

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

| Docket No. RP20-41-000

**PROTEST OF THE NEW JERSEY DIVISION OF  
RATE COUNSEL**

In this proceeding, the PennEast Pipeline Company, LLC (PennEast) seeks to re-litigate an issue decided authoritatively and adversely to PennEast by the United States Court of Appeals for the Third Circuit.<sup>1</sup> PennEast's petition requests a declaratory order that: (1) Section 7(h) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(h), authorizes holders of a certificate of public convenience and necessity (Certificate) to condemn property in which a state holds an interest; (2) a Certificate holder's condemnation authority stems from a delegation of the federal government's eminent domain power; and (3) Section 7(h) necessarily delegated to Certificate holders the federal government's exemption from claims of state sovereign immunity.<sup>2</sup>

The determination PennEast seeks is squarely contrary to the Third Circuit's decision, which held that the NGA had not abrogated states' sovereign immunity nor delegated to Certificate holders the Federal government's ability to overcome that immunity.<sup>3</sup> That decision is authoritative and binding as to PennEast, and the Commission cannot overrule it by declaration. The Commission thus should deny PennEast's petition because it is procedurally infirm, precluded by *res judicata*, and

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<sup>1</sup> *In re: PennEast Pipeline Company, LLC*, No. 19-1191 (3d Cir. Sept. 10, 2019) (*In re PennEast*).

<sup>2</sup> PennEast, Petition for Declaratory Order and Request for Expedited Action at 2 (Oct. 4, 2019), eLibrary No. 20191004-5170 (Petition).

<sup>3</sup> *In re PennEast*, slip op. at 33.

meritless. Accordingly, pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211, and the Commission's October 4, 2018 Notice of Petition For Declaratory Order,<sup>4</sup> the New Jersey Division of Rate Counsel (NJ Rate Counsel)<sup>5</sup> submits this protest and urges the Commission to reject PennEast's Petition.

## **I. BACKGROUND**

The Commission in January 2018 issued to PennEast a Certificate authorizing the construction and operation of a new, 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey (the Project).<sup>6</sup> PennEast then initiated condemnation proceedings to obtain the necessary right-of-way for the Project, including various actions against property interests held by the State of New Jersey.<sup>7</sup> New Jersey sought dismissal of the condemnation actions on Eleventh Amendment grounds. In December 2018, the U.S. District Court for the District of New Jersey issued condemnation orders to PennEast against forty-two properties in which the state of New Jersey holds an interest.<sup>8</sup>

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<sup>4</sup> eLibrary No. 20191004-3047.

<sup>5</sup> NJ Rate Counsel filed a motion to intervene in this proceeding on October 11, 2019. *See* eLibrary No. 20191011-5062.

<sup>6</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, *reh'g denied*, 164 FERC ¶ 61,098 (2018), *petition for review filed sub nom. Del Riverkeeper v. FERC*, No. 18-1128 (D.C. Cir. filed Aug. 13, 2018) *in abeyance*. NJ Rate Counsel and other parties petitioned the D.C. Circuit for review of the Commission's orders granting a Certificate to PennEast. *See Del. Riverkeeper Network v. FERC*, Nos. 18-1128, 18-1144, 18-1233, and 18-1256 (consolidated) (D.C. Cir. 2018). On October 1, 2019, the D.C. Circuit issued an order holding those cases "in abeyance 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 in No. 19-1191, *In re: PennEast Pipeline Company, LLC* (3d Cir. Sept. 10, 2019)."

<sup>7</sup> *PennEast Pipeline Co. v. Permanent Easement of 0.06 Acres in Moore Twp.*, No. 18-1585 (D.N.J. Dec. 14, 2018).

<sup>8</sup> *Id.*

New Jersey appealed, asserting that PennEast’s condemnation suits are barred as to the state by sovereign immunity. The Third Circuit agreed, and vacated the District Court’s order as to the properties in which the State has an interest.<sup>9</sup> After thoroughly reviewing applicable precedent, the Third Circuit joined its sister circuits and the Supreme Court in expressing “deep doubt” that the Constitution allows the United States to delegate its exemption from state sovereign immunity to private parties.<sup>10</sup> The court also held, based on the NGA’s text, that it “does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.”<sup>11</sup>

## II. PROTEST

Faced with an adverse ruling detrimental to its Project, PennEast now seeks a Commission order at odds with the Third Circuit’s decision. The Commission has discretion whether to provide declaratory relief,<sup>12</sup> and should decline to do so here. PennEast’s Petition is both procedurally unsound and substantively meritless.<sup>13</sup>

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<sup>9</sup> *In re PennEast*, slip op. at 5.

<sup>10</sup> *Id.* at 30.

<sup>11</sup> *Id.* at 33.

<sup>12</sup> *See, e.g., Phillips Petroleum Co.*, 58 FERC ¶ 61,290, at 61,932 (1992).

<sup>13</sup> PennEast seeks to bolster its Petition by claiming that there is “critical need for new pipeline capacity to secure the supplies necessary to serve new load and to continue providing reliable service to existing customers.” Petition at 5. In support of that claim, PennEast asserts that “[t]he New Jersey Board of Public Utilities has also opened a stakeholder proceeding (Docket No. GO19070846) to explore whether sufficient capacity has been secured to serve all of New Jersey’s firm natural gas customers. Petition at 5 & n.7. But that proceeding involves neither the sufficiency of gas supply nor whether the New Jersey gas distribution companies (GDCs) have secured enough firm capacity to serve their basic gas supply service customers. Rather, it involves the ability of third-party, retail gas suppliers to utilize excess firm capacity obtained by the GDCs to serve third party supplier customers. *See* N.J. Bd. of Pub. Util., Docket No. GO17121241, *In the Matter of the Verified Petition of the Retail Energy Supply Association to Reopen the Provision of Basic Gas Supply Service Pursuant to the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq.*, and *Establish Gas Capacity Procurement Programs* at 4 (Feb. 27, 2019), <https://www.state.nj.us/bpu/pdf/boardorders/2019/20190227/2-27-19-2M.pdf>.

**A. *The Petition fails to present a controversy or uncertainty fit for resolution through a declaratory order.***

Commission authority to issue declaratory orders is grounded in “Rule 207(a)(2) of its Rules of Practice and Procedure and section 554(e) of the APA, which allow the Commission to issue declaratory orders ‘to terminate a controversy or remove uncertainty.’”<sup>14</sup> But a ruling on the merits of PennEast’s Petition could not possibly accomplish that result.

Rather than terminate an existing controversy or remove uncertainty, PennEast asks the Commission to opine on questions of law that have already been disposed of by the Third Circuit. While PennEast may be displeased with that decision, the Third Circuit’s opinion is controlling.<sup>15</sup> The district courts, not this Commission, adjudicate PennEast’s condemnation suits, and district courts in the Third Circuit must heed that court of appeals’ rulings. Thus, whatever uncertainty *In re PennEast* may create for the Project<sup>16</sup> cannot be remedied by ruling on the Petition, as it “results from applying the law as it currently exists, not uncertainty about what the law requires or whether the law applies to particular facts.”<sup>17</sup> Even if the Commission were to grant the Petition and rule in the affirmative on each of PennEast’s presented questions, it could not nullify the Third Circuit’s decision or alter how the district courts proceed.

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<sup>14</sup> *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, P 42 (2016) (citing 18 C.F.R. § 385.207(a); 5 U.S.C. § 554(e)).

<sup>15</sup> *See Neal v. United States*, 516 U.S. 284, 295 (1996) (“Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law.”) (citing *Lechmere v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

<sup>16</sup> Petition at 15.

<sup>17</sup> 154 FERC ¶ 61,206, P 44.

Such relief may be obtained only by petition to the Third Circuit for rehearing— an option which PennEast says it is pursuing<sup>18</sup>—or, if necessary, a petition to the U.S. Supreme Court for a *writ of certiorari*. The Commission, of course, is free to make its views known to the Third Circuit or the Supreme Court by filing an *amicus* brief in those proceedings. But in this posture, only those courts can speak authoritatively to the legal rights of the parties. In this context, a declaratory order issued by this Commission “would likely generate controversy, not remove it.”<sup>19</sup>

***B. PennEast’s Petition is barred by res judicata.***

Re-litigation of the issues presented by PennEast’s Petition is precluded by *res judicata*. As the Commission has previously summarized, “[t]he doctrine of *res judicata* holds that a ‘final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’”<sup>20</sup> Thus, “where the issues presented have been fully litigated and decided on the merits and no new circumstances would justify” reconsideration, *res judicata* bars re-litigation of those issues.<sup>21</sup> This is the case here.

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<sup>18</sup> Petition at 44.

<sup>19</sup> 58 FERC ¶ 61,290, at 61,932 (denying petition for declaratory order where the petition failed to present “any issues that would affect any existing disputes concerning the Commission’s regulatory responsibilities with respect to the petitioners,” and may create additional confusion due to the likelihood that the order may be entered as evidence into an ongoing state tax proceeding).

<sup>20</sup> *Sw. Gas Corp.*, 44 FERC ¶ 61,165, at 61,546 (1988), (citing *Blacks Law Dictionary* (5th ed. 1979)). See also *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966) (*Res judicata* applies to administrative determinations).

<sup>21</sup> *Entergy Servs., Inc.*, 127 FERC ¶ 61,226, P 10 (2009). See also *id.* P 10 n.13 (collecting cases); *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order on reh’g*, 43 FERC ¶ 61,274 (1988) (“[I]n the absence of new or changed circumstances requiring a different result, ‘it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.’”) (citing *Ctr. Kan. Power*, 5 FERC ¶ 61,291, at 61,621 (1978)).

PennEast asks for a declaratory order stating, in relevant part, that when Congress granted eminent domain authority to Certificate holders it “necessarily delegated . . . the federal government’s exemption from claims of state sovereign immunity.” Petition at 2. That is almost identical to the PennEast contention that the Third Circuit considered—in detail—and rejected. *See In re PennEast*, slip op. at 14 (“The company argues that a delegation of the federal government’s eminent domain power under the NGA necessarily includes the ability to sue the States and that concluding otherwise would frustrate the fundamental purpose of the NGA to facilitate interstate pipelines.”).

At the outset, the Third Circuit rejected PennEast’s conflation of eminent domain authority with an exemption from state sovereign immunity. The Third Circuit explained that:<sup>22</sup>

[T]he federal government’s ability to condemn State land – what PennEast contends it is entitled to do by being vested with the federal government’s eminent domain power – is, in fact, the function of two separate powers: the government’s eminent domain power and its exemption from Eleventh Amendment immunity. A delegation of the former must not be confused for, or conflated with, a delegation of the latter. A private party is not endowed with all the rights of the United States by virtue of a delegation of the government’s power of eminent domain.

The Third Circuit then considered—and rejected—PennEast’s claim that Congress, through the NGA, delegated to certificate holders the United States’ exemption from state sovereign immunity. The court reviewed the case law “in . . . detail” and found that it “lends no credence to the notion that the United States can delegate the federal

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<sup>22</sup> *In re PennEast*, slip op. at 15.

government’s exemption from state sovereign immunity.”<sup>23</sup> As the court explained, the States’ consent to suits by the United States does not imply that they consented to suit “by anyone whom the United States might select.”<sup>24</sup> The court acknowledged that the United States can abrogate state sovereign immunity—but only when it acts pursuant to section 5 of the Fourteenth Amendment and not when it acts under its Commerce Clause powers, as it did when it enacted the NGA.<sup>25</sup> The court also observed that Congress can abrogate state sovereign immunity “‘only by making its intention [to do so] unmistakably clear in the language of the statute’ in question.”<sup>26</sup> Finally, the court reviewed the text of the NGA and found no indication, let alone one “unmistakably clear in the language of the statute,” that Congress meant to abrogate state sovereign immunity or delegate the United States’ exemption from it.<sup>27</sup> In reaching these conclusions, the Third Circuit considered and rejected PennEast’s reliance on the Commission’s decision in *Islander East Pipeline Co. v. Algonquin Gas Transmission Co.*, 102 FERC ¶ 61,054 (2003), and other cases PennEast cites in support of its petition.<sup>28</sup>

Thus, the questions of law presented in the Petition are the very same questions litigated before the Third Circuit and decided on their merits in *In re PennEast*. Yet PennEast now asks the Commission to issue a declaratory order directly contrary to the Third Circuit’s holding. The Commission routinely dismisses such collateral attacks,

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<sup>23</sup> *Id.* at 17-19.

<sup>24</sup> *Id.* at 17-18 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991)).

<sup>25</sup> *Id.* at 22.

<sup>26</sup> *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>27</sup> *Id.* at 30 (quoting *Blatchford*, 501 U.S. at 786).

<sup>28</sup> *E.g., id.* at 25-26 (*qui tam* cases); *id.* at 27-29 (*in rem* cases).

whether mounted by complaint<sup>29</sup> or declaratory order petition.<sup>30</sup> Because PennEast seeks to litigate before this Commission a claim identical to that already litigated before the Third Circuit, the Petition is barred by *res judicata*, and must be rejected.

**C. Commission action through declaratory order is unnecessary.**

PennEast asks the Commission to provide “its authoritative interpretation of the NGA’s eminent domain authority,” asserting that courts will find a FERC ruling “of substantial assistance[.]”<sup>31</sup> However, the questions presented in the Petition do not involve matters within the specialized expertise of the Commission. Moreover, contrary to PennEast’s assertions, the Commission’s views may be presented more appropriately by other means—by filing an *amicus* brief in any pending or subsequent proceedings to review the Third Circuit’s decision.

PennEast asks the Commission to opine on what are core questions of constitutional law regarding: (1) Congress’s ability to delegate Federal authority to override state sovereign immunity; and (2) how Congress may effect such a delegation (if permitted) or abrogation of state sovereign immunity. These questions are the sort that

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<sup>29</sup> *E.g.*, *New England Conference of Pub. Util. Comm’rs v. Bangor Hydro-Elec. Co.*, 135 FERC ¶ 61,140, P 27 & n.41 (2011) (“A collateral attack is ‘[a]n attack on a judgment in a proceeding other than a direct appeal’ and is generally prohibited.”) (quoting *Wall v. Kholi*, 562 U.S. 545, 552 (2011)). As the Commission there explained, “Disfavor for collateral attacks is embodied in the doctrine of collateral estoppel: once a court or adjudicative body has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Id.* P 27 & n.42.

<sup>30</sup> *E.g.*, *Ala-Tenn. Nat. Gas Co.*, 29 FERC ¶ 61,396, at 61,833 (1984) (dismissing declaratory order petitions as “collateral attacks upon [a] rule which is presently on appeal”); *Petition for Amendment of 18 C.F.R. Part 141*, 49 F.P.C. 1011 (1973) (same).

<sup>31</sup> Petition at 3.

federal courts address routinely, and do not implicate the Commission's specialized expertise regarding interstate natural gas pipelines.<sup>32</sup>

The procedural history of the Third Circuit case confirms this view. Courts are authorized to refer questions to expert agencies when necessary.<sup>33</sup> Yet neither the Third Circuit, nor the district court before it, referred any questions to this Commission. Likewise, PennEast's delay in seeking the Commission's input—only after the issuance of an adverse appellate decision—suggests that even it previously regarded these issues as fit for judicial resolution without Commission input.

In any case, and contrary to PennEast's suggestion,<sup>34</sup> declaratory relief is not needed to permit “the Commission's interpretation of NGA Section 7(h) to be considered in any rehearing by the Third Circuit of its decision in *In re PennEast Pipeline Company, LLC*.” There is another, more appropriate vehicle. The Commission could present its views to the Third Circuit by filing an *amicus* brief, even at the rehearing stage.<sup>35</sup> And the United States can present its views, though the Solicitor General, in response to any petition for a *writ of certiorari*. These mechanisms will permit consideration of the Commission's views without running afoul of the procedural concerns described in this Protest.

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<sup>32</sup> See *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures.”); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (“[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.”).

<sup>33</sup> *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956) (“‘Primary jurisdiction’ . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.”).

<sup>34</sup> Petition at 44.

<sup>35</sup> See Fed. R. App. P. 29(b)(2).

***D. Even if PennEast's Petition were procedurally sound, the Commission should deny the requested relief on the merits.***

Assuming *arguendo* that PennEast's Petition were properly before this Commission, its request for declaratory relief fails on the merits, and the Petition must be rejected. NJ Rate Counsel supports the position taken by the New Jersey Attorney General on behalf of other New Jersey state agencies regarding the merits of PennEast's Petition.

**III. CONCLUSION**

For the reasons set out above, PennEast's Petition should be denied.

Respectfully submitted,

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October 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 18th day of October, 2019.

*/s/ Amber L. Martin*

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