***EN BANC* ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020**

No. 17-1098 (consolidated with Nos. 17-1128, 17-1263, 18-1030)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEGHENY DEFENSE PROJECT, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

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CORRECTED BRIEF OF AMICI CURIAE STATES OF MARYLAND, DELAWARE, ILLINOIS, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, AND WASHINGTON, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA, AND THE PEOPLE OF THE STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As provided in Circuit Rule 28(a)(1), amici certify as follows:

A. Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing in this Court are listed in the certificate to Petitioners' Joint Brief on Rehearing *En Banc* ("Petitioners' Brief"), except for amici curiae States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan.

B. Rulings Under Review

The final agency actions under review appear in the certificate to Petitioners' Brief.

C. Related Cases

All related cases appear in the certificate to Petitioners' Brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Miscellaneous

STATUTES AND REGULATIONS

Amici States incorporate by reference the pertinent statutes and regulations attached as addenda to Petitioner' Opening Brief.

IDENTITY, INTERESTS, AND FILING AUTHORITY OF AMICI CURIAE

The Amici States are the States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan. Amici States share a substantial interest in the fairness and integrity of the process by which the Federal Energy Regulatory Commission (FERC or the Commission) decides to authorize the construction and operation of interstate natural gas pipelines and related infrastructure. FERC's decisions about whether to authorize new pipelines, and their approved routes, have profound effects on Amici States and their landowners, communities, businesses, and environment. Fundamentally, the process underlying these decisions must be fair and afford due process to all wishing to challenge them. As the chief law enforcement officers of the Amici States, the undersigned have an interest in vindicating the rights of our states' residents. The Amici States, through their Attorneys General, and agencies, including their public utility commissions, and (where separate from the Office of the Attorney General) their offices of ratepayer advocates, frequently appear before FERC. In many cases, the Amici States' own property interests, both possessory and nonpossessory (such as conservation easements and parkland), are at stake.

By routinely issuing tolling orders extending—for months on end—the congressionally mandated thirty-day statutory limit on FERC's authority to act on requests for rehearing on FERC pipeline approvals that a party must utilize prior to seeking judicial review, while simultaneously allowing pipeline construction to proceed, the Commission undermines the due process rights of individuals seeking to challenge its pipeline authorization decisions, forestalling meaningful judicial review of FERC's pipeline construction approvals. FERC's fundamentally unfair approach of allowing pipeline construction to proceed while effectively precluding would-be challengers from obtaining judicial review undermines our residents' right to due process of law. And, significantly, FERC uses tolling orders in non-pipeline contexts, as well, and FERC's use of tolling orders in those other contexts also injures states where the rehearing requests seek to vindicate states' sovereign right to adopt and implement important public policies.

The Amici States submit this brief under the authority of Federal Rule of Appellate Procedure 29(a)(2) and Local Rule 29(b).

BACKGROUND

Statutory Framework

Under the Natural Gas Act, FERC issues certificates of public convenience and necessity authorizing, among other things, the construction of natural gas pipeline facilities when it finds that a proposed project "is or will be required by the

present or future public convenience and necessity." 15 U.S.C. § 717f(c). In doing so, FERC is guided by its Certificate Policy Statement, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement), which provides that FERC should issue a certificate when the market need for and public benefit of a proposed pipeline project outweigh identified harms. "Market need" requires a showing that the project will "stand on its own financially," a showing that can be met by evidence of "preconstruction contracts" (also known as "precedent agreements") entered into between the transporter (the pipeline company) and a shipper (who reserve space or "capacity" on a pipeline to transport purchased gas) for gas transportation service. *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).[1] If "market need" is established, FERC will then balance the benefits and harms of the project, and will grant the certificate if the former are proportional to the latter. *See* Certificate Policy Statement, 88 FERC at 61,745.

When FERC grants a pipeline company a certificate, the company may immediately exercise the power of eminent domain, absent a stay of the Commission's order, to acquire lands necessary for the pipeline project. 15 U.S.C.

[1] "A precedent agreement is a long-term [private] contract subscribing to expanded natural gas capacity." *Myersville*, 783 F.3d at 1310 (D.C. Cir. 2015) (citation omitted).

§ 717f(h); *see also E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) (upholding condemning pipeline company's use of injunctive relief to permit immediate entry upon condemned property). Persons wishing to challenge the certificate, including landowners subject to eminent domain proceedings, must apply for rehearing before FERC within thirty days the certificate's issuance. 15 U.S.C. § 717r(a). FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id.* However, "[t]he filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." *Id.* § 717r(c); *see also Panhandle Eastern Line Co. v. FERC*, 881 F.2d 1101, 1119 (D.C. Cir. 1989) (rehearing request or judicial review does not stay a natural gas certificate). Then, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 15 U.S.C. § 717r(a). Once the Commission denies a rehearing request, or the request is deemed denied through inaction, the applicant may seek judicial review of the final certificate decision in the appropriate federal circuit court of appeals. *Id.* § 717r(d). As it did in this case, however, FERC routinely "acts" on rehearing requests by issuing orders tolling the thirty-day rehearing consideration period to allow time—often many months—for further consideration, even while, at the same time, it denies stay relief and authorizes pipeline construction to proceed before it renders a substantive decision on the

rehearing request. *See Allegheny Defense Project v. FERC*, 932 F.3d 940, 951 (D.C. Cir. 2019) (Millett, J., concurring), *vacated*, *reh'g en banc granted*, 943 F.3d 496 (D.C. Cir. Dec. 5, 2019).

Factual Background

The two Southeastern Pennsylvania homeowners in this case became ensnared in FERC's practice of tolling the time by which it must act on rehearing requests to preclude effective judicial review, while construction on a pipeline moved forward. At trial, the homeowners testified about their love of their properties, one family describing a "dream home" where their sons would eventually settle, the other a homestead located in a deeply private setting in "rolling hills" with "lots of wildlife" on the property. *Id.* at 948. In October 2015, they were notified that a pipeline was under consideration that "might cut right through their land," and would require "removing topsoil, trees, shrubs, brush, roots, and large rocks, and then removing or blasting additional soil and bedrock to create a trench for the pipeline," and giving Transco, the pipeline company, a "permanent right-of-way through their yards." *Id.* at 949.

After the Commission issued a certificate to Transco, the homeowners timely requested rehearing and moved for a stay of the Certificate Order pending rehearing. *Id.* The Commission took no immediate action on the motion for stay and, with

respect to the request for rehearing, issued a "tolling order," purportedly granting the request but "for the limited purpose of further consideration." *Id.*

Because there could be no final agency action until resolution of the request for rehearing, the homeowners could not obtain judicial review of the order granting the Certificate. *See Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110-111 (D.C. Cir. 2002). Nonetheless, the very same order that was non-final for the homeowners "was still final enough for Transco to prevail in an eminent domain action in a Pennsylvania federal district court and to acquire the needed easements over the [homeowners'] land." *Allegheny*, 932 F.3d at 949. Transco was thus granted the "right to immediate possession of the properties." *Id.*

The Commission then denied the homeowners' request for a stay (six months after it was filed) and, two weeks later, authorized Transco to start construction, which commenced immediately—while the request for rehearing was still pending. *Id.* at 950. When the homeowners requested rehearing of the order authorizing construction to proceed, the Commission issued yet another tolling order. "Meanwhile, Transco's construction continued apace. And the Homeowners remained trapped before the agency." *Id.* Not until months after construction started—and nine months after the rehearing request—did the Commission issue a

final appealable order denying the request for rehearing of the certificate decision. *Id.*

SUMMARY OF ARGUMENT

Even assuming, for purposes of argument, that FERC otherwise has authority under the Natural Gas Act to issue tolling orders, its practice of issuing tolling orders while simultaneously denying stay relief violates the Due Process Clause, because it precludes judicial review while pipeline construction proceeds. U.S. Const. Amend. V. The practice offends fundamental principles of fairness by allowing a taking of private property to become a *fait accompli* before the affected landowner even has the opportunity to challenge whether the certificate of public convenience and necessity authorizing the taking truly serves a public use, as required by the Takings Clause. The need for judicial review of the public-use determination is especially warranted in a setting where FERC increasingly relies solely on private precedent agreements to determine a project's need, and thus its public purpose, even where those precedent agreements are among only corporate affiliates. The Takings Clause cases supporting deference to the government's public-use determination when property is taken for an arguably private use typically involve courts reviewing determinations of state and local legislatures, representative and elected bodies more attuned to the public need in their communities and states than federal courts. The

federalism concerns that counsel deference in those cases are not present when courts review FERC's certificate orders.

Additionally, FERC's use of tolling orders contravenes public policy, including of particular concern to Amici States, impinging on state policy choices in areas such as a state's right to determine its own energy mix. FERC's tolling order procedure allows irreparable harm to occur, even before meaningful judicial review is available. FERC's tolling order procedure not only irreparably harms homeowners, other interested parties, and environmental interests, but can also severely undermine important state policies.

ARGUMENT

I. THE COMMISSION'S PRACTICE OF ISSUING TOLLING ORDERS WITHOUT STAY RELIEF VIOLATES THE DUE PROCESS CLAUSE BECAUSE, AMONG OTHER THINGS, IT DEPRIVES LANDOWNERS IN AMICI STATES OF TIMELY JUDICIAL REVIEW OF THE PUBLIC USE DETERMINATION UNDERLYING A CERTIFICATE GRANT.

FERC's tolling order practice has historically deprived challengers to certificates, including landowners in Amici States, of an opportunity to be heard at a meaningful time and in a meaningful manner, an essential component of due process. The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In assessing a due process claim, courts ask whether there is a "liberty or property interest of which a person has been deprived" and whether the

procedures that the government followed in depriving that interest were "constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citation omitted); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process "calls for such procedural protections as the particular situation demands" to meaningfully protect the constitutional right at stake). If a liberty or property interest is at stake, due process requires an opportunity to be heard at "a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In determining what process is due, a court weighs (i) "the private interest that will be affected by the official action"; (ii) "the risk of an erroneous deprivation of such interest through the procedures used"; and (iii) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Judge Millett's concurrence should guide the *en banc* Court's application of the *Mathews* test to the facts of this case. The affected private interest, as the concurrence aptly recognizes, is a landowners' right "to maintain control over [their] home[s], and to be free from governmental interference," which "is a private interest of historic and continuing importance." 932 F.3d at 954 (Millett, J. concurring) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993)). In this case, the "official action" is a government intrusion of an unusually

serious character—the "physical invasion" of the families' homesteads to make room for a gas pipeline. *Id.*; *see also id.* (discussing the "special kind of injury when a stranger invades and occupies the owner's property" and noting that "constructing a gas pipeline is not a tidy intrusion [as] [i]t requires cutting down the families' trees, digging up their soil, blasting their bedrock, displacing wildlife, and polluting the air" in irreparable ways)(internal citations omitted). Moreover, FERC could readily remedy the procedural unfairness its tolling order practice has created, by timely deciding rehearing requests on the merits or, when a reasonable tolling period is required, refusing to allow construction to commence before making a rehearing determination finalizing the certificate order. *Id.* at 956. As to the risk that the procedures used will erroneously deprive a person of the private interest, "[p]rompt access to federal court review of the lawfulness of the taking, *including the public use determination*, is part of the protection the Fifth Amendment affords." 932 F.3d at 955 (emphasis added); *see also id.* (quoting *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("[T]he question what is a public use is a judicial one.")).

While each pipeline authorization is unique, it is instructive that since FERC adopted its Certificate Policy Statement in 1999, it has approved 474 pipeline projects and rejected only two, as of November 2019. *See* Analysis Group, Revising FERC's 1999 Pipeline Certification Policy Statement for the 21st Century 1 (Nov. 2019), *available at* https://www.analysisgroup.com/globalassets/content/insights

/publishing/revising_ferc_1999_pipeline_certification.pdf (Analysis Group Report). That record raises serious concerns that FERC, when granting certificates, is not giving appropriate weight to the underlying need for a "public use" or "public purpose" sufficient under the Fifth Amendment's Takings Clause to authorize the exercise of eminent domain. Timely and meaningful judicial review is essential to ensure that landowners have a fair opportunity to challenge whether FERC's application of its Certificate Policy Statement has resulted in a taking that meets the public use requirement of the Takings Clause before their land is taken and physically altered.

This due process concern is heightened by the weight that FERC gives to private "precedent agreements" as the primary factor in determining whether a project should go forward. Despite calls from stakeholders, including some of the Amici States, to broaden its needs assessment, the Commission has stated that it will not "look behind the precedent agreements to evaluate project need." Order on Rehearing, *Mountain Valley Pipeline, LLC, Equitrans, L.P.*, 163 FERC ¶ 61,197 at *9 (June 15, 2018); *see* Comments of the Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, Washington and the District of Columbia, *Certification of New Interstate Natural Gas Facilities*, No. PL18-1, Accession No. 20180725-5204, at 6-7 (July 25, 2018) ("Multistate Comments") (noting, among other concerns, that "the Commission has relied heavily on proof of

precedent agreements to find need," a practice that "unduly restricts the Commission's inquiry . . . ."). Especially where FERC's certification relies nearly exclusively on private precedent agreements, there must be timely and meaningful judicial review to ensure that FERC issues certificates authorizing eminent domain only to projects with a legitimate public purpose.[2]

This Court has recently demonstrated the importance of judicial review of precedent agreements in determining whether a public purpose exists. In *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), FERC granted a certificate to a pipeline company that had entered into precedent agreements with eight different entities, two of which were Canadian companies serving customers in Canada. The petitioners challenging the certificate argued that because the certificate holder was authorized to exercise eminent domain, crediting the export agreements in finding "project need" violated the Takings Clause because "a private pipeline selling gas to foreign shippers serving foreign customers does not serve a 'public use' within the meaning of the Fifth Amendment." *Id.* at 606. Finding the Commission's responses to this argument unpersuasive, the Court remanded the case to the Commission "for further explanation of why – under the Act, the Takings Clause, and the precedent

[2] *See also* Analysis Group, *supra*, at 5-6 ("Unless FERC modifies its approach to determining need, there is no assurance that the taking of private land is for a public purpose as required by the Constitution.").

of this Court and the Supreme Court – it is lawful to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7 of the Act." *Id.*

In addition, as the recent case of *Spire STL Pipeline LLC*, 169 FERC ¶ 61134 (Nov. 21, 2019) indicates, the concern that FERC may be giving a certificate's public purpose short shrift is further compounded when the precedent agreements are among corporate affiliates. As the dissenting Commissioner in *Spire* noted, "the record suggests that the project . . . is more likely an effort to enrich the shared corporate parent of the developer . . . and its only customer . . . than a response to a genuine need for new energy infrastructure." *Id.* at *21 (Glick, C., dissenting). Despite this evidence, the Commission made "no effort to balance the benefits of the project against [the developer's] extensive use of eminent domain." *Id.* at *27. Prompt judicial review is critical where FERC may be systematically failing to weigh a project's public purpose:

> Because a section 7 certificate comes with eminent domain authority that the Commission cannot circumscribe, we must seriously consider whether conveying eminent domain authority is consistent with the public interest before issuing a section 7 certificate. Exhortations to work with landowners are no substitute for considering whether the pipeline should be built in the first place.

Id. at *27 n.277; *see also* Multistate Comments at 7-9 (arguing, among other things, that "relying too heavily on affiliate contracts risks mischaracterizing the need for the proposed pipeline project.").

In cases such as *Spire*, where there is a genuine question about whether a particular pipeline project redounds more to a private than public benefit, it is essential both that landowners obtain timely judicial review and that the reviewing court undertakes a more searching review of whether the public-use requirement has been met. *See Kelo v. City of New London, Conn.,* 545 U.S. 469, 477 (2005) (finding that the government "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party"); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

The Supreme Court's deferential approach to the public-use determination is not appropriate in the context of FERC certificate decisions. That approach arose in cases where state and local bodies attuned to the public needs of their citizens, rather than an independent federal agency acting on the application of a private party, were determining the public use. Thus, much of the deference afforded arose from federalism concerns that are not present when evaluating FERC's certificate decisions. As the Supreme Court has explained in *Kelo*, its "earliest cases

[concerning public use] . . . embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts *in discerning local public needs*." 545 U.S. at 482 (internal citations omitted) (emphasis added). Noting that the "needs of society have varied between different parts of the Nation," *id.*, the Court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483. That the takings claims challenged state and local decisions, made by bodies intimately familiar with the needs of their citizens, was a critical underpinning to the Court's deferential approach in those cases. *See, e.g.*, *id.* at 483 (involving a city's "carefully formulated" redevelopment plan); *Hawaii Housing Authority*, 467 U.S. at 241 (holding that a Hawaii statute under which property was taken from private landowners and transferred to lessees in order to eliminate the "social and economic evils of land oligopoly" met the standards of a valid public use); *Berman v. Parker,* 348 U.S. 26 (1954) (upholding a redevelopment plan targeting a blighted area of Washington, D.C.). In sum, because deference to state and local decisions on public use is grounded in federalism concerns not present in FERC cases, it is all the more critical that searching judicial review of FERC orders be available in a timely manner.

II. THE COMMISSION'S USE OF TOLLING ORDERS IN CASES IMPLICATING IMPORTANT STATE POLICIES OFFENDS PRINCIPLES OF STATE SOVEREIGNTY.

FERC applies its tolling orders to requests for rehearing in other contexts as well that also implicate additional important sovereign interests. States, of course, "wield sovereign powers." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). The Commission's inaction through the use of tolling orders can also irreparably undermine states' sovereign right to adopt and implement important public policies. Where a federal rule or regulation places a state's or Tribe's "sovereign interests and public policies at stake," the harm is "irreparable if [the state or Tribe] is deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).[3] Such injury can occur in contexts as diverse as energy policy or protection from pipeline development traversing state-owned land conserved pursuant to state law.

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[3] *See also Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 17 (D.D. Cir. 2014) (recognizing loss of state sovereignty as an irreparable harm); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1367 (S.D. Ga. 2018) ("Loss of [state] sovereignty is an irreparable harm"); *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (holding that National Park Service regulation adversely affecting State of Wyoming's ability to manage its trails program and fish populations was infringement on state sovereignty constituting irreparable harm); *North Dakota v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015) ("Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters.").

For example, the Federal Power Act recognizes that states retain broad authority "to direct the planning and resource decisions of utilities under their jurisdiction," including by "order[ing] utilities to purchase renewable generation." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted).[4] These significant state sovereignty issues are at stake in the Commission's recent order in *Calpine Corporation, et al. v. PJM Interconnection*, 169 FERC ¶ 61,239 (Dec. 19, 2019). There, the Commission built upon a June 2018 Commission order, as to which rehearing requests remain pending, finding the grid operator PJM Interconnection's capacity market minimum offer price rule was unjust and unreasonable because it failed to address growing state subsidies to renewable, nuclear, and other sources of energy supported by state policies, and instead covered only new gas-fired resources. *Id.* at *2. Without ruling on the requests for rehearing of the order containing that earlier finding, the Commission's December 2019 order specifically expands the minimum offer price rule to new resources entitled to state subsidies, thereby potentially excluding new renewable energy resources from the PJM capacity market and potentially increasing fossil fuel emissions. Commissioner Glick explicitly stated that the rule is a "direct [] attack on state resource decisionmaking," which will ultimately "supersede state

[4] The Federal Power Act's rehearing and judicial review provisions operate in the same manner as those under the Natural Gas Act. 16 U.S.C. § 825l.

resource" planning and policy making and concludes that "[i]t is hard to imagine how the Commission could much more directly target or aim at state authority over resource decisionmaking." *See* 169 FERC ¶ 61,239 at *61 (Glick, C., dissenting).

Given that the requests for rehearing of the June 2018 order remain pending, and without correction of the Commission's practices of tolling rehearing requests going forward, it is unclear when states will have access to the courts to challenge the Commission's affront to their energy policies. Indefinite tolling could have profound consequences for states if the grid operator moves forward with conducting a capacity market auction under the minimum offer price rule before the states have access to federal court, a scenario akin to construction of a pipeline before judicial review is available. Under the minimum offer price rule, many states' subsidized energy resources would likely be excluded from the auction, causing ratepayers to pay for both the unwanted fossil-fuel energy capacity and the subsidies for their state's preferred resources. And because the capacity market signals the need for future investment in generation resources and aids many states' resource planning, the harm to states would constitute irreparable injury to sovereign interests. It is essential that timely judicial review be available under these circumstances.

In sum, the Commission's current practices of tolling rehearing requests must be corrected to halt a procedure that indefinitely deprives states of timely and

meaningful judicial review, frustrating the states' ability to respond to FERC decisions that implicate the relationship between federal and state policies.

CONCLUSION

For the foregoing reasons, the Court should grant the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 32(G)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4029 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ John B. Howard, Jr.
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IN THE UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I certify that, on this 22nd day of January 2020, the Corrected Brief of Amici Curiae States was filed electronically and served on counsel of record who are registered CM/ECF users.

/s/ John B. Howard, Jr.

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John B. Howard, Jr.