178 FERC ¶ 61,109

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;

 James P. Danly, Allison Clements,

 Mark C. Christie, and Willie L. Phillips.

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| Spire STL Pipeline LLC |  Docket No. | CP17-40-012 |

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND DENYING STAY

(Issued February 17, 2022)

1. On December 3, 2021, the Commission issued a temporary certificate of public convenience and necessity under section 7(c)(1)(B) of the Natural Gas Act (NGA),**[[1]](#footnote-2)** which authorized Spire STL Pipeline LLC (Spire) to continue operating the Spire STL Pipeline.[[2]](#footnote-3)
2. On December 17, 2021, Scott Turman; ST Turman Contracting, LLC; Jacob Gettings; Kenny Davis; 4850 Longhorn; Sinclair Farm LLC; and the Niskanen Center (together, Niskanen Center) jointly filed a timely request for rehearing of the Temporary Certificate Order.[[3]](#footnote-4) On January 3, 2022, Environmental Defense Fund (EDF) filed a timely request for rehearing.[[4]](#footnote-5)
3. Pursuant to *Allegheny Defense Project v. FERC*,**[[5]](#footnote-6)** the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the NGA,**[[6]](#footnote-7)** we are modifying the discussion in the Temporary Certificate Order and continue to reach the same result in this proceeding, as discussed below.**[[7]](#footnote-8)**

# Background

1. On June 22, 2021, the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating and remanding the Commission’s orders authorizing Spire to construct and operate[[8]](#footnote-9) the 65-mile-long Spire STL Pipeline, running from Scott County, Illinois, to St. Louis County, Missouri.**[[9]](#footnote-10)**
2. On July 26, 2021, before the court issued its mandate, Spire filed an application for a temporary certificate of public convenience and necessity under NGA section 7(c)(1)(B).**[[10]](#footnote-11)** Spire explained that if the Spire STL Pipeline is removed from service, Spire Missouri Inc. (Spire Missouri), a local distribution company and shipper on the pipeline, will be unable to obtain adequate supplies to satisfy peak demand in the St. Louis region during the 2021-2022 winter heating season.
3. On September 14, 2021, to ensure continuity of service for a limited period while the Commission considered appropriate next steps, the Commission acted *sua sponte* to issue Spire a temporary certificate to under NGA section 7(c)(1)(B)[[11]](#footnote-12) allowing Spire to continue operation of the Spire STL Pipeline for 90 days.[[12]](#footnote-13)
4. On December 3, 2021, acting on Spire’s July 2021 application, the Commission issued Spire a temporary certificate of public convenience and necessity.[[13]](#footnote-14) The temporary certificate did not authorize the construction of any new facilities and will remain effective until the Commission acts on remand on Spire’s pending certificate application.[[14]](#footnote-15)

# Discussion

## Eminent Domain Authority

1. The Niskanen Center argues that the Commission erred by failing to prohibit Spire from exercising eminent domain authority under the temporary certificate.[[15]](#footnote-16) The Niskanen Center notes that NGA section 7(h)[[16]](#footnote-17) conveys the power of eminent domain to the holder of “a certificate of public convenience and necessity,”[[17]](#footnote-18) but argues that section 7(h) refers only to a certificate issued under NGA section 7(e), and therefore the NGA does not confer eminent domain to the holder of a temporary certificate issued under section 7(c)(1)(B).[[18]](#footnote-19) The Niskanen Center further contends that, because section 7(h) does not refer specifically to holders of “temporary certificates,” the provision does not satisfy the principle that the Commission’s grant of eminent domain must be expressly authorized and narrowly construed.[[19]](#footnote-20) The Niskanen Center argues that it is incumbent on the Commission to take a position on whether eminent domain authority extends to temporary certificate holders[[20]](#footnote-21) and that by refusing to opine on this issue the Commission is effectively endorsing Spire’s use of eminent domain authority under the temporary certificate.[[21]](#footnote-22)
2. In 1947, Congress added section 7(h) to the NGA, allowing “any holder of a certificate of public convenience and necessity” to exercise a federal right of eminent domain to acquire land or other property necessary to construct, operate, and maintain a pipeline and related equipment, if the certificate-holder cannot acquire the land or other property by contract.[[22]](#footnote-23) Courts have repeatedly held that Congress did not give the Commission authority to deny or restrict a certificate-holder’s exercise of the statutory right of eminent domain with respect to a certificate issued pursuant to the procedures laid out in section 7(e).[[23]](#footnote-24) Courts have provided less guidance, however, on whether the same holds true in the case of a temporary certificate.
3. The Commission continues to find that the applicability of NGA section 7(h) to temporary certificates is an issue better resolved by the courts.[[24]](#footnote-25) We disagree with the Niskanen Center’s contention that by taking this approach, the Commission is “affirmatively endorsing Spire’s attempts to complete condemnation.”[[25]](#footnote-26) To the contrary, by virtue of the Commission leaving this question to resolution by the judiciary, the Commission is respecting the prerogative of federal courts, which have jurisdiction over eminent domain proceedings under the NGA, to determine how such questions should be resolved.[[26]](#footnote-27)
4. We note that two federal district courts recently held that temporary certificates confer eminent domain authority. In *Spire STL Pipeline LLC v. Jefferson*, the District Court for the Central District of Illinois held that “the only reasonable construction of § 717f is that temporary certificates issued under subsection (c) are ‘certificates of public convenience and necessity’ under subsection [7](h)” and thus eminent domain authority attaches to a holder of such a certificate.[[27]](#footnote-28) Similarly, in *Spire STL Pipeline LLC v. 3.31 Acres of Land*, the District Court for the Eastern District of Missouri concluded that “[a] temporary certificate confers eminent domain authority.”[[28]](#footnote-29)
5. The Niskanen Center also contends that, under Commission Order Nos. 871-B and 871-C, the temporary certificate is presumptively stayed pending the Commission’s response to the requests for rehearing.[[29]](#footnote-30) The Center asserts that, because the Commission can stay a certificate under Order Nos. 871-B and 871-C, the Commission necessarily can take the targeted step of staying only the eminent domain authority related to a temporary certificate.[[30]](#footnote-31)
6. In Order Nos. 871-B and 871-C, the Commission adopted a policy of presumptively staying a certificate order during the 30-day rehearing period and pending Commission resolution of requests for rehearing filed by landowners, thereby addressing concerns regarding a certificate-holder’s exercise of eminent domain prior to the conclusion of Commission proceedings.[[31]](#footnote-32) Nevertheless, that stay is “only presumptive” and the Commission made clear that “the question of whether to impose a stay will be decided on the circumstances presented in each particular certificate proceeding.”[[32]](#footnote-33) Here, the Commission found that an “emergency” exists, at least temporarily, because “without a temporary certificate, Spire’s customer, Spire Missouri, will experience a loss of gas supply potentially impacting hundreds of thousands of homes and businesses during the winter heating season.”[[33]](#footnote-34) It would have been inconsistent with that finding of a temporary emergency to stay the certificate, thereby perpetuating the emergency circumstances that the certificate was issued to remedy. Under these circumstances, we find that it would be inappropriate to have temporarily stayed the certificate pending rehearing.
7. We also reject the Niskanen Center’s contention that “[h]aving the power to stay the entire certificate, the Commission surely has the authority to stay only [the eminent domain] provision.”[[34]](#footnote-35) As discussed above,[[35]](#footnote-36) the Commission lacks authority to deny or restrict a certificate-holder’s exercise of the statutory right of eminent domain; we view that restriction as encompassing a targeted stay. Thus, the Commission would necessarily have to stay the effectiveness of the entire temporary certificate in order to restrict the temporary certificate holder’s eminent domain authority. Since the Commission has found that an emergency exists warranting the issuance of the temporary certificate,[[36]](#footnote-37) we decline to stay the temporary certificate in its entirety, as would be required to effect a stay of Spire’s eminent domain authority.
8. Moreover, the policy concern cited by the Niskanen Center that “it is fundamentally unfair for a pipeline developer to use a section 7 certificate to begin the exercise of eminent domain before the Commission has completed its review of the underlying certificate order”[[37]](#footnote-38) does not apply in this case, where construction of the pipeline is complete and the purpose of the temporary certificate is merely to allow a developer to continue operating and maintaining the pipeline.[[38]](#footnote-39)

## Allegations of Self-Dealing

1. EDF argues that the Commission was arbitrary and capricious in declining to impose conditions on the temporary certificate to address the concerns of self-dealing between Spire and Spire Missouri raised by the D.C. Circuit in *Environmental Defense Fund v. FERC*.[[39]](#footnote-40) It contends that despite the Commission’s recognition in the Temporary Certificate Order of the D.C. Circuit’s holding that the record contained evidence of self-dealing and representation that it is addressing that issue on remand,[[40]](#footnote-41) the Commission did not explain a basis upon on which it could ignore record evidence of self-dealing in issuing a temporary certificate.[[41]](#footnote-42) EDF argues that the Commission has an obligation to consider the anti-competitive impacts of all section 7 authorizations, regardless whether they are temporary or permanent.[[42]](#footnote-43)
2. As the Commission explained, it issued the Temporary Certificate Order upon a finding that an emergency existed which, absent the issuance of a temporary certificate, would potentially subject hundreds of thousands of homes and businesses to gas shortages during the winter heating season.[[43]](#footnote-44) We acknowledge the D.C. Circuit’s concern that the Commission did not adequately address potential self-dealing allegations in the Certificate Order; however, this issue has been remanded to the Commission and will be addressed when the Commission acts on remand on Spire’s pending certificate application.
3. In vacating the Certificate Order, the D.C. Circuit questioned whether a single precedent agreement between Spire and Spire Missouri, its corporate affiliate, was sufficient to demonstrate the market need and benefits required for the Commission to issue a certificate of public convenience and necessity.[[44]](#footnote-45) It found that evidence of potential self-dealing raised by EDF and other parties was “more than enough to require the Commission to ‘look behind’ the precedent agreement in determining whether there was market need.”[[45]](#footnote-46)
4. The Temporary Certificate Order contains extensive discussion of the harm that might befall Spire Missouri’s customers if a temporary certificate were not issued, and ultimately culminated in the Commission determining that an emergency exists and that the temporary certificate is needed to stave off the potential of gas shortages during the winter.[[46]](#footnote-47) That finding is all that is needed to support the Commission’s action here where the pipeline was previously constructed and is currently in operation. As previously stated, while allegations of self-dealing must be taken seriously and merit additional consideration by the Commission on remand of the Certificate Order, that issue is not relevant to the question addressed by the Commission in this proceeding: whether to issue a temporary certificate in the heart of winter where the health and welfare of hundreds of thousands of customers is at stake.

The Commission orders:

(A) In response to the requests for rehearing filed by the Niskanen Center and EDF, the Temporary Certificate Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) The request for stay filed by the Niskanen Center is denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring in part and dissenting in part

 with a separate statement attached.

( S E A L )

Kimberly D. Bose,

Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

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| Spire STL Pipeline LLC | Docket No. | CP17-40-012 |

(Issued February 17, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in the Commission’s denial of the requested stay of Spire STL Pipeline LLC’s (Spire) temporary certificate. The Commission properly recognizes that it “would be inappropriate to have temporarily stayed the certificate pending rehearing”[[47]](#footnote-48) and that “the Commission lacks authority to deny or restrict a certificate-holder’s exercise of the statutory right of eminent domain.”[[48]](#footnote-49) I also concur in the Commission’s decision to wait until the issuance of an order on remand to address the questions raised in *Environmental Defense Fund v. FERC*,[[49]](#footnote-50) including the questions concerning self-dealing.[[50]](#footnote-51)
2. I dissent, however, from the Commission’s decision to again[[51]](#footnote-52) decline to take a position on whether NGA section 7(h)[[52]](#footnote-53) confers eminent domain authority on the holder of a temporary certificate issued under NGA section 7(c)(1)(B).[[53]](#footnote-54) This question is different from the issues more amenable to disposition in our order on remand because it concerns the rights of Spire as a current holder of a temporary certificate, i.e., whether such a certificate confers upon its holder the right to exercise eminent domain under NGA section 7(h). This question is ready to be decided. In fact, today’s order acknowledges two recent federal district court cases holding that temporary certificates do confer eminent domain authority.[[54]](#footnote-55)
3. The Commission is well-situated to speak in the first instance on the rights enjoyed by a temporary certificate holder under the statute that we administer. This question need not be left to others to decide. Requiring the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority is irresponsible and unnecessary.[[55]](#footnote-56) To leave this issue to the courts is to deprive both the courts *and* the litigants the benefit of a pronouncement by the Commission—regardless of how the Commission comes out on the matter—and the reasoned decision making required to support that pronouncement. The Commission implements NGA section 7 and some degree of deference is owed to the Commission’s reasonable interpretation of section 7(h).[[56]](#footnote-57) At the very least, I expect the courts would be attentive to our thoughts on the matter.
4. The landowners and the Niskanen Center are correct: in declining to interpret NGA section 7(h), the Commission has once again “stuck its head in the sand.”[[57]](#footnote-58)

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly

Commissioner

1. 15 U.S.C. § 717f(c)(1)(B). [↑](#footnote-ref-2)
2. *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (Temporary Certificate Order). [↑](#footnote-ref-3)
3. Niskanen Center Dec. 17, 2021 Request for Rehearing (Niskanen Center Rehearing Request). [↑](#footnote-ref-4)
4. Environmental Defense Fund Jan. 3, 2022 Request for Rehearing (EDF Rehearing Request). [↑](#footnote-ref-5)
5. 964 F.3d 1 (D.C. Cir. 2020) (en banc).   [↑](#footnote-ref-6)
6. 15 U.S.C. § 717r(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”). [↑](#footnote-ref-7)
7. *Allegheny Def. Project*, 964 F.3d at 16-17.  The Commission is not changing the outcome of the Temporary Certificate Order. *See Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015). [↑](#footnote-ref-8)
8. On November 14, 2019, the Spire STL Pipeline entered service during pendency of the appeal. [↑](#footnote-ref-9)
9. *See* *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order), *order on reh’g*, 169 FERC ¶ 61,134 (2019), *vacated sub nom. Envt’l Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir 2021). [↑](#footnote-ref-10)
10. 15 U.S.C. § 717f(c)(1)(B). [↑](#footnote-ref-11)
11. *Id.* (“the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate ….”). [↑](#footnote-ref-12)
12. *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (September 2021 Order); *order on reh’g*, 177 FERC ¶ 61,114 (2021) (November 2021 Order). [↑](#footnote-ref-13)
13. Temporary Certificate Order, 177 FERC ¶ 61,147. [↑](#footnote-ref-14)
14. *Id.* at ordering paras. A, C. [↑](#footnote-ref-15)
15. Niskanen Center Rehearing Request at 1, 8-9. [↑](#footnote-ref-16)
16. 15 U.S.C. § 717f(h). [↑](#footnote-ref-17)
17. Niskanen Center Rehearing Request at 8. [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. *Id.* [↑](#footnote-ref-20)
20. *Id.* [↑](#footnote-ref-21)
21. *Id.* at 9 (quoting November 2021 Order, 177 FERC ¶ 61,114 at P 8 (Danly, Comm’r, dissenting) (“To require the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority upon temporary certificate holders is irresponsible and unnecessary.”)). [↑](#footnote-ref-22)
22. Section 7(h) states that:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h). [↑](#footnote-ref-23)
23. *E.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (internal citation omitted)); *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that NGA section 7(h) “contains no condition precedent” to the right of eminent domain, other than issuance of the certificate, when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder .... Thus, FERC does not have discretion to withhold eminent domain once it grants a Certificate.” (internal citation omitted)). [↑](#footnote-ref-24)
24. *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at P 70; November 2021 Order, 177 FERC ¶ 61,114 at P 10. [↑](#footnote-ref-25)
25. Niskanen Center Rehearing Request at 9. [↑](#footnote-ref-26)
26. Temporary Certificate Order, 177 FERC ¶ 61,147 at P 70 (noting the particular implementing role conferred on the courts under NGA section 7(h)). [↑](#footnote-ref-27)
27. No. 18-cv-03204, slip op. at \*5-7 (C.D. Ill. Oct. 28, 2021) (denying defendant-landowners’ Motion to Dissolve Injunction and Dismiss Condemnation Action for Lack of Subject Matter Jurisdiction and upholding Spire’s authority to continue operating the Spire STL Pipeline through defendant-landowners’ properties based on and subject to the terms of the September 2021 Order). [↑](#footnote-ref-28)
28. No. 4:18 CV 1327 DDN, 2021 WL 5492897, at \*3 (E.D. Mo. Nov. 23, 2021) (denying defendant-landowners’ motion to dismiss the condemnation action and dissolve the injunction and upholding Spire’s authority under the September 2021 Order). [↑](#footnote-ref-29)
29. Niskanen Center Rehearing Request at 10-12. *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), *order on reh’g*, Order No. 871-B, 86, Fed. Reg. 26,150 (May 13, 2021), 175 FERC ¶ 61,098 (2021), *order on reh’g*, Order No. 871-C, 176 FERC ¶ 61,062 (2021). [↑](#footnote-ref-30)
30. Niskanen Center Rehearing Request at 11 (“Intervenors are not requesting that the Temporary Certificate be stayed in its entirety, but only to the extent it grants eminent domain authority. Having the power to stay the entire certificate, the Commission surely has the authority to stay only that provision.”). [↑](#footnote-ref-31)
31. Order No. 871-B, 175 FERC ¶ 61,098 at PP 45-46 (explaining that courts have held that the Commission lacks authority to restrict the exercise of the right of eminent domain, but the Commission unquestionably may determine the effective date of and stay its own orders, which in practice withholds the eminent domain authority conveyed through a certificate). [↑](#footnote-ref-32)
32. Order No. 871-B, 175 FERC ¶ 61,098 at P 51. [↑](#footnote-ref-33)
33. Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47. [↑](#footnote-ref-34)
34. Niskanen Center Rehearing Request at 11. [↑](#footnote-ref-35)
35. *See supra* paragraph 9. [↑](#footnote-ref-36)
36. *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47. [↑](#footnote-ref-37)
37. Order No. 871-B, 175 FERC ¶ 61,098 at P 47. [↑](#footnote-ref-38)
38. *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:18 CV 1327 DDN, 2021 WL 5492897, at \*3 (E.D. Mo. Nov. 23, 2021) (similarly explaining that because Spire has already completed construction of the pipeline and is not permitted by the temporary certificate to engage in any new construction, Order No. 871-B does not presumptively stay plaintiff's eminent domain authority); *Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, slip op. at \*8 (C.D. Ill. Oct. 28, 2021) (stating that the policy concerns underlying Order No. 871-B do not apply where construction of the pipeline has already been completed and the purpose of the temporary certificate is to allow a developer to continue operating and maintaining the pipeline). [↑](#footnote-ref-39)
39. EDF Rehearing Request at 2. [↑](#footnote-ref-40)
40. Temporary Certificate Order, 177 FERC ¶ 61,147 at PP 60 (“We are mindful of the D.C. Circuit’s concerns regarding the potential that Spire engaged in self-dealing and the Commission’s failure to seriously examine those concerns. Nevertheless, these matters have been remanded to the Commission, and are best addressed on remand.”). [↑](#footnote-ref-41)
41. EDF Rehearing Request at 5. [↑](#footnote-ref-42)
42. *Id.* at 3, 5 (citing *Pub. Utils. Comm’n of State of Cal. v. FERC*, 900 F.2d 269, 297 (D.C. Cir. 1990)). [↑](#footnote-ref-43)
43. Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47. [↑](#footnote-ref-44)
44. 2 F.4th at 973. [↑](#footnote-ref-45)
45. *Id.* at 975. [↑](#footnote-ref-46)
46. *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at PP 27-47. [↑](#footnote-ref-47)
47. *Spire STL Pipeline LLC*, 178 FERC ¶ 61,109, at P 13 (2022). I remain convinced that the Commission exceeded its authority in establishing the policy announced in Order Nos. 871-B and 871-C to presumptively stay Natural Gas Act (NGA) section 7(c) certificate orders. *See Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 176 FERC ¶ 61,062 (2021) (Danly, Comm’r, dissenting at PP 2-6) (Order No. 871-C); *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 175 FERC ¶ 61,098 (2021) (Danly, Comm’r, dissenting at PP 6-12) (Order No. 871-B). Section 19(c) sets forth the rule—that “[t]he filing of an application for rehearing under subsection (a) shall not . . . operate as a stay of the Commission’s order”—and the exception to that rule—“unless *specifically* ordered by the Commission.” 15 U.S.C. § 717r(c) (emphasis added). [↑](#footnote-ref-48)
48. *Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 at P 14. [↑](#footnote-ref-49)
49. 2 F.4th 953 (D.C. Cir. 2021). [↑](#footnote-ref-50)
50. *See Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 at P 17 (“We acknowledge the D.C. Circuit’s concern that the Commission did not adequately address potential self-dealing allegations in the Certificate Order; however, this issue has been remanded to the Commission and will be addressed when the Commission acts on remand on Spire’s pending certificate application.”). NGA section 7(c)(1)(B) states “[t]hat the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, *without notice or hearing, pending the determination of an application for a certificate*.” 15 U.S.C. § 717f(c)(1)(B) (emphasis added). [↑](#footnote-ref-51)
51. *See Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (Danly, Comm’r, concurring in part and dissenting in part at PP 2, 7); *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021) (Danly, Comm'r, dissenting at PP 7-17). [↑](#footnote-ref-52)
52. 15 U.S.C. § 717f(h). [↑](#footnote-ref-53)
53. *Id*. § 717f(c)(1)(B). [↑](#footnote-ref-54)
54. *See Spire STL Pipeline LLC* 178 FERC ¶ 61,109 at P 11 (citing *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:18 CV 1327 DDN (E.D. Mo. Nov. 23, 2021); *Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, slip op. (C.D. Ill. Oct. 27, 2021)). Assuming that NGA section 7(h) confers eminent domain authority upon temporary certificate holders, the Commission may not restrict such authority. *See supra* P 1 (agreeing with my colleagues that “the Commission lacks authority to deny or restrict a certificate-holder’s exercise of the statutory right of eminent domain”) (citation omitted); *see, e.g.*, *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (“The NGA, 15 U.S.C. § 717f(h), affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to ‘acquire [the right of way] by contract.’”); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . .  Thus, FERC does not have discretion to withhold eminent domain power once it grants a Certificate.”) (citation omitted); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . .  The Commission does not have the discretion to deny a certificate holder the power of eminent domain.”) (citation omitted). [↑](#footnote-ref-55)
55. *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (Danly, Comm’r, dissenting at P 8). [↑](#footnote-ref-56)
56. *See PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135, at P 20 (2020) (“Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.”) (citing *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at P 15 (2020); *City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*)); *PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135 at P 22 (rejecting an argument that “the Commission does not ‘qualify for *Chevron* deference’ when construing NGA section 7(h)”); *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 at P 15 (“[O]ur interpretation of NGA section 7(h) merits deference. The Third Circuit’s ruling does not diminish the Commission’s authority to speak on a statute that we administer.”) (citations omitted). [↑](#footnote-ref-57)
57. Landowners & Niskanen Center December 17, 2021 Request for Rehearing at 8. [↑](#footnote-ref-58)