's grant of federal eminent domain authority to certificate holders against a Tenth Amendment challenge.[109]

35. After challenging the Commission's reliance on *Thatcher,* Riverkeeper asserts that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by any judicial precedent. However, neither Riverkeeper nor the dissent note any precedent prior to the Third Circuit's decision, other than a 2017 federal district court decision,[110] supporting a contrary interpretation of the Commission's otherwise unchallenged interpretation of NGA section 7(h). That the issue had not been raised in the courts in 70 years despite extensive pipeline construction reinforces the

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[105] Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma*, 357 U.S. at 336-37).

[106] *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950).

[107] Declaratory Order, 170 FERC ¶ 61,064 at P 35.

[108] *Id.* ("*Thatcher* did not address the Eleventh Amendment, but resolved several other constitutional objections . . . .").

[109] *Thatcher*, 180 F.2d at 647; *see* Declaratory Order, 170 FERC ¶ 61,064 at P 35.

[110] *See Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

Commission's conclusion that section 7(h) confers the right to condemn state lands. Prior to 2017, it does not appear that courts doubted that proposition.

36. Riverkeeper further alleges that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by Commission precedent,[111] mischaracterizing supportive Commission precedent as "a single [Administrative Law Judge (ALJ)] opinion[.]"[112] The dissent similarly errs,[113] contending that "the Commission had, what was to my knowledge, an unblemished record of ducking any and all questions related to section 7(h)[.]"[114] That is incorrect.[115] First the decision of the ALJ in *Tenneco Atlantic* referenced in the Declaratory Order repeated verbatim the reasoning of a statutorily-mandated Presidential recommendation from the Federal Power Commission, issued in that same year, which likewise found that "[t]he eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."[116]

37. Second, the FPC decision cited in *Tenneco Atlantic* constitutes yet another precedent. That decision addressed numerous issues arising from the legislation[117] directing the FPC to make recommendations regarding the construction of the so-called Alaska Natural Gas Transportation Systems (ANGTS) intended to transport natural gas from fields on Alaska's North Slope. One such issue was the ability of a certificate holder to use its section 7(h) eminent domain authority to condemn the extensive Alaska state land ANGTS necessarily would have to traverse. The FPC conducted the same analysis we conducted in the Declaratory Order of the statutory language, the legislative

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[111] Request for Rehearing at 31-34.

[112] *Id.* at 32-33 & n.39 (citing Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm'r, dissenting)).

[113] Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm'r, dissenting).

[114] *Infra* P 6 (Glick, Comm'r, dissenting).

[115] Declaratory Order, 170 FERC ¶ 61,064 at PP 12-13 (Glick, Comm'r, dissenting) (discussing cases in which the Commission dealt with Eleventh Amendment issues implicated by NGA section 7(h)).

[116] *Id.* at P 25 n.108 (quoting *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025 (1977); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977)).

[117] Alaska Natural Gas Transportation Act, 15 U.S.C. § 719 (2018).

history, and the parallel provisions of FPA section 21.[118] Based on that analysis, the FPC concluded, as we do here, that "the eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."[119]

38. Third, the Commission cited to *Islander East*, which rejected an Eleventh Amendment argument.[120] Riverkeeper questions such reliance, due to the Third Circuit "dismiss[ing] the relevance of *Islander East*."[121] The court's conclusion notwithstanding, the Commission cited *Islander East* to illustrate its consistent implementation of NGA section 7(h) over the past seven decades.

39. Finally, Riverkeeper claims that the Commission has exaggerated the potential impact of the Third Circuit's decision.[122] We disagree. As explained in the Declaratory Order, if state-owned lands are treated as impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact.[123] If lands over which a state has asserted *any* property interest become impassable barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the Commission's Congressionally-conferred authority over interstate natural gas pipeline construction.

40. For instance, Columbia Gas Transmission, LLC (Columbia), the certificate holder in the pending Fourth Circuit proceeding, has been prevented from accessing a "small but necessary portion of land, severely impeding Columbia's ability to construct a project that will serve demonstrated demand and that the Commission has determined to be in the

[118] *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. at 1453-55.

[119] *Id.* at 1454.

[120] Declaratory Order at P 38 (citing *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 128, 131 (2003) (*Islander East*)).

[121] Request for Rehearing at 34.

[122] *Id.* at 40-42.

[123] Declaratory Order, 170 FERC ¶ 61,064 at P 58 n.221.

public interest[.]"[124] Furthermore, the Commission's analysis of potential impacts was buttressed by the concerns of commenters.[125]

IV. Conclusion

41. We confirm our conclusions in the Declaratory Order that, in enacting the NGA, Congress established a carefully-crafted, comprehensive scheme in which the Commission was charged with the exclusive authority to issue certificates of public convenience and necessity for interstate gas pipelines; that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain to acquire lands needed for authorized projects; and that this authority applies to lands in which states hold interest. Riverkeeper provides no convincing argument or authority to the contrary.

The Commission orders:

The request for rehearing is denied.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

[124] TC Energy's October 18, 2019 Motion to Intervene and Comments at 19. We note that the condemnation proceeding for the Eastern Panhandle Expansion Project involves approximately .12 acres of land in which the State of Maryland holds an interest. *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed Sept. 20, 2019).

[125] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 59-60, 62-64.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC Docket No. RP20-40-001

(Issued May 22, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissented from the underlying order because the Commission went out of its way to bolster a private party's litigation efforts regarding the meaning of the U.S. Constitution.[1] I also disagreed with several aspects of the Commission's slipshod analysis of the questions it chose to address. As I explained, the Commission magically saw clear congressional intent where a reasonable person could find only ambiguity and questions left unanswered. The bottom line was that "[t]he majority's confidence in its conclusion [wa]s better evidence of its own ends-oriented decisionmaking than any unambiguous congressional intent."[2]

2. Today's order is more of the same, and I do not need to repeat all of my underlying dissent. A few points, however, are worth a brief mention.

3. The first is the Commission's attempt to bolster its claim to *Chevron* deference.[3] In the underlying order, the Commission asserted, *ipse dixit*, that its interpretation would receive deference by the courts.[4] The Commission tries a little harder in today's order, contending that *Chevron* deference is appropriate because the Commission is the agency

[1] *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064, at P 15 (2020) (Order) (Glick, Comm'r, dissenting at P 1 & n.1).

[2] *Id.* (Glick, Comm'r, dissenting at P 2).

[3] *PennEast Pipeline Company, LLC*, 171 FERC ¶ 61,135, PP 20-22 (2020) (Rehearing Order); *see generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing deference).

[4] Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 5) ("The majority contends that today's order is useful because its interpretation of Congress's intent in enacting section 7(h) merits deference from the courts. It supports that statement with a single general citation to *Chevron*.").

charged with administering other provisions of the Natural Gas Act (NGA).[5] But the end result is the same, as today's order once again misapprehends the purpose and role of *Chevron*.

4. As the Supreme Court has repeatedly held, "[d]eference in accordance with Chevron . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[6] In particular, *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[7] An implicit delegation can be found where an "agency's generally conferred authority and other statutory circumstances [indicate] that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[8] But that must mean that ambiguity by itself is not sufficient to implicate Chevron; otherwise there would be no need to consider what Congress would "expect" from the agency.[9] "Rather, *Chevron* 'deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.'"[10]

5. As I explained in my earlier dissent, nothing in the NGA indicates that Congress would have expected the Commission to fill in ambiguity regarding the scope of section 7(h).[11] That is because the Commission has no role to play whatsoever in administering

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[5] Rehearing Order, 171 FERC ¶ 61,135 at PP 20-22.

[6] *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (explaining that not all agency statutory interpretations qualify for *Chevron* deference; only those interpretations that meet the criteria outlined in *Gonzalez*).

[7] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[8] *Mead*, 533 U.S. at 229.

[9] *Id.*; *see Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) ("'Mere ambiguity in a statute is *not* evidence of congressional delegation of authority.'" (quoting *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001)).

[10] *Atl. City*, 295 F.3d. at 9 (emphasis in the original) (quoting *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)).

[11] Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at P 6).

that provision.[12] Rather, section 7(h) provides what the Commission describes as an "'automatic right'" [13] that affords certificate holders the ability to begin eminent domain proceedings in federal court, with no Commission supervision. The Commission's oft-stated position is that all it does is evaluate whether a proposed pipeline is required by the public convenience and necessity and that the "Commission itself does not grant the pipeline the right to take the property by eminent domain."[14]

6. Indeed, the Commission has an impressive record of ducking questions related to section 7(h), insisting that the courts are the proper forum for those questions.[15] That makes sense given that section 7(h) provides no role for the Commission to play and there is nothing in the NGA's "generally conferred authority and other statutory circumstances" that indicates that "Congress would expect the [Commission] to be able to speak with the force of law" when interpreting section 7(h).[16] Against that backdrop,

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[12] This is a point the Commission makes frequently—almost every time eminent domain comes up in the certification process. *See id.* (collecting recent Commission orders disclaiming responsibility over the scope of certificate holders' eminent domain authority or how they exercise that authority).

[13] *Id.* (Glick, Comm'r, dissenting at P 6) (quoting *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 72 (2018)).

[14] *E.g.*, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 74 ("In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain . . . . The Commission itself does not grant the pipeline the right to take the property by eminent domain.").

[15] *See, e.g.*, Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 6). The Commission notes that it has not formally "disclaimed jurisdiction over every possible issue that may be deemed related to the acquisition of property rights by a pipeline." Rehearing Order, 171 FERC ¶ 61,135 at P 22 (internal quotation marks omitted). That statement, which is supported only by a citation to an unsupported section of the underlying order, tells us nothing. An agency's statement that it has not formally disclaimed jurisdiction hardly proves that it had it in the first place.

[16] *Mead*, 533 U.S. at 229. The Commission also suggests that its experience administering the NGA more generally entitles it to deference, even with regard to the provisions of the NGA that it does not administer. Rehearing Order, 171 FERC ¶ 61,135 at P 20. But that is not the theoretical foundation on which *Chevron* is based. *See supra*

the Commission's role in administering other aspects of the NGA's certification process is irrelevant.[17]

7. Second, the Commission attempts to rehabilitate its reliance on a series of cases that are —to put it charitably—inapt. As I previously explained, no reasonable person could read those cases to support the assertion that section 7(h) clearly vests certificate holders with the authority to condemn state lands.[18] Indeed, the Commission's reliance on those cases only highlights the absence of persuasive authority supporting its position.

8. Today's order begins with the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*.[19] Unlike the underlying order, the Commission this time admits that the case was decided on procedural grounds that are irrelevant to the question before us.[20] That should be the end of the analysis, since it means that all today's order has to

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notes 6-10 and accompanying text; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (explaining that "the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes" is "hardly a valid theoretical justification" for judicial deference). Instead, the theory of *Chevron* is that when Congress has not spoken to a specific issue and delegated to an agency the lawmaking authority to fill that gap, it is not for the courts' to second guess the agency's reasonable interpretation. The fact that the agency may have experience with other areas of the statute is beside the point where there is no indication from the "generally conferred authority and other statutory circumstances" that Congress would have expected the agency to fill in the ambiguity. *Mead*, 533 U.S. at 229.

[17] The Commission's principal response is a run-on footnote that rehashes its above-the-line arguments. In particular the Commission reiterates that it "administers the certification process under NGA section 7," that it believes that the statute's silence on the issue of certificate holders' ability condemn state lands is unambiguous evidence that they can do so, and that, in any case, it deserves deference in resolving any ambiguity. Rehearing Order, 171 FERC ¶ 61,135 at n.68. Those unsupported assertions are nothing that the Commission has not already said and repeating them does not make the points any more convincing.

[18] *See* Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at PP 11, 21).

[19] Rehearing Order, 171 FERC ¶ 61,135 at P 33 (discussing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 338 (1958))

[20] *Compare id.* ("recogniz[ing] that *City of Tacoma* was dismissed on procedural grounds") *with* Order, 170 FERC ¶ 61,064 at PP 45-47 (claiming that "the Supreme

contribute is the observation that the substantive question presented in a case dismissed on jurisdictional grounds[21] was whether a subdivision of a state could condemn state land under section 21 of the Federal Power Act (the most analogous provision to section 7(h) under the NGA).[22] The Court, of course, could not address that question,[23] and so that case says nothing about the issues now before us.[24]

Court's decision in *City of Tacoma* . . . directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21").

[21] *City of Tacoma*, 357 U.S. at 334-37 (explaining that the Court lacked jurisdiction to review the claims because they could only have been—and, in fact, were—brought through an appeal pursuant FPA section 313(b)).

[22] *Id.* at 323. In any case, as I explained in my earlier dissent, the City of Tacoma's substantive arguments appear to have addressed the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. 6, cl. 2, not the scope of section 7(h). Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at P 22); *see State of Wash. Dep't of Game v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953) (explaining that the authority conferred by a federal license trumped state law limitations on a city's capacity to exercise that authority); *see also City of Tacoma*, 357 U.S. at 339 (explaining that the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) resolved the case based on its "[c]onclu[sion] that . . . state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license"); *City of Tacoma*, 357 U.S. at 341 (Harlan, J., concurring) (explaining that the question decided by the Ninth Circuit was "whether state or federal law governed" the particular dispute between the parties).

[23] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (explaining that addressing the merits of any proceeding before establishing subject-matter jurisdiction violates Article III of the U.S. Constitution and "offends fundamental principles of separation of powers" (citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *see also Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56 (D.C. Cir. 2015) (dismissing an appeal for lack of subject-matter jurisdiction because the petitioner did not comply with FPA section 313(b)). That means that any substantive discussion therein was not just *dicta*, but *dicta* about an issue on which the Court lacked subject-matter jurisdiction to opine.

[24] The Commission criticizes this "assertion," Rehearing Order, 171 FERC ¶ 61,135 at n.104, but then fails to respond to the arguments on which it is based. That tells you all you need to know. The Commission's evident frustration with the holes in

9. In a pseudo-response, the Commission slips into a footnote a new theory of *City of Tacoma*'s relevance, asserting that it is an example of the Court's willingness to dismiss collateral attacks on the Commission's certificate orders.[25] Although that theory correctly characterizes *City of Tacoma* (for the first time), its implication badly mischaracterizes New Jersey's claim of sovereign immunity.[26] Whether right or wrong, a state's assertion of its "dignity" interest in not being haled into court without its consent, is hardly just a collateral challenge to a Commission certificate.[27] Immunity from suit in federal court is an altogether different theory than a substantive challenge to a section 7 certificate, and a condemnation proceeding is exactly the forum in which one would expect a state to raise that putative right.[28] So brusquely dismissing a state's attempt to assert its Constitutional immunity from suit in federal court as nothing more than a collateral challenge to a certificate order is quite the contrast to my colleagues' oft-repeated commitments to federalism and states' rights.

10. Next, the Commission turns to briefly defend its reliance on *Thatcher v. Tennessee Gas Transmission Company*,[29] a case from the U.S. Court of Appeals for the Fifth Circuit, which upheld section 7(h) against a challenge under the Tenth Amendment to the U.S. Constitution.[30] But, as I explained in my earlier dissent, the fact that section 7(h)

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its argument does not rob the counterarguments of their force.

[25] Rehearing Order, 171 FERC ¶ 61,135 at n.104.

[26] It also has nothing in common with the interpretation the Commission spent four pages advancing in the underlying order. *See* Order, 170 FERC ¶ 61,064 at PP 43-48.

[27] *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." (citing *In re Ayers,* 123 U.S. 443, 505 (1887)); *see also Alden v. Maine*, 527 U.S. 706, 748 (1999) ("The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" (citing *In re Ayers*, 123 U.S. at 505)).

[28] *Cf., e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent.").

[29] 180 F.2d 644 (5th Cir. 1950).

[30] Rehearing Order, 171 FERC ¶ 61,135 at P 34.

did not violate the Tenth Amendment is irrelevant when considering whether Congress intended section 7(h) to apply to state lands or what that means for the Eleventh Amendment.[31] Nevertheless, the Commission insists that considering *Thatcher* was appropriate because, lacking any cases directly on point, it was forced to resort to "analogies, inferences, and comparisons."[32] It may well be that *Thatcher* is all the Commission can point to as it works with what little authority it has.[33] But, if so, that only proves my point that we do not have a clear answer regarding Congress' intentions behind section 7(h).

11. Finally, I am glad to see today's order this time explicitly acknowledge that the text of section 7(h) is ambiguous.[34] Although I think that is the only reasonable conclusion, it means that this proceeding is not one that can be decided on the basis of the text alone, as the Commission suggested in the underlying order.[35] Instead, the outcome must turn on the other indicia of congressional intent that the Commission spent—and, in today's order, spends—so much time discussing.[36] I have reviewed those materials again

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[31] Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at P 11).

[32] Rehearing Order, 171 FERC ¶ 61,135 at P 34. The Commission suggests that *Thatcher* is somehow relevant because I do not cite old cases that involve the Eleventh Amendment or that present the Third Circuit's interpretation of section 7(h). *Id.* Now we're really grasping for straws. As I have maintained throughout this proceeding, the question before us simply cannot be answered clearly one way or the other. Why that ambiguity justifies the Commission in building an over-confident interpretation of section 7(h) on a foundation of irrelevant cases is beyond me.

[33] *Cf.* Bob Dylan, *Like A Rolling Stone* (1965) ("When you ain't got nothing, you got nothing to lose.").

[34] Rehearing Order, 171 FERC ¶ 61,135 at P 19 (asserting that it is appropriate for the Commission to weigh in "given the statute's ambiguity and silence with respect to lands in which states hold an interest"); *see also id.* P 20 (claiming *Chevron* deference and noting that "[d]eference is appropriate 'if the statute is silent or ambiguous with respect to the specific issue'" (quoting *Chevron*, 467 U.S. at 843)).

[35] Order, 170 FERC ¶ 61,064 at P 32.

[36] It is also noteworthy that the Commission addresses for the first time the consequences of that ambiguity. Despite the Commission's claim in the underlying order to be addressing only the "straightforward questions of law" regarding Congress' intent in enacting section 7(h), Order, 170 FERC ¶ 61,064 at P 21, today's order wanders so far afield as to theorize about whether the Supreme Court's clear statement rule for abrogating states' Eleventh Amendment immunity applies in the context of an eminent domain proceeding, Rehearing Order, 171 FERC ¶ 61,135 at P 28 ("[E]mploying the

and, for the reasons discussed in my earlier dissent, can only reach the same conclusion as before: "The evidence simply is not clear one way or the other . . . whether Congress intended section 7(h) of the NGA to apply to state lands or not."[37] As a result, the Commission had no business issuing the Declaratory Order that it did.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule); Rehearing Order, 171 FERC ¶ 61,135 at n.92 (speculating about distinctions in the nature of authority conferred by Congress)—hardly a matter within "the heartland of our quotidian ambit," Order, 170 FERC ¶ 61,064 at P 39.

[37] Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at PP 2, 23).