No. 25-1730

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PSEG RENEWABLE TRANSMISSION LLC,
Appellee,

v.

ARENTZ FAMILY, LP, *et al.*,
Appellants.

On Appeal from the United States District Court for the District of Maryland
(Adam B. Abelson, United States District Judge)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

PSEG's Brief confirms that the Maryland General Assembly has never delegated to PSEG the power of eminent domain. In its search for a delegation not found in any statutory text, PSEG treats as meaningless the actual statutory delegation because it occurs "[o]n issuance" of a Certificate of Public Convenience and Necessity ("CPCN"), which PSEG does not have. Public Utilities Article ("PU") §7-207(b)(3)(v). PSEG, therefore, is not an entity "having the power of eminent domain" and cannot invoke Real Property Article ("RP") §12-111 to access Appellants' properties.

Ignoring the plain language of the applicable Maryland statutes, the district court issued a mandatory injunction, changing the status quo, giving PSEG access to numerous private properties to collect information for an overhead transmission line project that has not been approved by the Maryland Public Service Commission ("PSC"). Indeed, based on the length of time needed for the PSC's comprehensive review, the project will not and cannot be approved in time to meet the contractual deadline in PSEG's agreement with PJM. Thus, the Preliminary Injunction does not prevent the alleged harm PSEG claimed would occur. It should be vacated.

ARGUMENT

I. A mandatory injunction was not warranted.

PSEG argues that the district court entered a "classic prohibitory injunction." Brief ("Br.") at 15. But PSEG did not ask for or receive a prohibitory injunction. In its Complaint, Motion for Preliminary Injunction, and Reply, PSEG repeatedly asked for affirmative relief altering the status quo. JA0062 (Petition seeking "Temporary Access"); JA0100 (requesting "an order that permits [PSEG] to enter each of Respondents' properties…"); Mem. in Supp. of Mot. for Prelim. Inj. (ECF 75-1 at 32) (requesting "to enter Respondents' Properties"). And the district court granted affirmative relief. JA2547 ("…PSEG shall be permitted to enter onto the properties of Respondents and to remain on the property…").

The Preliminary Injunction did not preserve the status quo. It changed the status quo by affirmatively permitting PSEG to enter Appellants' land. Prior to this controversy, the "last uncontested status between the parties" was that PSEG was not accessing any Appellant's property. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013). The Preliminary Injunction changed that. The heightened standard of review for mandatory injunctions applies here.

This disturbance of the status quo is further demonstrated by the Preliminary Injunction providing *final* relief in this case. *Pashby*, cited by PSEG, does not negate the fact that a mandatory preliminary injunction "largely congruent with the final

relief that PSEG seeks" (JA2510) effectively changes the last *uncontested* status between the parties and merits close scrutiny.

"Viewing the district court's preliminary injunction under this demanding standard, it is not clear, let alone indisputably so, that the [] theory advanced by [PSEG] and adopted by the district court is likely to succeed on the merits, as necessary for a [mandatory] preliminary injunction." *2311 Racing LLC v. Nat'l Ass'n for Stock Car Auto Racing, LLC*, 139 F.4th 404, 409 (4th Cir. 2025). The Preliminary Injunction should be vacated.

II. PSEG cannot succeed on the merits.

PSEG's Brief does not overcome *the* dispositive fact: PSEG cannot invoke pre-condemnation survey rights under RP §12-111 because it does not have the power of eminent domain. Despite acknowledging that the Maryland General Assembly "has the authority to grant or delegate the power of eminent domain" (Br. at 32), PSEG has never identified any statute, enactment, or other action through which the General Assembly delegated eminent domain authority to PSEG or any other private transmission line developer that had not been issued a CPCN. PSEG claims that the grant is somewhere in PU §7-207(b)(3)(i)-(iii), but those subparagraphs contain no language granting eminent domain power.

PU §7-207 does contain one clear and obvious grant of eminent domain power to overhead transmission line developers, which PSEG desperately seeks to

trivialize. In subparagraph (b)(3)(v), the General Assembly provided that a person, "[o]n issuance" of a CPCN, "may acquire by condemnation, in accordance with Title 12 of the Real Property Article" property necessary for the transmission line. PU §7-207(b)(3)(v). PSEG dismisses the entire subparagraph as meaningless in an effort to avoid the fact that the grant of eminent domain authority plainly does not extend to PSEG because it has not been issued a CPCN.

PSEG's curious assertion that subparagraph (b)(3)(v) is not a grant is refuted by the fact that identical language is used throughout the Public Utilities Article to *grant* eminent domain authority to other public utilities, including natural gas companies, oil pipeline corporations, telephone & telegraph companies, water companies and railroads. PU §5-403(b) (gas companies "may acquire by condemnation, in accordance with Title 12 of the Real Property Article," property necessary for pipelines); §5-404(b) (oil pipeline corporations "may acquire by condemnation, in accordance with Title 12 of the Real Property Article," property necessary for pipelines); §5-410(b) (telephone & telegraph companies "may … acquire by condemnation, in accordance with Title 12 of the Real Property Article," property necessary for their purposes); §5-411 (water companies "may acquire by condemnation, in accordance with Title 12 of the Real Property Article," under specified circumstances); §5-405(b) (railroads "may acquire the property by condemnation under Title 12 of the Real Property Article" for construction of

railroads).[1] Thus, other public utilities use eminent domain in their projects based upon grant language indistinguishable from PU §7-207(b)(3)(v). Like these other provisions, subparagraph (b)(3)(v) *is* the grant.

Purporting to rely on a dictionary definition of the word "acquire," PSEG asserts that "may acquire by condemnation" in PU §7-207(b)(3)(v) means something other than granting the power of eminent domain. But a dictionary definition of a single word cannot overcome the General Assembly's pervasive and repeated use of the same precise phrase to *grant* the power of eminent domain to other public utilities. PSEG's argument concerning the dictionary definition of "acquire" also ignores all other words in subparagraph (b)(3)(v). The ordinary meaning of the entire phrase – "may acquire by condemnation" – means to give permission or power to condemn property. The General Assembly has repeatedly used the phrase to mean exactly that.

In order to free itself from the clear and controlling language of PU §7-207(b)(3)(v), PSEG asserts that §7-207(b)(3)(i)-(iii) must be interpreted "to delegate

[1] Similarly, Congress provided in the Federal Power Act that, within a "national interest electric transmission corridor" (not implicated in this case), "the permit holder may acquire the right-of-way by the exercise of the right of eminent domain…." 16 U.S.C.A. §824p(e)(1). In the Natural Gas Act, Congress provided that a gas company holding a CPCN "may acquire [property] by the exercise of the right of eminent domain …." 15 U.S.C.A. §717f(h). This Court has explained that §717f(h) "gives a gas company the power to acquire property by eminent domain." *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004).

the power of eminent domain to PSEG." Br. at 33. Those statutory subparagraphs, however, do not contain the grant language that the General Assembly has used in connection with every other public utility. Nor do those subparagraphs contain language that could be construed as a delegation of eminent domain power using "dictionary definitions" or the "ordinary and popular meaning" of the words. *Westminster Mgmt., LLC v. Smith*, 486 Md. 616, 644 (2024). Subparagraph (b)(3)(i) imposes a *limit* on condemnation power – not a grant – flatly prohibiting both construction of overhead lines and the exercise of condemnation power unless a CPCN is first obtained from the PSC. This provision says nothing about how a person could be granted the power of eminent domain in the first instance.

Subparagraph (b)(3)(iii)[2] identifies the entities to which the PSC may grant a CPCN, that is, those entities that are eligible to apply. Subparagraph (b)(3)(iii) does not contain a grant of eminent domain authority and does not even mention eminent domain or condemnation. The mere expansion of potential applicants to construct an overhead transmission line does not include a grant of eminent domain power.[3]

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[2] Subparagraph (b)(3)(ii) relates to existing transmission lines, has no relevance to this case, and is not otherwise quoted or cited by PSEG in its Brief.

[3] PSEG improperly attempts to place itself in the same category as electric companies with respect to grants of eminent domain power. Br. at 31. This ignores the fact that electric companies historically were given eminent domain authority in franchises granted by the State. For example, in *Potomac Elec. Power Co. v. Birkett*, the Maryland Supreme Court noted that "Pepco [an electric company] succeeded to the franchises and all of the rights of Great Falls [a predecessor electric company],"

The *absence* of a grant of eminent domain power in PU §7-207(b)(3)(i)-(iii) is what led the General Assembly to enact Senate Bill 969 in 2017. The title clause reads: "FOR the purpose of *authorizing* a person to which a certain [CPCN] is issued for the construction of a certain overhead transmission line to acquire certain property or rights by condemnation." Laws of Maryland, 2017 Ch. 840 (S.B. 969)[4] (emphasis added). This express authorization was a substantive change in the law; it was not meaningless, as PSEG has argued.

Senate Bill 969 is unlike the legislation considered in cases cited by PSEG (Br. at 30), in which the legislature had expressly stated that the enactment was only "clarifying" or intended to codify existing case law. *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) ("Most significant to our determination here, Congress formally declared in the titles of the relevant subsections of MMA that the amendments of MSP were 'clarifying' and 'technical.'"); *Johnson v. Mayor & City*

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and, therefore, "it acquired the right of eminent domain throughout Maryland." 217 Md. 476, 483 (1958). This right came from the franchise, not from a codified statute. PSEG and other private transmission line developers have never had such franchises in Maryland and therefore do not have the power of eminent domain that is often granted in such franchises. In its comments on the 2017 amendment to PU §7-207, the PSC confirmed that "[e]lectric companies already have underlying condemnation authority granted to them from the State outside of the CPCN statute," while private transmission line developers do not. JA2125.

[4] Available at https://mgaleg.maryland.gov/2017RS/Chapters_noln/CH_840_sb0969e.pdf (last visited 11/6/2025).

Council of Baltimore, 430 Md. 368, 388 (2013) (title clause read, "FOR the purpose of clarifying" certain eligibility requirements); *Blanch v. Chubb & Sons, Inc.*, 124 F. Supp. 3d 622, 632 (D. Md. 2015) ("the 2011 amendment [to MWPCL] codified the holding of *Medex*" decided by Maryland's highest court almost a decade earlier); *Cunningham v. Feinberg*, 441 Md. 310, 346 (2015) (Fiscal and Policy Note of same 2011 amendment to MWPCL "suggested that it had no effect except to 'clarif[y] current law'").

All of these cases teach that legislative history is the primary indicator of whether an amendment is a substantive change in the law or merely a clarification of prior law. For example, in *Johnson*, despite the word "clarifying" in the title clause of the bill, the Court nevertheless held that the amendment was a substantive change in the law based on an extensive review of the legislative history. *Johnson*, 430 Md. at 393. There is nothing in the legislative history of Senate Bill 969 to suggest that it was a clarification and not a substantive change in the law. Rather, the amendment expressly added a grant of eminent domain authority to entities "[o]n issuance of" a CPCN.

PSEG seeks to disregard the interpretation placed on the 2017 amendment by the PSC – the Commission charged with administering the statute. In doing so, PSEG ignores that "the interpretation of a statute by the agency charged with administering the statute is entitled to great weight." *Adventist Health Care Inc. v. Maryland Health*

Care Comm'n, 392 Md. 103, 119 (2006). PSEG instead cites cases downplaying the role of witnesses opposing or supporting legislation. But the PSC was not a random witness testifying at a legislative committee hearing; it was and is the agency, or more precisely, the commission charged with administering PU §7-207 – the statute that was being amended. The PSC's view of its own authority and the powers granted to private entities subject to its jurisdiction is entitled to great weight.

The PSC understood that the statute in effect prior to the 2017 amendment allowed condemnation only if the person who obtained the CPCN "already had underlying condemnation authority granted to them by the State" and that private transmission line developers "most likely would not have that authority." JA2125. The purpose of the amendment, in the PSC's view, was to "authoriz[e] a person who has received a [CPCN] from the [PSC] for the construction of a transmission line to acquire condemnation rights in conjunction with that CPCN." *Id*. These comments are consistent with the plain language of the amendment, which added language granting the power of eminent domain "[o]n issuance" of a CPCN – using language, as noted above, that is identical to language used by the General Assembly to grant eminent domain authority to other types of public utilities in other statutes.

PSEG's argument suggests that the General Assembly's action, in passing a bill and adding subparagraph (v) to PU §7-207, was entirely unnecessary and meaningless. This is contrary to basic principles of statutory construction, which

require the Court to read the statute "as a whole so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Koste v. Town of Oxford*, 431 Md. 14, 25-26 (2013) (internal quotation marks and citations omitted). Maryland courts have routinely rejected arguments that the General Assembly passed unnecessary or meaningless amendments. *See, e.g.*, *Comptroller of Treasury v. Jameson*, 332 Md. 723, 734 (1993) (rejecting interpretation that would have rendered legislative amendment "unnecessary" and "mere surplusage"); *Elza v. Elza*, 300 Md. 51, 58 (1984) (quoting *McAndrew v. McAndrew*, 39 Md.App. 1, 8 (1978)) ("Unless the 1974 amendment had that effect, it had none at all; and we will not presume that the Legislature intended to enact a meaningless statute in so important an area.").

Even if PU §7-207(b)(3)(i)-(iii) could be construed to include an implied grant of eminent domain power prior to the 2017 addition of subparagraph (v), the new subparagraph more specifically addresses the issue of when and how the power of eminent domain is delegated. In accordance with established principles of statutory construction, if "there is a conflict between a general statute and one dealing specifically with the issue at hand, the specific statute controls." *Massey v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 389 Md. 496, 512 (2005). Thus, the specific language of subparagraph (v) indicating that condemnation authority is granted "[o]n

issuance" of a CPCN controls over any contrary indication that PSEG would like to infer from subparagraphs (i)-(iii).

Moreover, what the General Assembly provided in the 2017 amendment is similar to the mechanism created by Congress under the NGA, in which the delegation of eminent domain power is made only to a "holder of a [CPCN]." 15 U.S.C. §717f(h). Interpreting this grant, this Court has observed: "Issuing such a Certificate [CPCN] conveys and automatically transfers the power of eminent domain to the Certificate holder." *Berkley v. Mountain Valley Pipeline, LLC,* 896 F.3d 624, 628 (4th Cir. 2018). Thus, the grant of the power of eminent domain goes with the issuance of a CPCN. The grant made by the General Assembly in PU §7-207(b)(3)(v) operates the same way. Under both the NGA and the Public Utilities Article, only holders of a CPCN have the power of eminent domain.

Ignoring the plain language of RP §12-111(a) and PU §7-207(b)(3)(v), PSEG improperly seeks to construe each statute "with forced or subtle interpretations that … extend its application," supposedly to construct a harmonious statutory scheme. *Lockshin v. Semsker,* 412 Md. 257, 275 (2010). Still, PSEG ignores the fact that its purportedly harmonious statutory scheme makes no allowance whatsoever for the geotechnical surveys that PPRP has clearly required from PSEG in connection with the CPCN Application. Indeed, Dawn Shilkowski, PSEG's Senior Project Manager in charge of the MPRP, declared under oath that without first completing the

geotechnical and other required surveys, PSEG cannot "obtain[] CPCN approval from the PSC and other requisite permits." JA0149. *See also* JA0148 (defining "Field Surveys" to include "geotechnical surveys"). There is no basis to assume that the General Assembly, contrary to the language it actually used, intended to create a harmonious statutory scheme, and yet failed to address necessary geotechnical surveys in the scheme.

Contrary to these strained and unsupportable interpretations, the plain language of RP §12-111(a) and PU §7-207(b)(3)(v) mandates reversal of the district court's decision. RP §12-111(a) expressly applies to entities "having the power of eminent domain." In PU §7-207(b)(3)(v), the General Assembly delegated the power of eminent domain to a transmission line developer only "[o]n issuance" of a CPCN. PSEG has not been issued a CPCN and therefore has not been delegated the power of eminent domain. The plain language of these statutes must control.

III. There is no irreparable harm that is prevented by the injunction.

Defending the district court's conclusion that PSEG "likely will suffer substantial monetary harm from anticipated future financial losses (such as loss of revenue" "in the absence of an injunction," JA2516, PSEG attempts to rewrite the record. PSEG asserts that Appellants "were effectively 'holding up the entire [MPRP] project'" because PSEG "could not obtain survey data required by PPRP and the PSC to evaluate the project[,]" and that injunctive relief is warranted because

"delays and stagnation would result in irreparable harm." Br. at 38-39. This argument fails on every level.

PSEG's CPCN Application will never "proceed[] to the next stage in the CPCN review process" (*id.* at 39) because PSEG cannot obtain all survey data required by PPRP. PSEG needs wetland delineations, forest stand delineations, and geotechnical surveys "for the entirety of the Project ROW," JA0258, yet PSEG chose to sue a fraction of the affected landowners.[5] PSEG is "trapped in purgatory" because of its own "conduct" (Br. at 39), not because Appellants defended their property rights.

The invasive geotechnical surveys are particularly problematic for PSEG. Understanding "that geotechnical surveys are not authorized under Maryland law," PSEG notes that PPRP "requested" geotechnical surveys (*Id.* at 8, n.1) but otherwise ignores the undisputed fact that PSEG has already acknowledged it needs to do geotechnical surveys to advance the CPCN Application, and that PSEG cannot obtain these surveys without consent or by force of an injunction. PPRP has never drawn a distinction between the geotechnical and other field surveys it needs. PPRP has always required five categories of field-based surveys—including geotechnical surveys—before PPRP will evaluate PSEG's CPCN Application. JA0258-59. PSEG

[5] PSEG sued 117 landowners in this action, or 28.6% of all landowners within the proposed right-of-way for the MPRP. JA1940 ("Unique property owners within ROW (count) 409").

itself frames the surveys as "required" on nearly every page of its Brief. Br. at 1, 8, 9, 13, 34, 36-37, 39, 42, 45-46, 54-55. In fact, citing the PSC's Scheduling Order (filed September 11, 2025, PSC Docket No. 639),[6] PSEG explains that "PPRP[] need[s] to perform its statutorily required evaluation of the [CPCN] Application, which it cannot do without the required field studies." *Id.* at 54. The declaration of PSEG's Senior Project Manager also makes clear that without first completing the geotechnical and other required surveys, PSEG cannot "obtain[] CPCN approval from the PSC and other requisite permits." JA0149. The Preliminary Injunction does not extend to geotechnical surveys and therefore does not allow PSEG to advance its CPCN Application.

In concluding that PSEG's "prospective financial losses" constitute irreparable harm (JA2515), the district court necessarily found that PSEG was likely to meet the June 2027 in-service date if it was given immediate access to Appellants' properties. And PSEG doubled-down in its Brief, asserting: "Absent preliminary injunctive relief, the Property Owners' conduct was virtually guaranteed to delay the CPCN review process long enough to force PSEG to miss PJM's in-service date." Br. at 39. In reality, PSEG will miss the in-service date even with injunctive relief.

[6] The PSC docket is available at: https://webpscxb.psc.state.md.us/DMS/case/9773 (last visited 11/6/2025).

Under Maryland law, PSEG cannot build the MPRP unless the PSC grants PSEG's CPCN Application. PU §7-207(b)(3)(i) (without a CPCN, "a person may not begin construction of an overhead transmission line"). PSEG has always maintained that "[t]o meet the June 1, 2027 in service deadline, the Company must begin constructing the MPRP by January 2026[,]" (JA0064, ¶1 of Petition; JA1829; JA1860 (PSC filings)), yet PSEG did not file its CPCN Application until December 31, 2024. JA064 ¶2. *In re Application of PSEG Renewable Transmission LLC*, Case No. 9773 (Md. Pub. Serv. Comm'n 2024). This means that PSEG afforded just 12 months for the PSC to issue a CPCN even though it took the PSC approximately 30 months to review the only other project "sufficiently comparable to the subject case" (JA2075-2076).

The district court entered the Preliminary Injunction on June 20, 2025. At that time, PSEG's request that the PSC adopt an aggressive schedule had been pending for almost three months. On March 26, 2025, PSEG proposed a schedule that might have allowed the PSC to rule on the CPCN Application by January 2026 if discovery had commenced immediately. JA1841, JA2069. Discovery did not commence immediately, and by the time the district court granted the Preliminary Injunction, the first deadline in PSEG's proposed schedule had passed, and the second deadline was less than two weeks away, with no discovery having been accomplished. JA2069. Moreover, well before the district court's ruling, on April 11, 2025, PPRP

"strongly object[ed]" to PSEG's proposed schedule as "unrealistically optimistic" (JA2072), "implausible" (JA2074), and "nonsensical" (JA2324). Thus, even before the PSC issued its Scheduling Order, it was virtually guaranteed that the PSC would not rule on the CPCN Application in time for PSEG to meet the June 2027 in-service deadline. JA0064 (PSEG asserting it "must begin" construction "by January 2026" to meet the in-service deadline).

While PSEG acknowledges that this Court "may take judicial notice of" the PSC's Scheduling Order, PSEG argues the Court ought not consider the Scheduling Order because it post-dates the district court's decision. Br. at 42, n.6. However, this Court "may take judicial notice of facts outside the record where the fact may not be reasonably disputed and is relevant and critical to the matter on appeal." *United States v. Fowler*, 58 F.4th 142, 152 (4th Cir. 2023) (internal citations omitted). Regardless, PSEG's timeline was already impossible when the district court entered the Preliminary Injunction – long before the PSC entered its Scheduling Order. The record then demonstrated that PSEG could not meet the June 2027 in-service date because it had no prospect of completing all PPRP-required surveys, no path to expedite its CPCN Application, and thus no chance of earning revenue from the MPRP in mid-2027. The district court had no basis to conclude that "prospective financial losses" (JA2515) tied to an unapproved and unbuilt transmission line constituted irreparable harm.

To counter all evidence that the MPRP may never go into service and that economic injury tied to an impossible in-service date cannot constitute irreparable injury, PSEG asks this Court to ignore the "other reasons" for delay as "immaterial." Br. at 42. Doing so would defy the record and governing law. As the applicant for injunctive relief, PSEG bore the burden of establishing "that it will suffer harm that is 'neither remote nor speculative, but actual and imminent.'" *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). This is not a situation where other factors "*could* have also *potentially* affected [PSEG's] ability to meet its in-service deadline," or where "future delay *could* conceivably occur based on other factors that might never occur." Br. at 43 (emphasis added). Here, when the district court entered the Preliminary Injunction, it was a certainty – not just a possibility – that PSEG would not meet the in-service deadline. PSEG's Senior Project Manager provided a declaration that PSEG "must begin construction of the MPRP by January 2026 to meet" the in-service deadline. JA0147. With the PSC schedule not even begun as of June 20, 2025, the date of the Preliminary Injunction, PSEG's timeline was already unworkable. Now, because the PSC adopted a Scheduling Order that runs into February 2027 – more than a year after PSEG stated under oath that it needed to begin construction – there is no possibility that PSEG will place the MPRP into service by June 2027.

PSEG claims its economic harm is "self-evident" and that its failure to produce evidence of such harm is of no moment. Br. at 45. PSEG is wrong, and the authority it cites demonstrates why. In *Mountain Valley*, the natural gas company presented affirmative evidence of its irreparable economic harm, including "lost revenues from the delay in pipeline service, estimated at $40 to $50 million per month; charges and penalties for the breach of construction contracts, totaling $200 million; and carrying costs to prolong the project, such as storage and personnel expenses, for an additional $40 to $45 million." 915 F.3d at 217. The "district courts closely scrutinized those alleged losses" in concluding that Mountain Valley would suffer irreparable economic injury absent injunctive relief. *Id.*

Here, after comparing this case to *Mountain Valley*, the district court found "PSEG has satisfied the irreparable harm element on the basis of future lost revenue alone[.]" JA2516, n.7. But PSEG did not present any evidence of future lost revenue to the district court. While PSEG contends "the record evidence below confirmed PSEG's business expectation of future revenue," Br. at 46, the cited declaration (JA0151) merely summarizes the expenses PSEG allegedly incurred to prepare its CPCN Application and in contacting landowners to gain access for surveying purposes, all of which are fully recoverable under the FERC Order (JA2251-2255) and unrelated to any alleged future profits. PSEG even concedes that it never

attempted to "calculate[]" the "precise amount of [its] losses[.]" Br. at 45. The district court's conclusion on irreparable economic harm has no evidentiary basis.

PSEG's suggestion that the district court can make "common sense factual conclusion[s]" without any evidence fundamentally contradicts the preliminary injunction standard. A "preliminary injunction is 'extraordinary and drastic' and 'should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Wright & Miller's Federal Practice & Procedure §2948 (2d ed. 1995)) (emphasis original); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Because PSEG presented no evidence of future lost revenue, it did not carry its burden of proof. *See, e.g., Talleywhacker, Inc. v. Cooper,* 465 F. Supp. 3d 523, 543 (E.D.N.C. 2020) (plaintiff failed to establish irreparable harm because plaintiff "put forth no evidence to substantiate th[e] bare assertion" that it would suffer "complete and permanent" financial losses).

Having no evidence of irreparable harm, PSEG pivots to the PSC's Scheduling Order as new irreparable harm despite claiming elsewhere (Br. at 42 n.6) that this Court must ignore it. According to PSEG, the Scheduling Order "confirms"

that "the PSC process will be at a standstill" because "PSEG cannot proceed with the required surveys" absent injunctive relief. Br. at 42, n.6. This argument again ignores the fact that PSEG cannot complete *all* PPRP-required surveys even with injunctive relief.

PSEG also argues that it would be irreparably harmed if it cannot "freely exercise its statutory right under RP §12-111" to conduct pre-condemnation surveys. Br. at 47. PSEG raised the same argument before the district court (JA2513), and the district court did not credit it. JA2516, n.7 ("…the Court need not and does not decide whether [PSEG's] additional asserted forms of future injury" constitute irreparable harm). Setting aside that PSEG does not have a "statutory right" to enter Appellants' properties for the reasons explained *supra*, multiple courts have held that the loss of a statutory right, by itself, does not constitute irreparable harm. *See*, *e.g.*, *Heritage Found. v. U.S. Dept. of State*, No. CV 24-2862 (TJK), 2024 WL 4607501, at *5 (D.D.C. Oct. 29, 2024) ("Plaintiffs cannot rely only on a statutory entitlement to expedited processing to show irreparable harm."); *US Airline Pilots Ass'n v. Pension Benefit Guar. Corp.*, No. CV 09-1675 (HHK), 2011 WL 13273132, at *5 (D.D.C. Mar. 14, 2011) ("[T]he harm at issue in *Hi-Tech* and *Apotex* was not the loss of the entitlement *per se*, but rather the lasting and significant economic consequences thereof."); *Metso Mins., Inc. v. Powerscreen Int'l Distribution Ltd.*, 788 F. Supp. 2d 71, 74 (E.D.N.Y. 2011) ("However, the Supreme Court and the

Federal Circuit have made it clear that the mere violation of the [statutory] right to exclude alone does not necessarily result in irreparable injury" (internal citation omitted)).

In *Heritage Foundation*, the plaintiffs sought an order compelling agencies to process expedited Freedom of Information Act requests, arguing that "[a] wrongful denial of a statutory right to expedited processing necessarily causes irreparable harm because the clock cannot be wound back." 2024 WL 4607501, at *1, *12. The court disagreed, finding that "'something more' is required here…" *Id.* at *13. That "something more" is illustrated in cases where a deprivation of a statutory right was found to constitute irreparable harm. In those cases, the right was clearly conferred, *Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 45 (D.S.C. 2018), *aff'd*, 941 F.3d 687 (4th Cir. 2019), the plaintiff showed "lasting and significant economic consequences" of its imminent deprivation, and the right was "by its nature, fleeting," *i.e.*, could not be restored. *US Airline Pilots*, 2011 WL 13273132, at *5.

PSEG cannot satisfy those criteria. First, the statutory right at issue is not clearly conferred. In *Planned Parenthood South Atlantic*, the court found that a statute "unambiguously confers a right upon Medicaid-eligible patients" to obtain assistance from any healthcare provider, and the plaintiff "would suffer irreparable harm in the absence of a preliminary injunction because she would be deprived of her statutory right to select the qualified and willing provider of her choice." 326 F.

Supp. 3d at 45, 48. Here, there is no statute that unambiguously confers the power of eminent domain on PSEG, a prerequisite for an order under RP §12-111.

Second, PSEG will not suffer actual injury if denied access to Appellants' properties, let alone the "lasting and significant" economic injuries that constitute irreparable harm. *US Airline Pilots*, 2011 WL 13273132, at *5. PSEG "offered no actual *proof* that," absent access to Appellants' land, it will suffer longstanding economic injuries in the near future. *12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Bd.*, 289 F. Supp. 3d 73, 79 (D.D.C. 2018) (emphasis original). It is unknown whether PSEG will ever secure PSC approval to construct the MPRP. And if the MPRP is abandoned, PSEG can recover 100% of its prudently incurred expenses under the FERC Order (JA2251-2255). Without any lasting and significant injuries that will flow from a deprivation of rights, PSEG cannot demonstrate irreparable harm.

Finally, PSEG's claimed access rights under RP §12-111 are not intrinsically fleeting. In *Fairy-Mart v. Marathon Petroleum Co., LP*, No. 3:17-CV-1195 (MPS), 2017 WL 5140514 (D. Conn. Nov. 6, 2017), the court enjoined the defendant from completing sales that violated plaintiffs' statutory right of first refusal, because "[d]enying the motion for a preliminary injunction and allowing Marathon to close the sale of their locations to PMG—without first determining whether Marathon offered them a right of first refusal …—would *forever* deprive the plaintiffs of the

opportunity to purchase these stations." *Id.* at *6 (emphasis added). PSEG's purported right to access Appellants' properties and build the proposed transmission line will not be "irretrievably lost" if the requested injunction is vacated. *Id.* at *1. If the legislature confers upon PSEG the power of eminent domain, PSEG could then seek the access it prematurely seeks now.

PSEG did not establish irreparable injury before the district court, and its effort to repair the record falls well short. The Preliminary Injunction cannot stand.

IV. The balance of equities favors Appellants.

In arguing that the balance of equities favors PSEG, PSEG emphasizes its prediction of "grave and irreparable harms" to "PSEG *and the public*" absent injunctive relief. Br. at 48 (emphasis added). But purported public harms do not enter the calculus unless the government is a party. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 288 (D. Md. 2025) (recognizing that the "balance of the equities and the public interest" factors "merge when the Government is the opposing party" and, in that circumstance, the court considers "the relative harms to the applicant and respondent, as well as the interests of the public at large") (internal citations and quotations omitted). The inquiry here is a straight balancing of the "competing claims of injury" to PSEG and Appellants. *Winter*, 555 U.S. at 24. That balance tips in favor of Appellants for all reasons previously briefed.

PSEG's arguments to the contrary have no merit. Citing the Restatement of Torts §211, PSEG asserts that Appellants cannot exclude PSEG from their properties due to "pre-existing limitations" on title, "including the right of the government to enter onto private property for purposes of conducting surveys preliminary to the exercise of eminent domain." Br. at 49. PSEG is not the government, and there is no "legislative enactment" that gives PSEG authority to enter private property. Nor does RP §12-111 provide for open-ended access until a CPCN "is granted or denied" for the express purpose of "acquisition and future use of the properties in connection with the" MPRP. JA2547.

PSEG also misunderstands why the Preliminary Injunction amounts to a temporary taking. Appellants have never argued that RP §12-111 is unconstitutional. Appellants contend that the statute authorizes narrow pre-condemnation access by entities "having the power of eminent domain," and PSEG does not (and may never) have that power. The Preliminary Injunction, by its express terms, gives PSEG broad access to private property for all manner of survey work under the premise that PSEG *might* have eminent power domain in the future. This encumbrance will last at least 20 months, spanning from entry of the injunction in June 2025 through final briefing at the PSC in February 2027, and contains no limit on the total duration of access on each property. A 20-month, court-ordered right of entry is not an "innocuous and temporary" interference with private property rights. Br. at 51.

How PSEG has enforced the Preliminary Injunction is further evidence that it amounts to a taking. PSEG "typically gives notice that it will enter properties during a two- or three-week window," Mot. to Clarify Amend. Prelim. Inj. (ECF 302 at 5), with many Appellants receiving multiple multi-week notices. This is akin to the "*per se* physical taking" found in "allowing union organizers to traverse [private property] at will for three hours a day, 120 days a year." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152 (2021).

Despite what PSEG appears to believe, RP §12-111(c) does not absolve PSEG from paying just compensation. Br. at 51. It provides a right to recover for damage to "any land or personal property" during the survey work itself. It says nothing of PSEG's duty to compensate Appellants for the actual harms caused by the Preliminary Injunction, including depressing the value of all affected properties and destroying their marketability during the injunction's 20+ month term.

It is possible, if not probable, that the PSC never grants a CPCN authorizing PSEG to build the MPRP. In that event, PSEG will never initiate condemnation proceedings. This means that, despite causing great damage to property values now, PSEG could forever escape the obligation to pay just compensation. Such a result would be unconstitutional.[7]

[7] PSEG also argues that Appellants "waived" any "complaints about the scope of the Preliminary Injunction." Br. at 52. The record proves otherwise. Appellants challenged the scope of the Preliminary Injunction in their Memorandum in Support

V. The public interest is not served by violating private property rights.

Leaning into its familiar ominous predictions, PSEG asserts that "the public has a profound interest in a functional electric grid" and "PJM's forecasted blackouts and service interruptions absent a preliminary injunction heavily weighs in favor of a preliminary injunction." Br. at 53. PSEG cites no evidence for its assertions because there is none.

PJM never forecasted disaster absent a preliminary injunction in this case. And PSEG never produced any evidence that the MPRP, standing alone, could avert its predictions of grid-related disaster. In truth, the MPRP is part of a broader package of proposed grid upgrades, the earliest the MPRP could provide electricity to any end user is June 2030 (JA2287), and the State of Maryland (JA2287; JA2295-2309), PJM (JA0163), and FERC (JA1906-1919) all have protections in place should the MPRP never materialize. PSEG simply cannot overcome the record evidence confirming that the MPRP will not neutralize its claims of public calamity.

While it is true that PPRP needs field survey data to evaluate the MPRP, PPRP has never determined that surveying private property over a landowner's objection is in the public interest. Plus, as detailed *supra*, PSEG has no chance of completing

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of Opposition to Petitioner's Motion for Preliminary Injunction (ECF 92-1) and their Memorandum in Support of Motion to Stay Preliminary Injunction Pending Appeal (ECF 258-1). The district court rejected those challenges, and Appellants timely appealed those rulings. Nothing was waived.

all field-based surveys required by PPRP because geotechnical surveys are not available under RP §12-111 nor "authorized under Maryland law." Br. at 8, n.1.

Lastly, PSEG cites *Transource Pa., LLC v. DeFrank*, --- F.4th ---, No. 24-1045, 2025 WL 2554133 (3d Cir. Sept. 5, 2025) for the proposition that "a state public service commission" cannot "second-guess" PJM. Br. at 56. *DeFrank* is not binding, nor does it help PSEG. *DeFrank* confirms that PJM has no control over a state's eminent domain power. The court cautioned: "We would therefore be concerned if PJM were wielding Pennsylvania's eminent-domain power, but it is not." *DeFrank*, 2025 WL 2554133 at *20. The court examined Pennsylvania's eminent domain law and expressly held "that PJM—which is not a public utility—does not exercise the power of eminent domain." *Id.* at *21. Thus, the *DeFrank* opinion has no relevance to eminent domain and, unlike the district court's opinion in this case, does not "improperly empower any private party to wield the sovereign power of eminent domain." *Id*. PSEG cannot look to PJM or the *DeFrank* opinion to end-run the PSC proceeding.

CONCLUSION

For the reasons set forth herein and in Appellants' Brief, the district court's injunction granting PSEG access to Appellants' properties should be vacated, and the case should be remanded for further proceedings.

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Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument pursuant to Local Rule 34(a).

CERTIFICATE OF COMPLIANCE

1. Appellants' Reply Brief complies with the type volume limitations of Fed. R. App. P. 28(c) and 32(a) because it contains 6,483 words, excluding the parts exempted by Rule 32(f).

2. Appellants' Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point Times New Roman font.

/s/ Harris W. Eisenstein
Harris W. Eisenstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2025, a copy of the foregoing Appellants' Reply Brief was filed and served through the CM/ECF System on all counsel of record, who are registered CM/ECF users.

/s/ Harris W. Eisenstein
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