

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PennEast Pipeline Company, LLC

**Docket Nos. CP15-558-000
CP15-558-001**

**REQUEST FOR REHEARING AND MOTION FOR STAY ON BEHALF OF
NEW JERSEY CONSERVATION FOUNDATION
AND STONY BROOK-MILLSTONE WATERSHED ASSOCIATION***

Pursuant to Section 19(a) of the Natural Gas Act (“NGA”),¹ Rule 713, and Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),² New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association (collectively “Intervenors”) request rehearing and rescission of the Commission’s order dated January 19, 2018 (“Order”) granting a conditional certificate of public convenience and necessity (“Section 7 certificate”) to PennEast Pipeline Company, LPP (“PennEast”) under Section 7(c) of the NGA to construct and operate the proposed PennEast Pipeline Project (“PennEast Project” or “Project”).³ Intervenors also request rehearing of FERC’s denial of its motion for an evidentiary hearing, and a stay of the Order. FERC granted the Intervenors’ respective motions to intervene in this proceeding. Thus, the Intervenors are “parties” to this proceeding and have standing to file this request for rehearing and motion for a stay.⁴

The Project includes approximately 116 miles of greenfield pipeline from Luzerne County, Pennsylvania to Mercer County, New Jersey, along with multiple lateral connections, a

¹ 15 U.S.C. § 717r(a).

² 18 C.F.R. § 385.713.

³ PennEast Pipeline Company, LLC, 162 FERC ¶ 61,053 (Jan. 19, 2018) (hereinafter “Order”).

⁴ See 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

compressor station, and other appurtenant facilities. The completed pipeline would transport about 1.1 million dekatherms of Marcellus gas daily, primarily to shippers in eastern Pennsylvania and New Jersey (the “service area”).⁵ Intervenor seeks rehearing and rescission of the Order because the Order: (1) violates the NGA because PennEast is not required by the public convenience and necessity;⁶ (2) violates the takings clause of the 5th Amendment of the U.S. Constitution;⁷ (3) violates the Clean Water Act (“CWA”);⁸ (4) violates the National Historic Preservation Act (“NHPA”) and its implementing regulations;⁹ and (5) because FERC’s environmental impact statement (“EIS”) upon which the Order is based fails to meet the requirements of the National Environmental Policy Act (“NEPA”) and its implementing regulations.¹⁰

Intervenor also requests a stay of the Order pending FERC’s final disposition of this request for a rehearing, and prospectively requests that FERC not simply grant this request for the limited purposes of giving itself more time to consider it, as the ensuing delay could leave Intervenor with no meaningful judicial review of FERC’s errors.¹¹ If FERC does issue such a

⁵ Fed. Energy Regulatory Comm’n, PennEast Pipeline Project—Final Environmental Impact Statement, at ES-1–ES-2 (April 7, 2017) (hereinafter “FEIS”).

⁶ 15 U.S.C. §§ 717 *et seq.*

⁷ While we include this claim in our request for a rehearing to avoid any potential jurisdictional issues, we believe that FERC has already taken the position that the constitutionality of its grants of eminent domain are beyond the scope of its jurisdiction, and thus outside the purview of 15 U.S.C. § 717r, as seen in their lack of addressing this issue within the Certificate Order. *See* Order at 42.

⁸ 33 U.S.C. §§ 1251 *et seq.*

⁹ 54 U.S.C. §§ 300101 *et seq.*; 36 C.F.R. pt. 800.

¹⁰ 42 U.S.C. §§ 4321 *et seq.*; 40 C.F.R. pts. 1500–08.

¹¹ Since 2009, FERC has tolled its time to rule on the merits of cases requesting rehearing in 99% of its gas pipeline orders, with an average tolling delay of 194 days. *See* Pet. for Extraordinary Writ at 5, *Appalachian Voices v. FERC*, No. 18-1006, (D.C. Cir. Jan. 8, 2018); *see also* Ex. G to Pet. for Extraordinary Writ. During that delay, condemnation proceeds. FERC’s widespread and abusive practice of issuing “tolling orders” has no basis in either its enabling statutes nor in its regulations - and contravenes the entire structure of the Natural Gas Act. *See* 15 U.S.C. § 717r(a) (Congress commands

“tolling order” rather than acting on the substance of this request, Intervenors also request a stay of the Order during the pendency of such tolling order, until such time as FERC addresses the substance of this request for rehearing.

I. STATEMENT OF RELEVANT FACTS

On September 24, 2015, PennEast submitted an application to FERC for a Section 7 certificate seeking approval to construct and operate a 120.2-mile interstate natural gas pipeline, along with various associated facilities (“PennEast Project”) that would transport 1.1 million dekatherms of Marcellus Shale gas daily from northern Pennsylvania through eastern Pennsylvania and into New Jersey, with a proposed in-service date of November 2017.¹² As a major federal action significantly affecting the environment, FERC’s consideration of PennEast’s application triggered the requirement that FERC prepare an EIS under NEPA in order to evaluate the project’s environmental impacts as part of its decision making process on that application.¹³ On July 22, 2016, FERC issued a Draft Environmental Impact Statement (“DEIS”) that discussed some anticipated environmental impacts of the Project and identified

action within 30 days; otherwise, by operation of law, the request is deemed denied and parties can proceed to the Court of Appeals). And contrary to FERC’s assertions in other proceedings, court decisions examining FERC’s use of tolling orders have involved Section 4 rate cases, which do not involve abrogation of landowners’ Constitutional rights or environmental destruction from pipeline construction that proceeds while FERC holds the keys to the courthouse doors. *See, e.g., California Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 598 (5th Cir. 1969) (addressing tolling orders for rate proceedings with no landowner and environmental impacts); *see also City of Glendale v. FERC*, No. 03-1261, 2004 WL 180270 (D.C. Cir. Jan. 22, 2004) (unpublished opinion addressing tolling orders with no landowner or environmental impacts).

¹² Docket No. CP15-558, Accession No. 20150925-5028, exhibit A (Sept. 24, 2015) (“Section 7(c) Application”).

¹³ *See* 42 U.S.C. § 4332(C); 18 C.F.R. § 380.6(a).

several dozen action items still pending completion by PennEast.¹⁴ On April 7, 2017, although numerous studies and reports identified in the DEIS remained uncompleted, FERC released the final environmental impact statement (“FEIS”) for the PennEast Project. And on January 19, 2018, FERC issued an Order granting PennEast a Conditional Certificate of Public Convenience and Necessity, with its finding that the PennEast project satisfied the Natural Gas Act’s standard that the project be *required* by the public convenience and necessity – expressly conditioned on PennEast’s subsequent proof that it met that standard.

THE PENNEAST PROJECT

The Marcellus Shale formation sits beneath ninety-three million acres that cross Pennsylvania, southern New York, eastern Ohio, and northern West Virginia. In recent years, the oil and gas industry has developed a hydraulic fracturing (“fracking”) technique to extract gas from these and other shale reservoirs.¹⁵ The growth of natural gas production in the Marcellus and Utica areas - a combined growth of 12 billion cubic feet per day since 2011 - accounts for 89% of the United States’ total growth in natural gas production.¹⁶ With the natural gas fracking boom, the gas industry has been on a pipeline building spree, including in the PennEast proposed

¹⁴ Fed. Energy Regulatory Comm’n, PennEast Pipeline Project—Draft Environmental Impact Statement (July 2016) (hereinafter “DEIS”).

¹⁵ FEIS, *supra* note 5, at 4-321.

¹⁶ U.S. EIA, “New Pipeline Projects Increase Northeast Natural Gas Takeaway Capacity,” Today in Energy (January 28, 2016). Through October 31, 2017, FERC certificated more natural gas pipeline capacity and mileage during 2017 than it had as of the same date in 2016, according to the Energy Infrastructure Update issued by FERC staff on December 4. As of October 31, 2017, FERC certificated 23,512.9 MMcf/d of pipeline capacity and 2,507.91 miles of pipeline compared to 14,444.5 MMcf/d of pipeline capacity and 1,137 miles of pipeline from January 1 to October 31, 2016. *See* <https://ferc.gov/legal/staff-reports/2017/oct-energy-infrastructure.pdf>

service region.¹⁷ The Atlantic Sunrise project, with a full in-service date of mid-2018, has already added millions of dekatherms/day of capacity that flows out of the region because it is not needed to serve existing or anticipated regional demand.¹⁸

In theory, interstate gas pipelines are proposed and built to allow shippers to meet unserved demand in new territories or strained markets, or to allow producers to move gas from capacity constrained supply areas, to satisfy true public need.¹⁹ However, under the current system, gas shippers are often motivated to establish new pipelines financed through long-term contracts for capacity with local distribution companies (“LDCs”) and utilities that are the pipeline companies’ own affiliates and subsidiaries of the pipeline company. Through shifting existing shipping volumes from unaffiliated legacy pipelines to pipelines controlled by the parent company, payments by ratepayers to a third party pipeline company may instead be paid to the affiliated pipeline company.²⁰ In this way, savvy owners can receive a return on investment even for unnecessary pipeline capacity,²¹ while captive ratepayers on legacy systems bear the risk of

¹⁷ See *id.* at 4-322–4-324. See also U.S. EIA, Natural Gas Pipelines in the Northeast Region.

¹⁸ See GREG LANDER, SKIPPING STONE, ANALYSIS OF REGIONAL PIPELINE SYSTEM'S ABILITY TO DELIVER SUFFICIENT QUANTITIES OF NATURAL GAS DURING PROLONGED AND EXTREME COLD WEATHER (WINTER 2017-2018) (Feb. 11, 2018) (hereinafter “SKIPPING STONE WINTER 2017-2018 REPORT”) attached hereto as Exhibit A.

¹⁹ Nat'l Fuel Gas Supply Corp., 158 FERC ¶ 61,145, Docket No. CP15-115-001, Accession No. 20170203-3051 (Feb. 3, 2017) (Bay, Commissioner, separate statement on order granting abandonment and issuing Certificates).

²⁰ GREG LANDER, SKIPPING STONE, ANALYSIS OF PUBLIC BENEFIT REGARDING PENNEAST PIPELINE, *in* Intervenor's Comments on PennEast's Application, Docket No. CP15-558, Accession No. 20160311-5209, exhibit A at 18 (Mar. 9, 2016) [hereinafter ANALYSIS OF PUBLIC BENEFIT]. Intervenor New Jersey Conservation Foundation commissioned this study to evaluate PennEast's claims that the Project would lower costs to consumers and meet unserved demand for firm capacity.

²¹ *Id.* at 18–20.

overbuild,²² and construction gratuitously engenders adverse environmental and property impacts.²³

This is exactly what PennEast is doing. Despite no measurable data demonstrating public need for additional pipeline capacity in the service region, it is hardly surprising that gas shipping companies would seek an opportunity to profit where potential costs would be borne by the public by establishing a limited liability company (“LLC”) to build and operate an affiliated pipeline.²⁴ On August 11, 2014, the PennEast LLC was formed by six member companies: NJR Pipeline Company, PSEG Power Gas Holdings,²⁵ LLC (Public Service Enterprise Group), South Jersey Industries (SJI Midstream), Red Oak Enterprise Holdings, Inc. (Southern Company Gas), Spectra Energy Partners, LP, and UGI PennEast, LLC (UGI Energy Services).²⁶ The LLC entered into shipping contracts, or precedent agreements, with affiliates of each of its six members, as well as six additional companies, for a total of ninety percent of the pipeline’s capacity; contracts with the six affiliates comprise 74% of the initial capacity and more than 80% of the contracted capacity after five years.²⁷ To support its application, PennEast summarily

²² See *supra* note 19.

²³ See *supra* note 11 and accompanying text.

²⁴ See *supra* notes 12–16 and accompanying text.

²⁵ On June 7, 2017, Spectra Energy Partners acquired PSEG Power’s ten percent minority equity position in the Project. Press Release, PSEG, Enbridge Purchase of PSEG Equity Position in PennEast Pipeline Project Completed (June 7, 2017), <http://investor.pseg.com/press-release/other-ir-news-releases/enbridge-purchase-pseg-equity-position-penneast-pipeline-projec>.

²⁶ See *supra* note 12.

²⁷ PennEast FEIS, *supra* note 5, at 1-3–1-4, 3-1. The affiliated shippers are UGI Energy Services, LLC, New Jersey Natural Gas Company, Pivotal Utility Holdings, Inc., South Jersey Gas Company, Public Service Enterprise Group (PSEG) Power LLC, and NRG REMA LLC. These shippers account for 62.6% of the Project’s contracted capacity and 56.4% of its total capacity. The remaining shippers are Texas Eastern Transmission, Consolidated Edison Company, Cabot Oil & Gas Corporation, Talen Energy Marketing, LLC, Enerplus Resources (USA) Corporation, and Warren Resources, Inc, accounting for 37.4% of the Project’s contracted capacity and 33.7% of its total capacity.

asserted that the service region faces unmet supply needs. As prima facie evidence of public need for the project, PennEast cited the precedent agreements primarily with its affiliated shippers.²⁸

FERC has expressed concern about overbuilding, exclusive reliance on private commercial contracts to presume need and the environmental consequences thereof, and this has resulted in uniform agreement amongst the Commissioners that FERC will reexamine its certificate process.²⁹ But FERC proceeded to issue this Order under its existing flawed process, and the PennEast project epitomizes these flaws - serious impacts from which the NGA was enacted to protect consumers.

Market data indicate that eastern Pennsylvania and New Jersey do not face unserved demand for gas pipeline capacity. At times of peak demand³⁰—when gas supplies are more strained—peak shaving resources such as liquefied natural gas (“LNG”) have been available where needed in the service region, at lower cost than additional pipeline capacity.³¹ Moreover, a new analysis that relies upon the most recent winter data confirms what the existing data and analyses in the record demonstrated: recent pipeline projects have already more than made up for

²⁸ *Id.* at 8–11.

²⁹ News Release, FERC, FERC to Review its 1999 Pipeline Policy Statement (Dec. 21, 2017) (“[Chairman Kevin J.] McIntyre said the Commission will examine the Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities, issued in 1999”).

³⁰ *See* Order at 75 (“This estimate assumes the maximum capacity is transported 365 days per year, which is rarely the case because many projects are designed for peak use”).

³¹ Greg Lander, Skipping Stone, PENNEAST ANALYSIS OF ALTERNATIVES, *in* Intervenors’ Additional Comments on FERC’s July 2016 DEIS for the PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20160912-6009, exhibit A at 11–15 (Sept. 12, 2016) [hereinafter PENNEAST ANALYSIS OF ALTERNATIVES]. Intervenor New Jersey Conservation Foundation commissioned this study to analyze alternatives to the PennEast Project that would meet peak demand needs, including the continued use of LNG and other peaking resources. FERC’s policy of only considering transmission alternatives to private industry transmission projects violates both the NGA and NEPA, as discussed in greater detail below at Section 6.

any projected demand increases in the foreseeable future,³² indicating that peak shaving resources such as LNG are not even necessary to meet peak demand until at least 2030.³³

Residential gas prices in the region reflect a well functioning market: New Jersey prices are among the lowest in the nation, having fallen markedly from the national average in recent years; Pennsylvania prices have been steadily converging on the national average.³⁴

Despite this evidence, the Order unquestioningly accepted PennEast's pivot away from that original rationale of unmet supply needs, as evidenced by its precedent agreements formed in large part with its affiliated shippers, and found that "shippers on PennEast's system state they believe that the project will provide a reliable, flexible and diverse supply of natural gas that will lead to increased price stability and the opportunity to expand natural gas service in the future"³⁵ and noting that it is the State's role to protect affiliated local distribution company ("LDC") shipper's captive customers.³⁶ Far from substantial evidence, the Order refers to no data or analyses underlying or supporting these shippers' statements upon which FERC could make a

³² *Id.* at 11–15.

³³ *Id.* at 15–23; *See also* SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18.

³⁴ *See State Historical Residential Natural Gas Prices*, U.S. Energy Info. Admin. (May 31, 2017), http://www.eia.gov/dnav/ng/xls/NG_PRI_SUM_A_EPG0_PRS_DMCF_M.xls. Using these data, average monthly gas prices (in dollars per thousand cubic feet) in the five years from 2012 to 2016 can be calculated: nationally, 12.0, 12.1, 13.0, 12.3, and 12.2, respectively; in New Jersey, 12.0, 11.7, 10.7, 9.6, and 9.5, respectively; and in Pennsylvania, 14.1, 14.2, 14.4, 13.2, and 12.8, respectively. Although the "polar vortex" winter of 2013/14 brought temporary price spikes to the service region, FERC and the regional transmission organization, PJM Interconnection ("PJM"), have since improved coordination of natural gas and electricity in the PJM region, enabling the system to maintain reliable operations during the subsequent harsh winter of 2014/15. *See also* ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 17.

³⁵ Order at 30.

³⁶ Order at 34-35. While some states do, in fact, require LDCs to demonstrate capacity shortage prior to allowing those LDCs to contract for expensive long-term firm capacity contracts, New Jersey has historically conducted prudency review for least cost only after project construction. Where the state has engaged in no process to ensure that consumers are protected from economic harm flowing from new firm transportation capacity, and that such contracts serve a public use, FERC must engage in this analysis to fulfill the NGA's explicit and implicit mandates.

reasoned decision.³⁷ Nor does the Order refer to any FERC staff economic analysis or review of such data. Intervenors submitted a FOIA request for such economic analysis, review, and data, and FERC's response contained solely reference to precedent agreements.³⁸ Moreover, Intervenors submitted data and analyses showing why these statements could not be credited. Intervenors herewith submit additional recent factual evidence attached as Exhibit A, to further demonstrate that the region has well in excess of required capacity.³⁹ The Order's "analysis" is:

**Precedent agreements = Market Need/Demand
Market Need = Public Benefit⁴⁰**

Thus, the analysis in FERC's order yields the following simple algebraic formula:

Precedent agreements = Public Benefit

And despite the existence of a Certificate Policy Statement laying out many factors that FERC should consider to determine public benefit, the Order states that it is current FERC policy not to look beyond precedent agreements at any other data regarding need or benefit.⁴¹ FERC's Order asserts that the Certificate Policy Statement merely allows it to consider other factors, but does not require it to do so.⁴² This statement stands in direct conflict with the plain language of the Certificate Policy Statement:

“Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to

³⁷ See *B & J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C.Cir.2004) (citing 15 U.S.C. § 717r(b)) (“If supported by substantial evidence, the Commission's findings of fact are conclusive”). See also *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C.Cir.2002) (“whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”). See also Order at 27-30.

³⁸ Order at 27.

³⁹ See SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18.

⁴⁰ Order at 42.

⁴¹ Order at 27.

⁴² *Id.*

consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects . . . This is a change from the current policy which relies primarily on one test to establish the need for the project.”⁴³

This language is plainly mandatory, not permissive, and reiterates in no uncertain terms that the commission will not primarily rely on one test. Equally egregiously, this section of the Order ignores the directive of the Certificate Policy Statement for projects involving more than condemnation of only a few “holdout” landowners: these applications require *significant* evidence of *substantial* public benefit – the most searching FERC review and the highest burden of proof to support any finding that the project is required by the public convenience and necessity. Thus far, PennEast has filed eminent domain complaints against over 150 landowners. This massive exercise of eminent domain authority places this project squarely within the Policy’s heightened scrutiny standard. Nevertheless, FERC failed to conduct a searching review or present substantial evidence and the Order erroneously recites that “*consistent with* the Certificate Policy Statement and Section 7 of the NGA, that the public convenience and necessity requires approval of PennEast’s proposal, subject to the conditions...”⁴⁴

ENVIRONMENTAL IMPACTS RESULTING FROM PENNEAST

There are already several pipelines in the PennEast proposed service area, with the proposed PennEast pipeline crossing four existing pipelines.⁴⁵ This frenzy of construction is

⁴³ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 23 (1999), clarified, 90 FERC ¶ 61,128 (2000), further clarified, 92 FERC ¶ 61,094 (2000) [hereinafter Certificate Policy Statement].

⁴⁴ Order at 40.

⁴⁵ *See supra* note 43.

causing erosion and runoff, habitat destruction and alteration, wildlife displacement and population stress, wetlands and vegetation loss, disturbance of surface waters and groundwater, fugitive methane leakage, and increased greenhouse gas emissions contributing to climate change, among other direct environmental impacts.⁴⁶ This rapid overbuild of infrastructure is also enabling the growth of upstream gas drilling and production and its attendant environmental impacts on drinking water, habitats, recreation, and the fugitive emission of methane; and it is enabling downstream gas combustion that produces carbon dioxide and other air pollutants.⁴⁷

While evidence of genuine public need for additional pipeline capacity in the service region has not been presented—and in fact has been refuted—the environmental impacts of the proposed pipeline are well-documented in this record. As FERC articulated in its Certificate Policy, the NGA requires FERC to consider adverse environmental impacts in its analysis of public convenience and necessity.⁴⁸ The PennEast DEIS identified large data and analytical gaps, and any initial conclusions it drew were expressly circumscribed pending future analysis of these missing facts by the resource agencies with both expertise and responsibility to protect natural resources. Many critical studies and reports remain incomplete, including those solely within PennEast’s ability to complete.⁴⁹

Importantly, because a Section 7 certificate is a federal license that may lead to a discharge into surface waters, Section 401 of the CWA requires PennEast to present FERC with

⁴⁶ FEIS, *supra* note 5, at 4-327 – 4-336.

⁴⁷ See U.S. Env’tl. Prot. Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2015* (2016); U.S. Env’tl. Prot. Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States* (2016); N.Y. Dept. of Env’tl. Conservation, *Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program* (2015).

⁴⁸ Certificate Policy Statement, *supra* note 43 at ¶ 61,749.

⁴⁹ FEIS, *supra* note 5, at 5-19 – 5-30.

certifications from Pennsylvania and New Jersey that the Project would comply with state water quality standards prior to receiving this license.⁵⁰ On February 7, 2017, the Pennsylvania Department of Environmental Protection granted PennEast a conditional Section 401 certification.⁵¹ On April 26, 2017, the New Jersey Department of Environmental Protection (“NJDEP”) informed PennEast that its joint application for Section 401 certification and a related construction permit were administratively deficient, and gave PennEast thirty days to cure.⁵² On June 28, 2017, the NJDEP closed PennEast’s application because after sixty days, PennEast failed to cure its deficiencies.⁵³ On February 1, 2018, NJDEP denied PennEast’s application without prejudice. As of this filing, PennEast has not refiled its application with NJDEP, and no application for a freshwater wetlands individual permit is currently pending in any form before NJDEP.⁵⁴ Further, because a Section 7 certification is a federal license for an undertaking that may affect historic properties, Section 106 of the NHPA requires FERC to complete a consultation process with affected states and tribes, stakeholders, and the Advisory Council on Historic Preservation.⁵⁵ As of this filing, the Section 106 process remains ongoing.⁵⁶

Intervenors have repeatedly raised their concerns in the docket, as well as submitted substantial data for review regarding the economic and environmental interests that would be adversely impacted by the Project, and viable alternatives. On March 11, 2016, Intervenors urged

⁵⁰ 33 U.S.C. § 1341.

⁵¹ FEIS, *supra* note 5, at 1-13. *See also* Final State 401 WQC, Docket No. CP15-558-000.

⁵² Letter from N.J. Dept. of Env’tl. Prot. Re: Proposed PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20170531-0180 (May 23, 2017).

⁵³ *See* Letter from N.J. Dept. of Env’tl. Prot. Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FWW170001, PennEast Pipeline Project - Statewide (June 28, 2017).

⁵⁴ *See* Letter from N.J. Dept. of Env’tl. Prot. Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FWW170001, PennEast Pipeline Project - Statewide (Feb. 1, 2018).

⁵⁵ 54 U.S.C. § 306108.

⁵⁶ FEIS, *supra* note 5, at 4-228–4-229. Order at 172.

FERC to reject PennEast’s certificate application for several reasons, including a lack of support for PennEast’s assertion of genuine public need; a failure to fully undertake an analysis of project alternatives; and a failure to fully account for environmental impacts of the project.⁵⁷ On September 26, 2016, Intervenors evaluated the DEIS and raised various continuing and additional concerns, including FERC’s failure to frame the DEIS and its alternatives analysis around the public need, rather than private desire, for the project; and FERC’s failure to fully account for certain environmental impacts, including endangered and threatened species impacts, indirect greenhouse gas impacts, and cumulative impacts of regional gas infrastructure development.⁵⁸ On September 12, 2016, the New Jersey Division of Rate Counsel (NJDRRC) filed comments in the referenced docket regarding market need and the proposed return on equity and rate structure for PennEast.⁵⁹ NJ Rate Counsel’s September 12 Comments demonstrate, and the PennEast Answer fails to rebut, that those same LDCs which PennEast and FERC use as their sole determination of market demand, have no need for additional capacity.⁶⁰ On October 12, 2016, PennEast filed comments defending the DEIS.⁶¹ On December 1, 2016, Intervenors

⁵⁷ Intervenors’ Comments on PennEast’s Application, Docket No. CP15-558, Accession No. 20160311-5209 (Mar. 11, 2016) (“Comments on Application”).

⁵⁸ Intervenors’ Additional Comments on FERC’s July 2016 DEIS for the PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20160912-6009 (Sept. 12, 2016) (“Comments on DEIS”).

⁵⁹ Comments of the New Jersey Division of Rate Counsel, Docket No. CP15-558-000, Accession No. 20160912-6003, at 5–8 (Sept. 12, 2016) (“Rate Counsel Comments”).

⁶⁰ Motion for Leave to Answer and Answer of New Jersey Division of Rate Counsel to Comments of PennEast Pipeline Company, LLC, Docket No. CP15-558-000, Accession No. 20161114-5358, at 3 (Nov. 14, 2016).

⁶¹ Response to Comments on the Draft Environmental Impact Statement for the PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20161013-5008 (Oct. 12, 2016).

responded to PennEast's comments, and raised additional concerns regarding PennEast's failure to comply with the CWA and the NHPA.⁶²

The April 2017 FEIS adopted PennEast's stated purpose for the project: to meet supposed gas supply and reliability needs in the service region with an additional 1.1 million dekatherms of gas daily.⁶³ The FEIS's failure to even consider the factual assumptions underlying the purpose or need statement is plain error. A purpose and need statement "will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained."⁶⁴ That is the case here. PennEast's impermissibly narrow purpose to transport natural gas, and FERC's assumption of need necessarily undercut the "heart of the environmental impact statement," the alternatives analysis, by leading FERC to ignore alternatives that do not involve the construction of a pipeline to transport natural gas. For example, the FEIS noted that electric generation from renewable energy sources is a reasonable alternative for reviewing generating facilities powered by fossil fuels, but "because the proposed Project's purpose is to transport natural gas," it was not considered in the EIS.⁶⁵ FERC's blind endorsement of PennEast's stated project objectives in the FEIS's purpose and need statement and the severely limited alternatives analysis that followed violates NEPA.

⁶² Intervenor's Response to PennEast's October 12, 2016 Submission to the PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20161201-5105 (Dec. 1, 2016) ("Response to PennEast Comments").

⁶³ FEIS, *supra* note 5, at 1-3-1-4.

⁶⁴ *Protect Our Cmty's. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); see also *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

⁶⁵ Order at 80.

The FEIS suffered from the same data gaps as other filings to date;⁶⁶ it failed to fully assess indirect climate change impacts of the Project,⁶⁷ and it failed to conduct a rigorous analysis of the cumulative impacts of regional gas infrastructure development.⁶⁸ The FEIS did not include resource agencies’ assessments of water impacts, endangered species impacts, or impacts to historic resources, since such analyses have yet to be completed.⁶⁹ Nevertheless, based on data sets that were in some cases less than 50% complete, the FEIS declared that while “construction and operation of the PennEast Project would result in some adverse environmental impacts... most of the adverse impacts would be reduced to less than significant levels” through regulatory compliance and mitigation measures.⁷⁰

THE PENNEAST ORDER ISSUING CONDITIONAL AUTHORIZATION

On January 19, 2018, FERC issued the Order approving PennEast’s Section 7 certificate. Its finding of public necessity is subject to and conditioned on PennEast’s receipt of all pending federal and state authorizations.⁷¹ PennEast still lacks a Section 401 Water Quality Certification (“WQC”) from NJDEP, and with essential wetlands and flood hazard permits. The Section 106

⁶⁶ See *infra* Section II.B.4.

⁶⁷ See *infra* Section II.B.5.

⁶⁸ See *infra* Section II.B.6.

⁶⁹ U.S. House Comm. on Nat. Res., Hearing Memorandum—Full Committee Oversight Hearing Titled “Modernizing NEPA for the 21st Century” 4 (Nov. 27, 2017), http://naturalresources.house.gov/uploadedfiles/hearing_memo_-_fc_ov_hrg_on_nepa_11.29.17.pdf (“CEQ regulations require that federal agencies prepare the EIS ‘concurrently with and integrated with’ all other environmental requirements. Many complex actions require compliance with literally dozens of other federal, state, tribal, and local laws, and thus, the NEPA process is intended to act as an ‘umbrella’ with the EIS forming the overarching framework ‘to coordinate and demonstrate compliance with these requirements.’” (emphasis added by U.S. House Comm. on Nat. Res.) (citations omitted) (first quoting 40 C.F.R. § 1502.25; then quoting Linda Luther, Cong. Research Serv., RL33152, The National Environmental Policy Act: Background and Implementation 28 (2005)).

⁷⁰ FEIS, *supra* note 5, at 5-1.

⁷¹ Order, *supra* note 3.

process also remained incomplete.⁷² The Order simply adopted the determination in the FEIS with no additional assessment of the genuine existence—or lack thereof—of underlying market demand.⁷³ As evidence of public need and public benefit, FERC exclusively cited PennEast’s precedent agreements without conducting or considering existing independent market analysis.⁷⁴ Due to this significant lack of information, FERC therefore was limited to finding that the PennEast project was “in” the public convenience and necessity “as described and **conditioned** [in the Order],” and said that the certificate **authority** was explicitly **conditioned** on the actual gathering of those environmental data and later analysis of reviewing environmental agencies.⁷⁵

The Order certifies a project that would include: 116 miles of new 36-inch-diameter pipeline extending from Luzerne County, Pennsylvania to Mercer County, New Jersey; the 2.1-mile Hellertown Lateral consisting of 24-inch-diameter pipeline in Northampton County, Pennsylvania; the 0.6-mile Gilbert Lateral consisting of 12-inch-diameter pipeline in Hunterdon County, New Jersey; and the 1.5-mile Lambertville Lateral consisting of 36-inch-diameter pipeline in Hunterdon County, New Jersey.⁷⁶ In addition to the 120.2 miles of natural gas pipeline facilities, PennEast would construct a 47,000 horsepower compressor station in Kidder Township, Carbon County, Pennsylvania, eight metering and regulating stations, eleven mainline valve sites, and four pig launcher/receiver sites.⁷⁷ The project would impact 1588.4 acres of land.⁷⁸ It would permanently affect 680 tracts of land and an additional 163 tracts for the

⁷² *Id.* at 172. PennEast also still lacks other federal authorizations.

⁷³ Order at 31.

⁷⁴ *Id.* at 27.

⁷⁵ Order, *supra* note 3, at 81.

⁷⁶ FEIS, *supra* note 5, at 1-3.

⁷⁷ *Id.*

⁷⁸ *Id.* at 2-3.

duration of construction.⁷⁹ It would require clearing and grading of vegetation.⁸⁰ It would cross 269 waterbodies (170 in Pennsylvania and 99 in New Jersey); streams would be cut, drilled, bored, and blasted.⁸¹ It would make 235 wetland crossings.⁸² It would present geohazard risks, including subsidence in karst terrain.⁸³ Additionally, the project will have indirect impacts on 1,725 acres of interior forest, which the Order acknowledges are long-term impacts, ranging from 30 to hundreds of years in duration.⁸⁴

Construction and operations would affect air quality in the Project area.⁸⁵ Potential emissions of GHGs associated with operation of the Project, including methane emissions from fugitive leaks and equipment venting, are estimated to exceed the 25,000 metric ton threshold for the Kidder Compressor Station. In addition, GHG operating emissions from the New Jersey portion of the Project are also estimated to exceed 25,000 metric tons per year.⁸⁶ If, as PennEast represents, its pipeline would indeed lead to a net increase in gas consumption in the service region, then the Project would also be responsible for enabling upstream gas production and downstream gas consumption, and their attendant environmental consequences—particularly the upstream fugitive emission of methane and the downstream combustion emission of carbon dioxide, both greenhouse gases that the EPA has found to threaten the public health and welfare of current and future generations.⁸⁷ And this catalog of impacts is only a fraction of what the impact tally will be once the full measure of the project is taken. Selecting from the vast

⁷⁹ *Id.* at 2-3.

⁸⁰ *Id.* at 2-9.

⁸¹ *Id.* at 2-10–2-13.

⁸² *Id.* at 2-13–2-14.

⁸³ *Id.* at 4-1–4-18.

⁸⁴ Order, *supra* note 3, at 50; 52-53.

⁸⁵ FEIS, *supra* note 5, at 4-230–4-258.

⁸⁶ *Id.* at 4-238.

⁸⁷ *Id.* at 4-234; *see also supra* note 11 and accompanying text.

mountain of missing data and analyses, the Order acknowledges, for example, that PennEast only has approximately half of the karst data,⁸⁸ lacks Phases 2 and 3 of the Geohazard Risk Evaluation analysis,⁸⁹ no site specific HDD plans or feasibility analysis,⁹⁰ and only has remote-sensing non-site specific wetlands delineations.⁹¹

FERC's Order granting the Section 7 Certificate to PennEast contains an automatic delegation of eminent domain authority under 717f(h).⁹² As noted above, FERC's order states that FERC has relied upon precedent agreements to determine existence of public benefit and that a comprehensive assessment of environmental impacts will be forthcoming as part of separate environmental authorizations. This assessment is required to be submitted to FERC prior to any construction being allowed under the Order.

For the reasons set forth below, Intervenors seek a rehearing and rescission of the Commission's decision to grant the Section 7 certificate on the grounds that FERC has: (1) violated the NGA by erroneously finding that the project is required by the public convenience and necessity and by issuing a certificate conditioned on subsequent federal authorizations integral to that finding; (2) violated the Fifth Amendment by failing to conduct a sufficient public use analysis prior to granting certificates that convey the power of eminent domain;⁹³ (3) failed to comply with the CWA; (4) failed to comply with NHPA; (5) violated the NGA and the 5th Amendment by issuing a conditional certificate that purports to grant eminent domain for lands that may not be necessary; and (6) failed to comply with NEPA in its analysis of the

⁸⁸ Order at 40.

⁸⁹ Order at 43.

⁹⁰ Order at 45.

⁹¹ Order at 49.

⁹² Order at 42.

⁹³ See *infra* note 96.

Project. Intervenors additionally seek a rehearing of FERC’s denial to grant an evidentiary hearing on the question of public need.

II. BASIS FOR REHEARING

A. Concise Statement of the Alleged Errors in the Order

1. *The Order Fails to Demonstrate that the Project Is Required by the Public Convenience and Necessity Under the NGA.* The Certificate Order states conclusorily that precedent agreements are evidence of the public convenience and necessity when this is not actually true. The Order also fails to evaluate the environmental impacts of the project in its public convenience and necessity evaluation, as required by the NGA.⁹⁴
2. *Because FERC’s determination of public convenience and necessity is flawed, as set forth in Point 1 above, the Order, which FERC regards as triggering an automatic conferral of eminent domain authority, violates the Constitution.* FERC’s deficient determination of public convenience and necessity renders the conferral of eminent domain authority unconstitutional.⁹⁵
3. *The Order Violates the Clean Water Act by Issuing a Section 7 Certificate Prior to New Jersey Water Quality Certification.* The CWA clearly prohibits FERC

⁹⁴ Certificate Policy Statement, *supra* note 43, at 61,749.

⁹⁵ Intervenors contend, and FERC agrees, that FERC has no jurisdiction nor any expertise for the consideration of constitutional challenges. *See* Mountain Valley Pipeline, L.L.C., 161 FERC ¶ 61,043, Docket No. CP16-10-000, Accession No. 20171013-4002 at 63 (Oct. 13, 2017) (order issuing Certificates and granting abandonment authority) (“Notwithstanding the fact that we addressed a takings argument raised in Transco and here, such a question is beyond our jurisdiction: only the courts can determine whether Congress’ action in passing Section 7(h) of the NGA conflicts with the Constitution.”); Atlantic Coast Pipeline, L.L.C., 161 FERC ¶ 61,042, Docket No. CP15-554-000, Accession No. 20171013-4003 at 81 (Oct. 13, 2017) (order issuing Certificates) (“Notwithstanding the fact that we addressed a takings argument raised in Transco and here, such a question is beyond our jurisdiction; only the courts can determine whether Congress’ action in passing Section 7(h) of the NGA conflicts with the Constitution.”). Nevertheless, to the extent that Intervenors are required to raise all potential legal claims to preserve them for the Circuit Court, we do so here.

from issuing the Order in advance of the grant of the required Section 401 certification.⁹⁶

4. *The Order Violates the National Historic Preservation Act by Preceding the Completion of Section 106 Consultation.* The NHPA clearly prohibits FERC from issuing the Order in advance of the completion of the Section 106 process.
5. *Because FERC Failed to Ensure That the Route it Certified Would be Granted Necessary Approvals for the Construction of the Pipeline, FERC's Order Violates the NGA and the Constitution.* The NGA allows exercise of eminent domain only over land that is “necessary” for the pipeline’s construction, but there is no way to know for sure if land will be “necessary” if the route is likely to change. The Constitution similarly requires that land may only be taken for the public use, and any land that is taken that cannot be used for the pipeline due to a change in route will not have been taken for the public use.⁹⁷
6. *FERC's Order violates NEPA because it rests on an FEIS that is Wholly Deficient*
 - a. *FERC's Order violates NEPA because it rests on an FEIS that is Wholly Deficient.*
 - b. *FERC Violated NEPA BY Failing to Engage in a Robust Alternatives Analysis.* As a result of the impermissibly narrow purpose and need statement, the FEIS failed to conduct a rigorous evaluation of the no action alternative, as required by NEPA.⁹⁸ FERC primarily based its rejection of the no action alternative on PennEast’s objectives⁹⁹ (the construction of a new natural gas pipeline) without considering what the new pipeline was meant to accomplish, and whether another alternative could accomplish that goal better.
 - c. *Material Information Gaps in the FEIS Precluded FERC From Engaging in Informed Decision-making Required by NEPA.* FERC erred in issuing the FEIS prior to PennEast furnishing reasonably

⁹⁶ Intervenors contend that FERC lacks the authority to determine whether its own actions violate the Clean Water Act’s requirements, yet we raise this argument in our rehearing request to preserve it for the court’s review.

⁹⁷ Intervenors contend here as well that FERC does not have the jurisdiction to consider constitutional challenges, but we raise this argument to preserve for possible appeal to the Circuit Court.

⁹⁸ NEPA § 102(2)(C), (42 U.S.C. § 4332)

⁹⁹ FEIS, *supra* note 3, at 3-3.

available information necessary to informed decision-making under NEPA.

- d. *FERC Failed To Properly Analyze and Assess Cumulative Impacts*
- e. *FERC violated NEPA's public participation requirements.* By issuing a low quality, deficient Draft EIS, the public was unable to scrutinize the proposed project and meaningfully comment on it.

- 7. *FERC Improperly Denied an Evidentiary Hearing During its Consideration of the Proposal.* Intervenors submitted evidence into the record that showed there were questions of material facts and relevant questions of credibility. FERC improperly denied an evidentiary hearing to resolve these issues.

B. Statement of Issues

The subsections below correspond to the numbered paragraphs in Section II.A above, and set forth Intervenors' position with respect to the identified issues. Intervenors incorporate by reference all arguments and evidence contained in Intervenors' previous submissions to the FERC docket on these issues.

1. The Order Fails to Demonstrate that the Project Is Required by the Public Convenience and Necessity As Required by the NGA

What the Natural Gas Act Requires

The "primary aim" of the Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies."¹⁰⁰ In order to ensure this goal was met, Congress intended FERC to conduct a searching review on whether any proposed new natural gas pipeline would benefit the public before allowing it to be constructed. Section 7(e) of the NGA allows FERC to

¹⁰⁰ FPC v. Hope Gas Co., 320 U.S. 591, 610 (1944); Pennsylvania Power Co. v. FPC, 343 U.S. 414, 418 (1952) ("A major purpose of the (Power) Act is to protect power consumers against excessive prices"); Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York City., Pa., 768 F.3d 300, 331(3rd Cir. 2014).

grant Certificates authorizing construction only if the project “is or will be *required* by the present or future public convenience and necessity.”¹⁰¹ Otherwise, “such application shall be denied.”¹⁰² This is stronger language than necessary to make the point—the pipeline must be “*required by* the present or future public convenience and necessity” instead of “*in the* present or future public convenience and necessity,” and the law makes clear that only pipelines required by the public convenience and necessity may be certified—otherwise the application shall be denied. Outsourcing its analysis to clearly self-interested applicants does not come close to fulfilling the required individualized review providing substantial evidence of public need that would require any particular pipeline project to be certified.

FERC’s Certificate Policy Statement Interpreting Its Natural Gas Act Mandate

FERC originally acknowledged that the NGA required it to conduct an individualized review of each project. When evaluating a given project under the Statement, the Commission stated that it shall conduct a balancing analysis to determine whether the proposed pipeline is required by the public convenience and necessity. Specifically, where an applicant proposes new pipeline construction, the Certificate Policy Statement directs FERC to (1) consider “the evidence of public benefits to be achieved” by the proposed project; (2) balance that evidence against adverse economic effects on “existing pipelines in the market and their captive customers” and on “landowners and communities affected by the route of the new pipeline”; and, if that balance favors pipeline construction, (3) proceed to consider environmental impacts as a

¹⁰¹ 15 U.S.C. § 717f(e).

¹⁰² *Id.*

final step in public interest balancing.¹⁰³ The Policy Statement anticipates that when a project has significant adverse effects, specifically citing the situation where a significant use of eminent domain is required, the benefits demonstrated must be even more robust.¹⁰⁴ Given that this project will cut through 116 miles of greenfield, and, thus far, wielding the Certificate as a sword, PennEast has filed over 125 condemnation proceedings to date, the adverse effects of this project are undoubtedly significant.¹⁰⁵

Recently, FERC Commissioners unanimously announced that they would be re-evaluating FERC's Certificate Policy Statement and practice.¹⁰⁶ At least two commissioners have stated the Commission's current Policy, as applied, does not do enough to require the Commission to fully consider whether a project is needed.¹⁰⁷ And all Commissioners acknowledge that its current practice of relying exclusively on precedent agreements - which bears little relation to this Policy - needs to be reassessed.

The Certificate Policy Statement specifically rejects the idea of using only precedent agreements to determine project need, a component of public convenience and necessity. The Policy Statement states that “[t]he amount of capacity under contract . . . is not a sufficient

¹⁰³ Certificate Policy Statement, *supra* note 43, at 19.

¹⁰⁴ Many of these lands used public funds for their permanent preservation, and were specifically chosen for their high ecological value and their physical location as essential to protecting interior forest congruity.

¹⁰⁵ Order at 16. FERC acknowledged the high use of eminent domain for this project in its Order, stating, “We are mindful that PennEast has been unable to reach easement agreements with a number of landowners.”

¹⁰⁶ Press Release, Fed. Energy Regulatory Comm'n, FERC to Review its 1999 Pipeline Policy Statement (Dec. 21, 2017), <https://www.ferc.gov/media/news-releases/2017/2017-4/12-21-17.asp#.WjvuMLaZPab>.

¹⁰⁷ Cheryl LaFleur, Comm'r, Fed. Energy Regulatory Comm'n, Remarks at Commission Meeting (Dec. 21, 2017), <https://www.ferc.gov/CalendarFiles/20180104102157-transcript.pdf>, at 51—53; Richard Glick, Comm'r, Fed. Energy Regulatory Comm'n, Remarks at Commission Meeting (Dec. 21, 2017), <https://www.ferc.gov/CalendarFiles/20180104102157-transcript.pdf>, at 58—60.

indicator by itself of the need for a project.”¹⁰⁸ The Statement expounds on its process for considering whether to grant Certificates, saying:

Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.¹⁰⁹

The Statement suggests several possible ways to measure need, and goes on to state that “the evidence necessary to establish the need for the project will usually include a market study.”¹¹⁰ In a recent statement, FERC Commissioner Cheryl A. LaFleur explains how FERC has deviated from the Certificate Policy Statement’s requirements:

The Certificate Policy Statement established a policy for determining economic need that allowed the applicant to demonstrate need relying on a variety of factors, including ‘environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure. However, the Commission’s implementation of the Certificate Policy Statement has focused more narrowly on the existence of precedent agreements.’¹¹¹

The Certificate Policy Statement is clear that it envisions FERC employing a holistic analysis that considers multiple factors to determine public need. By looking only at precedent agreements, FERC is flagrantly disregarding its own rulebook.

Instead of conducting the individualized review anticipated both by the NGA and by its own Policy Statement, FERC expends most of its Order explaining why it can ignore its own

¹⁰⁸ Certificate Policy Statement, *supra* note 43, at 16.

¹⁰⁹ Certificate Policy Statement, *supra* note 43, at 23.

¹¹⁰ *Id.* at 25.

¹¹¹ Cheryl A. LaFleur, Statement on Order Issuing Certificates and Granting Abandonment Authority, Nos. CP15-554-000, CP16-10-000 (Oct. 13, 2017).

Policy and enabling laws.¹¹² FERC's Order states that PennEast's precedent agreements with twelve gas shippers is the only evidence of public benefit required to approve the pipeline. FERC insists that "nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers."¹¹³ This statement is in direct conflict with the Certificate Policy Statement ("Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project.")¹¹⁴ The Order also dismisses supply forecast projections as uncertain, ignores data reflecting excess capacity, and deems precedent agreements to be better evidence of demand without even attempting to explain why, placing complete reliance on these agreements without providing even a theory about why concrete evidence in the docket could be disregarded.¹¹⁵ FERC's double assumption, that precedent agreements show proof of market demand, and that market demand is proof that a project is in the public convenience and necessity (by providing the required public benefits) are both unwarranted based on the facts that FERC failed to consider.

Beyond violating the NGA in its review process for the PennEast Certificate, FERC's substantive conclusion is unsupported by any evidence. FERC bases its entire Order on: (1) the existence of precedent agreements reflecting that there is unserved demand for firm capacity, (2) PennEast and project shippers' claims that the Project would lower prices for gas consumers; and

¹¹² Order at 1 (Glick, R. Dissenting) ("In today's order, the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed.")

¹¹³ Order at 27.

¹¹⁴ Certificate Policy Statement, *supra* note 43, at 23.

¹¹⁵ Order at 29.

(3) PennEast and project shippers' claims that the Project would increase reliability.¹¹⁶ However, as set out below in subsections a through d, the record indicates that there is no evidence to support any of these claims, and the record contains substantial evidence that undermine their veracity.

The PennEast Project is Not Required by the Public Convenience and Necessity

FERC improperly relies solely on precedent agreements in granting PennEast its certificate. In its order, FERC summarily dismisses data and analyses submitted by Intervenors and others regarding PennEast's assertions regarding the project's cost, reliability and unmet demand. In addition, Intervenors herewith present important and compelling new evidence of lack of need based on analysis of pipeline contracts and deliveries in the region during the historic cold weather events in December 2017 and January 2018.

a. FERC erred in relying solely on PennEast's Precedent Agreements as evidence of Market Demand

Given the recent market trends toward owner-affiliate pipeline projects, precedent agreements in such dockets do not properly indicate market demand, and thus often do not indicate that a project is in the public convenience and necessity; they certainly cannot be taken as conclusive proof of the public convenience and necessity.¹¹⁷ As clearly described by Intervenors and independent energy experts in the PennEast docket, there are two main (although

¹¹⁶ Order at 30.

¹¹⁷ See *supra* note 19, at 3; Order at 1 (Glick, R. Dissenting); Order at 1 (LaFleur, C. Concurring); Rate Counsel Comments, *supra* note 58, at 5–8 (Sept. 12, 2016); ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 5; Dr. Steve Isser, NATURAL GAS PIPELINE CERTIFICATION AND RATEMAKING (Oct. 7, 2016).

not exclusive) situations in which precedent agreements do not even reflect legitimate market demand: if the precedent agreements are signed by shippers who are affiliates of the pipeline company, and if the pipeline will just be used to divert already flowing natural gas from an older pipeline to a newer one because it presents excess capacity. The PennEast pipeline reflects **both** of these scenarios.

Yet, in granting the certificate, FERC explicitly states that it does not look beyond precedent agreements at any other data regarding need or benefit.¹¹⁸ But this plainly is not the language in the policy statement. As the Commission admits in its order, while precedent agreements may be *some* “evidence of demand¹¹⁹,” the mere existence of precedent agreements does not end the Commission’s inquiry as to whether the project is in public convenience and necessity. Further, the Commission relies on PennEast’s answer (which is contrary to its own policy), even though the answer does not resolve any of the concerns Intervenors raised in the comments. The entire commission has agreed to review its pipeline certificate practices.¹²⁰ Particularly in light of the pending review, PennEast’s project should never have been given the green light that relies on precedent agreements alone. By relying on self-dealing precedent agreements with affiliated shippers to conclude that the PennEast Project is required by the public convenience and necessity, the Order considers private rather than public benefit, and ignores the weight of evidence against precedent agreements as outlined below.

PennEast affiliates of the initial owners purchased 74.2% of pipeline capacity, rising to 88% of capacity in 10 years, a project structure designed to convert a cost imposed upon retail

¹¹⁸ Order at 27; *See infra* Statement of Relevant Facts at 3.

¹¹⁹ Certificate Policy Statement, *supra* note 43, at 25.

¹²⁰ Federal Energy Regulatory Commission, *FERC to Review its 1999 Pipeline Policy Statement*, Press Release (Dec. 21, 2017); Order at 1 (Glick, R. Dissenting); Order at 1 (LaFleur, C. Concurring).

ratepayers into shareholder return. (While PSEG has since sold its ownership stake, they remain a shipper and shippers signing onto precedent agreements are typically prevented from selling this capacity except for extremely limited circumstances. This shipper agreement retains the features of an affiliate transaction for the purposes of this analysis, as the transaction was not arms-length at the time of execution.) Since affiliate contracts may not represent genuine demand, we look to non-affiliated customers, which demonstrate demand for only 12% of this pipeline's capacity beyond the initial five years. The market response to the PennEast project is telling. Without the support of ratepayers, non-regulated and non-affiliated firms purchased 0% of long-term capacity; and only 6.7% of capacity at 10 years. While there is market-based demand for 15.7% of capacity for the first five years, the market is signalling great uncertainty about demand and market conditions after five years, a risk that the LDCs were willing to ask ratepayers to bear.

PennEast bears virtually no risk on this project for overestimating demand, and has successfully shifted that risk to existing pipelines and their captive customers. PennEast affiliates can shift capacity contracts from existing pipelines to PennEast if they choose, leaving excess capacity elsewhere.¹²¹ There is no evidence in the record that affiliates' contract decisions were based on competitive factors, and FERC has stated its unwillingness to protect consumers from the impacts of uneconomic decisions by examining the evidence of such. From the extant record, it appears such decisions were driven by profits to be realized by the parent in the transportation market.

¹²¹ See PENNEAST DRAFT RESOURCE REPORT, Docket No. PF15-1-000, Accession No. 20150731-5266, at 1-4 (“PSEG... intends to utilize the supplies of gas from the proposed PennEast Project to displace more expensive supplies from the Gulf of Mexico.”).

FERC has stated that non-affiliate agreements did in fact have greater evidentiary value than affiliate agreements: “A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.”¹²² Here, the original ownership structure shows that PennEast only had barely 25% backing by unaffiliated shippers for the first five years when it drops to less than 18% – and then to only 12% after ten years. PennEast has not made anything close to a rigorous showing of unmet natural gas demand in the markets that PennEast supposedly proposed the project to serve.

With the PennEast project, the members of the PennEast Consortium¹²³ stand to make a 14% percent rate of return on their investment in the pipeline, which provides a strong incentive to garner the regulated returns provided by the interstate transportation market design unrelated to true demand.¹²⁴ FERC must weigh the mere existence of those agreements against the mountain of evidence pointing to lack of need for this project, from both government agencies and industry experts.¹²⁵

FERC cannot assume that Affiliate Shippers (depicted in bold in Table 1) made arm’s-length decisions based on genuine demand and an evaluation of competitive alternatives. FERC Commissioners must be assured that the market for pipeline capacity expansion is competitive before concluding that a specific expansion project provides a public benefit. Dr. Makholm

¹²² Certificate Policy Statement, *supra* note 43, at 25.

¹²³ The members of the PennEast Consortium in this project are: New Jersey Natural Gas, PSEG Power, Texas Eastern Transmission, South Jersey Gas, Elizabethtown Gas, and UGI Energy Services.

¹²⁴ “As it stands, we are seeing a disturbing trend of utilities pursuing a capacity expansion strategy by imposing transportation contract costs on state-regulated retail utility ratepayers so that affiliates of those same utilities can earn shareholder returns as pipeline developers.” *Testimony of N. Jonathan Peress Before Senate Energy and Natural Resources Committee*, (June 14, 2016), at 5.

http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=51079A26-DD96-4FB5-8486-411C8A7F9024

¹²⁵ See Certificate Policy Statement, *supra* note 43, at 23. The precedent agreements were not intended to replace FERC’s entire public interest inquiry, but rather be one element of evidence of demand.

suggests a key question: “do both potential entrants and incumbents compete equally to secure the business of new pipeline customers?”¹²⁶ In the case of PennEast, the answer is no. In the current market, there are limited potential customers for firm capacity; LDCs (and their parent firms) now find themselves able to exercise market power to create an uneconomic project in the midstream market and prevent competitive projects in the region.

Table 1

Shipper/ Investor	Firm Contracts	Shipper % in Year 1-5	Shipper % in Year 5-10	Shipper % in Year 10-15	Original Ownership %
Spectra Energy Partners (Texas Eastern shipper)	125,000	12.6%	13.9%	15.0%	10%
AGL Resources (Elizabethtown Gas is shipper)	100,000	10.1%	11.2%	12.0%	20%
NJR Pipeline Co. (New Jersey Natural Gas is shipper)	180,000	18.1%	20.1%	21.6%	20%
South Jersey Industries (South Jersey Gas is shipper)	105,000	10.6%	11.7%	12.6%	20%
UGI Energy Services (owner and shipper)	100,000	10.1%	11.2%	12.0%	20%
PSEG Power LLC (PSEG ER&T is shipper)	125,000	12.6%	13.9%	15.0%	10%
Consolidated Edison Company (non affiliated shipper)	100,000	10.1%	11.2%	12.0%	

¹²⁶ Jeff D. Makhholm, THE POLITICAL ECONOMY OF PIPELINES: A CENTURY OF COMPARATIVE INSTITUTIONAL DEVELOPMENT at 91 (2012) (Dr. Makhholm is senior vice president at NERA Economic Consulting).

Cabot Oil & Gas Corporation	50,000	5.0%	5.6%	0.0%	
Talen Energy Marketing, LLC	50,000	5.0%	0.0%	0.0%	
Enerplus Resources (USA) Corporation	30,000	3.0%	0.0%	0.0%	
Warren Resources, Inc.	15,000	1.5%	0.0%	0.0%	
NRG REMA LLC	10,000	1.0%	1.1%	0.0%	
TOTAL SIGNED CAPACITY	990,000				
% of signed capacity held by owners at time shipping contracts were signed (through affiliates)		74.16%	82.00%	88.20%	

In a competitive market to construct transport capacity, potential customers would evaluate options and contract for capacity that provides a better combination of terms (cost, route, services). Shippers would negotiate with current pipeline operators and potential new projects before committing to a long-term contract for additional capacity. The facts of this case suggest that distortions in the customer decision process resulted in an uneconomic project. During the open season for PennEast, an alternative project was offered at a somewhat lower cost and similar terms.¹²⁷ Diamond East, a Williams project, was proposed as an expansion of an

¹²⁷ "Unlike competing projects designed to serve the New Jersey Market Pool, Diamond East is a cost-effective expansion along an existing Transco corridor." Williams Announces Open Season For Transco Pipeline's Diamond East Project, The Williams Companies, Inc. (Aug. 26, 2014), <http://investor.williams.com/press-release/williams/williams-announces-open-season-transco-pipelines-diamond-east-project>;

"Transco plans to offer shippers a negotiated daily reservation rate in the low \$0.40's to high \$0.50's per Dth/day for firm transportation service under the Project dependent on the final project volume." Open Season for Diamond East Project, (Aug. 26, 2014),

existing pipeline at a lower cost of construction for the same volume of capacity. Diamond East would have run from Transco receipt points in Luzerne County to Transco points in Mercer County, exactly as PennEast will do. Three New Jersey LDCs chose to purchase long-term capacity on PennEast, in lieu of a myriad of options available in the market, including Diamond East. What is clear about their decision process is the result: the option that they chose remunerates their own stockholders.

The behavior of LDCs can impose an insurmountable barrier to new projects that lack an affiliate connection. Non-affiliated transportation operators cannot compete in adding new capacity as long as prospective shippers are only interested in contracting for capacity from pipelines in which their affiliated unregulated companies own a substantial interest. Once local distribution companies vertically integrate into the transportation market, it loses features of a competitive marketplace. The result, absent a demonstration of market demand growth matched to the proposed new capacity, is very likely to be stranded capacity, significantly reduced value of the invested capital on the line(s) meeting current demand, and increased costs for captive customers throughout the impacted region.

It is important to distinguish the nature of overbuilding presented by PennEast from other instances of overbuilding by looking at which parties bear the risk. In a competitive market pipeline operators apply the brakes on expansion when shippers are no longer willing to purchase long-term transportation contracts. Shippers, however, do not have perfect foresight and can make flawed decisions. Generally, shippers bear market risk for the terms of their 15 to 20 year

<http://www.1line.williams.com/1Line/wgp/download?delvid=5977734&hfNoticeFlag=Y&hfDownloadFlag=false&hfFileName=download.htm>.

contracts, and where the pipeline is not fully subscribed (at compensatory rates), pipeline owners bear the risk of overestimating demand thereafter.

In PennEast's case, there are two types of shippers with different risk profiles. Market-based shippers bear market risk that the value of firm capacity will be less than expected over the 15-year contract period. Market risk works to discourage shippers from contracting for risky new capacity into (or out of) regions that could become overbuilt either as a result of the project they subscribe to, or another project in the same region. In this proceeding however, market risk is partly offset by the promise of a high regulated rate of return for all the affiliated PennEast owners. LDC-affiliates bear even less market risk, as they expect to pass along the cost of PennEast transport to ratepayers, regardless of market conditions. LDC decisions are particularly important, as they play an outsized role in capacity expansion, as demonstrated by PennEast.

PennEast's actual motives are simply to secure affiliated shareholder profit from pipeline operation while captive ratepayers shoulder the attendant risks arising from overcapacity. PennEast's attempt to defend FERC's insufficient assessment of economic need offered no new supporting information. PennEast insisted that:

The record contains substantial information supporting a finding of need for the Project as well as a sufficient discussion of impacts and benefits for the Commission to consider in its determination under the public convenience and necessity standard.¹²⁸

Yet, PennEast's allusion to its own certificate application and supplemental materials for substantiation does not respond to the crux of the comments on the DEIS regarding need, nor intervenors submissions of expert data and analyses showing otherwise.¹²⁹

¹²⁸ PennEast Oct. 12 Comments, *supra* note 60, at 1–2.

¹²⁹ Rate Counsel Answer, *supra* note 59, at 2.

PennEast also dismisses Rate Counsel’s comments without engaging in a meaningful discussion of why they are “based on incorrect assumptions and contrary to Commission precedent.”¹³⁰ Rate Counsel’s comments note that “two-thirds of the demand for the pipeline exists because the Project’s stakeholders have said it is needed,” and refer to several studies that indicate that the forecasted demand PennEast purports to provide is actually already met by existing pipeline capacity.¹³¹ Rate Counsel also posits that existing infrastructure is poised to take advantage of the natural gas in the Marcellus Shale, which further diminishes PennEast’s argument for project need based on forecasted increase in demand.¹³² PennEast responds to Rate Counsel’s calls for FERC to engage in closer scrutiny of project need by citing reasons aside from increased demand for why shippers would enter precedent agreements, such as cost savings and increased diversity and flexibility of supply.¹³³

However, not only are these factors merely post-hoc rationalizations, they do not provide justification based on project need, as explained in Intervenor’s responses.¹³⁴ Precedent agreements do not demonstrate a lack of adequate existing capacity in this proceeding, because the PennEast project structure provides other incentives for those particular entities to contract for capacity. FERC cannot properly rely on the opportunistic applications of individual pipeline companies acting alone, to ensure that the public convenience and necessity require a given

¹³⁰ PennEast Oct. 12 Comments, *supra* note 60, at 2.

¹³¹ Rate Counsel Comments, *supra* note 58, at 4 and 8.

¹³² *Id.* at 7.

¹³³ Reply Comments of Concentric Energy Advisors to Comments Submitted by the New Jersey Division of Rate Counsel Regarding PennEast Pipeline Company, LLC, Docket No. CP15-558-000, Accession No. 20161017-5038, at 5 (October 17, 2016) [hereinafter Concentric Reply Comments]. (“Factors such as cost savings, supply security and reliability, supply diversity, supply flexibility, price stability, and the ability to grow and meet incremental demand, also play an important role in the decision-making.”).

¹³⁴ Rate Counsel Answer, *supra* note 59, at 4–6 (arguing that PennEast is deflecting the conversation of need to “ancillary considerations,” and noting that the project will not ultimately procure cost savings or increased flexibility or diversity in supply in any case).

project.¹³⁵ Relying on them to show public need would only result in more pipelines than are needed to satisfy actual demand.

b. PennEast’s claim of public need depends upon unsubstantiated assertions that there is unmet demand.

Even if precedent agreements were reliable as conclusive evidence of market demand, which FERC’s own Certificate Policy Statement indicates they are not, FERC’s assumption that market demand always means that a project is in the public convenience and necessity violates a key Congressional goal of the Natural Gas Act - balancing the broad competing public interests involved.¹³⁶ In a recent reflection on FERC’s CPCN analysis process, Former Commissioner Bay cautioned that current market demand does not reflect future realities:

Pipelines are capital intensive and long-lived assets. It is inefficient to build pipelines that may not be needed over the long term and that become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems. If a new pipeline takes customers from a legacy system, the remaining captive customers on the system may pay higher rates. Under such circumstances, a cost-benefit analysis may not support building the pipeline.¹³⁷

Despite the studies and expert reports raised by Intervenors, the Commission, without explanation finds that PennEast has “demonstrated that there is market demand” and that “end users will generally benefit from the project.”¹³⁸ While the Order raises the argument that the Commission is required to “examine a group of projects together and pick which project(s) best

¹³⁵ Comments by New Jersey Conservation Foundation and Stony Brook--Millstone Watershed Association on PennEast’s Application Docket No. CP15-558, at 25 [*Hereinafter* Comments by New Jersey Conservation Foundation].

¹³⁶ *Columbia Gas Transmission, LLC*, 768 F.3d at 331 (3rd Cir. 2014).

¹³⁷ See *supra* note 19, at 3.

¹³⁸ Order at 28.

serve an estimated future regional demand,”¹³⁹ and then disputes it, this argument is a strawman. Intervenor do not suggest FERC should pick a “winner,” but rather have demonstrated that this project, taken in isolation, should not be approved as there is simply no shortage of pipeline capacity to meet current or projected future regional demand. PennEast represents the market failure that occurs when shippers and pipeline companies have a financial incentive to propose “uneconomic” projects” as outlined in the arguments below.¹⁴⁰

PennEast makes conflicting assertions regarding demand and need throughout its filed papers, all of which are also controverted by other data currently in the docket, and therefore cannot provide a factual basis – much less one comprising substantial evidence – for FERC’s finding that this project was required by the public convenience and necessity. The only data PennEast offers to support assertions of unmet demand are historical data about 2013 retail sales and peak day sendout,¹⁴¹ and estimates of company retail growth over the following 3 to 5 years, obtained directly from the LDCs that are also owners of PennEast. Yet, analysis of pipeline capacity, and using the data supplied by PennEast about projected demand, shows that PennEast is not needed.¹⁴²

PennEast’s adequacy-of-demand showing relies entirely upon faulty conclusions about conditions at the time of the “Polar Vortex” of 2013/2014. While PennEast uses data from the Polar Vortex to conclude that additional pipeline capacity is required to meet peak winter demand, this conclusion is flawed for several reasons. First, there was no analysis offered by

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 26.

¹⁴¹ PennEast’s own consultants have subsequently acknowledged that peak day sendout data, on its own, is insufficient to evaluate LDC supply/demand balance. Concentric April 2016 submission, Docket No. CP15-558, Accession No. 20160414-5202, at 10.

¹⁴² ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 9 (Mar. 9, 2016).

PennEast of the adequacy of pipeline capacity to meet peak winter demand. Intervenor offered expert analysis of this very issue, showing that there is adequate pipeline capacity through at least 2030.¹⁴³ In addition, substantial reforms have occurred at both PJM and FERC to reduce stress on gas infrastructure as occurred during the Polar Vortex.¹⁴⁴ Intervenor and others submitted evidence thereof to FERC during the course of this proceeding. As set out in the record, the reforms have proven effective in preventing a recurrence of the abnormal price spikes, as Commissioner Bay noted in June 2015:

In the winter of 2014, uplift payments were \$667 million (January - February 2014) and the forced outage rate was 22 percent. But this winter saw marked improvement, even though it was almost as cold as last winter and PJM had a higher peak load at 143,086 megawatts. The outage rate dropped to 12 percent, and uplift was \$105 million (January - February 2015). Better preparation and winterization, which are relatively inexpensive fixes, and the addition of gas infrastructure, with better gas-electric coordination, helped make this happen.¹⁴⁵

In addition, PennEast's forecasts are predicated on insubstantial evidence. Future peak winter constraints are to be expected, and reflect high, but short-term demand by customers that have alternatives and do not require year-round firm capacity. Such customers perform cost-benefit analysis and conclude that firm capacity is not the most efficient option to meet their needs. For local distribution companies and others requiring firm capacity, there is 49.9% more capacity in the NJ and Eastern PA region than necessary to handle even the peak demands

¹⁴³ PENNEAST ANALYSIS OF ALTERNATIVES, *supra* note 31, at 4 (Sept. 12, 2016).

¹⁴⁴ Office of Enforcement, Division of Energy Market Oversight, 2014 STATE OF THE MARKETS, 19 (Mar. 19, 2015), <http://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2014-som.pdf>.

¹⁴⁵ PJM Interconnection, L.L.C., 151 FERC ¶ 61,208, 2-3, Docket No. ER15-623, Accession No. 20150609-3067 (Jun. 9, 2015) (Bay, Chairman, dissenting) (internal citations omitted).

reached during the Polar Vortex,¹⁴⁶ and PennEast has not given any reason to think it is insufficient.

Further, additional analysis evaluated winter peak demand as projected by the Eastern Interconnection Planning Collaborative to 2030 and evaluates LNG imports as an alternative.

This analysis found:

PennEast constructs an LNG alternative as a strawman that leaves out any analysis of “need” and automatically fails the fallacious alternatives test.

The LNG Alternative evaluated by Skipping Stone was based on analysis that showed the extent of possible need unmet by currently existing pipelines out to 2030 to be at most a 10 - 30 day winter peak need. This need can easily be met by existing LNG facilities.

These earlier analyses, demonstrating that there is no need for any additional peak pipeline capacity at least until 2030, are confirmed by more recent analysis that is included herewith, as Exhibit A.¹⁴⁷ The recent record-breaking cold weather in December 2017 and January 2018 offers another opportunity to assess existing pipeline capacity and peak winter demand, and to confirm the existing record data, analyses and projections.¹⁴⁸ The Transco pipeline system is a major supplier to the region and is the predominant destination for more than 90% + of proposed PennEast supplies and thus examination of the physical and market dynamics evidenced on Transco this past winter provides an important and dispositive insight into the central question under study. The data for Transco pipeline utilization are illustrated in Exhibit 2.¹⁴⁹

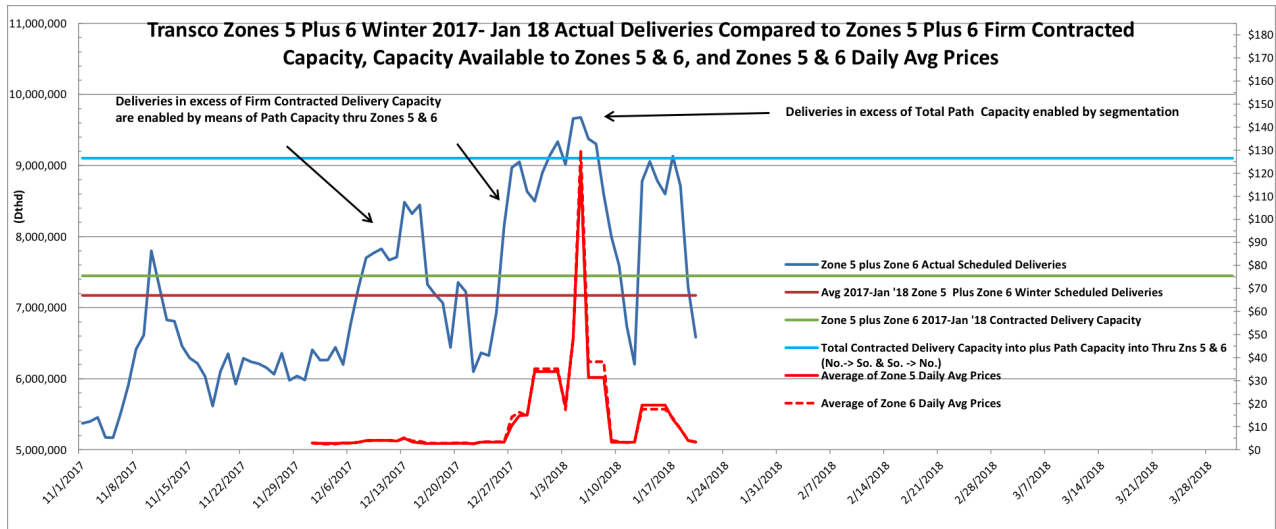
Exhibit 2. Transco Pipeline Utilization in Winter 2017-2018

¹⁴⁶ ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 4.

¹⁴⁷ See SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18, at 3. (This analysis is based on regional winter data from 2017-2018, and thus those data were collected and analyzed as soon as they became available.)

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Exhibit 2 at 6.



Recent analysis of the performance of the Transco pipeline system, with which PennEast would connect, reveals that:

...gas flow for this region is now bi-directional, which has greatly expanded the available delivery capacity, without the addition of additional pipeline capacity into the subject region. In fact, recent performance shows that the system delivered in Zones 5 and 6 ~23% more natural gas than the total contracted delivery capacity on the Transco pipeline in Zones 5 and 6. This growth in delivered capacity has occurred with capacity in existence as of this writing, i.e., without building any additional pipeline capacity into the subject regions. The growth results from the bi-directional flow of gas in the Transco system, which allows for multiple deliveries within and across Zones using the same pipeline path.

This analysis shows that PennEast is not needed to meet peak winter demand, not even for a single day, even during extreme weather events.¹⁵⁰

During the recent historic cold weather pattern under study, the system was stressed with record low temperatures, and led to record demand for natural gas. On January 1, 2018, the U.S. consumed 143 Bcf of natural gas, breaking the old record of 142 Bcf set in 2014. The new study shows that on the Transco pipeline network, the system performed well and met demand as

¹⁵⁰ *Id.* at 3.

shown in the above charts. There has been no evidence from NERC or DOE that any gas delivery problems occurred in the New Jersey or mid-Atlantic region during this period.

Further, the pipeline utilization data during the recent peak winter event shows:

On the Transco system, New Jersey is located in Zone 6, which runs from Maryland to New York City and Long Island. South of Transco's Zone 6, is Transco's Zone 5.

In Zone 6 alone, at its peak, the system delivered more than 5.23 Bcf/d. This means that the system delivered ~300 million cubic feet per day more than the maximum contracted delivery capacity, an increase of ~6% over contracted delivery capacity.

Notably, even on the highest Zone 6 demand day on the Transco system, there remained 1.7 Bcfd of capacity through Zone 6 (i.e., in addition to the contracted delivery capacity into Zone 6) that was not utilized to meet Zone 6 demand.

The high level of Zone 6 deliveries plus the 1.7 Bcfd of remaining, Path, capacity through Zone 6 to the south shows that there is now "extra" capacity that is available to provide natural gas to customers in Zone 6's region that did not exist when the Transco line was uni-directional and flowing to the north from the Gulf Coast during the winter months.¹⁵¹

This recent data shows, conclusively, that PennEast, which would add 1 Bcf/d of capacity, is not required to meet *any* demand on *any* day, since 1.7 Bcf/d of capacity in Zone 6 remained unused to meet Zone 6 demand, even on the highest demand day of the recent historic cold weather.¹⁵²

It is empirically unreasonable to conclude, therefore, that any additional capacity is required to meet New Jersey needs during peak winter periods. Further, there is additional pipeline capacity currently under construction that will shift supply and further reduce demand for new capacity to supply this portion of the Transco system, as the PennEast project purports to do. As discussed in the above report, the Atlantic Sunrise project is expected to become fully available by June 2018, and will add 1.3 billion cubic feet per day of capacity, with 800 million

¹⁵¹ *Id.* at 5-6.

¹⁵² *Id.*

cubic feet per day delivered into Zone 4 to the south, and 500 million cubic feet per day delivered to the region studied here, Zones 5 and 6.¹⁵³

If there was no need for additional pipeline capacity before Atlantic Sunrise, there is certainly no need once Atlantic Sunrise capacity becomes available, and in fact, may create a glut. The reports explains:

As presented above, had Atlantic Sunrise come online 6 or more months early and been fully utilized, on the highest priced day, fully 1.5 Bcfd would have been available for incremental load in Zone 6 or more likely for export southward to Zone 5. Keep in mind that this is 1.5 Bcfd of excess capacity, on the highest priced and highest Zone 6 demand day, and it represents ~1 ½ “PennEasts-worth” of capacity, before PennEast were to lay even one mile of pipe.¹⁵⁴

The data shown above in Exhibit 2 and Exhibit 4 demonstrate that during this period of high demand, existing path capacity **added 23%** to the capacity available to serve loads reflected by firm delivery point contracts (i.e., the total of which are represented by the green line in Exhibit 2); and when supplemented by the capacity coming on line in mid-2018 with Atlantic Sunrise’s completion, the **9.1 Bcfd** of combined Zone 5 and Zone 6 Path capacity will become **10.4 Bcfd** or **140%** of (and ~**3.0 Bcfd** greater than) the currently existing **7.4 Bcfd** of contracted delivery point capacity to Zones 5 and 6 locations.¹⁵⁵

The above analysis clearly demonstrates that there is no genuine unmet demand. PennEast’s self-commissioned study does not purport to address real data of market demand, but rather relies on a few data points rather than meaningful analysis of the issues at hand.

PennEast’s long-term predictions for natural gas markets are not relevant to the issue of regional demand, because they contain national – not regional – projections. PennEast relied on

¹⁵³ *Id.* at 5 - Exhibit 1.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.* at 6; 8-9.

EIA Annual Energy Outlook 2014's prediction that *national* natural gas use would rise to 31.6 trillion cubic feet by 2040.¹⁵⁶ Moreover even examining this irrelevant national data shows decreased projections for natural gas use. The following year, EIA reduced that prediction by more than five percent, to 29.7 Tcf.¹⁵⁷ Additionally, these data are of limited utility, because they pertain to national natural gas use, which trends are not relevant to establishing if there will be any future regional unmet demand.¹⁵⁸ Next, PennEast pointed to an unpublished study by Concentric that PennEast itself commissioned. The study "fails to examine actual pipeline contracts and available resources to meet peak demand in determining whether PennEast is, in fact, needed to meet demand."¹⁵⁹ In the absence of real external evidence of unmet market demand, PennEast's unpublished and self-commissioned studies cannot be relied upon by FERC as proof of demand: the conflict of interest is clear.

In sum, PennEast offers no study of market demand, a self-commissioned unpublished study of 2013/2014 peak conditions resulting from conditions that are uniformed understood to have been addressed by in the market, PennEast's unfounded conclusions that projected growth requires additional capacity, and the EIA's since-downgraded 2014 *national* prediction as the "evidence" for the need for this pipeline. These assertions have been rebutted by substantial research from nationally renowned gas experts. These reports provide compelling evidence that the regional surplus of pipeline capacity will continue until at least 2030, without PennEast. This project, put simply, shows a lack of demonstrated public need.

¹⁵⁶ RESOURCE REPORT 1, Docket No. CP15-558, Accession No. 20150925-5028, at 1-6.

¹⁵⁷ *Id.*; U.S. Energy Information Admin., Annual Energy Outlook 2015 with Projections to 2040, Apr. 2015, at 16.

¹⁵⁸ And given New Jersey's Global Warming Response Act commitment to reduce GHG by 80% by 2050, future demand will be subject to these goals.

¹⁵⁹ ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 7.

c. PennEast also fails to demonstrate that its project will reduce costs, and recent data and analysis show the opposite, --that it will increase costs for consumers or customers

PennEast's assertion that the Project is needed because it will lower costs is contrary to the economic reality in the natural gas market. Residential gas prices in New Jersey are among the lowest in the nation, having fallen markedly from the national average in recent years. Meanwhile, Pennsylvania prices have been steadily converging on the national average.¹⁶⁰ As experts have predicted, the U.S. Energy Information Administration ("EIA") has found that the price of Marcellus gas is rising with the expansion of transmission capacity from that area.¹⁶¹ Despite expert findings, the Commission concludes that because state regulatory commissions are responsible for approving any expenditures by state-regulated utilities, they are best able to avoid rate changes and impacts on the secondary markets. In abdicating its duties to the State however, FERC overlooks the fact that it is approval of a Section 7 certificate that will be used to condemn a plethora of lands for a project that is not in the public convenience or necessity.¹⁶² In New Jersey, regulators do not require pre-approval of precedent agreements by LDCs. There is no regulatory role until after a pipeline is built and LDCs seek cost recovery for transportation contracts from the NJ Board of Public Utilities. Such an outcome would result in a long-term

¹⁶⁰ See State Historical Residential Natural Gas Prices, U.S. Energy Info. Admin. (May 31, 2017), http://www.eia.gov/dnav/ng/xls/NG_PRI_SUM_A_EPG0_PRS_DMCF_M.xls. Using these data, average monthly gas prices (in dollars per thousand cubic feet) in the five years from 2012 to 2016 can be calculated: nationally, 12.0, 12.1, 13.0, 12.3, and 12.2, respectively; in New Jersey, 12.0, 11.7, 10.7, 9.6, and 9.5, respectively; and in Pennsylvania, 14.1, 14.2, 14.4, 13.2, and 12.8, respectively.

¹⁶¹ Spread Between Henry Hub, Marcellus Natural Gas Prices Narrows as Pipeline Capacity Grows, U.S. Energy Info. Admin. (Jan. 27, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=24712>. EIA is, like FERC, housed at the U.S. Department of Energy.

¹⁶² Many of these lands used public funds for their permanent preservation, and were specifically chosen for their high ecological value and their physical location.

glut in capacity that state regulators have no ability to remedy, and constitutes a significant regulatory gap. Based on this regulatory gap, Skipping Stone concludes that “the likelihood that cost-savings will be realized after PennEast is in-service is doubtful,” and cautioned that FERC must not rely solely on PennEast’s claims:

While New Jersey regulated gas companies, whose affiliates own 60% of PennEast, have asserted that PennEast will lower gas costs, they are in no way bound by this claim. FERC should be cautious in relying on claims about cost - savings – especially in the absence of contractual or binding regulatory commitments.¹⁶³

Skipping Stone also reached the conclusion that, “FERC must be the first line of defense against certifying uneconomic projects like PennEast.”¹⁶⁴ By ignoring the evidence presented within the course of this proceeding, FERC’s Order disregarded its responsibilities for ensuring consumer protection under its own policy statement and Congressional Mandate.¹⁶⁵

Intervenors have submitted data showing that contrary to PennEast claims a) Marcellus prices will escalate when new pipeline capacity comes online, and in fact, have already started to do so; and b) the cost differential in the region served by PennEast will shrink, with or without PennEast. For several years, Marcellus natural gas prices have been trading “well below the Henry Hub national benchmark price because of the area’s high gas production and limited pipeline takeaway capacity.”¹⁶⁶ But building PennEast creates additional capacity, which economists expect will raise, not lower, Marcellus natural gas prices.¹⁶⁷ Now, “[n]ew pipeline

¹⁶³ ANALYSIS OF RELIABILITY IN THE ELECTRIC AND GAS MARKETS, COST SAVINGS AND PROJECT NEED, Skipping Stone Report, Docket No. CP15-558, Accession No. 20161201-5105, Exhibit A, at 5 (Nov. 28, 2016).

¹⁶⁴ *Id.* at 4

¹⁶⁵ See Certificate Policy Statement *supra* note 43, at 13 (stating that FERC’s certificate policy should “protect captive customers”).

¹⁶⁶ U.S. Energy Information Administration, Natural Gas Weekly Update (Jan. 7, 2016), http://www.eia.gov/naturalgas/weekly/archive/2016/01_07/index.cfm.

¹⁶⁷ See *id.*; see also ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 12-15.

investment is expected to increase takeaway capacity from the low cost Marcellus/Utica shale and reduce regional surpluses and increase gas prices by 2018.”¹⁶⁸ This occurs because the “spread between Henry Hub and Marcellus natural gas prices narrows as pipeline capacity grows.”¹⁶⁹ This decline was dramatic from January 2015 to February 2016. “New pipelines are already allowing larger amounts of gas to travel from the Marcellus to end users, with the spot price spread between Henry Hub and Leidy Hub decreasing over the last year. The spread has been slashed by more than half in the past 12 months, to 69 cents/MMBtu, as of Feb. 19, from \$1.74/MMBtu as of Jan. 29, 2015.”¹⁷⁰ Moreover, existing natural gas prices are near historic lows, with New Jersey prices being amongst the lowest in the nation.¹⁷¹ Thus, PennEast’s assertion that the project is needed because it will lower costs is contrary to both the facts in this particular case and also the economic reality in the natural gas market.

Importantly, the Natural Gas Act requires FERC Commissioners to protect captive customers of competing pipelines from paying for unsubscribed capacity that may result from construction of new capacity. PennEast adds significant excess capacity to the market in eastern Pennsylvania and New Jersey;¹⁷² as shippers on PennEast reduce their contracts on competing, legacy pipelines, the impact will be to increase, rather than decrease costs to gas customers in the region. Costs will increase for two reasons. First, rate-payers currently recoup significant value from reselling excess capacity on the secondary capacity market. This value would plummet if

¹⁶⁸ Public Service Enterprise Group, Edison Electrical institute 2015 Financial Conference (2015), <https://www.sec.gov/Archives/edgar/data/81033/000119312515370394/d77337dex99.htm>.

¹⁶⁹ See U.S. Energy Information Administration, Natural Gas Weekly Update (Jan. 7, 2016), http://www.eia.gov/naturalgas/weekly/archive/2016/01_07/index.cfm.

¹⁷⁰ SNL Financial, “Mega-projects linked to Appalachian shale top list of planned pipelines,” by Arsalan Gul, February 25, 2016, attached hereto as Exhibit B.

¹⁷¹ EIA.gov, State Historical Residential Natural Gas Prices, http://www.eia.gov/dnav/ng/xls/NG_PRI_SUM_A_EPG0_PRS_DMCF_M.xls.

¹⁷² ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 4.

PennEast’s capacity were to come online. Second, if rates are raised on existing pipelines to recover lost revenue, existing rate-payers would be exposed to higher costs.¹⁷³ FERC’s Order did not address these adverse cost consequences of approving PennEast, which, far from a finding that the projects would create public benefit, demonstrate that the project will create public harm. If FERC had bothered to conduct its own individualized analysis of PennEast, rather than relying on precedent agreements as conclusive proof of need, it would have discovered that PennEast was not required by the public convenience or necessity.

d. The Project’s Ability to Increase “Reliability” in the Natural Gas Distribution Grid is a Meaningless Post-hoc Rationalization for Project Need

PennEast claims it is trying to build a pipeline that would “increase reliability” of the interstate pipeline grid, yet offers no evidence or analysis in the record that would allow a determination that the project would do so. FERC’s only response to Intervenor’s analysis of reliability, both in the interstate pipeline grid and the electric grid, is that project shippers state that they believe it would provide a reliable natural gas supply, and the Commission “finds no reason to second guess the business decisions of these shippers.”¹⁷⁴

As Intervenors have reiterated numerous times before, reliability is assured when customers can obtain the supplies for which they have contracted. PennEast has failed to identify an enduring reliability issue in the region served. For customers of firm pipeline capacity, including local gas distribution companies in this region, analysis shows that there is currently far more than enough firm capacity to meet customers’ needs --even during peak winter demand. “In total, there are

¹⁷³ *Id.* at 12-15.

¹⁷⁴ Order at 30.

49.9% more resources available to meet peak day demand from local gas distribution companies in the region than is needed.”¹⁷⁵

For customers who have contracted for interruptible service, reliability is an economic decision and depends heavily on the forecasted frequency of service interruptions. The Eastern Interconnection Planning Collaborative (EIPC) issued a report in July 2015 that describes several approaches for improving reliability of electric generation and mitigating pipeline constraints, “for low frequency, short duration constraints resulting in the non-scheduling or interruption of gas-fired generation.”¹⁷⁶ The economics of two primary methods identified in the EIPC study, dual fuel and purchasing natural gas from LNG facilities, were analyzed in greater detail by Skipping Stone. This analysis shows that even if unmet peak demand were to emerge in the future, which we have shown elsewhere to be a flawed assumption, the PennEast project would not be a cost-effective solution to meet such peak demand. “Based on our analysis of alternative costs, one can readily see that it is highly unlikely that an electric generator will choose to bear the fixed cost burden of the firm pipeline capacity and would be economically better off choosing oil or LNG for the few days each year of high, coincident, gas demand.”¹⁷⁷

Moreover, the Skipping Stone Report explains that that true reliability in the natural gas pipeline system would require “near total duplication,” which is not only inefficient but also unnecessary given the gas grid is a “highly interconnected, hydraulically integrated and resilient

¹⁷⁵ ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 4.

¹⁷⁶ Eastern Interconnection Planning Collaborative, Interregional Transmission Development and Analysis for Three Stakeholder Selected Scenarios and Gas-Electric System Interface Study (“Gas-Electric Report”) (July 2, 2015), <http://www.eipconline.com/phase-ii-documents.html>.

¹⁷⁷ ANALYSIS OF PUBLIC BENEFIT, *supra* note 20, at 4.

system.”¹⁷⁸ Although PennEast would like to claim that the project’s additional capacity would provide needed “reliability” for the natural gas grid, this assertion is ultimately worthless because a determination of reliability must come from “authorized regulators in a regulatory proceeding.”¹⁷⁹

As set out above, Exhibit A hereto reviews the most recent winter pipeline capacity and flow data for the Transco pipeline, which confirms the analysis of peak demand already submitted to the docket but ignored in the Order. In fact, Exhibit A confirms that there is substantial capacity in the system beyond what is required to meet current peak demand.¹⁸⁰ Even if demand increases to 2030 as projected in the EIPC study, there is already substantially more capacity in the system to meet that demand, without PennEast or the LNG Alternative. This evidence strongly contradicts the primary argument used by PennEast: that there is insufficient capacity to meet peak winter demand. As explained in the alternatives analysis, customers for interruptible service make a business decision not to contract for firm capacity, and fully expect to pay higher prices during peak periods. Even when price spikes occur, it is simplistic to then assume that additional pipeline capacity is a cost-effective solution, or that there would be genuine market demand for such capacity. Importantly, such cold day price spikes are not a basis upon which long-term capacity projects would be premised and “most gas used by residents and businesses is bought under long-term contracts unaffected by sudden jumps in spot-market

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *Id.* at 8. Moreover, the PJM Presentation to FERC describes that there are “no reliability issues identified for base and N-1 analysis.” PJM Presentation, *supra* note 144, at 7. Presenters Yeomans and Bryson also stated that for Winter 2016-2017, “we are in good shape.” FERC 1,031st Commission meeting, Transcript at 35 and 49 (October 20, 2016).

<https://www.ferc.gov/CalendarFiles/20161109081104-transcript-10-20-16.pdf>.

¹⁸⁰ See SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18, at 3.

prices.”¹⁸¹ In fact, New Jersey Rate Counsel recently explained, “We have not heard from any of New Jersey’s local gas distribution companies that they had insufficient gas to provide reliable service to their customers during the recent cold spell.”¹⁸² Not only can shippers servicing the region rely on current excess capacity, the Atlantic Sunrise project will add 1.3 bcf/d of additional capacity by June 2018, making the 1 bcf/d proposed PennEast capacity even more superfluous.¹⁸³

FERC’s Order Failed to Establish Need

FERC is required to balance the project’s claimed economic benefits against its potential adverse impacts, to make its determination of public convenience and necessity. The stated reasons that PennEast provides as justification of public need: “cost savings, supply security, and price stability” come with no evidentiary support, and simply do not stand up to analysis of facts, at the time of application or now. Intervenors raised these issues, and submitted data directly on point, which FERC does not refute or even address in its Order. FERC failed to even assess whether the precedent agreements were designed to serve unmet demand. Although FERC claimed its staff would conduct an independent economic review of the project, FOIA requests did not yield any such study.¹⁸⁴ Only precedent agreements were proffered in return.¹⁸⁵

FERC’s blatant disregard for factors other than market demand, including but not limited to, cost to ratepayers, and avoiding unnecessary construction resulting in excessive condemnation and environmental degradation is a violation of its duties under Section 7 of the

¹⁸¹ Tom Gilbert, A Few Cold Days Should Not A Pipeline Make, NJSpotlight (Jan. 18, 2018) available online at <http://www.njspotlight.com/stories/18/01/17/a-few-cold-days-should-not-a-pipeline-make/>.

¹⁸² *Id.*

¹⁸³ See SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18, at 8.

¹⁸⁴ Federal Energy Regulatory Commission, *Letter to Senator Booker* (Apr. 19 2017).

¹⁸⁵ Federal Energy Regulatory Commission, FOIA No. FYI 7-97 Initial Response Letter (Sep. 20, 2017).

NGA.¹⁸⁶ The likely increase in prices of natural gas in the producing region and the economic harm to ratepayers likely to occur as a direct result of a glut of regional pipeline capacity strongly cuts against PennEast’s vague claims of public benefit factors, which FERC merely parroted in its Order, absent independent analysis.

FERC also disregarded its own Policy Statement in its process for approving a Certificate of Public Convenience and Necessity (“CPCN”) for PennEast. As a result, FERC failed to provide substantial evidence to support its finding that the PennEast Pipeline would be in the public convenience and necessity. Rather than conducting the required particularized analysis, FERC stated that no analysis of the claims was even necessary, because PennEast has demonstrated it had contracts for the capacity of the pipeline. The Commission “f[ound] no reason to second guess the business decisions of these shippers that they need the service to which they have subscribed.”¹⁸⁷ This argument is doubly flawed. First, it improperly assumes that contracts for pipeline capacity constitute proof of market demand for a project; then, it improperly assumes that current market demand for a project constitutes proof that a project is in the public convenience and necessity.¹⁸⁸

FERC’s Order has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁸⁹ In light of the weight of evidence in the record, FERC here arbitrarily and

¹⁸⁶ See 15 U.S.C. § 717f(e).

¹⁸⁷ Order at 30.

¹⁸⁸ Order at 27.

¹⁸⁹ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

capriciously failed to examine whether market need actually exists and justified the Order on grounds that run counter to its Certificate Policy.

e. FERC Did Not Properly Consider the Adverse Environmental Impacts of the PennEast Project

Even if FERC had properly determined that the economic benefit of the PennEast Project would outweigh all adverse economic effects, in order to approve the pipeline, the Commission still needs to balance environmental impacts of the project against the net economic benefit to determine public benefit.¹⁹⁰ Here, by failing to obtain data or analysis on water quality, wetlands, and many other as of yet unmeasured environmental impacts—indeed, impacts highly relevant to the public’s interests with respect to the proposed PennEast Pipeline—FERC ignored critical factors necessary to determine whether the project is required by the public convenience and necessity under Section 7 of the NGA.¹⁹¹

Environmental impacts are squarely within the scope of public interest balancing under Section 7 of the NGA. FERC has stated that its public interest balancing “includes factors as diverse as considerations of clean air and other environmental benefits, and the energy security of the nation.”¹⁹² The Commission’s practice is to use the NEPA process to assess environmental

¹⁹⁰ See Certificate Policy Statement, *supra* note 43, at 19 and 27.

¹⁹¹ While the Order acknowledges that its finding of public convenience and necessity is subject to acquiring later additional analysis that could alter this finding (via outstanding permit processes and consultations), it then fails to ensure that this Order remains an “incipient authorization, without current force or effect.” Crown Landing LLC, 117 FERC ¶ 61,209, 21 Docket No. CP04-411, Accession No. 20061117-3057 (Nov. 17, 2006) (order denying rehearing and issuing clarification). While FERC readily asserts that limitation in legal proceedings, by being silent as to whether that Order has the force and effect of triggering the operation of 717f(h), FERC’s practice violates the Natural Gas Act.

¹⁹² *Guardian Pipeline, L.L.C.*, 94 FERC ¶ 61,269, 17, Docket No. CP00-36, Accession No. 20010316-0075 (Mar. 3, 2001). To be sure, courts have established limits to the types of public interest considerations within the purview of the Federal Power Commission (“FPC”), FERC’s predecessor, and now FERC—for example, by finding employment discrimination by regulated entities to be outside the scope of federal energy regulation statutes. See *NAACP v. Fed. Power Comm’n*, 520 F.2d 432, 441 (D.C.

impacts for the purpose of the “public convenience and necessity” analysis.¹⁹³ While this approach may prove sufficient in situations where the analyses by the relevant resource agencies under NEPA are completed prior to the conclusion of FERC’s NEPA process, and therefore could be properly weighed within that assessment, this is not such a case. As noted below, FERC issued an FEIS, and then its Order, without the benefit of resource agency assessments related to clean water and historic preservation. Therefore, FERC’s weighing of the public benefits of the project completely excluded any effect the project will have on water quality or historic resources. FERC cannot properly weigh the adverse environmental impact of a pipeline project if it does not possess any actual data on extremely important aspects of that project’s effect on the environment. FERC acted arbitrarily and capriciously by deciding that the project was in the public convenience and necessity without actually possessing data on extremely important environmental effects of the project.

Further, even with regards to the environmental issues that the FEIS does address, FERC’s analysis is incomplete. Environmental quality issues related to natural gas transmission that affect the public interest include, broadly, ecosystem health, clean air, clean water, and a balanced atmosphere. All these matters may be affected by increased fossil fuel extraction, shipping, and combustion enabled by the PennEast Project. However, as discussed in greater

Cir. 1975) (holding that “Congress has not charged the [FPC] with advancing all public interests, but only the public’s interest in having the particular mandates of the Commission carried out”). Nevertheless, environmental considerations are squarely within the scope of those directives given to the FPC, and now FERC, by Congress. *See id.* at 441 (describing “the conservation of natural resources” as within the FPC’s ambit, and noting that “[i]t has . . . been held that environmental considerations are the proper concern of the Commission”); *see also* Public Utilities Comm’n of Cal. v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (identifying “conservation, environmental, and antitrust” issues as being among the purposes of the NGA); NAACP v. Fed. Power Comm’n, 425 U.S. 662, 670 n.6 (1976) (upholding the D.C. Circuit decision and noting that “the Commission has authority to consider conservation, environmental, and antitrust questions”).

¹⁹³ *See* Certificate Policy Statement, *supra* note 43, at 27.

detail in Section II.B.6 below, the FEIS fails to fully consider certain impacts of the PennEast Project that are critical to the present and future public convenience and necessity. These include:

- critical species, geologic, drinking water, recreational, and other impacts with respect to which PennEast had not fully furnished necessary studies and reports as of the issuance of the FEIS nor at the time of the Order;¹⁹⁴
- cumulative environmental impacts of regional gas infrastructure development, including impacts on wildlife and vegetation, water quality, and climate change, which the FEIS addresses only briefly and summarily because it lacks data, and which the Order also does not analyze.¹⁹⁵

Because FERC failed to properly consider these impacts in the NEPA process—and, likewise, by neglecting to consider them directly in the Order—FERC has failed to balance these impacts as required by the Certificate Policy Statement under Section 7 of the NGA.

The Order asserts that that NEPA does not require consideration of the impacts identified above: impacts for which certain information remains unavailable or a full and robust accounting of cumulative impacts. But even if these impacts do not need to be considered under NEPA, they must be considered under the NGA. The Certificate Policy Statement is clear that the NGA requires FERC to consider all environmental effects of the project; nowhere does the Order say only certain environmental effects are relevant. By neglecting the above impacts—and thus, by failing to consider all adverse effects with significant bearing on the public interest—FERC has failed to make a finding that “the public benefits from the project outweigh *any* adverse effects.”¹⁹⁶ Commissioner Glick directly raised this failure in his dissent to the Order. Discussing the lack of environmental information about the pipeline, he wrote, “PennEast’s certificate

¹⁹⁴ See *infra* Section II.B.6.c.

¹⁹⁵ See *infra* Section II.B.6.d.

¹⁹⁶ Certificate Policy Statement, *supra* note 43, at 28 (emphasis added).

application lacks evidence that I believe is important to making the public interest determination.”¹⁹⁷ One example of this, he writes, is that “68 percent of the project alignment in New Jersey has yet to be surveyed for the existence of historic and cultural resources.”¹⁹⁸

FERC’s Order granting PennEast’s certificate rests on flawed and incomplete findings and thus it cannot determine that the public convenience and necessity “require” the PennEast project to be built. FERC’s Order is arbitrary in its determination that the pipeline provides significant public benefit because there is a sufficient number of precedent agreements for the project, and that certain environmental harms do not need to be considered. Further, the Order’s factual findings are not based on “substantial evidence,”¹⁹⁹ including “relevant data and . . . a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁰⁰ FERC must therefore reconsider and rescind its Order, and conduct a proper public interest balancing to determine whether the proposed Project is truly required by the public convenience and necessity.

2. FERC Failed to Conduct a Constitutionally Sufficient Public Use Analysis Under the Fifth Amendment to the U.S. Constitution When Granting PennEast a Conditional Certificate that Gives PennEast the Power of Eminent Domain.

The Takings Clause of the Fifth Amendment requires that any property taken from private owners must be for “public use.”²⁰¹ In 1938, Congress adopted the Natural Gas Act, justifying the need for federalizing the regulation of interstate natural gas pipelines by

¹⁹⁷ Order at 3 (Glick, R. dissenting).

¹⁹⁸ *Id.*

¹⁹⁹ 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(e).

²⁰⁰ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁰¹ U.S. CONST. amend. V.

determining that the business of the transportation of natural gas was “affected with a public interest.”²⁰² The NGA was amended in 1947 to provide FERC with the power to grant eminent domain authority to Certificate holders.²⁰³ While *federalizing* regulation of the business of transporting natural gas was essential to protecting the public interest, the NGA is forceful in its instructions to FERC that an individualized analysis of any proposed pipeline is required to determine if that pipeline is in the public convenience and necessity. Moreover, the Constitution requires a “public use” for the exercise of eminent domain. Because a Certificate gives a pipeline company the power of eminent domain, FERC’s determination under Section 7(e) that a project “is or will be required by the present or future public convenience and necessity”²⁰⁴ must also satisfy the Fifth Amendment’s “public use” criterion.

FERC’s Order found that the PennEast project served a public use based only on the fact that PennEast had precedent agreements, without any additional analysis.²⁰⁵ As explained above, the assumption that any project that has enough precedent agreements is in the public convenience and necessity is inaccurate. Because the “public convenience and necessity” requirement, to be constitutional, must be the same as the “public use” requirement, this means that FERC’s reliance only on precedent agreements to grant PennEast a Section 7 Certificate also violates the public use requirement of the Fifth Amendment of the Constitution. Therefore, FERC’s approval of the PennEast project and the eminent domain rights that purportedly

²⁰² 15 U.S.C. § 717(a).

²⁰³ The Clean Water Act was passed in 1972. Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 et seq. Until recently, FERC waited until projects had Clean Water Act Section 401 Water Quality Certificates before issuing Section 7 Certificates.

²⁰⁴ 15 U.S.C. § 717f(e).

²⁰⁵ Order at 70 (Glick, dissenting) (“In today’s order, the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed”).

provides to PennEast violate the Constitution. Further, as described in Section I above, if FERC had done its own analysis, it would have found that the project was not a public use.

Moreover, the Order is unconstitutional because FERC failed to properly consider the adverse environmental effects of the Project.²⁰⁶ As explained in Section I(e), FERC's order could not possibly consider certain environmental effects of the pipeline because the agencies in charge of conducting that analysis had not done so, and FERC had not done so in their place.²⁰⁷

Therefore, the Order omitted any analysis whatsoever on critical environmental effects of the project, yet still purported to conduct a proper public use analysis.²⁰⁸ Further, FERC's analysis was insufficiently rigorous with respect to the limited data it did possess. To satisfy the Constitution's public use requirement, FERC's individualized assessment of the PennEast Project must include the environmental impact findings by the state and/or federal regulatory resource agencies charged with making determinations that could impact the route or construction of the proposed pipeline. FERC's failure to follow this requirement in its Order means that the Order violates the public use requirement of the Fifth Amendment to the Constitution.

3. The Order Violates the Clean Water Act by Issuing a Section 7 Certificate Prior to New Jersey Water Quality Certification

²⁰⁶ See *supra* notes 184-186 and accompanying text (describing environmental considerations as among the factors to be considered by FERC in issuing a Certificate).

²⁰⁷ See *supra* Section I(e).

²⁰⁸ Order at 71 (Glick, dissenting) (“In my view, Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest.”).

Section 401 requires that “any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification” from the affected state “that any such discharge will comply” with that state’s water quality standards.²⁰⁹ “No license or permit shall be granted until the certification required by this section has been obtained or has been waived[, and] . . . [n]o license or permit shall be granted if certification has been denied by the State.”²¹⁰

Accordingly, the Supreme Court has stated that section 401 “requires States to provide a water quality certification *before* a federal license or permit can be issued.”²¹¹ Indeed, “without [section 401] certification, FERC lacks authority to issue a license.”²¹²

Here, because construction of the Project would result in surface water discharges, and because PennEast requires a license from FERC to proceed with construction, PennEast must provide FERC with a water quality certification from both Pennsylvania and New Jersey before FERC can issue PennEast a Section 7 certification. But PennEast does not have that certificate. It submitted an incomplete application to NJDEP; failed to provide required information and NJDEP denied the application. Nevertheless, FERC issued the Order in the absence of the statutorily required water quality certification from New Jersey. The Order purports to issue PennEast a Section 7 certificate subject to the provision that prior to construction, PennEast must

²⁰⁹ 33 U.S.C. § 1341(a)(1).

²¹⁰ *Id.*

²¹¹ PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology, 511 U.S. 700, 707 (1994) (emphasis added).

²¹² City of Tacoma v. FERC, 460 F.3d 53, 68 (D.C. Cir. 2006); *but see* Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, 857 F.3d 388 (D.C. Cir. 2017) at 12. (D.C. Circuit held that granting a Section 7 Certificate prior to the issuance of a Water Quality Certification did not trigger 401’s sequencing requirement because FERC’s conditional approval did not authorize any activity which might result in a discharge in navigable waters). This decision ignores the original language of the CWA, as well as the Supreme Court’s interpretation, and remains an open question in the Third Circuit.

present a water quality certification from NJDEP.²¹³ The CWA is not ambiguous, however: “No license or permit shall be granted until the certification required by this section has been obtained or has been waived.”²¹⁴ The statute does not make exception for licenses or permits granted subject to the subsequent receipt of 401 certification. The Order thus violates Section 401 of the CWA by granting PennEast a license to construct the Project absent a Section 401 certification from New Jersey.

The Commission’s error in issuing a license—even a conditional license—prior to PennEast’s receipt of all water quality certifications is underscored by the legislative history of CWA §401. Explicit Congressional intent refutes FERC’s rationale that a conditional Certificate can precede a §401 Water Quality Certification. From its inception, the certification requirement was intended as a mechanism to give states primary authority over federal agencies regarding compliance with water quality standards and pollution control. Senator Edmund Muskie, who introduced the 1970 bill, specified that “no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”²¹⁵ The Congressional Record further shows that Senator Muskie stated:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.²¹⁶

These comments candidly present the certification requirement as a mechanism to ensure that project proposals would not move forward – and garner major capital investments – without first

²¹³ Order at 122.

²¹⁴ 33 U.S.C. § 1341(a)(1) (emphasis added).

²¹⁵ H.R. Rep. No. 91-127 (1969).

²¹⁶ 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie).

ensuring compliance with state water pollution control standards. This goal – of preventing capital investment in projects that cannot meet state water quality standards – requires that the states be able to review those projects prior to federal certification. Senator Cooper further stated that, pursuant to the amendments, “the primary responsibility for controlling water pollution rests with the States.”²¹⁷ The Act’s Congressional Declaration of Goals and Policy echoes Senator Cooper’s comments regarding the primary role of the states in controlling water quality standards:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.²¹⁸

Legislative history illustrates that §401 was enacted to enable states to prevent pollution by regulating water quality standards that other federal licenses or permits could not circumvent.

Congress did not intend for FERC’s conditioning power under 717f(e) to be interpreted as making certificates “conditional” in the sense of needing to satisfy the prerequisite of obtaining a 401 permit before pipeline activity can commence. The “conditions” referred to in 717f(e) mean “conditions on the terms of the proposed service itself” - these are limitations, not prerequisites.²¹⁹ Furthermore, legislative history shows that this conditions clause concerns “rates and contractual provisions for the services to be certificated”²²⁰; “Section 7(e) vests in the

²¹⁷ 115 Cong. Rec. 28,970 (1969) (statement of Sen. Cooper).

²¹⁸ 33 U.S.C. § 1251(b).

²¹⁹ *N. Nat. Gas Co., Div. of InterNorth, Inc. v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987).

²²⁰ *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979).

Commission control over the conditions under which gas may be initially dedicated to interstate use.”²²¹

4. The Order Violates the National Historic Preservation Act by Preceding the Completion of Section 106 Consultation

The PennEast Pipeline is a federally licensed undertaking that may affect historic properties and thus is subject to the National Historic Preservation Act (“NHPA”) (the “Section 106 Process”). NHPA’s mandate to evaluate historic property impacts requires that this process be completed “prior to the issuance of any license.”²²² The Section 106 Process requires consultation with the State Historic Preservation Officer (“SHPO”) and tribal authorities. It also mandates opportunities for public, stakeholder, and Advisory Council on Historic Preservation (ACHP) feedback, as the agency evaluates the effects of the proposed undertaking on historic properties and, in some cases, establishes appropriate mitigation measures.²²³ These consultations and exchanges are essential to adequate consideration of historic preservation.²²⁴

PennEast started the Section 106 Process by conducting outreach to stakeholders, engaging with the ACHP, and consulting with the Pennsylvania and New Jersey SHPOs and with affected tribes.²²⁵ But PennEast has yet to complete substantial steps in the Section 106 process. At the time of the FEIS, PennEast had not completed surveys, evaluation reports, and

²²¹ *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 389, 392 (1959).

²²² 54 U.S.C. § 306108. ACHP regulations do provide that the Section 106 process “does not prohibit agency official [sic] from conducting or authorizing nondestructive project planning activities before completing compliance with Section 106,” but this flexibility is limited to actions that “do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties.” 36 C.F.R. § 800.1(c). Because the Order makes a final decision on the Project that restricts the subsequent consideration of alternatives, it does not meet this regulatory exception.

²²³ *See id.*

²²⁴ *See id.* §§ 800.4(d), 800.5, 800.6(a)–(b), 800.7(a)–(c).

²²⁵ *See* FEIS, *supra* note 5, at 4-203–4-229.

avoidance/treatment plans. Neither was there a determination as to whether the Project would adversely impact historic properties; and if so, whether there were appropriate mitigation requirements.²²⁶ The Order confirms that this process remains incomplete.²²⁷

The Commission has violated the NHPA's requirement to evaluate historic property impacts "prior to the issuance of any license."²²⁸ The Commission cannot simply choose to postpone the Section 106 process until after it makes a decision on the Project.²²⁹ "[W]hen procedures are established by law, those procedures must be followed."²³⁰

5. FERC Violated the NGA and the Fifth Amendment of the Constitution by Approving the Use of Eminent Domain on Land that May Not Be "Necessary" to the Project's Completion.

a. FERC Violated The NGA Approving the Use of Eminent Domain on Land that May Not Be "Necessary" to the Project's Completion.

To set an appropriate constitutional limit on its delegation of eminent domain authority, Congress limited that delegation to "the *necessary* right-of-way to construct, operate, and maintain a pipe line [sic] . . . and the *necessary* land . . . for the location of . . . stations or equipment *necessary* to the proper operation of such pipe line." 15 U.S.C. § 717f(h) (emphasis added). FERC's Order issued a *conditional* Certificate to the PennEast Project prior to the

²²⁶ FEIS, *supra* note 5, at 4-228–4-229.

²²⁷ Order at 172.

²²⁸ 54 U.S.C. § 306108. ACHP regulations do provide that the Section 106 process "does not prohibit agency official [sic] from conducting or authorizing nondestructive project planning activities before completing compliance with section 106," but this flexibility is limited to actions that "do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). Because the Order makes a final decision on the Project that restricts the subsequent consideration of alternatives, it does not meet this regulatory exception.

²²⁹ *See id.* §§ 800.2(d)(1) ("The views of the public are essential to informed Federal decisionmaking in the section 106 process.").

²³⁰ *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 266–67 (3d Cir. 2001).

Project receiving its Water Quality Certificate from the State of New Jersey pursuant to Section 401 of the Clean Water Act and prior to the completion of the Section 106 process. Both of these authorizations are necessary before any construction on the project can start.²³¹

While the NGA authorizes FERC to issue Certificates “with such reasonable terms and conditions as the public convenience and necessity may require,”²³² legislative history and case law indicate that the NGA authorizes FERC only to impose “conditions” on pipeline activity that related to the economic provisions, such as rates and recovery – not conditions such as other federal authorizations that have bearing on the fundamental inquiry of whether a project is in the public interest.²³³ Commissioner Glick recognized this history in his dissent: “Although the certificate is conditional, it gives the pipeline developer the authority to exercise eminent domain...Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest.”²³⁴

²³¹ There are other outstanding authorizations needed as well, such as Army Corps Section 404 permits (PA) and Delaware River Basin Commission approval (bi-state). *See* Order at 122, Appendix A 30.

²³² 15 U.S.C. § 717f(e)

²³³ *See Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391-92 (1959) (“Their proposals must be supported by evidence showing their necessity to ‘the present or future public convenience and necessity’ before permanent certificates are issued. . . . On the other hand, if unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to s 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.”); *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987) (“We concluded, however, that there was a fundamental distinction between imposing conditions on the terms of the proposed service itself and imposing conditions on the terms of services not directly before the Commission in the Section 7 certification proceeding.”); *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1131 (D.C. Cir. 1979) (quoting *Atl. Ref. Co.*, 369 U.S. at 392) (“The Court noted that in allowing the Commission to attach rate conditions on certificates, ‘s 7 is given only that scope necessary for ‘a single statutory scheme under which all rates are established initially by the natural gas companies . . . subject to being modified by the Commission.’ Further, ‘(s)ection 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate.’”).

²³⁴ Order at 3 (Glick, R. dissenting).

If New Jersey decides not to approve the required 401 certificate, or to approve it only with significant conditions, this could substantially change the pipeline's route or prevent its construction altogether. The route may also substantially change depending on the completion of the Section 106 process. In turn, these changes would significantly impact what land is necessary for the pipeline's construction, perhaps making Intervenors' land (or any of the *over* one hundred property condemnations PennEast filed) no longer "necessary." Land cannot be "necessary" when pending approvals before other state and federal agencies may require a route change or preclude the pipeline's construction entirely, such that the land will not be used for construction, operation, or maintenance of a pipeline. FERC violates the NGA by granting Certificates that are conditional on applicants obtaining future permits from state or local agencies.²³⁵

b. FERC Violated the Fifth Amendment by Approving the Use of Eminent Domain on Land that May Not Be "Necessary" to the Project's Completion.

FERC's Order granting a conditional certificate also violates the Fifth Amendment. Unless the Commission stays its Order, PennEast's condemnation lawsuits (in excess of one hundred and fifty of them filed) will proceed in accordance with FERC's view that Section 717f(h) is automatically triggered by *any* certificate, even a conditional one that FERC acknowledges is an "incipient authorization without current force or effect."²³⁶ Because PennEast has not obtained the requisite permits (such as the Clean Water Act Section 401 water quality certificate), nor has any indication that its project could obtain such permit approvals, absent a stay of the Order with respect to Section 717f(h), PennEast will have taken private

²³⁵ See 15 U.S.C. §717f(e).

²³⁶ Crown Landing LLC, *supra* note 191, at 21 (order denying rehearing and issuing clarification).

property for no reason (as described above). This scenario is wholly contrary to the notion of public use, constituting an egregious violation of the Fifth Amendment. Absent a stay, FERC's Order granting certificates conditional on federal and state permits not yet acquired violates the Takings Clause of the Fifth Amendment.²³⁷

6. FERC's Order violates NEPA because it rests on an FEIS that is Wholly Deficient.

a. FERC Failed to Properly Address Project Purpose or Need

An agency's duty in preparing an EIS under NEPA is to evaluate a given "federal" action.²³⁸ Here, FERC's *certification* of the PennEast Project is the federal action and FERC must adhere to its congressional directive in considering and approving the Certificate according to the balancing process under the NGA.²³⁹ ²⁴⁰ Under the Council on Environmental Quality ("CEQ") regulations governing NEPA review, a statement of purpose and need for the agency action under consideration is a required component of an EIS that provides an essential basis for the NEPA analysis.²⁴¹ Properly establishing purpose and need is critical to environmental review under NEPA because it shapes the scope of an EIS's core inquiry: its alternatives analysis.²⁴² As

²³⁷ FERC has stated it doesn't have jurisdiction to determine the exercise of eminent domain under the NGA. *See Mountain Valley Pipeline, L.L.C.*, 161 FERC ¶ 61,043, Docket No. CP16-10-000, Accession No. 20171013-4002 at 63 (Oct. 13, 2017) (order issuing Certificates and granting abandonment authority) ("[S]uch a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution."); *Atlantic Coast Pipeline, L.L.C.*, 161 FERC ¶ 61,042, Docket No. CP15-554-000, Accession No. 20171013-4003 at 81 (Oct. 13, 2017) (order issuing Certificates).

²³⁸ *See* 42 U.S.C. § 4332(2)(C).

²³⁹ *See infra* Section II.B.1 (describing the public interest balancing process).

²⁴⁰ *See* 15 U.S.C. § 717f(e).

²⁴¹ 40 C.F.R. §1502.13.

²⁴² *See id.* § 1502.14.

is the case here, an overly narrow statement will exclude alternatives essential to an agency's reasoned decision making.²⁴³

In formulating a purpose and need statement in an EIS for a Section 7 certificate, FERC must consider the core congressional mandate embedded in Section 7 the NGA: to approve gas projects only if they are **required** by the “public convenience and necessity.”²⁴⁴ Because FERC must make a broad public interest determination in considering a Section 7 certificate application, and because protecting the public interest was the genesis for enacting the NGA, the purpose and need statement in the corresponding EIS must encompass broad public interest considerations that mirror FERC's directive under Section 7 of the NGA in order to authorize action. But FERC has failed to do so here. Instead it framed the purpose and need statement around the purely private, profit-motivated goals of the project proponent.²⁴⁵ By framing the purpose and need statement around private objectives and not the public convenience and necessity, FERC failed to “look hard at the factors relevant to the definition of purpose.”²⁴⁶ The Commission cannot simply wave away its duty under NEPA by using the policy that it “does not . . . redefine an applicant's stated purpose” in the purpose and need statement of an EIS.²⁴⁷ In violation of NEPA, the FEIS impermissibly limited the project's statement of purpose and need

²⁴³ See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

²⁴⁴ See 15 U.S.C. § 717f(e).

²⁴⁵ Private profit-seeking must align with public needs and consumer protection to yield a finding of public benefit.

²⁴⁶ See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

²⁴⁷ See FEIS, *supra* note 5, at 1-4; see also *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (invalidating a purpose and need statement where the agency “adopted [the applicant's] interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval”); see also *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (rejecting an EIS that was based on “wholesale acceptance of [the project applicant's] definition of purpose”).

and thus limited the alternatives analysis.²⁴⁸ While FERC should have engaged in a rigorous analysis to determine whether there were true capacity deficits and explored ways to meet any documented energy needs, it evaluated only a very narrow set of alternatives that also provided increased pipeline capacity.²⁴⁹

The FEIS improperly relied on PennEast’s stated purpose for the Project to formulate the purpose and need statement under NEPA. As an initial matter, PennEast’s articulated “purpose and need” for the Project (detailed in the table below) was based on a factually questionable assumption of need for additional gas pipeline capacity. FERC erred in taking this assumption at face value.²⁵⁰ FERC cannot adopt PennEast’s narrowly stated project objective of building additional pipeline capacity because it is obligated by the NGA to make a broad public interest determination under the NGA. By simply accepting PennEast’s stated project objectives in formulating the purpose and need statement in the FEIS and thus failing to “exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project,” FERC unlawfully and unreasonably narrowed the scope of NEPA review.²⁵¹

Table 2 below presents a side-by-side comparison of the language of PennEast’s application for a Section 7 certificate, and the language of the purpose and need statement in the FEIS.

²⁴⁸ See *infra* Section II.B.6.b.

²⁴⁹ See *infra* Section II.B.6.b.

²⁵⁰ See Letter from Cheryl A. LaFleur, Acting Chairman, FERC, to Cory A. Booker, United States Senator, Docket No. CP15-558-000 (Apr. 19, 2017) (“The EIS...does not constitute...determination of public need... The Project need will be determined separately by the Commission in its Order...”).

²⁵¹ See, e.g., 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.14; *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178 (10th Cir. 2013); *Simmons v. U.S. Army Corps of Eng’s*, 120 F.3d 664 (7th Cir. 1997); Order, Dissent at 2 – 3.

Table 2.

<i>PennEast Application</i>	<i>FEIS Purpose and Need Statement</i>
<p>States that the Project is intended to “provide approximately 1.1 million dekatherms per day (MMDth/d) of year-round transportation service from northern Pennsylvania to markets in New Jersey, eastern and southeastern Pennsylvania and surrounding states.”²⁵²</p>	<p>States that, “[a]ccording to PennEast, the purpose of the Project is to provide about 1.1 million dekatherms per day (MMDth/d) of year-round transportation service from northern Pennsylvania to markets in New Jersey, eastern and southeastern Pennsylvania, and surrounding states.”²⁵³</p>
<p>States that “[t]he Project is designed to provide a long-term solution to bring the lowest cost natural gas available in the country produced in the Marcellus Shale region in northern Pennsylvania to homes and businesses in New Jersey, Pennsylvania and surrounding states.”²⁵⁴</p>	<p>States a Project objective to “provide low cost natural gas produced from the Marcellus Shale region in northern Pennsylvania to homes and businesses in New Jersey, Pennsylvania, and surrounding states.”²⁵⁵</p>
<p>States that “[t]he Project is designed to provide a new pipeline to serve markets in the region with firm, reliable access to the Marcellus supplies versus the traditional, more costly Gulf Coast regional supplies and pipeline pathways.”²⁵⁶</p>	<p>States that the Project is intended to “serve markets in the region with firm, reliable access to Marcellus Shale natural gas supplies versus traditional, more costly Gulf Coast regional supplies and pipeline pathways.”²⁵⁷</p>
<p>States that the Project would “provid[e] enhanced competition among suppliers and pipeline transportation providers.”²⁵⁸</p>	<p>States that the Project would “provide enhanced competition among natural gas suppliers and pipeline transportation providers.”²⁵⁹</p>

²⁵² RESOURCE REPORT 1, *supra* note 156, at 1-2.

²⁵³ FEIS, *supra* note 5, at 1-3.

²⁵⁴ RESOURCE REPORT 1, *supra* note 156, at 1-2.

²⁵⁵ FEIS, *supra* note 5, at 1-3.

²⁵⁶ RESOURCE REPORT 1, *supra* note 156, at 1-2.

²⁵⁷ FEIS, *supra* note 5, at 1-3.

²⁵⁸ RESOURCE REPORT 1, *supra* note 156, at 1-2.

²⁵⁹ FEIS, *supra* note 5, at 1-3.

States that “[t]he Project will satisfy the needs of shippers seeking (i) additional supply flexibility, diversity and reliability; (ii) liquid points for trading in locally produced gas from the Marcellus Shale and the Utica Shale; (iii) direct access to premium markets in the northeast and mid-Atlantic regions; (iv) the ability to capture pricing differentials between the various interconnected market pipelines; (iv) enhanced natural gas transportation system reliability to the region with modern, state-of-the art facilities and (v) firm access to currently the most affordable long-lived dry gas reserves.”²⁶⁰

States the Project’s objective to “satisfy the needs of shippers seeking: additional supply flexibility, diversity, and reliability; liquid points for trading in locally produced gas; direct access to premium markets in the northeast and mid-Atlantic regions; ability to capture pricing differentials between the various interconnected market pipelines; enhanced natural gas transportation system reliability; and direct access to affordable long-lived dry gas reserves.”²⁶¹

In short, the FEIS’s purpose and need statement unlawfully parrots PennEast’s stated project objectives. Despite Intervenor’s and other commenters’ serious questions in the record as to the accuracy of PennEast’s underlying assumption that the service region suffers from unserved need for additional pipeline capacity,²⁶² FERC simply stated in the FEIS that, “[t]he Commission does not . . . redefine an applicant’s stated purpose.”

As set forth above, FERC has made no attempt to question much less scrutinize the assumption of need underlying PennEast’s stated project objectives. FERC’s policy not to “redefine an applicant’s stated purpose”²⁶³ means the questionable assumption that there is need—that a problem exists—is accepted as true and inappropriately informs the purpose and need statement (and thus, the alternatives analysis).

²⁶⁰ RESOURCE REPORT, *supra* note 156, at 1-2.

²⁶¹ FEIS, *supra* note 5, at 1-3.

²⁶² See *infra* Section II.B.1.

²⁶³ *Id.*

In a letter to Senator Raymond Lesniak, former Commissioner Bay conceded that the EIS only “briefly addresses PennEast’s stated purpose, but does not determine whether the need for the project exists,” explaining that the final Order would address need.²⁶⁴ The Commission’s admission that its entire consideration of purpose and need would only be made available in its final order to certify or deny the Project, gives plain indication that the purpose and need statement violates NEPA. If the predicate to an entire EIS—its purpose and need statement—is not examined until after the EIS is issued, then the EIS has failed to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”²⁶⁵ Such is plainly the case here. The FEIS’s failure to even consider the factual assumptions underlying the purpose and need statement, is in plain error. Furthermore, even if the purpose and need statement could be examined in the Order after the issuance of EIS, the Order itself failed to do so. There is no additional examination of market-based evidence of genuine public need to support the assumption on which the EIS relies. The Order simply reiterates what the FEIS said - that precedent agreement equal need. Moreover, FERC’s failure to take a hard look at the assumption of need in the EIS undercuts the “heart of the environmental impact statement,” the alternatives analysis,²⁶⁶ by leading FERC to ignore alternatives, such as

²⁶⁴ Letter from Norman C. Bay, Chairman, FERC, to Raymond J. Lesniak, New Jersey Senator, Docket No. CP15-558, Accession No. 20161103-0023 (Nov. 3, 2016) (“Lesniak Letter”); *see also* Letter from Cheryl A. LaFleur, Acting Chairman, FERC, to Cory A. Booker, United States Senator, Docket No. CP15-558-000 (Apr. 19, 2017). The Lesniak Letter also stated that the Commission would “give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain” - which the Order dismissed in favor of reliance on precedent agreements to find public benefit. See Lesniak Letter.

²⁶⁵ 40 C.F.R. §1500.1(b).

²⁶⁶ *Id.* §1502.14.

LNG or other peak shaving resources, that analyses suggest are sufficient (and more cost-effective) to meet any unmet peak demand in the service region.²⁶⁷

A purpose and need statement “will fail if it unreasonably narrows the agency’s consideration of alternatives so that the out-come is preordained.”²⁶⁸ FERC’s blind endorsement of PennEast’s stated project objectives in the FEIS’s purpose and need statement and the severely limited alternatives analysis that followed violates NEPA. It is arbitrary and capricious and eschews FERC’s obligation of sound decision making.

b. FERC Violated NEPA BY Failing to Engage in a Robust Alternatives Analysis

NEPA regulations require an agency to “rigorously explore and objectively evaluate all reasonable alternatives” to a proposed action.²⁶⁹ The alternatives analysis is the “heart of the environmental impact statement,” and must cover “all reasonable alternatives,” including “the agency’s preferred alternative,” any “reasonable alternatives not within the jurisdiction of the lead agency,” and “the alternative of no action.”²⁷⁰ By “[d]evot[ing] substantial treatment to each alternative considered in detail[,] . . . reviewers may evaluate their comparative merits.”²⁷¹ In particular, “[a] no action alternative in an EIS allows policymakers and the public to compare

²⁶⁷ See *infra* Section II.B.6.b (discussing the lack of any rigorous evaluation of no action alternatives); see also *supra* Section II.B.1 (discussing the analyses indicating that peak demand needs in the service region are modest and best served by peak shaving resources such as LNG).

²⁶⁸ *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); see also *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

²⁶⁹ 40 C.F.R. § 1502.14(a).

²⁷⁰ *Id.* § 1502.14(a), (c)–(e); see also *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1052 (9th Cir. 2013) (noting that all alternatives that can “feasibly meet the project’s goal . . . should be considered in detail”).

²⁷¹ 40 C.F.R. § 1502.14(b).

the environmental consequences of the status quo to the consequences of the proposed action.”²⁷² “[F]or alternatives which were eliminated from detailed study,” the agency must “briefly discuss the reasons for their having been eliminated.”²⁷³

Because the alternatives analysis flows from the statement of purpose and need, FERC’s failure to adhere to the congressional directive of the NGA and the requirements of NEPA resulted in an unduly narrow alternatives analysis limited primarily to those alternatives that supply year-round 1.1 million dekatherms per day of gas capacity to shippers and consumers in the service region.²⁷⁴ It failed to consider the no action alternative; any renewable energy alternative and other specific alternatives.

1. FERC failed to adequately consider the no action alternative.

NEPA required FERC to rigorously explore a “no action” alternative to the PennEast Project—i.e., an alternative in which FERC would not approve the PennEast Project or similar pipeline alternatives, leaving energy needs to be met through other means—or furnish valid reasons for neglecting to take a hard look at this alternative.²⁷⁵ Yet in its several hundred pages, the FEIS uses *one* page to address—and summarily reject—the no action alternative required under NEPA. The deficiency in analysis of the no action alternative flows from FERC’s adoption of an erroneous and impermissibly narrow project purpose.²⁷⁶ In its section addressing the no

²⁷² *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010).

²⁷³ 40 C.F.R. § 1502.14(a).

²⁷⁴ *See infra* Section I.

²⁷⁵ *See FEIS, supra* note 5, at 3-3. The FEIS separately analyzes “system alternatives,” in which FERC would rely on other existing, modified, or proposed pipelines to meet the purpose and need of the proposal. *See id.* at 3-3–3-8.

²⁷⁶ *See supra* 6.a.

action alternative, the FEIS affirms PennEast’s specific project objective to “create an additional approximately 1.1 MMDth/d of year-round transportation service from northern Pennsylvania to markets in southeastern Pennsylvania and New Jersey and surrounding states,” and parrots PennEast’s stated purposes to “accommodate increased demand and greater reliability of natural gas in the region”; provide “firm, reliable access to the Marcellus Shale supplies versus the traditional, more costly Gulf Coast regional supplies and pipeline pathways”; and “provid[e] enhanced competition among suppliers and pipeline transportation providers.”²⁷⁷ This improper formulation of the purpose and need statement induced FERC, in the alternatives analysis, to dismiss any no action alternative out-of-hand as clearly not allowing for the transportation of more natural gas—undermining sound decision-making and stunting public input. Despite its insistence on adopting Penn East’s project objectives, FERC concedes in the Order that the Project itself is unlikely to carry 1.1MMDth/d year round.²⁷⁸ Nevertheless, FERC refused to consider any alternatives that did not meet that threshold.

The FEIS speculated, without any evidence, that without the Project, other pipelines or other energy projects “*may*” or “*could*” take its place that “would result in environmental impacts that *could* be equal to or greater than those of the Project.”²⁷⁹ Such complete speculation, far from providing support for ignoring the no action alternative, explicitly invites the precise analysis that a hard look at a no action alternative is meant to provide. With this brief and unsubstantiated rejection, the FEIS failed to rigorously explore and objectively evaluate a no

²⁷⁷ See *id.* at 3-3.

²⁷⁸ Order at 208 (“This estimate assumes the maximum capacity is transported 365 days per year, which is rarely the case because many projects are designed for peak use.”).

²⁷⁹ *Id.* (emphasis added).

action alternative, or to provide a satisfactory explanation as to why that alternative does not warrant detailed consideration.²⁸⁰ The Order fails to cure any of these defects.

As demonstrated above, FERC has failed to require any market-based evidence of genuine public need for the transmission capacity the PennEast Project would supply²⁸¹ – a failure that renders FERC’s rejection of the no action alternative fatally deficient.²⁸² Intervenor and other commenters have submitted analyses showing that the Project is not needed, and that LNG or other peak shaving resources may continue to cost-effectively meet peak demand during occasional extreme cold weather events.²⁸³ These analyses indicate that no new pipeline capacity is needed in the service region, and that under a no action alternative, existing pipeline capacity supplemented by LNG and/or other peak shaving resources will continue to meet consumer needs.²⁸⁴ The Order admits projects such as this one are built for peak demand.²⁸⁵ Even when there is peak demand, LNG and other alternatives can meet the demand, rendering the additional capacity redundant.²⁸⁶ Moreover, new recent data and analysis show that LNG is not even

²⁸⁰ See 40 C.F.R. § 1502.14(a).

²⁸¹ See *supra* Section II.B.1.a.

²⁸² See FEIS, *supra* note 5, at 3-3.

²⁸³ See *supra* notes 63–69 and accompanying text; see also N.J. Conservation Found. & Stony Brook-Millstone Watershed Ass’n, Intervenor’s Comments on PennEast’s Application, Docket No. CP15-558-000, Accession No. 20160311-5209, at 28–29 (Mar. 11, 2016) (initially noting that “FERC’s ‘hard look’ under NEPA requires it to examine . . . purchasing gas from LNG facilities as alternatives to new construction”); Comments on DEIS, *supra* note 57, at 7–8 (submitting a detailed analysis of an LNG alternative).

²⁸⁴ See *infra* Section II.B.1.

²⁸⁵ Order at 208.

²⁸⁶ See *supra* notes 63–69 and accompanying text; see also N.J. Conservation Found. & Stony Brook-Millstone Watershed Ass’n, Intervenor’s Comments on PennEast’s Application, Docket No. CP15-558-000, Accession No. 20160311-5209, at 28–29 (Mar. 11, 2016) (initially noting that “FERC’s ‘hard look’ under NEPA requires it to examine . . . purchasing gas from LNG facilities as alternatives to new construction”); Comments on DEIS, *supra* note 57, at 7–8 (submitting a detailed analysis of an LNG alternative).

needed to meet peak demand.²⁸⁷ By blindly accepting PennEast’s assurances of public need for the Project, and in contravention to what FERC clearly acknowledged in its Order, the FEIS fails to substantiate its already unsubstantiated assertion that the no action alternative would be futile, because other pipelines or other energy projects “may” or “could” take the place of the PennEast Project.²⁸⁸ Indeed, without genuine market need for additional pipeline capacity in the service region, market forces would not, in fact, lead alternative facilities to spring into the PennEast Project’s place, as the FEIS speculates. As demonstrated in Exhibit A, the region already flows gas out on all but a few days, and with the Atlantic Sunrise Pipeline brought fully online in Summer 2018, this trend should continue and even increase. The FEIS completely fails to address the very real scenario that there is no market need. Put differently, FERC has entirely failed to consider an important aspect of the problem: evidence that there *is* no problem.

2. FERC failed to adequately consider clean energy and LNG alternatives.

The FEIS claims that clean energy options do not warrant detailed analysis because they would not create gas pipeline capacity.²⁸⁹ This results from their impermissibly narrow purpose and need statement, which should not be constrained by “those alternative means by which a particular applicant can reach his goals.”²⁹⁰ This narrow point of view ignores the

²⁸⁷ SKIPPING STONE WINTER 2017-2018 REPORT, *supra* note 18.

²⁸⁸ *See* FEIS, *supra* note 5, at 3-3 (the no-action alternative “could” have environmental impacts from hypothetical capacity projects that “could” arise).

²⁸⁹ FEIS, *supra* note 5, at 3-3.

²⁹⁰ *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (emphasis added) (finding alternatives analysis inadequate where Corps failed to substantially consider use of existing facility because the applicant did not own or have access to the land); *see also Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997) (finding underlying purpose and need to be supplying water to locality, not building, or finding, a single reservoir to supply that water).

possibility that, if the service region genuinely faces unmet energy needs – which data demonstrate it does not – the public convenience and necessity may require alternatives other than additional pipeline capacity.²⁹¹

The FEIS noted that electric generation from renewable energy sources is a reasonable alternative for reviewing generating facilities powered by fossil fuels, but “because the proposed Project’s purpose is to transport natural gas”, it was not considered in the EIS. But the public has no specific interest in natural gas supply per se; it has an interest in powering and heating homes and businesses, whether by gas or other energy resources, such as renewable energy and energy efficiency. The public also has an interest in a clean environment, and an interest in energy sources that create local jobs.

The FEIS erroneously attempts to construct a distinction between electric generation facilities and gas transportation, when these are parts of the same whole: gas is used largely for electricity generation, heating, and industrial processes; and electricity, too, may be used for heating and industrial processes.²⁹² Thus, as renewable energy generation increases total electricity supply, electricity may displace natural gas in end uses such as heating and industry. Moreover, the FEIS ignores that energy efficiency improvements have potential to reduce natural gas demand across many end uses. Even as the FEIS summarily dismisses clean energy

²⁹¹ For consumers, natural gas is in most cases a means to an end. In order for a New Jersey gas or electricity ratepayer to maintain a given indoor air temperature, or to achieve a given level of refrigeration, computer or television use, etc., the ultimate outcomes are the same regardless of the particular input mix of natural gas, renewable energy, or energy efficiency. There are of course differences between these energy sources with respect to price tag, environmental impacts, and other factors that may affect the welfare of the ratepayers themselves as well as the general public—and that is what the alternatives analysis is for.

²⁹² See Natural Gas Consumption by End Use, U.S. Energy Info. Admin. (last updated May 31, 2017), https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm; Use of Electricity, U.S. Energy Info. Admin. (last updated May 22, 2017), https://www.eia.gov/energyexplained/index.cfm?page=electricity_use.

alternatives as irrelevant to its consideration of the PennEast Project, FERC guidelines recognize that consideration of energy alternatives, including clean energy alternatives, are germane to the analysis of a no build alternative under NEPA.²⁹³ FERC’s dismissive, superficial analysis of clean energy alternatives fails to establish that any public demand for energy that may exist in Pennsylvania and New Jersey, is somehow confined to demand for gas—and may not include clean energy substitutes that could carry fewer adverse impacts.

The FEIS also failed to consider the record submission proposing and analyzing an LNG alternative. LNG injections involve the transportation of natural gas through pipelines, and thus should have been considered even under the overly narrow FEIS statement of purpose and need. Furthermore, LNG and other peak shaving resources have the potential to continue meeting any unmet peak demand. LNG injection is a reasonable alternative to the PennEast project and should have been evaluated in the EIS. The Order did not cure this deficiency.

3. FERC failed to explain its failure to adequately review legitimate alternatives.

Under NEPA, an EIS may omit detailed review of certain alternatives if the agency explains why such alternatives would not be reasonable.²⁹⁴ Here, the FEIS’s analysis of the no action alternative fails to engage in a rigorous exploration of that alternative, rejecting it

²⁹³ FERC guidelines instruct project applicants to “[d]escribe the effect of any state or regional energy conservation, load-management, and demand-side management programs on the long-term and short-term demand for the energy to be supplied by the project,” and to “[d]iscuss energy alternatives in sufficient detail to convincingly present the advantages or disadvantages of natural gas relative to oil, coal, electricity, and other alternative fuels readily available in the project area,” including “relative impacts on air quality, . . . relative transportation impacts . . . , and relative environmental and economic impacts associated with the construction of natural gas-based versus alternative fuel-based facilities.” Fed. Energy Regulatory Comm’n, *Guidance Manual for Environmental Report Preparation* 3-106 (2002).

²⁹⁴ 40 C.F.R. § 1502.14(a).

summarily as unable to meet the Project purpose of additional gas pipeline capacity in the service region. This explanation for eliminating the no action alternative from detailed study is arbitrary and capricious: the FEIS fails to explain why LNG and other peak shaving resources will not continue to meet modest peak demand needs; and it fails to explain why purported growth in unmet energy demand may only be met with additional pipeline capacity, rather than clean energy resources like renewables and efficiency. For these reasons the FEIS is deficient and cannot satisfy the NEPA requirements for the Order.

FERC's mandate under the NGA is to approve projects only if they are required the public convenience and necessity; accordingly, the FEIS's purpose and need statement, and the scope of the alternatives analysis, should have taken a similarly broad approach.²⁹⁵ Importantly, because of the significant exercise of eminent domain authority that this project would require, FERC was required by its own policy to have substantial evidence of significant public benefit – not just unsupported speculation and assertions.

c. Material Information Gaps In The FEIS Precluded FERC From Engaging in Informed Decision-making Required by NEPA

NEPA directs the Commission to build a thorough record on environmental impacts and mitigation options to allow the Agency to make an informed choice between the Project and

²⁹⁵ See *supra* Section II.B.2.b. It is the public convenience and necessity that “serve as a guide by which to determine the reasonableness of the objectives outlined.” *Protect our Communities Found. v. Jewell*, 825 F.3d 571, 579–80 (9th Cir. 2016) (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084–85 (9th Cir. 2013)).

other alternatives.²⁹⁶ “[E]nvironmental analysis . . . must occur before the proposed action is approved, not afterward.”²⁹⁷ PennEast has yet to file (and neither the FEIS nor the Order include or even refer to) a number of expressly requested studies, analyses, and other plans that are essential to the public review and governmental decision-making required under NEPA.

The data that should have informed the Commission’s analysis derive from PennEast’s submissions to the agency, including its initial application and subsequent submissions. In the docket, Intervenor, together with various federal and state agencies, pointed out gaping holes in PennEast’s data submissions and, as a result, the DEIS.²⁹⁸ Many of these gaps persisted in the FEIS, and are acknowledged as outstanding but not filled in by the Order. Specifically, information expressly missing from the FEIS and from the Order, included (but was not limited to) the following:²⁹⁹

- Survey information for the northern flying squirrel, the bobcat, the eastern redbelly turtle, the southern gray tree frog, and the long eared owl, all state listed threatened and endangered species.³⁰⁰

²⁹⁶ See *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (“NEPA has twin aims. First, it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action’”); see generally 40 C.F.R. pt. 1502; 42 U.S.C. § 4332

²⁹⁷ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011) (internal citations omitted) (stating that “plans to conduct surveys and studies as part of its post-approval mitigation measures” do not constitute a “sufficiently ‘hard look’” under NEPA); cf. *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (“[T]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”) (internal citations omitted).

²⁹⁸ See, e.g., Comments on DEIS, *supra* note 57; Response to PennEast Comments, *supra* note 61; U.S. Fish & Wildlife Serv., Letter Re: DEIS and Biological Assessment, Docket No. CP15-558, Accession No. 20160913-5213 (Sept. 12, 2016); N.J. Dept. of Env’tl. Prot., Letter Re: Proposed PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20160919-0014 (Sept. 12, 2016); U.S. Fish & Wildlife Serv., Letter Re: PennEast Pipeline Project Biological Opinion, Docket No. CP15-558-000, USFWS Project no. 2014-1013 (PAFO) and 05E2NJ00-2014-F-0543 (NJFO) (Nov. 28, 2017).

²⁹⁹ See also FEIS, *supra* note 5, at 5-19–5-31 (summarizing several dozen action items remaining uncompleted by PennEast, including various surveys, impact assessments, and mitigation plans).

³⁰⁰ *Id.* at 4-125–4-127; Order at 148, Appendix A 39.

- Surveys of private water supply wells in New Jersey.³⁰¹
- A Geohazard Risk Evaluation Report detailing soil stability hazards associated with Project facilities, finalizing an inventory of landslide hazards, and providing mitigation measures and monitoring plans to avoid such hazards.³⁰²
- In the same report, the final results of the ongoing geotechnical evaluation of working, not active, and abandoned mines near the proposed crossing of the Susquehanna River.³⁰³
- Blasting plans updated based on geophysical, geotechnical, and archaeological evaluations.³⁰⁴
- A final crossing plan for the Appalachian National Scenic Trail, including mitigation measures.³⁰⁵
- Archaeological investigations for nearly 1250 acres, and impact assessments and/or mitigation plans for various historic properties and districts.³⁰⁶

NEPA requires that when an agency preparing an EIS is faced with “incomplete or unavailable information” that is “relevant to reasonably foreseeable significant adverse impacts” and “essential to a reasoned choice among alternatives,” the agency is not excused from including that information in the EIS unless “the overall costs of obtaining it are exorbitant or the means to obtain it are not known.”³⁰⁷ Moreover, this information “is precisely the information

³⁰¹ FEIS, *supra* note 5, at 4-37–4-38ll; Order at 129, Appendix A 21.

³⁰² FEIS, *supra* note 5, at 4-9; Order at 191, Appendix A 15.

³⁰³ FEIS, *supra* note 5, at 4-11; Order at Appendix A 17.

³⁰⁴ FEIS, *supra* note 5, at 4-16, 4-228; Order at 126, Appendix A 18, 25, 50.

³⁰⁵ FEIS, *supra* note 5, at 4-164; Order at Appendix A 42.

³⁰⁶ FEIS, *supra* note 5, at 4-214–4-227. The FEIS does not clearly state how much of this acreage was unavailable to survey due to landowner access refusal, and how much was not surveyed through PennEast’s own inaction. *See id.* at 4-226 (indicating that “[m]any” of the areas remaining to be surveyed have been unavailable due to landowner access refusal); Order at 172, Appendix A at 51.

³⁰⁷ 40 C.F.R. § 1502.22. To the extent that some of this missing information is unavailable due to survey access refusals from landowners, the FEIS failed to clearly delineate which pending information is unavailable for this reason, as opposed to PennEast’s own delays. *See, e.g.* FEIS, *supra* note 5, at 4-17 (explaining that some, but not all, geotechnical analysis remains pending due to survey access problems);

and understanding that is required *before* a decision that may have a significant impact on the environment is made.”³⁰⁸ FERC was unable to make an informed choice between alternatives without having survey information for several state listed endangered and threatened species or for private wells in New Jersey. Nor did FERC have final information on landslide hazards of the Project or mitigation options for them, or on risks to mines at the Susquehanna River crossing; updated reports on the environmental and archaeological impacts of blasting; a crossing plan for the treasured Appalachian Trail; or a better-developed understanding of the archaeological impacts of the Project and PennEast’s plans to mitigate them. The Commission plainly did not have the information necessary to determine whether the Project’s impacts on species, drinking water, geology, or historic, cultural, and recreational resources will be significant or whether mitigation measures will be sufficient.

The Commission is not permitted to approve the Project and then conduct its study of the Project’s environmental effects.³⁰⁹ By prematurely issuing the FEIS without full environmental analysis, FERC bypassed its duty under NEPA to engage in informed decision-making by accounting for the environmental impacts of its preferred alternative and comparing those impacts to other alternatives, *before* making a decision among alternatives.

FERC violated NEPA by issuing the Certificate without receiving and contemplating vital environmental information. It compounded this error by not requiring a supplemental EIS as a Condition of the Order. Conditioning the Order on the receipt of information necessary to conduct a proper EIS does not cure the inadequacies of the EIS - once submitted the data must be

id. at 4-226 (stating that “[m]any” of the areas pending archaeological survey have been unavailable due to landowner access refusal).

³⁰⁸ Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001).

³⁰⁹ N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1083 (9th Cir. 2011).

reviewed and analyzed. Absent a supplemental EIS that adequately considers the data, construction of the pipeline will occur without *meaningful* environmental review and in violation of NEPA.

d. FERC Failed To Properly Analyze and Assess Cumulative Impacts

In analyzing the environmental effects of a proposed action, an EIS must address that action's "cumulative" impacts as well as its individual impacts:³¹⁰

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.³¹¹

Assessing the impacts of a proposed action within the context of existing and foreseeable effects in the same area yields "a realistic evaluation of the total impacts" and ensures that an EIS does not impermissibly "isolate a proposed project, viewing it in a vacuum."³¹² Indeed, as the FEIS describes, the PennEast Pipeline proposal should be viewed in the context of the Marcellus Shale fracking boom and attendant pipeline construction; this construction is causing erosion and runoff, habitat destruction and alteration, wildlife displacement and population stress, wetlands and vegetation loss, and disturbance of surface waters and groundwater, among other impacts.³¹³ Fully understanding the cumulative impacts of rapid gas infrastructure development is essential for FERC to assess a given proposed gas project, such as the PennEast Pipeline, in its larger

³¹⁰ 40 C.F.R. § 1508.8.

³¹¹ *Id.* § 1508.7.

³¹² *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

³¹³ *See id.* at 4-327-4-330.

context. Yet here, FERC engaged in only a cursory and analytically shallow assessment of cumulative impacts that cannot serve as a basis for reasoned decision-making under NEPA.³¹⁴

The FEIS simply makes the conclusory finding that those impacts would be minor or nonsignificant. For example, the FEIS concludes that cumulative impacts on soils and geology would be insignificant because PennEast would mitigate any adverse effects and any proposed connection would not happen until some date in the future.³¹⁵ Similarly, the FEIS concluded that cumulative impacts to waterways would be minimal because projects would get permits with mitigation measures.³¹⁶ Neither these conclusions nor any others are based on serious rigorous analysis. It should be noted that the FEIS's discussion of each of these impacts has minimal qualitative (and essentially no quantitative) analysis that cannot pass for proper analytical rigor in an EIS. Moreover, FERC's analysis utterly fails to explore *cumulative* impacts. Simply stating that an action that has cumulative effect would be non-significant by itself defeats a key purpose of analyzing cumulative impacts: to understand the effects of an action that may flow from "individually minor but collectively significant actions."³¹⁷

To the extent the FEIS acknowledged cumulative impacts in certain areas, it simply recited those impacts without any analysis or proposed responsive action. For example, the FEIS acknowledged that cultural resources would be impacted. It also recognized cumulative impacts to wildlife and vegetation, in particular the displacement of deep forest with edge habitat and the risk of spreading invasive vegetation.³¹⁸ Likewise, the FEIS noted that the project would

³¹⁴ See FEIS, *supra* note 5, at 4-312–4-336.

³¹⁵ *Id.* at 4-327–4-328.

³¹⁶ *Id.* at 4-328–4-329.

³¹⁷ 40 C.F.R. § 1508.7.

³¹⁸ FEIS, *supra* note 5, at 4-329.

“increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to future climate change impacts.”³¹⁹ But it went no further. These conclusory findings do not represent a “hard look” under NEPA, and can hardly form a basis for reasoned decision-making. Furthermore, the Order fails to cure the defective FEIS because it does not rigorously analyze these cumulative impacts of the Project within the context of the Marcellus Shale fracking boom and attendant pipeline construction. With the ongoing regional buildout in pipeline infrastructure, it is essential for the Commission to conduct rigorous, informed analysis of the impacts of this cumulative wave of development, rather than dismiss meaningful consideration with useless generalities.

e. FERC violated NEPA’s public participation requirements by issuing such a deficient Draft EIS that the public couldn’t meaningfully comment

Agencies are required to provide opportunities for meaningful public participation in the NEPA process.³²⁰ Not only must relevant information be made available to the public, but the public must be able to comment and scrutinize the proposed action.³²¹ While the public was given the opportunity to comment on a half-baked DEIS, the DEIS and FEIS both lacked so much data and were so deficient that the public could not *meaningfully* comment.³²² The DEIS lacked *any* survey information for the dwarf wedgemussel and the rusty patched bumble bee,

³¹⁹ *Id.* at 4-335.

³²⁰ *See* 40 C.F.R. § 6.203.

³²¹ Robertson, 490 U.S. at 349; 40 C.F.R. § 1500.1(b).

³²² *See, e.g.*, Comments on DEIS, *supra* note 57; Response to PennEast Comments, *supra* note 61; U.S. Fish & Wildlife Serv., Letter Re: DEIS and Biological Assessment, Docket No. CP15-558, Accession No. 20160913-5213 (Sept. 12, 2016); N.J. Dept. of Env’tl. Prot., Letter Re: Proposed PennEast Pipeline Project, Docket No. CP15-558, Accession No. 20160919-0014 (Sept. 12, 2016).

both federally listed endangered species;³²³ any survey information for several state listed endangered and threatened species;³²⁴ any survey information on private wells in New Jersey;³²⁵ final information on landslide hazards of the Project or mitigation options for them, or on risks to mines at the Susquehanna River crossing;³²⁶ updated reports on the environmental and archaeological impacts of blasting;³²⁷ a crossing plan for the treasured Appalachian Trail;³²⁸ or a better-developed understanding of the archaeological impacts of the Project and PennEast’s plans to mitigate them.³²⁹

Due to the lack of data, FERC’s DEIS, FEIS, and, ultimately, Order that rested on those underlying NEPA documents, precluded meaningful comment. The information provided for public scrutiny “must be of high quality,” as “accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”³³⁰ The DEIS was not of high quality because it lacked large amounts of vital data, and as such, federal and state resource agencies were also not given the opportunity to make meaningful comments and scrutinize the proposal in a way necessary for informed decision-making. It is not sufficient to allow opportunities for ceremonial comment throughout a NEPA process in which the deficiencies are never cured. As such, FERC violated NEPA’s requirements for public participation, and issued an Order that must be reconsidered.

7. FERC erred in denying Intervenor’s request for an evidentiary hearing

³²³ FEIS, *supra* note 5, at 4-118, 4-122–4-123

³²⁴ *Id.* at 4-125–4-127.

³²⁵ *Id.* at 4-37–4-38.

³²⁶ *Id.* at 4-11.

³²⁷ *Id.* at 4-16, 4-228.

³²⁸ *Id.* at 4-164.

³²⁹ *Id.* at 4-214–4-227.

³³⁰ 40 C.F.R. § 1500.1(b).

Intervenors moved the Commission to hold an evidentiary hearing to resolve serious disputed factual issues regarding PennEast’s economic claims, supporting their motion with expert assessments and data.³³¹ The Order summarily denied Intervenors’ motion, stating that the written record was sufficient to resolve the issues raised – and notably the only portion of the written record that the Order used to resolve all issues consisted of precedent agreements. The Order merely refers to the existence of Intervenors’ data and analyses, and summarily dismisses them by using unsupported assertions PennEast provided in an answer. PennEast’s answer neither clarifies the challenged economic methodology nor addresses valid alternatives to the pipeline. Its answer (typically not allowed into the record, in fact) also does not provide missing documentation that Intervenors requested in their comments.³³² Thus, critical information for evaluating public benefit - like FERC’s analysis of the existing mountain of data indicating that there is no public need – remains missing from the record. And as set out above, Intervenors’ FOIA request for the Commission’s evidentiary analysis of these issues yielded only reference to those same precedent agreements.

Furthermore, while the Commission may rely on precedent agreements as some evidence of demand-side need, the existence of such contracts does not abrogate the Commission’s duty to evaluate whether they accurately represent unmet capacity, true market demand, or will cause harm to consumers, using other pieces of evidence.³³³ Nevertheless, the agency admits that it did

³³¹ Complaint and Motion of New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association for an Evidentiary Hearing under CP15-558., Docket No. CP15-558, Accession No. 20160615-5167 (June. 15, 2016) (“Motion for Evidentiary Hearing”).

³³² For example, although PennEast claimed to have contacted historical organizations in a letter dated Dec. 14, 2015, information pertaining to such contact has not been disclosed.

³³³ See Certificate Policy Statement, *supra* note 43, at 13 (stating that FERC’s certificate policy should “protect captive customers”); See also *Pennsylvania Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (“A

not “look behind the agreements” to determine whether they are an accurate representation of market demand. The policy statement the Commission relies on in the Order states that precedent agreements alone are insufficient evidence to support pipeline certification.³³⁴ As Commissioner Glick warned, “[b]y itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer’s burden to show that the pipeline is needed.”³³⁵ In its Order, the Commission does not evaluate whether the precedent agreements are a legitimate indicator of demand, nor does it consider any of the evidence strongly indicating that in this proceeding, they are not.

As such, a paper hearing was insufficient for several reasons. First, without cross-examining experts on issues of economic assessment, FERC has shown that it has not conducted any independent assessment to determine whether the evidence presented by PennEast is credible and whether there is a legitimate need for the project.³³⁶ Courts have repeatedly held that

major purpose of the (Power) Act is to protect power consumers against excessive prices”); *FPC v. Hope Gas Co.*, 320 U.S. 591, 610 (1944) (The “primary aim” of the Natural Gas Act is “to protect consumers against exploitation at the hands of natural gas companies”); *Columbia Gas Transmission*, 768 F.3d at 331(3rd Cir. 2014).

³³⁴ Certificate Policy Statement, *supra* note 43, at 25. The Certificate Policy Statement states that “contracts or precedent agreements always will be important evidence of demand for a project, the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity.” Nowhere in the policy statement however, is there any mention that the precedent agreements by themselves are sufficient to demonstrate demand-side need, or that their validity does not need to be verified.

³³⁵ Former FERC Chairman Norman Bay similarly warned, “*Pipelines are capital intensive and long-lived assets. It is inefficient to build pipelines that may not be needed over the long term and that become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems. If a new pipeline takes customers from a legacy system, the remaining captive customers on the system may pay higher rates. Under such circumstances, a cost-benefit analysis may not support building the pipeline*”

³³⁶ In fact, as outlined in Section II.B.1.a, FERC has ignored the weight of evidence submitted by intervenors.

credibility determinations cannot be resolved on the written record.³³⁷ Second, given the level of public participation in this matter, "a trial-type hearing would help citizens to better evaluate this project."³³⁸ In prior cases, the Commission has allowed a rehearing based on "unprecedented level of public comment, input and concern" generated by pipeline applications. Third, since Intervenor filed their motion for an evidentiary hearing, additional investigations have revealed that the price increases are not a reliable indicator of demand-side need.³³⁹ That alone provides a strong basis for FERC to reconsider its denial of Intervenor's motion for an evidentiary hearing.

Since the Natural Gas Act requires FERC to make a robust public convenience and necessity determination, this inherently requires it to evaluate what evidence exists in the record, and compel PennEast to support its assertions of demand-side need with data and analysis, not just affiliate agreements. Giving Intervenor the opportunity to cross-examine PennEast, and allowing the Commission to examine the independent energy experts' data and analysis will yield a true and complete picture of whether or not there is unmet need for this additional long-term capacity on a greenfields pipeline. Issues of public need and credibility are material issues of disputed fact and unless they are resolved, the Commission cannot conclude that the project meets "public convenience and necessity." An evidentiary hearing before the commission would allow FERC to meet its legal obligations under the Natural Gas Act and NEPA, and, in turn, under the 5th Amendment.

³³⁷ *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (2010); *Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (1997).

³³⁸ *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1109 (1992).

³³⁹ See *SKIPPING STONE WINTER 2017-2018 REPORT*, *supra* note 18; see also *A Few Cold Days Should Not A Pipeline Make*, *supra* note 180.

III. INTERVENORS' MOTION FOR STAY

In addition to its request for rehearing and rescission, Intervenor, New Jersey Conservation Foundation, also moves the Commission for a stay of the Certificate Order pending resolution of the merits of Intervenor's request for rehearing and rescission.³⁴⁰ The Commission has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."³⁴¹ Intervenor specifically request that, if the Commission grants rehearing for the limited purposes of taking more time to consider the merits, that the stay continue until any tolling order that this Commission issues related to Intervenor's Request for a Rehearing is terminated or withdrawn. While the Commission's "general policy is to refrain from granting stays to ensure definiteness and finality in our proceedings,"³⁴² the Commission also takes the position that its orders are non-final and subject to modification at any time prior to conclusion of the rehearing process.³⁴³ To prevent impacts during the pendency of the rehearing process that are indeed final with respect to Intervenor and their members, the Commission should stay the Certificate Order based on the three factors that it considers in determining whether justice requires a stay.

³⁴⁰ Intervenor note that because their request for rehearing is paired with a motion for stay, its request for rehearing is not a "stand alone" request and, therefore, the Commission has not delegated authority to the Secretary to toll the time for action on Intervenor's request for rehearing. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

³⁴¹ 5 U.S.C. § 705.

³⁴² Constitution Pipeline Company, LLC., 154 FERC ¶ 61,092, 9, Docket No. CP13-499, Accession No. 20160210-3067 (Feb. 10, 2016).

³⁴³ Moreover, this matter presents a clear case where FERC is likely to revisit its finding of public convenience and necessity in light of the volume of environmental data that remains outstanding. Several Commissioners stated that they voted to approve the project because the Order gave FERC the option to reconsider its approval after PennEast submitted additional data. Order at 1 (Chatterjee, N., concurring) ("The order imposes conditions requiring the filing of additional environmental information for review and approval once survey access is obtained."); Order at 1—2 (LaFleur, C., concurring).

Intervenors meet all three factors that the Commission considers in making a decision in response to the request for a stay: (1) Intervenor will suffer irreparable harm without a stay, (2) issuing a stay will not substantially harm PennEast, and (3) a stay is in the public interest.³⁴⁴ The cumulative and irreversible impacts of the PennEast project require a stay in the interest of justice.

1. FERC Must Grant a Stay of its Certificate to Prevent PennEast from Irreparably Harming Intervenor by Taking their Land Without the Public Use Analysis Required by the Fifth Amendment

FERC’s Order granting PennEast a Section 7 Certificate does not contain any language restricting the operation of Section 717f(h), the NGA provision assigning PennEast the right of eminent domain over any land “necessary” to the construction of its pipeline. PennEast has filed over 150 condemnation complaints seeking to take the land of Intervenor and many others. In light of the record replete with evidence and analyses demonstrating that, in fact, the proposed project serves purely private interests without any corresponding public benefit, the Order must be stayed so that PennEast is not allowed to take Intervenor’s lands for a private use in violation of the Fifth Amendment.

FERC did not conduct a proper public use analysis before issuing the Order. The agency denied Intervenor’s motion seeking an evidentiary hearing to analyze the need for the project. The agency relied solely on shippers’ precedent agreements, most of which were with its own affiliates, to determine the project served a public use. It ignored its own policy to examine other factors in assessing the need for the project. Therefore, as set out in Section II.B.1 of Intervenor’s

³⁴⁴ Tennessee Gas Pipeline Company, L.L.C., 154 FERC ¶ 61,263, 4, Docket No. CP14-529, Accession No. 20160330-3085 (Mar. 30, 2016).

Request for Rehearing, FERC violated the Fifth Amendment by failing to perform a constitutionally sufficient analysis of public use before issuing an Order that authorizes PennEast to take Intervenor's land.

Absent a stay, PennEast's condemnation proceedings will continue in violation of the Fifth Amendment. Thus, Intervenor will suffer irreparable harm without a stay of this Order that PennEast is using as the authority to take Intervenor's land. Under the Constitution, landowners have the right to exclude others from their land unless the government approves the seizure of the land with substantial evidence of a public use.³⁴⁵ Thus, a private party may not take another's land without lawful permission from either the landowner or the government.³⁴⁶ Unless FERC stays its order, that is exactly what would happen to Intervenor here. It does not matter that Intervenor will be paid for its land. Intervenor has already chosen not to sell at fair market value and a payment of fair market value cannot compensate the loss of property rights that Intervenor will suffer. Further, FERC may have approved the seizure of Intervenor's land, but because FERC's approval was unconstitutional, Intervenor will still have its land unlawfully taken by PennEast, a private company, for a private use, thus violating their property rights. Several courts have held that a violation of property rights constitutes irreparable harm.³⁴⁷ The Commission should follow this precedent.

³⁴⁵ THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1171 (3rd ed. 2017) ("This power of compulsory transfer is obviously an exception to the ordinary rules associated with property ownership. The ordinary rule is. . . [i]f B wants A's property, B must obtain A's consent to a transfer of property.").

³⁴⁶ *Id.* at 1172 ("Eminent domain is a governmental power, and hence cannot be exercised by a private person unless there has been a valid delegation of eminent domain authority to that person.").

³⁴⁷ *See* *Carpenter Technology Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005) (holding that deprivation of an interest in real property, and damage to sensitive vegetation and wetlands that would result from wrongful

2. Defendants are Not Irreparably Harmed by a Stay

If PennEast incurs any harm at all as a result of the grant of a stay, such harm would be solely economic. This Commission has developed well-established precedent that economic harm is not irreparable harm.³⁴⁸ Only where the very survival of the company is at stake may economic loss become “irreparable.”³⁴⁹ A delay in the start of construction of the pipeline that would be caused by a stay does not threaten the survival of PennEast. Further, PennEast has no right to a Certificate Order from the Commission. PennEast entered into contracts with shippers at its own risk. This nation’s public policy cannot be altered to fit the needs of a private contract.

3. A Stay is In the Public Interest

There is a fundamental public interest in protecting the constitutional rights of property owners. As discussed above, without a stay, Intervenor will lose its valued property for a purpose that is non-public, in violation of the Fifth Amendment to the Constitution. The Supreme Court has stated, “[I]t is always in the public interest to prevent violation of a party’s constitutional rights.”³⁵⁰

condemnation, constitutes irreparable harm); *Monarch Chem. Works, Inc. v. Exxon*, 452 F. Supp. 493, 502 (D. Neb. 1978) (holding condemnation of land can result in irreparable injury).

³⁴⁸ *See, e.g.*, *Tennessee Gas Pipeline Company, L.L.C.*, *supra* note 344, at 6 (“Economic loss does not constitute irreparable harm.”); *Constitution Pipeline Co., LLC*, *supra* note 342 at, 10 (“Economic loss, without more, does not constitute irreparable harm.”); *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183, Docket No. CP13-551-001, Accession No. 20150312-3011 (Mar. 12, 2015) (holding that potential diminution of property values “are indicative of only economic harm, which, without more, is not considered irreparable injury”); *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, 17, Docket No. CP11-515, Accession No. 20121009-3030 (Oct. 9, 2012) (same).

³⁴⁹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“Monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.”).

³⁵⁰ *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Intervenor and the public also have a significant interest in seeing the Natural Gas Act properly administered. The NGA's "fundamental purpose is to protect natural gas consumers from the monopoly power of natural gas pipelines."³⁵¹ By refusing to conduct an individualized review of the PennEast pipeline to determine whether it is truly in the public convenience and necessity, and by taking the arguments of the project proponent which it is charged with regulating at face value, FERC has failed to discharge its duty under the NGA. When FERC ignores that congressional charge, the public suffers due to a lack of a competitive, consumer-friendly natural gas market.³⁵²

A stay is in the public interest because, as explained above in the Request for Rehearing and Rescission, this pipeline is not necessary to reduce gas prices, ensure reliability, allow for flexibility, or for any other reason. Meanwhile, Intervenor's property rights will be severely violated if a stay is not granted and the NGA will continue to be improperly administered. Therefore, the Commission should grant a stay until it rules on the merits of Intervenor's Request for Rehearing and Rescission.

IV. CONCLUSION

FERC should grant Intervenor's request for rehearing and rescission because its Order issuing PennEast a Section 7 Certificate: (1) violates the NGA by failing to demonstrate substantial evidence that the Project is required by the public convenience and necessity or is in the public use; (2) violates the 5th Amendment of the Constitution by providing for takings

³⁵¹ Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 833 (D.C. Cir. 2006).

³⁵² JIM WELLS, U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-726R, ELECTRICITY MARKETS: FERC'S ROLE IN PROTECTING CONSUMERS 1—5 (2003).

without a constitutionally sufficient public use analysis; (3) was issued prior to securing New Jersey's Section 401 Water Quality Certification in violation of the CWA; (4) was issued prior to the conclusion of Section 106 Process, violating the NHPA; (5) FERC violated the NGA and the 5th Amendment of the Constitution by approving the use of eminent domain on land that may not be "necessary" to the project's completion and (6) relies on a deficient NEPA process.

For the foregoing reasons, Intervenors respectfully request that Commission grant rehearing and rescind the Order. Intervenors additionally request that the Commission reconsider its denial of Intervenors' motion for an evidentiary hearing. To properly review the Project under NEPA, the Commission must issue a supplemental FEIS that frames the purpose and need for the Project according to public interest factors, and upon diligent inquiry into the assumptions underlying those factors; that rigorously evaluates all reasonable alternatives, including the alternative of no action, as guided by the public purpose and need, if any, for the Project; that accounts for all reasonably available information necessary to FERC's decision; that evaluates the indirect environmental impacts of induced upstream gas system activity; and that rigorously accounts for the cumulative impacts of regional gas infrastructure development. Considering these new analyses of project alternatives and environmental impacts, FERC must freshly decide among Project alternatives.

In the event that FERC decides that the Project is acceptable upon this supplemental environmental review, FERC must separately conclude that the Project is required by the public convenience and necessity under the NGA and is in the public use, as required by the 5th Amendment to the Constitution. Critically, FERC must diligently account for the public benefit, if any, of the Project; and then diligently account for the economic costs of the Project that would weigh against any such benefit. In the event that this balance favors the Project, FERC must

proceed to balance this net economic benefit against all environmental impacts of the Project. Only if FERC thereupon determines that the Project's benefit outweighs any adverse effects—and only if NJDEP has approved a Section 401 certification for the Project, and only once Section 106 consultation has completed—may FERC issue an order granting PennEast a certificate of public convenience and necessity under Section 7 of the NGA.

Finally, Intervenor New Jersey Conservation Foundation requests that the Commission grant a motion for a stay pending full resolution of Intervenor's request for rehearing and rescission. The constitutional harms of this project far outweigh any economic gain, and Intervenor will be irreparably harmed if a stay is not granted. Justice requires that the Commission grant a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Request for Rehearing and Motion for Stay electronically on the docket and thus upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: February 12, 2018



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