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

NO. 03-1066

RICHARD BLUMENTHAL,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTER-STATEMENT OF JURISDICTION

Petitioner Richard Blumenthal, the Connecticut Attorney General ("CTAG"), seeks judicial review purportedly on behalf of the State of Connecticut, of two orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"), *Islander East Pipeline Co.*, 100 FERC ¶ 61,276 (2002), *order on reh'g*, 102 FERC ¶ 61,054 (2003).[1] Because Connecticut law does not authorize Petitioner to seek

[1] All citations to the *FERC Reports* are captioned *Islander East Pipeline Co.* unless otherwise noted.

judicial review of those orders on behalf of the State of Connecticut, but only on behalf of the Connecticut Department of Environmental Protection ("CDEP"), which is not a petitioner in this case, Petitioner lacks standing, and the petition should be dismissed for lack of subject-matter jurisdiction.

STATEMENT OF THE ISSUES

1. Does Petitioner lack standing to seek judicial review of the challenged orders on behalf of the State of Connecticut, where Connecticut law limits Petitioner's authority to seek such review to representing the CDEP, which is not a party in this case?

2. Did the Commission reasonably balance all environmental and non-environmental factors in determining that issuance of a certificate of public convenience and necessity, which contained numerous environmental conditions, was in the public interest?

3. Did the Commission act within its statutory authority when it provided that state and local authorities would not be allowed to impede the certificated activity by denying or unreasonably delaying issuance of permits?

PERTINENT STATUTES AND REGULATIONS

The statutes and regulations applicable to this case are set forth in an appendix to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

Section 1(b) of the ("NGA"), 15 U.S.C. § 717(b), confers upon FERC comprehensive regulatory authority over the transportation and sale for resale of natural gas in interstate commerce. NGA § 7(c)(1)(A) prohibits any "natural-gas company or person" from constructing or operating pipeline facilities prior to obtaining a "certificate of public convenience and necessity" from FERC. 15 U.S.C. § 717f(c)(1)(A). NGA § 7(e) mandates the issuance of such certificates to qualified applicants once the Commission determines that the proposed service "is or will be required by the present or future public convenience or necessity[.]" 15 U.S.C. § 717f(e). NGA § 7(e) further authorizes the Commission to attach to certificates "such reasonable terms and conditions as the public convenience and necessity may require." *Id.* NGA § 7(h) grants certificate holders the right to acquire land necessary to the completion of their projects by eminent domain. 15 U.S.C. § 717f(h).

The Commission's determination to issue or condition a certificate must incorporate the requirements of other statutes. Section 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4322, requires all federal agencies to prepare an Environmental Impact Statement ("EIS") prior to taking "major Federal actions" that significantly affect the quality of the human environment. Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, requires consideration of the proposed pipeline's effect on any "site, building, structure, or object that is included in or eligible for inclusion" in the National Register of Historic Places prior to granting a certificate. Finally, Section 401(a)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a)(1), effectively prohibits FERC from approving any construction or operation of facilities that may result in a "discharge" into navigable waters prior to the applicant's obtaining a certificate from the affected state certifying that the project complies with CWA standards.

II. The Proceeding Below

Islander East Pipeline Company ("Islander East") proposes to construct and operate a natural gas pipeline and appurtenant facilities (collectively, the "Project") that will extend approximately fifty miles from an interconnection with Algonquin Gas Transmission Company's existing pipeline near North Haven, Connecticut, across Long Island Sound, to a termination point on Long Island near Brookhaven,

New York. 102 FERC ¶ 61,054 P 2. Approximately 22.6 miles of the pipeline will be located offshore in Long Island Sound, 10.2 miles onshore in Connecticut and twelve miles onshore in Long Island. 100 FERC ¶ 61,276 P 6. The new facilities initially will transport 260,000 Dekatherms per day ("Dth/d") of natural gas on a firm basis to Long Island markets. 102 FERC ¶ 61,054 P 2. Currently, Long Island is served by only one natural gas pipeline, operated by Iroquois Gas Transmission System, L.P. *Id.* P 5.

On July 3, 2001, FERC issued a Notice of Intent ("NOI") to prepare an Environmental Assessment, soliciting public comments to identify significant environmental issues. Record Item ("RI") No. 10. The NOI was sent to federal, state, county and local agencies, state and local conservation organizations, federal and state elected officials, local newspapers, libraries, property owners along the proposed pipeline route and other individuals. RI No. 533 at 1-2.

On October 4, 2001, after receiving more than 70 letters or interventions from concerned landowners, state and local agencies, townships and environmental groups, FERC issued a notice, stating that it intended to visit designated sites and to prepare an EIS and inviting parties to attend the meetings and express their concerns. RI No. 533 at 1-3. During October 16-18, 2001, FERC staff conducted site visits on Long Island and in Connecticut, along with a meeting with federal, state and local agencies

in Connecticut on, and on February 20, 2002, staff conducted an additional site visit to review alternatives. *Id.*

FERC's draft EIS, issued on March 29, 2002, provided a period in which interested parties could file comments. RI No. 533 at 1-3. During the comment period, FERC held public meetings, in Long Island on May 7, 2002 and in Connecticut on May 8, 2002, where 56 persons made statements. *Id.* In addition, FERC received comment letters from six federal agencies, eight state agencies, one county, four local municipalities, and 82 groups and individuals. *Id.*

FERC's final EIS, issued on August 21, 2002, summarized and responded to all comments received on the draft EIS, and discussed information that had been provided by Islander East and Algonquin, and further developed by field investigations, research of applicable literature, analyses of route variations, and contacts with federal, state, and local agencies and with individual members of the public. RI No. 533. The final EIS concluded that, if the proposed Project was constructed and operated in accordance with FERC Staff's recommended mitigation measures, its construction and operation would result in "limited adverse environmental impact" and would be an environmentally acceptable action. *Id.* at ES-5, 5-1; 102 FERC ¶ 61,054 P 3. The final EIS also explained that any such adverse impacts of the Project would be largely temporary, and would be most significant during the construction

period. RI No. 533 at ES-5, 2-10, 5-1, 5-3 to 5-9. The EPA published a notice of availability of the final EIS in the Federal Register on August 30, 2002. 102 FERC ¶ 61,054 P 3 n.8.

In the meantime, on December 21, 2001, FERC's preliminary determination found Islander East's proposal to be in the public convenience and necessity, subject to completion of FERC's environmental analysis. 97 FERC ¶ 61,363 (2001). On September 19, 2002, the first challenged order denied rehearing of the Commission's December 21 preliminary determination and, as relevant here, issued a certificate authorizing construction of the Islander East pipeline. 100 FERC ¶ 61,276 ("Certificate Order"). Noting that Iroquois is currently the only pipeline that provides direct access to Long Island, the Certificate Order found that the Project would "provide Long Island with another source of supply, allowing this market to enjoy the benefits of pipeline-to-pipeline competition for the first time." *Id.* P 56; 102 FERC ¶ 61,054 P 5. "More importantly," the Project would "provide much needed security and reliability by providing a second facility to access supply in the event something

happens to either of the pipeline facilities." 100 FERC ¶ 61,276 P 56.[2] Because the Project provided those benefits, and, as conditioned, was an environmentally acceptable action, the Certificate Order concluded it was required by the public convenience and necessity. *Id.* P 3. Islander East had to satisfy all certificate conditions before it could begin construction and operation of the Project. *See id.* Conclusion and Appendix; 102 FERC ¶ 61,054 P 42 & n.38.

On October 21, 2002, the CDEP Commissioner filed a motion for late intervention and a request for rehearing. RI Nos. 650, 651. The CDEP Commissioner represented that the DEP "is the natural resource agency for the State of Connecticut" and that its "constituent departments include . . . an Office of Long Island Sound Programs[,]" which, in turn, regulates activities impacting "Connecticut's coastal environment[.]" RI No. 651 at 1. Others, including Petitioner, also sought rehearing. *See* RI No. 643.

[2] The final EIS had concluded that an alternative, albeit hypothetical, route, which was a modification of a route originally proposed by Iroquois in another docket, was environmentally preferable to the Project route (primarily because it involved less construction in Long Island Sound). The alternative was hypothetical because Iroquois was not proposing to build along this route. RI No. 533 at 4-8 to 4-10. The Commission rejected this alternative, finding that even if it was not hypothetical, its environmental advantages were outweighed by the Project's non-environmental advantages of providing pipeline-to-pipeline competition and added reliability. 100 FERC ¶ 61,276 P 56; 102 FERC ¶ 61,054 P 5.

The second challenged order reiterated that the proposed Project would "increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects," and would "introduce pipeline-to-pipeline competition to eastern Long Island markets." 102 FERC ¶ 61,054 P 59 ("Rehearing Order"). Moreover, having reviewed the precedent gas-supply agreements filed by Islander East as well as various market studies, FERC determined that "there was sufficient long and short-term market demand to support the proposed project." *Id.*

In addition, "the filings made by Islander East's proposed customers and the New York [Public Service Commission]" emphasized "the need for a totally separate [S]ound crossing to provide contingency protection for both gas and electric systems against a total loss of supply if damage were to occur to the Iroquois line." 102 FERC ¶ 61,054 P 61. One customer, KeySpan Delivery Companies, "alone currently serves approximately 1.8 million customers, most of whom are residential and small commercial customers who use natural gas for life sustaining uses such as heating and cooking." *Id.* Accordingly, "disruption of existing firm service from Iroquois for any significant period could require KeySpan to curtail service to approximately 124,000 customers on Eastern Long Island[,]" which "would have a significant and possibly disastrous impact." *Id.* Moreover, "if an unexpected event" disrupted Iroquois'

"service to a natural gas local distribution company . . . during the winter," the company's "customers could be without heat for an extended period of time." *Id.* P 88.

Considerations such as these had led FERC, the New York Public Service Commission, and the New York Reliability Council to agree on the importance of having a contingency plan for the single failure of any gas pipeline. 102 FERC ¶ 61,054 P 90. Thus, FERC found it "in the public interest to approve a pipeline facility that will continue to provide service to high priority customers in the event service from other alternative pipelines experiences long term disruptions." *Id.*

The Rehearing Order denied Petitioner's request for rehearing. 102 FERC ¶ 61,054 P 1. The Order also denied the CDEP Commissioner's motion to intervene out of time, and, because the CDEP Commissioner was not a party, dismissed its request for rehearing. *Id.* PP 18, 19. *See* 15 U.S.C. § 717r(a) (only parties to proceeding may file applications for rehearing).

Petitioner filed the instant petition for review on March 7, 2003. The CDEP Commissioner filed a petition for review of the same orders in No. 03-1075, on March 18, 2003. By order dated September 1, 2004, this Court summarily affirmed the Commission's denial of the CDEP's late intervention, and dismissed No. 03-1075 on

grounds that the CDEP Commissioner was not a party to the underlying proceeding. *See* 15 U.S.C. § 717r(b) (limiting petitions for judicial review to parties).

SUMMARY OF ARGUMENT

I

Connecticut law does not authorize the CTAG to initiate federal-court litigation regarding environmental matters, except on behalf on of the CDEP. Because the CDEP is not a petitioner in this case, Petitioner lacks authorization to bring this appeal under Connecticut law, and, therefore lacks standing to bring this appeal under Article III of the Constitution. Accordingly, the petition should be dismissed for lack of subject-matter jurisdiction.

To establish standing, a state official seeking judicial relief from an Article III court must demonstrate that the action at issue impairs the official's discharge of its legal obligations or that the official has legal authority to commence proceedings concerning the subject matter of its jurisdiction. If the official has no standing, an Article III court has no jurisdiction to hear the claim.

The Connecticut Supreme Court has held that the CTAG has no common law authority to act, and, thus, lacks standing to pursue litigation that his office is not specifically authorized by statute to pursue. The CTAG's statutory authority to pursue

litigation is limited to representing other state officers, including department heads, in cases in which the state has an interest.

Under Connecticut law, the CDEP has sole authority to initiate litigation in federal courts concerning environmental matters. While the CTAG can represent the CDEP Commissioner in federal-court litigation that the Commissioner initiates, the CTAG cannot initiate that litigation by itself. Because the CDEP is not a party to this appeal, Petitioner has exceeded his statutory authority.

As the challenged orders do not impair Petitioner's discharge of his statutory obligations and Petitioner otherwise lacks authority to bring this appeal, Petitioner lacks standing, the Court lacks jurisdiction, and the petition should be dismissed.

II

The Commission properly certificated the Project, as conditioned, on the ground that its significant benefits will outweigh its limited adverse environmental effects. The record conclusively shows that by providing a second pipeline into Long Island, the Project will provide Long Island's largely residential and small commercial customers the benefits of pipeline-to-pipeline competition, and, even more significantly, much needed security and reliability. Moreover, by making satisfaction of numerous environmental conditions developed from the final EIS a prerequisite for commencement of construction, FERC assured that any potential adverse

environmental impacts that might result from the Project's implementation would be mitigated.

Petitioner's contention that the Commission failed to order or to complete the necessary environmental studies mandated under NEPA § 102 prior to issuing a final EIS and Islander East's certificate does not withstand scrutiny. The Commission required studies to address all material environmental impacts likely to result from the project; issuing a certificate subject to future completion of certain studies and reports has been expressly endorsed this Court.

Petitioner's contention that Islander East may not construct its pipeline across the Connecticut-owned portion of Long Island Sound without the state's consent is similarly misguided. NGA § 7(h) authorizes certificate holders to obtain state-owned land through eminent domain, and the courts have long recognized that Congress has authority to delegate eminent-domain authority to agencies and private parties in furtherance of federal goals.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

Connecticut law does not authorize Petitioner to seek review of the challenged orders. Accordingly, Petitioner lacks standing, and the Court lacks subject-matter jurisdiction over the appeal.

A. Standing Is A Jurisdictional Prerequisite.

Article III of the Constitution confines the jurisdiction of the federal courts to adjudication of cases or controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). An individual seeking judicial relief from an Article III court must demonstrate the existence of a case or controversy by showing that he has standing, *i.e.*, has suffered a cognizable injury that can be redressed by the Court. *See, e.g., Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976).

Since the question of standing is integral to an appellate court's subject-matter jurisdiction, which cannot be waived, a court must decide the issue even if raised for the first time on appeal. *See Jenkins v. McKeithen*, 395 U.S. 411, 417 (1969). A petitioner has the burden of demonstrating standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and failure to do so requires dismissal. *McNutt v. General*

Motors Acceptance Corp., 298 U.S. 178, 188-90 (1936); *Chiron Corp. v. National Transp. Safety Bd.*, 198 F.3d 935, 939-44 (D.C. Cir. 1999).

Injury necessary to confer standing is referred to as "injury-in-fact." *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180 (2000). This Court equates Article III's requirement of injury to NGA § 19(b)'s requirement that persons seeking judicial review of Commission action be "aggrieved by an order issued by the Commission in such proceeding." 15 U.S.C. § 717r(b). *See Northwestern Pub. Serv. Co. v. FPC*, 520 F.2d 454, 458 (D.C. Cir. 1975) (a petitioner is "aggrieved" within the meaning of NGA § 19(b) if as a result of a Commission order, the petitioner "has sustained 'injury in fact' to an interest arguably within the zone of interests to be protected or regulated by the [Commission] under the Act").

A public agency seeking review of the actions of another agency under a statute that, like NGA § 19(b), permits review only by persons "aggrieved" by the latter agency's actions must establish a sufficiently "clear and distinctive responsibility" for the matters for which review is sought "as to overcome the universal assumption that 'person adversely affected or aggrieved' leaves private interests (even those affected by public policy) to be litigated by private parties." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132 (1995). Whether the agency meets this standard depends on whether the

petitioning agency's statutory scheme makes it the "champion" of persons aggrieved by the challenged actions. *See id.* The petitioning agency can meet the standing requirement by demonstrating a statutory or common-law relationship with aggrieved persons (such as a guardianship) that authorizes it to bring suit on their behalf, express statutory authorization to initiate litigation, or interference with its discharge of its legal obligations. *See id.* at 132-34.

B. Petitioner Lacks Standing.

1. Petitioner Lacks Authority To Seek Review of the Challenged Orders Under Connecticut Common Law.

Petitioner claims that the Supreme Court of Connecticut has recognized the CTAG's duty to '"protect the interest of his client, the people of the state[,]'" Br. at 8 (quoting *Levitt v. Attorney General*, 151 A. 171, 174 (1930)), and that the people of Connecticut have a direct interest in the Long Island ecosystem. *Id.* at ix-x. Despite Petitioner's apparent belief that the foregoing statements establish his common-law right to seek review of the challenged orders, Connecticut case law makes clear that he has no independent common-law authority to seek review of the instant orders.

In *Blumenthal v. Barnes*, 804 A.2d 152, 170 (2002) ("*Barnes*"), the Connecticut Supreme Court affirmed that the CTAG derives its authority to act solely from statute, and, therefore, lacks standing to litigate matters absent a statutory grant of authority to pursue the action. In that case, the CTAG filed an action at common law against an

officer of a state charter school principally based on alleged misappropriation of non-charitable contributions. A question was raised as to the CTAG's standing, and the court described the showing required: "Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved." 804 A.2d at 157.

The court affirmed the trial court's judgment that the CTAG "had no authority statutory *or otherwise*" to pursue the action. 804 A.2d at 154 (emphasis added). The CTAG's lack of statutory or common-law ("otherwise") authority to bring an action concerning non-charitable contributions meant the CTAG lacked standing to bring the case.

The court's conclusions rested, in part, on an historical review of the CTAG's authority. Prior to the creation of the office of the CTAG, "each state agency and department had retained its own legal counsel to represent it, and thus the state, in legal matters pertaining to the respective agency or department." 804 A.2d at 167 (citation omitted). That meant that "no one state's attorney was responsible for appearing on behalf of the governor or other state officers, departments, boards or commissions, in various matters of significance to the state." *Id.*

Accordingly, the legislature defined the scope of the CTAG's authority in P.A. 191 § 2 (now codified as amended at Conn. Gen. Stat. § 3-125), in pertinent part as follows:

> '[The CTAG] shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which the state's attorneys have direction. He shall advise and assist the state's attorneys if they so request. *He shall appear for the state*, the governor, the lieutenant-governor, the secretary, the treasurer, and the comptroller, *and for all heads of departments and state boards, commissioners,* agents . . . and institutions, *in all suits and other civil proceedings . . . in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question in any court or other tribunal*, as the duties of his office shall require; and all such suits shall be conducted by him or under his direction . . .'

804 A.2d at 168 (quoting P.A. 191 § 2) (emphasis added in brief). In other words, the legislature created the CTAG's office to represent the state and various state officials in cases that involve the state as a party, a state interest, or a challenge to the conduct of state officials.

Based on this history and the plain language of P.A. 191, the court in *Barnes* rejected the CTAG's argument that he had broad authority to act under Connecticut common law. Though other language in P.A. 191 § 2 expressly gave the CTAG common-law authority "to represent the public interest in the protection of public and charitable gifts, legacies and devises[,]" the "exclusionary language of the act" and

"the principle of *inclusio unius est exclusio alterius*"[3] dictated the conclusion that the CTAG possessed "only that common-law authority . . . that the legislature has transferred to [CTAG] by way of legislation." 804 A.2d at 170. Thus, the CTAG's authority under Conn. Gen. Stat. § 3-125 to bring suits concerning *charitable* gifts could not be expanded to give the CTAG common-law authority to initiate litigation concerning non-charitable gifts. *Id.* at 164.

Finally, the court rejected the argument that the CTAG's lack of standing would allow the alleged wrongdoing to go unremedied. Rather, the CTAG could bring an action under Conn. Gen. Stat. §§ 3-125 and 10-66ee(h) "on behalf of the commissioner of education, to compel the repayment of" the misappropriated state funds. *Barnes,* 804 A.2d at 166-67 (footnotes omitted). In other words, to bring an action against the defendant officer under Conn. Gen. Stat. § 3-125, the CTAG had to appear and act on behalf of the affected department head, the Commissioner of Education. *Barnes* thus makes clear that the CTAG has no authority under Connecticut common law to represent either the State or its residents.

2. No Connecticut Statute Authorizes Petitioner To Seek Review of the Challenged Orders.

[3] "[T]he inclusion of one thing implies the exclusion of another thing." *Ameren Servs. Co. v. FERC,* 330 F.3d 494, 500-01 (D.C. Cir. 2003).

Petitioner claims to be "empowered[,] pursuant to Section 3-125 of the General Statutes[,]" to "appear in this case 'on behalf of the State of Connecticut.'" Br. at vii. Neither § 3-125 nor any other Connecticut statute authorizes Petitioner to seek review of the challenged orders.

a. Conn. Gen. Stat. § 3-125 Does Not Authorize Petitioner To Seek Such Review.

Conn. Gen. Stat. § 3-125 provides the CTAG the following authority to litigate:

> [The CTAG] shall *appear for* the state, the Governor [other officers of the State], and for all heads of departments and state boards, commissioners . . . and institutions . . . in all suits and other civil proceedings . . . in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question . . . in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. . . . [The CTAG] shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. . . . All suits or other proceedings by [officers and boards named in the statute] shall be brought by [the CTAG] or under his direction[.]

(Emphasis added).

Nothing in this statute authorizes Petitioner to appeal the Certificate and Rehearing Orders other than on behalf of another Connecticut officer or department head. While the CTAG may represent state departments, boards and commissions in those proceedings in which the state is a party or has an interest, *Barnes*, 804 A.2d at

167 n.32, Petitioner is not representing such an entity in this appeal, but is appearing on his own behalf as the CTAG. The instant case does not fit within the one situation in which Conn. Gen. Stat. § 3-125 gives the CTAG a mandate to litigate in the "public interest" because it is not a case or action involving the "protection" of charitable gifts, legacies or devises.

Thus, the specific limitations on the CTAG's authority in Conn. Gen. Stat. § 3-125 deprive Petitioner of standing to seek review here. *See, e.g., State ex rel. Barlow v. Kaminsky*, 136 A.2d 792, 796 (1957) ("[a]n enumeration of powers in a statute is uniformly held to forbid the things not enumerated").

The CTAG's reliance on *Levitt* for the proposition that Conn. Gen. Stat. § 3-125's limited grant of authority translates into authority to represent directly, and on his own initiative, the interests of the people of Connecticut concerning environmental matters, *see* Br. at 8, is entirely misplaced. At issue in *Levitt* was the extent of CTAG's discretion to act under General Statute § 3614, now Conn. Gen. Stat. § 16-5, to remove a Public Utilities Commissioner for misconduct. *See Levitt*, 151 A. at 174. The scope of the CTAG's authority under Conn. Gen. Stat. § 3-125 was not at issue, and, therefore, the statute was not mentioned in the opinion. Accordingly, *Levitt* has no relevance to any issue before this Court and offers no basis for a finding that CTAG has standing to appeal the challenged orders.

b. Other Connecticut Statutes Reinforce the Conclusion that the Legislature Did not Intend To Authorize Petitioner To Seek Such Review.

Conn. Gen. Stat. § 3-125 authorizes the CTAG to appeal the challenged orders only as the representative of the CDEP. A survey of statutes granting the CTAG authority to act in other situations demonstrates that if the Connecticut legislature had intended to give the CTAG independent authority to litigate environmental matters, the legislature would have said so.

Conn. Gen. Stat. § 3-129c, for example, authorizes the CTAG to "bring an action, or intervene in an action, including a class action, as attorney for any persons residing in [Connecticut], or in the name of the state as *parens patriae*" for such persons regarding "the imposition of the New York City personal income tax" on such persons "who earn income in New York City," if that tax "is not imposed on individuals who are residents of the state of New York who do not reside in New York City." The statute's proponent explained that the statute was needed to "clarify" that "the [CTAG] had the standing to bring the action" because the action would not be brought on behalf of a state department authorized to bring suit, but "on behalf of some residents of the state." *See* Addendum, Connecticut General Assembly, 15 H.R. Proc., Pt. 15, 1999 Sess., pp. 5689-90, remarks of Representative Farr; *see also id.* at 5691-92 (same). If the CTAG had the authority to represent generally the interests of

Connecticut and its residents, Conn. Gen. Stat. § 3-129c would have been unnecessary.

Other statutes defining the scope of the CTAG's authority to litigate emphasize the legislature's care in defining the contours of that authority, and make clear that the legislature was well aware of what language was required to authorize the CTAG to take an appeal such as this one, had it chosen to grant such authority. *See, e.g.,* Conn. Gen. Stat. § 28-13(a) (CTAG to "appear for and defend the state" in any civil action brought against it arising from a civil preparedness activity); Conn. Gen. Stat. § 16a-20(a) (the Connecticut Office of Policy and Management ("OPM") to "be represented by the [CTAG]" if it commences an action in state or federal court); Conn. Gen. Stat. § 21a-86g ("upon complaint of the Commissioner of Consumer Protection," the CTAG "shall institute a civil action to recover [a] penalty" for violation of Connecticut consumer protection laws); Conn. Gen. Stat. § 1-89(c) (CTAG may bring a civil action against a public official who breaches the State's code of ethics); Conn. Gen. Stat. § 4-28j(b) (CTAG "may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow funds required" under Connecticut law). The absence of any language in the Connecticut General Statutes giving the CTAG independent authority to represent the state in environmental matters shows conclusively that the legislature did not intend him to have that authority.

2. The Challenged Orders Do not Interfere with the Discharge of Petitioner's Legal Obligations.

The only Connecticut official arguably affected by the challenged orders is the CDEP Commissioner. Title 22a of Connecticut's General Statutes, titled "Environmental Protection," delegates to the CDEP "jurisdiction over all matters relating to the preservation and protection of the air, water and other natural resources of the state." Conn. Gen. Stat. § 22a-2(a). Conn. Gen. Stat. § 22a-9 states that the CDEP Commissioner "shall act as official agent of the state in all matters affecting the purpose of[,]" *inter alia*, Title 22a "under any federal laws now or hereafter to be enacted[.]" Though the CTAG is referenced repeatedly in Title 22a, none of those references gives the CTAG any substantive responsibility for regarding environmental matters, much less authorizes the CTAG to appeal a federal agency's orders.

Though the CDEP is the only State agency authorized by the Connecticut Legislature to appeal the challenged orders on environmental grounds, the CDEP Commissioner is not a party to this proceeding. Though he moved to intervene in the proceeding below, identifying the CDEP as "the natural resource agency for the State of Connecticut[,]" RI No. 651, the Commission denied the motion as untimely, and this Court summarily affirmed that denial. In the same order, the Court dismissed the CDEP Commissioner's petition in No. 03-1075 on grounds that he was not a party.

Accordingly, under Connecticut law, Petitioner has no responsibility over the subject matter of the challenged orders and no independent authority to appeal those orders. By statute, the authority to determine the interests of Connecticut and its residents with respect to environmental matters, and to represent those interests in federal court, is expressly vested in the CDEP not in the CTAG. As the CDEP is not a petitioner in this case, Petitioner lacks standing, and his petition must be dismissed for lack of subject-matter jurisdiction.

II. ASSUMING JURISDICTION, THE ORDERS SHOULD BE AFFIRMED.

A. Standard of Review

The Court's review of FERC certificate orders is limited to determining whether such orders are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *National Committee for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004); *B&J Oil & Gas Co. v. FERC*, 353 F.3d 71, 75-76 (D.C. Cir. 2004). In applying this standard, the Court determines "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.'" *National Committee*, 373 F.3d at 1327 (quoting *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002)). The Court "cannot substitute its judgment for that of the Commission"

and "must uphold the Commission's findings if they are supported by substantial evidence." *Id.* (citations omitted).

The same standard applies to challenges to FERC's compliance with NEPA § 102, and to the adequacy of the EIS. *See National Committee*, 373 F.3d at 1327 (citing *City of Olmstead Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002) ("*Olmstead Falls*")). In this regard, the Court's "role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Id.* (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)). An EIS "is reviewed to 'ensure that the agency took a "hard look" at the environmental consequences to go forward with the project.'" *Id.* (quoting *Olmstead Falls*, 292 F.3d at 269). The Court gives "'an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.'" *B&J Oil & Gas*, 353 F.3d at 76 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003)).

"'The party alleging an agency's decision to be arbitrary and capricious bears the burden of proof.'" *City of Olmsted Falls*, 292 F.3d at 271 (quoting *Lomak Petroleum, Inc. v. FERC*, 206 U.S. 1193, 1198 (D.C. Cir. 2000)). Even assuming the agency made missteps along the way, the burden is on the petitioner to demonstrate

that the agency's '"ultimate conclusions are unreasonable.'" *Id.* (quoting *National Petrochemical & Refiners Ass'n v. EPA*, 287 F3d 1130, 1146 (D.C. Cir. 2002)).

B. The Commission's Orders Are Rational and Supported by Substantial Evidence.

The Commission properly certificated and conditioned the project. Having found that implementation of the Project would provide Long Island's residents significant benefits in the form of "pipeline-to-pipeline competition" and "much needed security and reliability[,]" 100 FERC ¶ 61,276 P 56, the Commission imposed numerous environmental conditions – which Islander East had to satisfy before commencing construction – to limit any potential adverse environmental effects. *See id.* Conclusion and Appendix; 102 FERC ¶ 61,054 P 42 & n.38. Those conditions were recommended in the final EIS, after an exhaustive analysis of information and materials provided by the applicants, public agencies and individual persons and firms. *See* RI No. 533 at 1-3. The final EIS concluded that, as conditioned, the proposed Project would cause only "limited adverse environmental impact[,]" *id.* at ES-5, 5-1, that would be largely temporary and most significant during the construction period. *Id.* at ES-5, 2-10, 5-1, 5-3 to 5-9.

C. Petitioner's Arguments to the Contrary Are Unavailing.

1. The Commission's Issuance of the Certificate Complied with the National Environmental Policy Act.

Petitioner asserts that the Commission issued the final EIS and the certificate without ordering the completion of necessary environmental studies and reports mandated under NEPA. Br. at 19-22. Petitioner makes two objections: first, that some Commission-ordered studies will not adequately predict or serve to mitigate expected environmental impacts; and second, that other studies should have been completed prior to issuance of the final EIS.

Petitioner complains that the orders require Islander East to use its computer model addressing offshore sedimentation disbursement to predict near-shore sedimentation behavior during construction without explaining how the offshore model can predict near-shore behavior. Br. at 20. Moreover, Petitioner contends, because near-shore sedimentation will have the most significant effects on the sea floor ecosystem, the absence of a near-shore model renders the EIS incomplete. *Id.*

Petitioner provides an incomplete picture. The Commission determined that the Project's impact on near-shore sedimentation might be significant solely because of the possibility that a "non-typical storm" during construction "could result in greater sedimentation on near-shore areas" and thereby pose a threat to the oyster population. 100 FERC ¶ 61,276 P 112 (citing RI No. 533 at 3-70). Because "any damages caused

by the construction of the project" – even damages resulting from an "unexpected" storm – would be Islander East's responsibility, the Commission ordered the pipeline to use its computer model to predict the resulting near-shore sedimentation behavior in such conditions to estimate the damages for which the pipeline would be responsible should such an event occur. 102 FERC ¶ 61,054 P 146.

The Commission found that Islander East's computer model was up to this task, citing the final EIS's finding that the model adequately addressed the impact to sediment mounds from a likely, foreseeable storm event. 100 FERC ¶ 61,276 PP 109, 111 (noting that the "modeling included site-specific current and wave data that captured a storm event whose magnitude is considered to be representative" and "two typical northeasters") (citing RI No. 533 at 3-51). *See* 102 FERC ¶ 61,054 P 146. Environmental Condition ("Condition") 54, which requires Islander East to run its offshore sedimentation computer model on shallower sections nearer to shore, did not reflect a concern that sedimentation was likely to occur in those areas, as Petitioner suggests, but rather served as a means to assess damages in the unlikely event that such an occurrence transpired. 100 FERC ¶ 61,276 P 113. Indeed, Petitioner fails to challenge the Commission's – and the final EIS's – finding that the model appropriately simulated sedimentation movement during storm events. *See* 100 FERC ¶ 61,276 PP 109, 111.

Next, Petitioner asserts the absence of a plan to mitigate sedimentation damage to oyster beds precludes review of the proposed methods for dealing with such damage. Br. at 20. Here Petitioner is complaining about the absence of a mitigation plan for a "non-typical" and, therefore, *unanticipated* storm. *See* 100 FERC ¶ 61,276 P 112. NEPA does not require a mitigation plan for an unanticipated event. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989) (NEPA requires a discussion of mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated," but not the creation of "a fully developed plan that will mitigate environmental harm before an agency can act").

Conditions 54 and 55 fully comply with NEPA's requirement for a reasonable and well-considered response to an environmental risk. These conditions require Islander East to monitor near-shore sedimentation impacts and to mitigate such impacts that exceed Islander's estimates by taking, in consultation with affected leaseholders and authorities, steps such as seeding clam and oyster beds and replacing oyster habitat. 100 FERC ¶ 61,276 PP 112, 113, App. Conditions 54, 55.

Petitioner's claims of inadequacy rest on its view that no evidence shows viable oyster habitats can be successfully recreated. Br. at 20-21. But the Rehearing Order cited information in the "National Oceanic and Atmospheric Administration's Coastal

Services Center website" indicating "that oyster attachment sites include almost any hard surface" and "that commercial oyster harvesters often 'seed' areas with oyster shell" to populate the beds. 102 FERC ¶ 61,054 P 154. The Commission thus concluded that "appropriate site preparation of disturbed areas" through replacement with any variety of hard surfaces could avert any '"permanent destruction' of shellfish habitat" and was "reasonably assured" that Islander East could replace any "damaged oyster habitat." *Id.*[4] FERC's expert determination in this area is not only unrebutted but also entitled to an extreme degree of deference. *See B&J Oil & Gas*, 353 F.3d at 76.

Petitioner also asserts that FERC's failure to require issuance of certain reports prior to issuing the certificate rendered the final EIS incomplete: (1) a site-specific study regarding construction impacts, particularly blasting, on contaminated ground water; (2) a complete ground survey along the Branford Steam Railway, particularly

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[4] Petitioner misquotes the Certificate Order as saying that "clams cannot be killed by smothering with sediment" and then claims that statement is inconsistent with language in the final EIS. Br. at 21 n.3. The order actually said that "because clams are vertically mobile in sediments and are not killed by smothering, underestimates from the [sedimentation] model would have no consequence on the discussion of impacts to clams that were described in the final EIS." 100 FERC ¶ 61,276 P 112 n.57 (citing RI No. 533 at 3-70). The final EIS fully supports FERC's actual statement, observing that adult clams are capable of burrowing and escaping consolidated sediments of depths up to 19.5 inches, and that the sediment deposition

regarding contaminated soil; and (3) an NHPA § 106 investigation and report. Br. 21-22.

Petitioner provides no support for his assertions that prior completion of the foregoing studies was critical to an adequate NEPA review, and, thus, fails to show that the absence of completed studies renders FERC's ultimate conclusions unreasonable. Accordingly, Petitioner has failed to meet its burden under NEPA, *Olmsted Falls*, 292 F.3d at 271, particularly in view of the high degree of deference to which FERC is entitled in evaluating the scientific data regarding the environmental impacts of a project like Islander East. *B&J Oil & Gas*, 353 F.3d at 76.

In any event, the Commission adequately explained why the studies were not completed and required their completion prior to commencement of construction. Condition 14 requires Islander East, in consultation with the CDEP, to conduct a site-specific study to determine if construction activities, particularly blasting, will affect contaminated groundwater migration in North Branford, and to file documentation of its consultations, work plan and results of its studies with FERC prior to constructing the facilities. 100 FERC ¶ 61,276 P 131, Condition No. 14. Such a study "could not be performed prior to the certificate, because access to the land was restricted by the landowner." 102 FERC ¶ 61,054 P 167. However, Condition 14 "specifically

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associated with dredging for the Project is anticipated to be only 1.9 cm, a depth

requires that the parameters and planning of the site-specific study will be determined with input from the [CDEP] and reviewed by the Commission environmental staff" and thereby "allows for a review of the site-specific plan prior to its implementation." *Id.* Accordingly, Condition 14 recognized the need for such a plan, and assured compliance after the issuance of the orders.

Condition No. 43 requires Islander East and Algonquin to defer construction of the proposed Project until they have filed all required cultural resource inventory and evaluation reports, filed all the comments of the state authorities, and received written notification from FERC that they may proceed with mitigation programs or construction. 100 FERC ¶ 61,276 P 130, App. Condition 43. The Commission reasoned that NHPA § 106 does not require a delay in the issuance of a certificate until the required investigation and report is completed. 100 FERC ¶ 61,176 P 130 (citing *City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1509 (D.C. Cir. 1994), which found that federal approval of a runway with the condition that no federal expenditures would be permitted prior to completion of the NHPA review process did not violate the Act).

Islander East's inability to complete all the surveys required along the Branford Steam Railway was also attributable to access difficulties. 100 FERC ¶ 61,276 P 133

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unlikely to cause clam mortality. RI No. 533 at 3-70.

(citing RI No. 533 3-135 to 3-136, App. M, comment letter G65). Despite the survey gaps, the Commission found Islander East's Contamination and Erosion Control Plan sufficient to address any potential impacts from the type of soil contamination (polyaromatic hydrocarbon) that could be expected to exist along that right-of-way. *Id.* In addition, the Commission added Condition No. 38, requiring the pipeline to obtain FERC approval of a site-specific plan for this area prior to commencing construction. *Id.* Petitioner does not challenge the adequacy of Islander East's contamination plan or of Condition No. 38 to address the potential risks of soil contamination.

The Rehearing Order explained that NEPA does not require completion of all relevant studies concerning potential environmental impacts prior to issuance of the final EIS. NEPA requires the preparation of an EIS to assure that an agency "will have available and will carefully consider, detailed information concerning significant environmental impacts" resulting from its decisions, and to guarantee that "the relevant information will be made available to the larger audiences that may also play a role" in the making and implementation of those decisions. 102 FERC ¶ 61,054 P 41 (citing *Robertson*, 490 U.S. at 349). The Commission staff's final EIS for Islander East set "forth the information necessary to achieve those purposes." *Id.*

Moreover, practicalities require the issuance of orders prior to completion of some reports and studies because "large projects such as Islander East . . . take considerable time and effort to develop." 102 FERC ¶ 61,054 P 43. Indeed, "their development is subject to many significant variables whose outcome cannot be predetermined." *Id.* Here, "many individuals" had "denied or limited Islander East's access to property that it need[ed] to complete its surveys and environmental studies." *Id.* "Depending on state law," the pipeline might well need "eminent domain authority [under NGA § 7(h)] to access this property[.]" *Id.* As issuance of an NGA § 7 certificate is a prerequisite for exercising such authority, "some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality." *Id.* P 44. It follows that if "every aspect of the project were required to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project." *Id.*[5]

Here, as "with virtually every certificate issued by the Commission" authorizing "construction of facilities," the Commission's approval of the project was "subject to

[5] The foregoing analysis also answers Petitioner's unsupported assertion that Condition Nos. 6, 23, 25, 38, 40, and 44 demonstrate the absence of other significant information necessary for an accurate picture of environmental impacts. *See* Br. at 19 & n.2. Petitioner has failed to show that this information is material, *see Olmsted*

Islander East's compliance with the environmental conditions set forth in the order." 102 FERC ¶ 61,054 P 42. The final EIS contained "sufficient information for the Commission to determine under NEPA that the proposed Islander East Project is an environmentally acceptable action" with those conditions, and, therefore, issuance of the certificate was "not premature." *Id.* P 44.

National Committee endorsed virtually identical Commission reasoning, explaining that "NEPA does not require a complete plan be actually formulated at the outset, but only that proper procedures be followed for ensuring that environmental consequences have been fairly evaluated." 373 F.3d at 1329 (citing *Robertson*, 490 U.S. at 352). The Court adopted virtually the same reasoning adopted in the Rehearing Order, 102 FERC ¶ 61,054 PP 43-44, stating:

> [T]he practical realities of large projects . . . involve considerable time and effort to develop, with segments of the project proceeding at different speeds. This is the result, for instance, of many individuals denying or limiting access to property that [the pipeline] needs to survey and assess for environmental impacts. . . . 'If every aspect of the project were required to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project.'

373 F.3d at 1329 (quoting *East Tenn. Natural Gas Co.*, 102 FERC ¶ 61,225 P 25 (2003)). *Compare* 102 FERC ¶ 61,054 PP 41-44 *with East Tennesse*, 102 FERC ¶

Falls, 292 F.3d at 271, and, in any event, FERC's imposition of the conditions

61,225 PP 22-25. Thus, it was sufficient that FERC had "identified the areas where gaps existed" and "included conditions to address those gaps before construction and operation could proceed." 373 F.3d 1329. Accordingly, the orders were not issued prematurely.

Petitioner also cites EPA comments warning that the final EIS lacked the detailed information necessary to understand the direct, indirect and secondary impacts on wetlands and waters, and disagreeing with the final EIS's conclusion that the project would have limited adverse impacts. Br. at 14-15, 22-23.

FERC addressed EPA's concerns by explaining that the final EIS "does not restate or include all of the data in the public file, but rather is a tool to summarize and analyze potential impacts associated with the proposed project." 102 FERC ¶ 61,054 P 147. FERC pointed to several documents in the record that provided the details requested by EPA for such offshore issues as "computer modeling data for sediment dispersion, soil physical properties and the relationship to trench size, trench spoil transport and placement, modeling inputs related to storm events, sediment fate and transport along the plowed trench, and turbidity and resuspended sediments." *Id.* (citing RI Nos. 470, 474). Moreover, Islander East had provided additional information in response to the EPA's letter. *Id.* (citing RI No. 671, Section 1 at tab

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reasonably addressed the issues presented. *See* 102 FERC ¶ 61,054 PP 42-44.

10). The Commission found that those documents sufficiently addressed EPA's concerns. *Id.*

As to the Project's adverse environmental impact, FERC explained that while the final EIS found that the Project's principal environmental impacts would be temporary and most significant only during the construction period, some impacts, on forests and offshore areas, would be long-term and unavoidable. 102 FERC ¶ 61,054 P 152 (citing RI No. 533 at ES-5, 2-10, 5-1, 5-3 to 5-9). Nonetheless, having considered these long-term impacts, the final EIS determined that the overall project would have limited adverse environmental impacts. *Id.* Petitioner ignored FERC's responses, which satisfactorily addressed EPA's concerns.[6]

[6] Petitioner's reliance on *Utahns for Better Transportation v. DOT*, 305 F.3d 1152, 1166 (10th Cir. 2002), for the proposition that the absence of critical information to support a conclusion in an EIS renders the statement inadequate to meet NEPA's goals of informed decision making and public comment, Br. at 23, is misguided. Unlike the detailed and thorough EIS in the instant case, the EIS in *Utahns* compared the costs of two projects without applying *any* cost methodology to one project. The court found the EIS's cost comparison to be based on pure speculation, and held that the comparison had to be based on "more than nothing" to meet NEPA's goal of informed decision-making. *Id.* at 1165-66 & n.6. Petitioner's reliance on *Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994), fares no better because in that case the agency failed to prepare an EIS at all.

2. The Challenged Orders Do Not Attempt To Influence Issuance of Clean Water Act Permits.

By arguing that the orders improperly require Connecticut to approve CWA § 401(a)(1) permits for the Project, Br. at 41, Petitioner raises a false issue. The Commission expressly acknowledged that whereas "state and local permits are preempted under the NGA, state authorizations required under federal law are not." 102 FERC ¶ 61,054 P 115. The Commission's practice of issuing pipeline certificates subject to CWA permitting requirements" was "founded on practical grounds[,]" specifically a recognition that "it is often impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate." *Id.* Nonetheless, the Commission made clear that "until Islander East obtains the necessary approvals under . . . the CWA, it cannot exercise the authorization granted in the [Certificate] Order to construct and operate its project." *Id.* P 119. Thus, Connecticut retains full authority to grant or deny such permits.

3. The Challenged Orders Are Consistent with Connecticut's Sovereign Rights.

Although the Certificate Order states that any state or local permits issued to the authorized facilities must be consistent with the conditions of the certificate, it makes clear that state and local agencies may not use "state or local laws" to "prohibit or unreasonably delay" the construction or operation of such facilities. 100 FERC ¶ 61,276 P 138. Petitioner contends that to the extent that language refers to a Structures and Dredging permit, which Conn. Gen. Stat. § 22a-361 requires Islander East to obtain as a prerequisite to constructing its pipeline across the Connecticut-owned portion of Long Island Sound, the Commission's directive is "illegal and unconstitutional[.]" Br. at 33.

The Commission includes the above language "in virtually every order in which a construction certificate is issued" as it explains FERC's policy of "requiring applicants to cooperate with state and local agencies," while, at the same time, indicating that such agencies cannot use "state and local laws" to "prohibit or unreasonably delay" the construction of Commission-authorized facilities. 102 FERC ¶ 61,054 P 109 (internal quotation omitted). Thus, while the Commission encourages '"applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures[,]'" '"regulatory requirements" cannot '"undermine . . . the force and

effect'" of a Commission certificate. 102 FERC ¶ 61,054 P 111 (quoting *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094 at 61,346-47 (1992)).

FERC's policy is consistent with judicial precedent holding that the NGA preempts state and local laws that would otherwise impede natural gas companies from engaging in activities mandated or protected by the Act. 102 FERC ¶ 61,054 P 110 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), which held Michigan regulations "aimed at regulating activities of a natural gas company" to be "preempted by the NGA[,]" and *National Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y.*, 894 F.2d 571, 579 (2nd Cir. 1990), which held a New York statute requiring an interstate pipeline to apply for and obtain a certificate of environmental compatibility from the New York [Public Service Commission] to be preempted by the NGA"). *National Fuel*, which rejected a claim virtually identical to that being made by Petitioner, found preemption on the alternative grounds "that either the NGA explicitly vested exclusive jurisdiction in the Commission to regulate interstate pipeline facilities or Congress had so occupied the field of regulation of interstate pipelines by enactment of the NGA that there was no room for the states to regulate[,]" and "held that the pipeline did not have to comply with New York's regulatory scheme." *Id.* (citing *National Fuel*, 894 F.2d at 579).

"NGA preemption over state law and permits evolves from the Supremacy Clause." 102 FERC ¶ 61,054 P 123. "'The NGA has long been recognized as a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce'" that "'confers upon the FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce.'" *Id.* (quoting *Schneidewind*, 485 U.S. at 300-01 (citations and internal quotation omitted)). Thus, "the NGA 'preempts state and local law to the extent the enforcement of such laws or regulations'" – such as "denial of a permit" – "'would conflict with the Commission's exercise of its jurisdiction under the federal statute.'" *Id.* P 112 (quoting *Iroquois*, 59 FERC at 61,360). While "'[a] state or local agency may challenge a Commission decision by filing a timely request for rehearing'" and appeal to the courts, such an "'agency may not use its regulatory power to challenge a decision by this Commission.'" *Id.* (quoting *Iroquois*, 59 FERC at 61,360). Accordingly, Islander East's federal authorization to construct its pipeline would preempt Conn. Gen. Stat. § 22a-361, if Connecticut used it to deny or unreasonably delay issuance of a Structures and Dredging Permit.[7]

[7] Petitioner cites *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), for the proposition that the Commission's directive regarding state and local permits would override Connecticut's sovereign immunity, and that "the Commerce clause, under which the NGA was passed, is not sufficient" to support such an override. *Id.* (citing 517 U.S. at 54). Noting that Petitioner had cited *Seminole Tribe* "without analysis"

Petitioner also claims that the orders abridge Connecticut's Tenth Amendment rights to the extent they authorize Islander East to "seize state land." Br. at 33. According to Petitioner, the portion of Long Island Sound owned by Connecticut is "public trust land" that is "owned by the people through their . . . state government[] and cannot be subject to seizure by a private company for its own purposes." *Id.* (citing *State v. Sargent & Co.*, 45 Conn. 358, 372 (1877) ("*Sargent*")). In Petitioner's view, a law enacted under the Commerce Clause that "'violates the principle of state sovereignty reflected in the various constitutional provisions'" is nothing more than an

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(as Petitioner does here), the Commission explained why the case is inapposite. 102 FERC ¶ 61,054 P 120. Whereas that case had held an act allowing Indian tribes to sue states in federal court to violate the Eleventh Amendment's proscription against a citizen of one state's use of the federal courts to pursue a "suit in law or equity" against another state, *id.* PP 122-23 (citing 517 U.S. at 54), NGA preemption of Conn. Gen. Stat. § 22a-361 does not involve a "suit in law or equity" against Connecticut. *See id.* P 123. Therefore, neither the Eleventh Amendment nor *Seminole Tribe* bears on the challenged orders. *Id.*

"'act of usurpation.'" *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 923-24 (1997)).[8]

This argument is premature. The orders do not authorize Islander East to seize state land. Rather, they issue the company a certificate conditionally authorizing construction and operation of the proposed pipeline, as required by NGA § 7(e) upon a finding that implementation of the project is in the public interest. *See* 15 U.S.C. § 717f(e). By enacting NGA § 7(h), Congress, rather than FERC, authorized certificate holders to exercise eminent domain. *See* 15 U.S.C. § 717f(h). Thus, Petitioner's argument comes down to a claim that NGA § 7(h) violates the Tenth Amendment. The proper time to consider that argument is when – and if – Islander East commences an eminent domain action to acquire a right-of-way across the Connecticut-owned part of the Long Island Sound. Until that time, the Court's interest in deferring consideration of such an argument clearly outweighs any hardship that Connecticut would experience from such a deferral. *See Mount Wilson FM Broadcasters v. FCC*,

[8] *Printz* holds that Congress may not require county employees to conduct background checks of prospective gun purchasers, 521 U.S. at 933, and, on its face, is inapplicable here. Nor does *Sargent* support Petitioner's position. Though the court stated that Connecticut holds a portion of the submerged lands under Long Island Sound in trust, the court also made clear that the state's exercise of power over such lands was subject to restrictions imposed by the United States Constitution. 45 Conn. at 372-73.

884 F.2d 1462, 1466 (D.C. Cir. 1989); *State Farm Mut. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986).

In any event, Petitioner's eminent-domain argument fails on the merits. "[T]he power of eminent domain is vested in the federal government as an element of sovereignty, and may be exercised in the enjoyment of the powers conferred upon the federal government by the Constitution." *Id.* P 125 (citing *Kohl v. United States*, 91 U.S. 367, 372 (1876)). Thus, the "federal government, as well as federal agencies to whom the power of eminent domain has been delegated, can condemn property owned by a state over the State's objection." *Id.* (citing: *Kohl*, 91 U.S. at 373; *United States v. South Dakota*, 212 F.2d 14 (8th Cir. 1954); *United States v. New York*, 160 F.2d 479 (2nd Cir. 1947); and *Minnesota v. United States*, 125 F.2d 636 (8th Cir. 1942)). *See also Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534 (1941) ("the fact that land is owned by a state is no barrier to its condemnation by the United States").

Such power is necessitated by the public interest. '"If the right to acquire property is made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power will be rendered nugatory, and the government will be dependent for its practical existence upon the will of a State.'" 102 FERC ¶ 61,054 P 126 (quoting *Kohl*, 91 U.S at 371).

Similarly, "Congress may delegate the federal power of eminent domain to a private corporation, such as in NGA [§] 7(h)." *Id.* P 128 (citing *Southern Pac. Transp. Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983) ("*Watt*")). Indeed, Congress' power to delegate eminent-domain authority to corporations is well settled. *See Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-30 (1894); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 US 641, 657-58 (1890); *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950) (upholding constitutionality of NGA § 7(h)). A federal licensee authorized to condemn land is exercising a federal power, and the "licensee acts as the agent of the United States government." *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1181 (5th Cir. 1977).[9]

The Tenth Amendment, which "provides that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people[,]'" is "facially inapplicable" to the instant case, "because the power at issue here is expressly granted to the federal government" under the Commerce Clause. 102 FERC ¶ 61,054 P 127 (quoting the Tenth Amendment). Congress, in turn, exercised its power under that clause when it enacted the NGA, and "pursuant to its express power to regulate interstate commerce[,]" delegated the

[9] This case was later overruled, in part, on other grounds. *See Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980).

federal power of eminent domain to certificate holders by enacting NGA § 7(h). *See id.* P 128 (citing *Watt*, 700 F.2d at 554). As such a "delegation necessarily extends to public or state property unless Congress expressly restricts that power[,]" *id.*, NGA § 7(h)'s absence of such restrictions manifests Congress' intent to delegate certificate holders the right to condemn state-owned land.

Accordingly, "a natural gas pipeline company that holds a FERC Certificate and commences an action under NGA [§] 7(h) to condemn property owned by a state is acting on behalf of the federal government to implement a decision that the pipeline project serves the national interest." 102 FERC ¶ 61,054 P 130. It follows that a natural gas pipeline company acting pursuant to a Commission certificate has authority to take lands through eminent domain. *Id.* (citing *Tennessee Gas Transmission Co. v. Arkansas*, 335 S.W.2d 312 (Ark. 1960)).

Indeed, if a natural gas pipeline company could not "condemn property owned by a state," the state could "substantially raise the cost of a project, unreasonably delay a project or perhaps prevent it altogether." 102 FERC ¶ 61,054 P 129. In the instant case, Connecticut was asserting "its own parochial interests in an effort to frustrate the will of Congress and the public interest by depriving consumers of additional supplies of natural gas." *Ibid.* NGA § 7(h) prevents such obstruction by delegating eminent domain powers to natural gas companies so that they can "'comply

with [FERC's] requirements as well as with all phases of the statutory scheme of regulation.'" *Id.* (quoting *Thatcher*, 180 F.2d at 647).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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January 31, 2005

NO ORAL ARGUMENT IS YET SCHEDULED

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

No. 03-1066

RICHARD BLUMENTHAL,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FEDERAL ENERGY REGULATORY COMMISSION
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JANUARY 31, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. ***Parties and Amici:*** All participants in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

B. ***Rulings Under Review:***

1. *Islander East Pipeline Co.*, Docket No. CP01-384, *et al.*, 100 FERC ¶ 61,276 (2002).

2. *Islander East Pipeline Co.*, Docket No. CP01-384, *et al.*, 102 FERC ¶ 61,054 (2003).

C. ***Related Cases:*** Counsel is not aware of any related cases pending before this or any other Court.

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David H. Coffman
Attorney

January 31, 2005

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
CDEP	Connecticut Department of Environmental Protection
CTAG	Connecticut Attorney General
CWA	Clean Water Act
Islander East	Intervenor Islander East Pipeline Company
NGA	Natural Gas Act, 15 U.S.C. § 717, *et seq.*
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act