

INABILITY TO CONDEMN STATE PROPERTY RAISES QUESTIONS ABOUT FERC ORDERS

A recent Alert discussed the US Court of Appeals for the 3rd Circuit's ruling that the Natural Gas Act does not allow private companies to condemn state property interests to secure routes for their pipelines. *In Re: PennEast Pipeline Company*. That ruling, based on property interests of the State of New Jersey and its instrumentalities, may also affect the litigation in the US Court of Appeals for the DC Circuit challenging the decision of the Federal Energy Regulatory Commission (FERC) to grant the certificate of public convenience and necessity (the Certificate) to PennEast for this pipeline.

Challenge to FERC's Action

Several entities, including the New Jersey Department of Environmental Protection (NJDEP) and Delaware Riverkeeper Network, challenged FERC's grant of the Certificate to PennEast. *Delaware Riverkeeper Network v. FERC*. Their complaints include that FERC's action did not comply with the National Environmental Policy Act (NEPA). They have requested the DC Circuit to vacate FERC's issuance of the Certificate.

Request for Abeyance

After the 3rd Circuit issued its opinion, NJDEP asked the DC Circuit to hold in abeyance its consideration of the PennEast matter. NJDEP argued that the 3rd Circuit's opinion may make the pipeline no longer viable or may require PennEast to reroute the pipeline. A rerouting, according to NJDEP, would require FERC to prepare a supplemental Environmental Impact Statement to meet NEPA requirements. In any case, NJDEP argued the 3rd Circuit's ruling raised serious questions about the pipeline's route and feasibility, such that the DC Circuit should hold the case in abeyance, noting that the likely impact of the 3rd Circuit's opinion will eventually require the DC Circuit to remand the matter to FERC.

Order to Submit Briefs

The DC Circuit ordered the parties in *Delaware Riverkeeper Network v. FERC* to submit briefs by September 30, 2019 to address if the 3rd Circuit's ruling made the DC Circuit matter no longer ripe for review. The DC Circuit may decide to cancel the oral argument in the case, currently scheduled for October 4, 2019. If the DC Circuit determines the matter is not ripe, it will either hold it in abeyance or dismiss it.

