

No. 19-1039

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

NEW JERSEY ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Third Circuit**

BRIEF OF THE INDUSTRIAL ENERGY
CONSUMERS OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*¹

The Industrial Energy Consumers of America (“IECA”) is a nonpartisan association of leading manufacturing companies with \$1.0 trillion in annual sales, over 3,700 facilities nationwide, and more than 1.7 million employees.

IECA is an organization created to promote the interests of manufacturing companies through advocacy and collaboration for which the availability, use and cost of energy, power, or feedstock play a significant role in IECA members’ ability to compete in domestic and world markets.

IECA’s membership represents a diverse set of industries on which the national economy depends: chemicals, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, automotive, brewing, independent oil refining, and cement.

These industries are one-hundred percent dependent upon a robust interstate pipeline system to supply their energy needs. IECA member industries directly purchase approximately twenty-two percent of U.S. natural gas production shipped via pipeline. The products that IECA members produce are used by

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties received notice at least 10 days before the deadline and have given express consent to this brief.

every sector of the economy and pertain to all aspects of day-to-day life.

Today, there are clear signs that the natural gas pipeline infrastructure is near maximum capacity. The continued viability of the manufacturing, power, and home heating sectors and liquefied natural gas exports depends upon the ability to quickly respond to the dramatic increases in demand each of these sectors is placing on the pipeline network.

The United States Court of Appeals for the Third Circuit’s decision²—that private parties may not exercise the federal eminent domain power delegated by §717f(h) of the Natural Gas Act (“NGA”) to secure rights-of-way over property owned by a state or even over property in which a state merely holds a recreational or conservation easement—is wrong and inhibits or denies the ability of IECA member companies to produce and contribute to U.S. economic growth and to create high paying middle-class jobs.

The NGA expressly delegates to a gas company that obtains the requisite approvals the “right of eminent domain” to obtain “necessary right[s]-of-way” to construct, operate, and maintain an interstate pipeline. 15 U.S.C. §717f(h) (2018).

To exercise eminent domain power, a natural gas company must obtain a certificate of public

² *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019). The Third Circuit’s opinion is reproduced at App.1-31.

convenience and necessity from the Federal Energy Regulatory Commission (“FERC”). *Id.* §717f(h). Although the court of appeals acknowledged that §717f(h) delegates the federal eminent domain power to such certificate holders, it nevertheless concluded that §717f(h) cannot be read to “delegate” the federal government’s (separate) power to “exempt” states from sovereign immunity under the Eleventh Amendment, and hence leaves eminent domain power that cannot be exercised as to state property. App.11, 27.

As explained by the Petitioner, this decision of the court of appeals “invalidates an act of congress out of a misguided effort to avoid constitutional concerns that do not exist.” Brief for Petitioner at 19. Nothing prevents the federal government from delegating its eminent domain power to certificate holders that have satisfied FERC review of their proposal to construct interstate pipelines.

IECA writes to further explain the exceptional importance of correcting the court of appeals’ error. The decision below is profoundly disruptive to, and in fact would inhibit or deny, the free flow of commerce on which IECA’s members and the economy are one-hundred percent dependent. As the court of appeals itself stated, its decision “may disrupt how the natural gas industry” has operated “for the past eighty years.” App.30.

SUMMARY OF ARGUMENT

To say that this case is of immense national importance is an understatement. The court of appeals' decision would disrupt how the natural gas industry has operated for the past eighty years. The decision would create barriers for manufacturing companies that depend on natural gas and gas-fired electric infrastructure throughout the nation and would inhibit or deny the supply of energy on which IECA's members depend. The decision would undermine "the principal purpose of . . . [the NGA] to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices" *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976).

Contrary to the court of appeals' claim, there is no practical work-around to the harm created by its decision. The court of appeals' decision would create barriers to pipeline development that would severely affect IECA's members, whose annual sales top one trillion dollars and who form a major component of the national economy.

ARGUMENT

I. The Decision Below Would Create Barriers to Energy Infrastructure Development and to Natural Gas Supplies Throughout the Nation.

The court of appeals' decision would disrupt the development of energy infrastructure, "allow[ing] states to nullify the effect of Commission orders affecting state land—and, apparently, private land in which the state has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." *PennEast Pipeline Co., LLC*, Order on Petition for Declaratory Order, 170 FERC ¶ 61,064, Dkt. No. RP20-41-000, ¶58 (January 30, 2020) ("FERC Order").

As a result of the court of appeals' decision, states would be free to block natural gas infrastructure projects that cross state lands by refusing to grant easements for the construction and operation of the projects on land for which the state has a possessory interest, regardless of any Commission finding that a particular project is in the public interest under the NGA. *Id.* As FERC explained:

[T]he court's interpretation would permit states to block construction both on land a state owns (e.g., along or across all state roads and the bottoms of navigable water bodies), and on land

over which the state asserts some lesser property interests (e.g., conservation easements). 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. If lands over which a state has asserted any property interest also 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 purpose of NGA section 7(h).

FERC Order ¶58 n.221. Indeed, New Jersey has already proposed new legislation for the purpose of blocking natural gas pipelines. *Id.* ¶61 n.233. New Jersey's actions can and will be replicated in other states.

Even if pipeline companies find ways to work around these "impassable barriers," they may ultimately be forced to locate their pipelines further away from the manufacturer end-users the pipelines are intended to serve, thereby dramatically raising costs. Natural gas pipelines are a regulated monopoly. FERC rate design guarantees a rate sufficient to recover all of the pipeline company's

approved pipeline costs plus a return on equity. *See* “Cost of Service Rate Filings,” Federal Energy Regulatory Commission, <https://www.ferc.gov/industries/gas/gen-info/rate-filings.asp>. This means all additional work-around costs of building the pipeline would be passed onto consumers like IECA’s members, thereby negatively impacting their costs and competitiveness. Higher pipeline rates increase both the cost of natural gas and electricity.

While the court of appeals proposed a “work-around,” whereby FERC would bring the condemnation action itself, and then somehow transfer the property or rights-of-way to the certificate holder, the proposed “work-around” is entirely impractical. App.31. The Commission has no statutory authority or mechanism by which to condemn property and transfer it to certificate holders. FERC Order ¶58. Congress has not given the Commission the power to bring eminent domain proceedings, let alone given it the power to “pay just compensation” or to “transfer[] the property from the Commission to the pipeline” once it is condemned. *Id.* ¶¶52-53.

Instead, under the system Congress designed, FERC is only tasked with determining whether an exercise of eminent domain would be appropriate, while a certificate holder is tasked with implementing that determination and providing just compensation. *See* NGA §§717f(e), 717(h).

II. Pipeline Development Barriers Harm IECA's Members and the National Economy.

IECA's members depend on "the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *See NAACP v. Fed. Power Comm'n*, 425 U.S. at 669-70. If the Court allows the court of appeals' decision to stand, the barriers to pipeline development that the court of appeals' decision impose (described *supra*) would significantly harm IECA's members by limiting or prohibiting their much needed access to natural gas supplies.

A. Manufacturers Need More Pipeline Capacity to Access Natural Gas Supplies.

The NGA has a "superordinate goal of ensuring the public has access to reliable, affordable supplies of natural gas." FERC Order ¶58. The Supreme Court has explained that "the principal purpose of . . . [the NGA is] to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *NAACP v. Fed. Power Comm'n*, 425 U.S. at 669-70.

"Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices." *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004). FERC, the agency tasked with administering the NGA, has further explained that "[e]ach of [the] textual provisions [in NGA section 7] illuminate the

ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.” *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133, Dkt. No. CP18-332-000 ¶24 (2019).

Today, natural gas pipeline capacity is either inadequate or unavailable for many IECA member companies to operate existing facilities, to expand or build new manufacturing production facilities, or to expand or build new electric self-cogeneration facilities along much of the East Coast, West Coast, and South, including New Jersey, New York, Connecticut, Massachusetts, New Hampshire, Maryland, California, Virginia, North Carolina, South Carolina, and Tennessee.

As an example, even though the U.S. had a mild 2019-2020 winter with relatively lower seasonal demand for natural gas, over this same period, IECA companies received a record number of operational flow orders (“OFOs”). An OFO is a communication from a pipeline company to all capacity holders, including manufacturing companies, stating that there is insufficient pipeline capacity to supply the expected demand. This forces manufacturers to reduce their output (i.e., reduce their operating rate) and exposes manufacturers to increased costs and balancing penalties. Reducing manufacturer operating rates reduces profitability and jeopardizes manufacturers’ abilities to serve customer demands. If domestic manufacturers’ costs increase, or they simply cannot supply their customers with needed products, manufacturers risk losing business to

overseas competition, placing their facilities and jobs at risk.

IECA companies are one-hundred percent dependent upon pipeline infrastructure for natural gas supply, and their dependence is only increasing. Nationwide, industrial demand for natural gas is expected to increase from 2019 levels of 8.33 trillion cubic feet per year to 9.37 trillion cubic feet per year in 2025, a 12.4 percent increase just over this period. “Annual Energy Outlook 2020,” Energy Information Administration, available at <https://www.eia.gov/outlooks/aeo/data/browser/#/?id=77-AEO2020®ion=0-0&cases=ref2020&start=2018&end=2050&f=A&linechart=ref2020-d112119a.24-77-AEO2020&map=&ctype=linechart&chartindexed=0&sourcekey=0>.

Without a steady increase of pipeline capacity, manufacturers cannot expand existing production facilities or build new facilities that increase high paying middle-class jobs, economic growth, and needed exports. In 2018, the average manufacturing worker earned \$ 87,185 of wages and benefits. “Facts About Manufacturing,” National Association of Manufacturers, available at <https://www.nam.org/facts-about-manufacturing>. Without increased pipeline access, many individuals who desire to be employed in the manufacturing industry would be denied that privilege.

Manufacturers also use natural gas to cogenerate electricity and steam energy that is in turn

used by manufacturing facilities. *See generally* “Combined Heat and Power,” Environmental Protection Agency, at available at <https://www.epa.gov/sites/production/files/2015-08/documents/chpguide508.pdf>. Cogeneration of electricity is more than twice as energy efficient than electricity generated by an electric utility. *Id.* at 1. Cogenerated electricity represents between eleven and thirteen percent of the manufacturing sectors’ demand for electricity. *See* “Electricity use at manufacturing establishments,” Energy Information Administration, <https://www.eia.gov/todayinenergy/detail.php?id=35472>.

Because it is highly efficient, cogeneration produces electricity for manufacturing facilities at lower costs for these facilities than if they were to buy their power from the grid. Because it is a source of distributive energy, cogeneration also increases electric grid reliability and reduces transmission line losses, thereby reducing greenhouse gas emissions. *Id.*

For these purposes, it is essential to manufacturers that pipeline companies do not face unreasonable barriers when they attempt to increase natural gas pipeline capacity that is deemed by FERC to be needed in the public interest.

B. Manufacturers Do Not Have a Comparable Alternative to Natural Gas.

1. Manufacturers have no reliable and environmentally acceptable alternative to natural gas.

Manufacturers use natural gas as an energy source to operate factories, including as a fuel for process heating, in combined heat and power systems, and as a raw material (feedstock). See “Natural Gas Explained,” Energy Information Administration, <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php>. Coal and fuel oil are not suitable or reliable alternatives for these purposes. While manufacturers can readily access natural gas supplies by tapping into the interstate gas pipeline grid, coal and a significant amount of fuel oil are accessible to manufacturers only by rail. Fewer manufacturing facilities are equipped with direct access to rail than natural gas pipelines. If a factory does not have an existing rail siting, supply of coal or fuel oil may be impossible.

Use of coal or fuel oil to operate the facility or for electric generation produces more greenhouse gas emissions, more sulfur oxides (SO_x), and more nitrogen oxides (NO_x), than natural gas fired electric generation.³ See “How much carbon dioxide is produced when different fuels are burned ?” Energy

³ SO_x and NO_x are classified by the Environmental Protection Agency as Criteria Air Pollutants. “Criteria Air Pollutants,” Environmental Protection Agency, available at <https://www.epa.gov/criteria-air-pollutants>.

Information Administration, available at <https://www.eia.gov/tools/faqs/faq.php?id=73&t=11>; “Power plant emissions of sulfur dioxide and nitrogen oxides continue to decline in 2012,” Energy Information Administration, available at <https://www.eia.gov/todayinenergy/detail.php?id=10151> (stating that sulfur dioxide and nitrogen oxides declined in part as a result of a shift from coal generation to gas generation).

Renewable resources, while perhaps environmentally friendly, are not sufficiently reliable or economically scalable for the typical manufacturing facility, in part because the majority of renewable resources are non-dispatchable Variable Energy Resources whose ability to be called upon as a resource when needed is “beyond the control of the facility owner or operator.” *Integration of Variable Energy Resources*, Order No. 764, 139 FERC ¶ 61,246, Dkt. No. RM10-11-000, at ¶1 n.1 (2012). *See also* “Combined wind and solar made up at least 20% of electric generation in 10 states in 2017,” Energy Information Administration, <https://www.eia.gov/todayinenergy/detail.php?id=37233> (“Unlike most other generating technologies, grid operators generally do not dispatch wind and solar generation because these generators produce electricity only when the associated resources are available . . . Other generating technologies that use combustible fuels respond to grid dispatch commands to increase or decrease generation as needed . . . hydroelectric facilities with reservoirs have some control over the dispatch of their electricity, and run of the river generation is non-dispatchable because it

generates electricity as water passes through it. Hydro facilities can also have seasonal limits on dispatch based on available water resources.”)

Most manufacturing facilities operate continuously, twenty-four hours a day, seven days a week. Natural gas pipelines can provide continuous reliable supply, while renewable energy cannot.

Increasing generation of renewable energy relies, in many instances, upon natural gas fired generation as a back-up resource. Without access to natural gas pipelines, renewable electricity generators would be dependent upon using coal or fuel oil as a backup generation resource which, as discussed *supra*, produce more greenhouse gas emissions and Criteria Area Pollutants than natural gas-fired generation resources.

2. Electricity does not provide an economic alternative to natural gas for manufacturers.

Manufacturers cannot switch from using natural gas to relying entirely on electricity purchased from the grid. First, as a source of energy, the cost of electricity is substantially more expensive than natural gas on a unit-by-unit basis. To illustrate, we will assume that a company's daily natural gas use is about 100,000,000,000 British Thermal Units. This example assumes a natural gas price of \$3.00/Million British Thermal Units (roughly

the industrial average over the past two years⁴) and a purchased electricity price of \$55.00/megawatt-hour (roughly the industrial average over the past two years⁵). The annual cost of natural gas would be \$109,500,000, while the same amount of energy purchased in the form of electricity would cost \$588,709,000, almost six times as much.

Second, the manufacturing sector cannot easily or economically convert its equipment to rely on electric energy instead of energy from natural gas, because the manufacturing industry has invested trillions of dollars in equipment assets that can only use natural gas. Switching to electricity for these manufacturers is either impossible (based on the configuration of existing facilities) or severely cost prohibitive. In many cases, equipment that uses natural gas is not commercially available to use electricity.

Third, while manufacturers purchase between eighty-seven and eighty-nine percent of their

⁴ Between 2018 and 2020, the price of natural gas per million British Thermal Units has hovered between approximately \$1.76 and \$4.65 cents. *See, e.g.*, “Henry Hub Natural Gas Spot Prices,” Energy Information Administration, available at <https://www.eia.gov/dnav/ng/hist/rngwhhdd.htm>.

⁵ Between 2018 and 2020, the price of a megawatt-hour of electricity across various regions of the country has hovered around \$55 per megawatt-hour, occasionally spiking higher than \$100 per megawatt-hour. “Wholesale electricity prices were generally lower in 2019, except in Texas,” Energy Information Administration, available at <https://www.eia.gov/todayinenergy/detail.php?id=42456>.

electricity from the grid (as opposed to self-generated electricity), electric generation from the grid has become increasingly reliant upon natural gas. See “Electricity use at manufacturing establishments,” Energy Information Administration, <https://www.eia.gov/todayinenergy/detail.php?id=35472>. For example, electricity produced by natural gas generation at utility-scale facilities increased approximately forty percent from 2014 to 2019, totaling about thirty-eight percent of total electric generation from utility-scale facilities across the United States. “Net Generation by Energy Source: Total (All Sectors), 2009-December 2019,” Energy Information Administration, available at https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_01.

Therefore, even if manufacturers were able to meet more of their energy demand through electricity purchased from the grid, they would still need increased pipeline capacity to guarantee a stable supply of natural gas for electricity consumption.

C. Without Increased Pipeline Capacity, Some IECA Companies May Need to Move Production and/or Investments to Other Countries With Regulatory Certainty and Better Access to an Economical Natural Gas Supply; Regulatory Certainty is Needed to Encourage Reshoring.

IECA companies have tough competition from foreign companies that often receive subsidies, including for natural gas and electricity.

Manufacturing companies need confidence that natural gas supplies will be available to meet their current and future demand. When a manufacturer invests capital to expand or build a new facility, it does so assuming it will operate that facility for at least fifty years. A company will not invest capital without absolute assurance that it has reliable and economical access to natural gas and electricity. The low cost of shale natural gas provides an economic incentive for companies to reshore their facilities back to the U.S. Without pipeline regulatory assurance, manufacturing will not be able to continue to do so. According to the Bureau of Labor Statistics, since December of 2009, manufacturing jobs have increased twelve percent to 12.86 million workers, representing 1.35 million new manufacturing jobs. See “All employees, thousands, manufacturing, seasonally adjusted,” Bureau of Labor Statistics, [https://data.bls.gov/timeseries/CES3000000001?amp %253bdata_tool=XGtable&output_view=data&include_graphs=true](https://data.bls.gov/timeseries/CES3000000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true).

Abundant resources of natural gas in the ground mean nothing unless there is pipeline capacity available to move the natural gas to consumers like IECA’s members. Regulatory certainty—that a pipeline company that receives approval through a FERC certificate can proceed successfully with its project—is needed for a pipeline company to invest in a new project. The serious barriers to pipeline development imposed by the court of appeals’ decision diminish the regulatory certainty on which pipeline companies depend to build new pipelines. Without regulatory certainty for pipeline companies,

manufacturing companies recognize that supply of natural gas via new pipeline capacity will not be available for their manufacturing facilities. Manufacturers will have no alternative but to move production to other countries where there is access to reliable and economical natural gas supply. The net result is forgone economic growth and loss of high paying middle-class manufacturing jobs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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