

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New Jersey Conservation Foundation)	
)	
and)	
)	
Stony Brook-Millstone Watershed Association)	Docket No. CP15-558-000
)	
Complainants)	
v.)	
PennEast Pipeline Company LLC)	
Respondents)	

NOTICE OF RULE 206 COMPLAINT AND RULE 212 MOTION

()

Take notice that on June 15, 2016, New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association filed with the Federal Energy Regulatory Commission (“FERC”) a Rule 206 Complaint and Rule 212 Motion against PennEast Pipeline Company LLC (“PennEast”) pursuant to 15 U.S.C. 717f(e) of the Natural Gas Act, and 18 CFR 385.206 (Rule 206) and 18 CFR 385.212 (Rule 212), alleging that PennEast’s application for a Certificate of Public Convenience & Necessity does not contain substantial evidence of public benefit as required by the Natural Gas Act, and requesting that FERC initiate an evidentiary hearing to develop the record upon which the Commission could make findings to determine whether PennEast qualifies for the Certificate.

New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association certify that copies of the complaint were served on the contacts for PennEast Pipeline Company LLC as listed on the Commission’s list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent’s answer and all interventions, or protests must be filed on or before the comment date. The Respondent’s answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in

lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, DC. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose,
Secretary.

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

IMO PennEast Pipeline Company LLC application for a Certificate of Public Convenience and Necessity	Docket # CP15-558
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**Complaint and Motion Brought by the New Jersey Conservation
Foundation and Stony Brook-Millstone Watershed Association under
18 CFR 385.206 (Rule 206) and 18 CFR 385.212 (Rule 212)**

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June 15, 2016

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Preliminary Statement

In its review of an application for a certificate of public convenience and necessity, FERC's determination must rest on substantial evidence regarding the presence or absence of public need. It also must weigh that determination against the potential adverse impacts from issuing the certificate. In reaching an appropriate balance, FERC must consider the allocation of risk between shareholders and captive ratepayers.¹

In this docket, FERC must assess the proposed PennEast project, a greenfield natural gas pipeline proposal whose capacity is subscribed primarily by affiliates of the project developer. In conducting its legally mandated review, FERC must duly discharge the oversight role accorded to it by the Natural Gas Act, its implementing regulations, and the body of federal case law expounding upon it.² In order to discharge those duties, FERC must hold an evidentiary hearing to examine market need. It is obligated to do so in this case because, as set forth in more detail below, PennEast's proposed project would allow this corporate consortium to appropriate quasi rent to its shareholders, leaving

¹See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("The primary aim of [the Natural Gas Act] was "to protect consumers against exploitation at the hands of natural gas companies.").

² See, e.g. *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 751 (D.C. Cir. 1971) (the "primary purpose of the [NGA] is to protect consumers," and therefore the Commission "must weigh the sometimes conflicting interests of both producer and consumer.").

captive ratepayers to shoulder higher costs in excess of any conferred benefits. If FERC fails to carefully examine market need in an evidentiary hearing in this case, there is a real risk that affiliate relationships will have created new barriers to entry such that more efficient projects cannot move forward, not only in this geographic market, but in many natural gas markets, given the trend towards pipeline developers structuring projects based on the altered economics of affiliate transactions.³

In the New Jersey natural gas market, absent affiliate transactions like those underpinning PennEast, the demand for additional firm capacity is insufficient to support a new pipeline with 1 bcf/day of capacity. While PennEast has submitted precedent agreements in support of public benefit or need for its project, and little else, these agreements are with affiliates and do not in and of themselves reflect genuine need. The promise of high returns provides the parent firms of local distribution companies (“LDCs”), as owners of the new pipeline, a strong financial incentive to enter the interstate transportation business; to create demand, they need only to effectuate a shift of pre-existing firm capacity

³Cathy Kunkel & Tom Sanzillo, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, IEEFA, Apr. 2016, at 7 (“This [current] approach by FERC is highly likely to result in excess capacity that will be underutilized. For example, in situations in which a pipeline developer contracts with an affiliate company to ship gas through a new pipeline, this is strong evidence that it is doing so because of the financial advantage to the parent company from building the pipeline, but not necessarily that there is a need for the pipeline...[T]he private financial interests of individual pipeline developers do not necessarily align with the public interest”), FERC Docket No. CP15-558, Accession No. 20160608-5004. As set out in Part II below, LDCs used to be engaged in protecting against market abuse that could produce anticompetitive outcomes and consumer harm. With these newly conceived LDC affiliate consortiums, they are now exercising market power to benefit their shareholders, and gas consumers are left unprotected from inefficient outcomes that are less likely in a truly competitive market.

contracts from incumbent pipelines to PennEast.⁴ Without FERC's scrutiny of the extent of underlying public need beyond the four corners of the precedent agreements, PennEast would be permitted to create a glut of capacity that serves no new demand. This excess capacity, far beyond what would be built in a competitive market, will impose significant costs on captive ratepayers and distort the efficient allocation of resources, all for the sake of providing a low-risk, high rate of return to the PennEast Consortium.⁵

Even the record thus far compiled by PennEast includes data and analyses contradicting PennEast's own claims of public need. It suggests adverse economic impacts that have not been addressed, and itself creates genuine disputes of the material facts undermining PennEast's application. These controversies have generated unprecedented public outcry, and should be resolved in an evidentiary hearing. Such a hearing is essential where, as here, the material facts in dispute relate to specific findings that FERC must make to conduct its threshold economic test. An evidentiary hearing will permit FERC to discharge its obligation by looking behind self-interested affiliate contracts to assess public need and determine, as it is required to do by the Natural Gas Act and its implementing policies, whether the project appropriately allocates risk among shareholders and captive ratepayers.⁶

⁴LDCs are one of the primary purchasers of year-round firm transport. New pipelines in the northeast are generally built based on contracts with LDCs that require substantial additional capacity based on new demand.

⁵See, e.g., Kunkel and Sanzillo, *supra* note 3.

⁶In the course of the 1999 FERC Certificate Policy Statement Process, UGI and others actually argued to FERC that it should look behind precedent agreements in affiliate transactions.

The structure of this particular project and the state public utility regime require that FERC rely on more than the market signals that the PennEast precedent agreements for firm capacity purport to send. Instead FERC must hold an evidentiary hearing and look beyond those agreements to determine whether such contracts are in fact an arm's length transactions indicative of public need, so that the Commission can equitably balance risks and rewards between shareholders and ratepayers.⁷

In undertaking its statutory review of PennEast, FERC must recognize and acknowledge that the potential affiliate market power at work in this instance differs substantially from those previously addressed by the Commission. For decades, it was retail gas distributors who fought to protect gas consumers from the exercise of market power by other parties. As Dr. Jeffrey Makholm explains in "The Political Economy of Pipelines":

Although in its Certificated Policy Statement, FERC sought a compromise stance -- of considering precedent agreements as but one factor of public need -- it has unfortunately appeared sometimes to implement that policy by regarding those agreements as a full proxy for a searching need determination. Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶61,128, 61,392, 61,390 further clarified, 92 FERC ¶61,094 (2000). ("[T]he Commission found...reliance on contractual agreements cannot be a substitute for reliance on proper pricing signals" as "precedent agreements may no longer be a sufficient indicator that a project is in the public convenience and necessity"). As set out in greater detail below, here, given the substantial threat of abuse, FERC must look behind those agreements, particularly given the highest level of review required by the applicant's proposed sweeping use of eminent domain.

⁷ The New Jersey Board of Public Utilities does not review precedent agreements prior to FERC completing its 717(f) certificate review. Interview by Barbara Blumenthal, Tom Gilbert, Edward Lloyd and Carleton Montgomery with Stefanie Brand, Director of the Division of Rate Counsel; Henry Ogden, Assistant Deputy Rate Counsel, Division of Rate Counsel; and Felicia Thomas-Friel, Managing Attorney, Division of Rate Counsel; in Trenton, N.J. (Dec. 21, 2015). This sequencing provides fewer pre-construction checks and balances as to the existence and extent of the purported market signals for new builds. Numerous states require regulated utilities seeking cost recovery for long-term contracts to first request and receive approval of such contracts, including: Massachusetts, Connecticut, New Hampshire, and Arizona.

Any economic history of the development of a market in legal entitlements to gas transport in the United States would be incomplete without recognizing the sustained collective action on the part of gas distributors and their state and municipal allies who acted in the interest of their constituencies of many millions of local gas consumers. It is no overstatement to say that the creation of the competitive gas transport market in the United States owes its existence to these doughty gas distributors, acting over decades through adversarial litigation – first in a contest against gas producers and then against the pipeline companies. They pushed for decades to erase the sources of market power or the barriers to entry that would keep delivered gas prices up and transport options restricted.⁸

Now it is local distribution companies themselves who propose a project likely to impose costs in excess of benefits to gas consumers. It therefore rests with others to raise, as Movants do in this instance, the inefficient and uneconomic outcomes attendant to the PennEast project structure.

Movants therefore request FERC to appoint an administrative law judge and initiate an evidentiary hearing to resolve the genuine disputes of material fact that cannot be resolved on the current record. Only after the administrative law judge avails itself of the tools of a FERC evidentiary hearing, and makes findings based on the evidence adduced at such a hearing, will the FERC Commissioners be able to fulfill their duty to maintain an appropriate allocation of risk between shareholders and ratepayers, and ensure significant public benefit. Importantly, only then will FERC be able to ensure that the natural gas market will not suffer economic distortion and an inefficient allocation of infrastructure investment if this project were to proceed.

⁸ Jeff D. Makhholm, The Political Economy of Pipelines: A Century of Comparative Institutional Development 148 (2012) (Dr. Makhholm is senior vice president at NERA Economic Consulting).

Relief Requested

Intervenors, the New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association (hereinafter “Movants”), hereby move FERC to issue an Order initiating a hearing before an administrative law judge, in accordance with 18 C.F.R. § 385.206(g)(3) and 18 C.F.R. § 385.502(a)(1). Movants further request that this hearing include an opportunity for full discovery under 18 C.F.R. Subpart D, in order to: (1) test the underlying economic data and assumptions regarding public need; and (2) allow cross-examination of PennEast’s experts and PennEast Consortium officers and directors.⁹ Only by initiating an evidentiary hearing, can FERC determine whether, based on a record containing substantial evidence of material facts, the applicant has demonstrated public necessity and convenience.¹⁰

⁹ Williams Gas Pipelines Central, Inc., 95 FERC ¶ 61,028, 61,089 (2001) (when motive, intent, or credibility are at issue, the Commission is not free to resolve factual issues on the basis of a written record); 18 C.F.R. §§ 401-411.

¹⁰ See *Village of Bethany v. F.E.R.C.*, 276 F.3d 934, 940 (7th Cir. 2002) (each element of FERC’s decision must be supported with substantial evidence after giving “reasoned consideration” to all “pertinent factors” relevant to balancing “the needs of the industry and... public interests).

Statement of Facts

The PennEast Consortium comprises AGL Resources Inc.,¹¹ New Jersey Resources,¹² South Jersey Industries,¹³ UGI Corporation,¹⁴ PSEG Power LLC and Spectra Energy Partners LP. These groups jointly own PennEast Pipeline LLC. and are referred to collectively hereinafter as the “PennEast Consortium.” UGI Corporation is the managing investor in PennEast.¹⁵ The table below, drawn from PennEast’s application filing, shows that each of the six members of the PennEast Consortium also holds one of the six largest precedent agreements to ship natural gas using the PennEast pipeline.¹⁶

¹¹ through subsidiary Red Oak Enterprise Holdings Inc.

¹² through subsidiary NJR Pipeline Company

¹³ through subsidiary SJI Midstream LLC

¹⁴ through subsidiary UGI PennEast LLC

¹⁵ UGI Corporation’s subsidiary, UGI Energy Services LLC, controls PennEast’s operations through a Management Agreement. Under that Agreement, the officers and directors of PennEast do not have authority to overrule UGI’s decisions, or to run company operations without UGI oversight.

¹⁶ Table excerpted from PennEast’s September 2015 Application, FERC Docket No. CP15-558, Accession No. 20150925-5028, pp. 6-10.

Shipper	Contract Length (years)	Dth/day	Current % of Total	% of Total in 5 Years	% of Total in 10 Years	% Equity in PennEast by affiliate of shipper
New Jersey Resources (through subsidiary New Jersey Natural Gas)	15	180,000	18.2%	20.11%	21.6%	20%
PSEG Power LLC	15	125,000	12.6%	13.97%	15%	10%
Spectra Energy Partners LP (through subsidiary Texas Eastern Transmission LP)	15	125,000	12.6%	13.97%	15%	10%
South Jersey Industries (through subsidiary South Jersey Gas Company)	15	105,000	10.6%	11.73%	12.6%	20%
AGL Resources Inc. (through subsidiary Elizabethtown Gas)	15	100,000	10.1%	11.17%	12%	20%
UGI Corporation (through subsidiary UGI Energy Services LLC)	15	100,000	10.1%	11.17%	12%	20%
Consolidated Edison	15	100,000	10.1%	11.17%	12%	
Cabot Oil and Gas	10	50,000	5.1%	5.59%	0.00%	
NRG Rema LLC	10	10,000	1.0%	1.12%	0.00%	
Talen Energy	5	50,000	5.1%	0.00%	0.00%	
Enerplus Resources	5	30,000	3.0%	0.00%	0.00%	
Warren Resources	5	15,000	1.5%	0.00%	0.00%	

Collectively, the six affiliate agreements amount to 74.2% of the pipeline's initial contracted capacity. All but one of the non-affiliate agreements are five- and ten-year contracts; the affiliate agreements total 88% of the pipeline's contracted capacity after ten years. PennEast's filings state that PSEG plans to replace capacity that PSEG currently purchases from natural gas pipelines from the Gulf of Mexico, with capacity purchased from PennEast.¹⁷ South Jersey Gas plans to do the same.¹⁸ Similarly, New Jersey Natural Gas plans to use this new capacity to supply their distribution system at a new location, and is not intended to serve new demand.¹⁹

In October 2014, PennEast began the pre-application review process.²⁰ On September 10, 2015, PennEast met with FERC representatives and expressed its desire to have the application approved in less than a year, with condemnation proceedings to begin immediately thereafter, and construction to begin in 2017.²¹ In this meeting, FERC reminded PennEast that the speed of application review would depend on the completeness of PennEast's application, and included an item on the meeting agenda regarding PennEast's failure to address comments from government agencies: "Various issues and recent trends that continue to be raised in comments and how they are / are not addressed in the filing."²²

¹⁷ See PennEast Draft Resource Report, FERC 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.").

¹⁸ See *id.*

¹⁹ See *id.* at 1-3.

²⁰ See FERC Docket No. PF15-1-000, Accession No. 20141007-5229.

²¹ FERC Docket No. PF15-1-000, Accession No. 20150916-4006, "Meeting Minutes," at 1-2.

²² *Id.* at 1.

Shortly thereafter, on September 24, 2015, PennEast filed its application.²³ Although FERC and other state and local agencies have repeatedly requested PennEast to satisfy record data deficiencies, FERC largely has been silent with respect to the “public need” portion of its certificate review.²⁴ To date, PennEast has primarily offered the following items as evidence that the pipeline serves a public need: (1) insider precedent agreements, which total 74.2% of the pipeline’s current contracted capacity, together with additional arms-length precedent agreements that total only 25.8% of the pipeline’s initial contracted capacity; (2) self-commissioned, unpublished, unreviewed economic studies by Concentric Energy Advisors; and (3) a self-commissioned, unpublished, unreviewed jobs study by Econsult Solutions Inc. See FERC Docket No. CP15-558, Accession No. 20150925-5028, at 6.

The credibility of these data have been called into question by independent industry analyst reports, economic studies, job creation reports, data and analyses, all of which are currently before FERC in this docket.²⁵ The extant record now also includes evidence regarding potential adverse impacts to existing pipelines, captive ratepayers, and landowners. FERC must ensure that the applicant has properly identified, eliminated, or minimized the project’s adverse

²³ FERC Docket No. CP15-558, Accession No. 20150925-5028.

²⁴ FERC did request that PennEast clarify the misleading data submitted with respect to job creation. See FERC November 2015 Environmental Information Request, FERC Docket No. CP15-558 Accession No. 20151124-3028, at 46.

²⁵ The inclusion of these independent data into the record raises material issues of fact with respect to any public need that could justify this project. These controversies should be resolved in a trial-type hearing, where the parties may adduce evidence as to the credibility of their respective methodologies. See Part II, below.

impacts.²⁶ The merits of the adverse economic impacts should also be probed in an evidentiary hearing, and balanced against any substantial evidence of significant public need developed therein. Moreover, an evidentiary hearing is essential, not only to collect and probe the credibility of the underlying economic data, assumptions, and models, but also to assess the applicant's credibility. Finally, critical public policy goals also compel FERC to initiate an evidentiary hearing, such as protecting against anticompetitive outcomes, addressing heightened public concerns, assuring compliance with FERC's standards of conduct, and maintaining vigilance in a region where there is no pre-certification assessment of public benefits by the state regulatory commission.

ARGUMENT

As set out in Part I below, when reviewing an application for a pipeline, FERC first must determine whether the proposed pipeline satisfies a public need. See 15 U.S.C. § 717(f)(e); Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,743 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000). In this case, FERC is obliged to find an even higher showing of public benefit -- there must be more than significant public

²⁶ Although there are significant, adverse environmental impacts that would result from this project's construction and operation, Movants focus herein on the adverse economic impacts recognized by FERC in its own Certificated Policy Order as part of its threshold economic inquiry -- impacts to existing pipelines, captive customers and landowners/communities. See Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,750 (1999), clarified, 90 FERC ¶61,128, further clarified, 92 FERC ¶61,094 (2000). Movants do not reach any additional balancing that FERC must do to address adverse environmental impacts that will be identified in a Draft Environmental Impact Statement under NEPA.

need.²⁷ Moreover, this finding of at least significant public need must rest on “substantial evidence.” 15 U.S.C. § 717r(b), 5 U.S.C. § 706(2)(E). Part II below demonstrates why FERC must hold an evidentiary hearing in order to satisfy the legal standard that requires it to make its determination based on substantial evidence demonstrating more than significant public need for this project. FERC’s ability to meet this standard is currently undermined by the sparse record that lacks data and analyses underpinning the material facts essential to determine public need as well as contains genuine issues with respect to those material facts. Part III highlights additional policy grounds demanding FERC’s highest level of scrutiny through initiation of an evidentiary hearing.

I. UNDER THE NATURAL GAS ACT, FERC CANNOT APPROVE PENNEAST’S APPLICATION ABSENT A RECORD SHOWING SUBSTANTIAL EVIDENCE OF SIGNIFICANT PUBLIC NEED FOR THIS PROJECT.

Under the Natural Gas Act, in order to approve PennEast’s Section 7 Application for a Certificate of Public Convenience and Necessity, FERC would have to find that the project is required by present or future public convenience and necessity. See 15 U.S.C. § 717(f)(e); Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,743 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000). The standards that FERC must employ in arriving at such a determination are detailed below.

²⁷ As set out more fully below, for even a modest use of eminent domain, FERC must make a determination that there is a significant public need. FERC’s own sliding scale approach requires that here, given that it is far more than a modest exercise of eminent domain, but rather a *sweeping* exercise of eminent domain, “significant” public need is the absolute minimum level required. Here, FERC’s proportional approach calls for the highest showing of public benefit.

A. The Extensive Use of Eminent Domain Requires that FERC Use the Highest Level of Scrutiny

In cases such as this one, where the applicant must exercise eminent domain to take the vast majority of the pipeline rights-of-way, FERC must employ a heightened standard of proof when reviewing that applicant's claim of public need. FERC's own interpretation of its duties under the Natural Gas Act, as articulated through its Certificate Policy Order compels the higher standard. FERC's Certificate Policy Statement sets out a "sliding scale approach," dictating that as an applicant's use of eminent domain increases, its burden of proof to establish public need correspondingly intensifies. Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,749 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000); see Jordan Cove Energy Project, LP, 154 FERC ¶ 61,190 (2016) (FERC Order denying Applications for Certificate of Public Convenience and Necessity because "generalized allegations of need proffered by [applicant] do not outweigh the potential for adverse impact on landowners" from the significant use of eminent domain).

Projects involving little to no exercise of eminent domain sit at the low end of the sliding scale.²⁸ This same FERC policy requires that applicants proposing even a "modest use of federal eminent domain authority" need to make a

²⁸ "Under this policy, if project sponsors, proposing a new pipeline company, are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, and the proposal is to serve a new, previously unserved market... [s]uch a project would not need any additional indicators of need and may be readily approved if there are no environmental considerations." Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,749 (1999), clarified, 90 FERC ¶61,128, further clarified, 92 FERC ¶61,094 (2000) This is the lowest standard for a showing of public need on the sliding scale.

“showing of significant public benefit.” Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,749 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000) (emphasis added). But where, as here, an applicant proposes to use eminent domain on a sweeping scale: taking hundreds of acres of property from many different landowners, FERC must conduct the highest level of inquiry, and require the greatest showing of public benefit.²⁹ PennEast’s proposed exercise of federal eminent domain authority in this case is not “little” or even “modest,” and not merely to take property from “a few holdout landowners.” Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,749 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000). Under the Certificate Policy Statement’s sliding scale approach, PennEast’s proposed massive and unprecedented taking requires a correspondingly high standard for what constitutes substantial evidence of significant public need. See Jordan Cove Energy Project, LP, 154 FERC ¶ 61,190, 62,093 (2016) (“the strength of the benefit showing will need to be proportional to the applicant’s proposed exercise of eminent domain procedures.”). As more fully discussed in Part II below, here, the applicant’s showing of benefit rests on scant and controverted evidence.

²⁹ The PennEast Pipeline will impact 118 miles and 2246.7 acres of publicly and privately owned lands, held by approximately 300 landowners in New Jersey and 565 landowners in Pennsylvania. A significant portion of the property rights required for the proposed pipeline will need to be obtained through the exercise of eminent domain. A large percentage of landowners -- around 70% -- have evidenced their intention to refuse to negotiate with PennEast, and to only surrender their property rights in court. Additionally, there are large number of preserved farms in the pipeline’s path in New Jersey that will be taken by eminent domain since the New Jersey State Agricultural Development committee cannot negotiate away those protections.

B. FERC's Determination of the Highest Level of Public Benefit Must Be Predicated on Substantial Evidence

FERC's finding of significant public need flowing from PennEast's application must be based on substantial evidence. 15 U.S.C. § 717r(b). This is a well settled principle of administrative decision making. Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1257-1258 (D.C. Cir. 1973). In Mobil Oil, the U.S. Supreme Court made clear that this principle applied to FERC's decisions under the Natural Gas Act. Id.³⁰ Substantial evidence is defined as "such relevant evidence

³⁰ Immediately following Mobil Oil, litigants attempted to extend this holding to mandate an evidentiary hearing for each and every Federal Power Commission decision. As a result, the courts had to clarify that Mobil Oil did not impose requirements beyond what the Natural Gas Act or the Administrative Procedure Act mandate. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) ("adequacy of the 'record...' is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes"); Wisconsin Gas Co. v. F.E.R.C., 770 F.2d 1144, 1167 (D.C. Cir. 1985) (Mobil Oil did not impose procedures not required by the Natural Gas Act or the Administrative Procedure Act).

Following those doctrinal refinements, Mobil Oil has been widely cited for the propositions for which it was originally intended – to ensure that FERC decisions are based on substantial evidence contained in a well-developed record, tested through evidentiary hearings when genuine questions are raised with respect to that evidence. See, e.g., Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 375 (D.C. Cir. 1982) ("[I]n any administrative proceeding, the type of procedure required is related and proportionate to the degree of evidentiary support required for the agency's decision." (citing Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1259 (D.C. Cir. 1973).)); City of Ukiah, Cal. v. F.E.R.C., 729 F.2d 793, 799 (D.C. Cir. 1984) ("Ukiah cites the judicially defined principle requiring the Commission to provide an adversarial hearing when genuine issues of material fact are in issue (citations omitted)" (citing Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1259-60 (D.C. Cir. 1973)); Iowa State Commerce Comm'n v. Office of Fed. Inspector of Alaska Nat. Gas Transp. Sys., 730 F.2d 1566, 1574 (D.C. Cir. 1984) ("...under a substantial evidence test, notice and comment procedures are statutorily insufficient and 'some sort of adversary, adjudicative-type procedures [are] ... necessary.' (citing Mobil Oil Co. v. F.P.C., 483 F.2d 1238, 1259 (D.C. Cir. 1973)); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 24 (D.C. Cir. 1999) ("...whenever a statute requires the agency action to be supported by 'substantial evidence'—a term of art in administrative law—there must be 'some sort of adversary, adjudicative-type procedures' before the agency." (citing Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1259 (D.C. Cir. 1973).)); Corrosion Proof Fittings v. E.P.A., 947 F.2d 1201, 1214 (5th Cir. 1991), opinion clarified (Nov. 15, 1991) ("The [substantial evidence] test 'imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.' (citing Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1258 (D.C. Cir. 1973).")) As discussed above, here, both the Natural Gas Act and FERC's own Certificate Policy Statement compel FERC to employ the highest level of scrutiny available to develop that substantial evidence -- here, that is an evidentiary hearing.

as a reasonable mind might accept as adequate to support a conclusion.” S. Coast Air Quality Mgmt. Dist. v. F.E.R.C., 621 F.3d 1085, 1099 (9th Cir. 2010). FERC’s decisions have been invalidated when “excellent points” have been raised and FERC dismisses them arbitrarily. United Distrib. Cos. v. F.E.R.C., 88 F.3d 1105, 1136-1137, 1174-1175 (D.C. Cir. 1996) (finding that FERC failed to provide a substantial reason for allowing preferential rate and service treatment to specific customers despite evidence that such treatment was discriminatory). In this case, because there is a dispute of the material facts based on credible independent data and analyses, reasonable minds could not accept the applicant’s controverted and spotty data as adequate to support a conclusion requiring substantial evidence. As discussed in Part II below, to resolve these disputes related to material facts and thereby ground FERC’s decision in substantial evidence, an evidentiary hearing should be granted.

II. FERC MUST HOLD AN EVIDENTIARY HEARING TO ASSESS THE MERITS OF THE CONTROVERSIAL PENNEAST APPLICATION AND THE EXTENT OF VALID EVIDENCE RELATED TO THE MATERIAL FACTUAL INQUIRY INTO PUBLIC NEED FOR THIS PROJECT.

The controversies presented by this record raise questions not only with respect to the extent of public need in this case, but also with respect to new potential affiliate abuses of market power that will both skew market signals and hinder FERC’s ability to assess public benefit in similar cases -- controversies that require careful probing in an adjudicative setting. “An evidentiary hearing is required only if there exists a genuine issue of material fact. Genuine issues of

material fact are not created by mere conjecture or allegations . . . but, rather, some affirmative demonstration of fact material to the decision that creates a dispute regarding the material fact (citations omitted).”³¹ Here, PennEast’s case for public need is predicated upon these three material facts: (1) there is unmet demand for the pipeline, (2) the project will lower costs for consumers by taking advantage of price differentials, and (3) the project will increase reliability. As discussed above, PennEast must show substantial evidence of significant public benefit in order to be granted a Certificate of Public Convenience and Necessity and it rests upon these three factors to do so, thus making the data and facts behind these three claims material as to whether or not this certificate may be granted. Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,748 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶ 61,094 (2000). (“Vague assertions of public benefits will not be sufficient.”)

Furthermore, these issues are not “general matter[s] of policy,”³² purely legal issues,³³ or “bald assertions.”³⁴ Rather, a determination of whether there is market-based demand for the pipeline, whether the pipeline will result in lower costs, and whether it will improve reliability must all rest on substantial evidence.

³¹ Tenneco Oil Co., 25 FERC ¶ 61,234, 61,605 (1983).

³² Nat. Gas Pipeline Co. of Am., 43 FERC ¶ 63,040, 65,424 (1988) (general matters of policy are not material factual issues).

³³ Coal. For Fair & Equitable Regulation of Docks on Lake of the Ozarks v. F.E.R.C., 297 F.3d 771, 780 (8th Cir. 2002) (court upheld denial of an evidentiary hearing before FERC because appellants’ contentions were based on legal, not factual issues).

³⁴ Blumenthal v. F.E.R.C., 613 F.3d 1142, 1145 (D.C. Cir. 2010) (“Connecticut provides nothing more than a bald assertion that Mercer was biased. ...Without more, Connecticut’s assertion of bias does not require FERC to hold a hearing.”)

But as demonstrated below, the very facts that PennEast is depending upon to show public need are in dispute.

Given the materials already in the record calling into question the applicant's "facts," FERC does not have to look much further to determine that this dispute cannot be resolved on the extant record. In order to satisfy the high evidentiary standard applicable to FERC's determination of significant public need -- a standard at the highest end of FERC's sliding scale given the contemplated enormous exercise of eminent domain powers -- a trial-type hearing should be initiated. See Mobil Oil Corp., 483 F.2d 1238, 1260 (the Natural Gas Act requires that the record "should contain sufficient unimpeachable--or at least persuasive--evidence to support the conclusion the Commission has reached. . . . A 'whole record,' as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures."). Trial-type proceedings are granted when the resolution of an issue without such a hearing might create a result that is "unjust, unreasonable, and unduly discriminatory or preferential, or otherwise unlawful." PJM Interconnection, 124 FERC ¶ 61,184, 61,912.

In this case, PennEast's factually sparse application, affiliate transactions, and controverted studies from Concentric and Econsult cannot possibly serve as "substantial evidence" that the pipeline meets a public need unless their credibility is tested and the consortium's motives are thoroughly vetted in an

evidentiary hearing. Given the very presence of these tainted affiliate transactions, together with the potential threat of abuse described below, any additional information PennEast would submit cannot “fix” this flawed record, absent the probing assessment of a FERC administrative law judge.³⁵ FERC has the clear authority to initiate a hearing with adversary, adjudicative procedures, including discovery, testimony and cross-examination. See 18 C.F.R. § 385.206 (“One of the following procedures may be used to resolve complaints:...The Commission may establish a hearing before an ALJ”); 18 C.F.R. § 385.502 (“A hearing under [Subpart E] will be initiated by... Order of the Commission”); 18 C.F.R. § 385.506 (allowing for testimony and cross-examination); 18 C.F.R. § 385.401 through 411 (governing pre-hearing discovery). The Natural Gas Act, its implementing regulations, and FERC’s own policy compel FERC to use those procedures here, to fix PennEast’s failure to create a “substantial” record suitable for the Commission’s decision and for subsequent judicial review.

FERC must order an evidentiary hearing if there is a disputed issue of material fact, and the dispute may not be resolved purely on the written record. The current PennEast record is incomplete with respect to some material facts

³⁵ Movants question the credibility of the evidence that PennEast has presented to support the construction of this pipeline. See Brian Hunter, 135 FERC ¶ 61,054 (2011) (questioning the credibility of rationales presented to explain insider trading). When credibility of a source or rationale is called into question, an ALJ should become involved through an evidentiary hearing because ALJs are the best parties to decide credibility issues. Brian Hunter, 137 FERC ¶ 61,146, 61,787 (2011) (as the trier of fact, an ALJ’s expertise earns deference). Because much of the credibility issues here revolve around affiliate transactions, which PennEast cannot solve through the submission of more papers, an evidentiary hearing is necessary. Any additional data as to demand presented by the affiliate LDCs must be vetted, as they would be biased toward projecting growth where none exists.

and analyses, and rife with inconsistent or conflicting data relevant to others.³⁶ Importantly, Movants (and other intervenors) dispute PennEast's factual contentions that support its claim of public need. And the docket now contains economic data and analyses, from multiple sources, directly controverting PennEast's limited offerings supporting public need for this project. Each of these items must be addressed in FERC's decision. See Trans Alaska Pipeline Sys., 81 FERC ¶ 61,319, 62,462 ("an agency must take into account 'contradictory evidence or evidence from which conflicting inferences could be drawn')(citations omitted). Moreover, an administrative law judge may not resolve this dispute purely on the written record because the credibility of PennEast's claims and the motivation of its affiliates to contract for long-term capacity are suspect.

As set out in Part I above, FERC's decisions must be predicated upon a complete record and "substantial evidence;" in its current state, PennEast's application cannot possibly meet this standard. 15 U.S.C. § 717r(b). Both case law and FERC policy support the Commission's initiation of an evidentiary hearing where a complete record would be created through use of adversary, adjudicative procedures such as discovery, testimony and cross-examination, to test PennEast's limited offerings.

³⁶ As set out more fully herein, PennEast's record is largely incomplete with respect to any data regarding adverse economic impacts to existing pipelines, captive ratepayers or landowners/communities.

A. An Evidentiary Hearing Will Demonstrate That The Precedent Agreements Are a Particularly Unreliable Proxy for Market Demand Because They Are Formed Principally With Pipeline Affiliates.

An evidentiary hearing will allow the ALJ to make a finding as to whether the precedent agreements in this matter are the product of arm's length transactions that reflect sufficient market need. Movants submit that the evidence adduced at such a hearing will demonstrate that they are not; and further that the application cannot establish the extent of market need alleged by PennEast.

PennEast affiliates purchased 74.2% of pipeline capacity, rising to 88% in 10 years, a project structure designed to convert a cost imposed upon retail ratepayers into shareholder return. If affiliate contracts do not represent genuine demand, then non-affiliated customers demonstrated demand for only 12% of this pipeline's long-term capacity. 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.³⁷ There is no evidence in the record that affiliates' contract decisions were based on competitive factors. Although more examination in an evidentiary hearing is essential, from the incomplete extant record, it appears such decisions were driven by profits to be realized by the parent in the transportation market.

The lurking risks of affiliate abuse have shown their colors in different vignettes through past years of FERC's evolving regulatory oversight. For example, in 1999, the risks of affiliate abuse surrounded rolled in rates. In those years, the threat manifested in incumbent pipeline operators wielding great advantage over new market entrants. In April 1999, given this rolled in rate controversy resulting from the then prevalent type of affiliate abuse, Consolidated Edison Company of New York Inc. ("Con Ed") pointed out that pipelines backed by affiliate agreements could unfairly shift risk, and urged the Commission to "pierce the corporate veil" in these instances, to ensure that demand charges of LDC customers using existing pipelines would be credited to the new pipeline, without any rate effect to other shippers on the existing pipelines. See FERC Docket Nos. RM98-10 and RM98-12, Accession Nos. 19990423-0174 and 19990423-0194; see also FERC Docket No. RM98-10, Accession No. 19990423-0106, at 8 (Public Utilities Commission of Ohio, echoing Con Ed's concern that the precedent agreements could shift risk from

³⁷ See PennEast Draft Resource Report, FERC 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.").

shareholders to ratepayers, stated that, “market power abuse and affiliate transactions are closely linked. . .”).

In order to address that problem, Enron Gas Pipeline Group suggested that at least twenty-five percent of every new pipeline should be backed by non-affiliated shippers: and at least seventy-five percent for an applicant that did not present a “rigorous showing of the underlying markets.” FERC Docket Nos. RM98-10, RM-98-12, Accession No. 9904230194-2, at 51. Ultimately, after considering these arguments, FERC decided 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.” Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,748 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶ 61,094 (2000). FERC was vigilant in addressing that form of affiliate abuse, looking behind the precedent agreements to determine true measures of need. Here, PennEast only has 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 New Jersey natural gas demand.

With the PennEast project, the threat of abuse from the presence of affiliate relationships has changed its colors: the members of the PennEast Consortium stand to make a 12 to 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.³⁸ FERC ought not accede to PennEast's expectation that the Commission will approve the pipeline solely on the basis of these affiliate agreements, because doing so would run afoul of the Natural Gas Act's requirements.³⁹ FERC must weigh the simple existence of those agreements against the mountain of evidence pointing to lack of need for this project, from both government agencies and industry experts.⁴⁰ There is a long history of FERC acting to combat market power abuse and inefficient outcomes in natural gas markets and pipeline construction. Because the exact nature of the market power has changed over time as market actors find new ways to exploit advantages attained in a partially regulated market, the Commission should remain vigilant in assessing and responding to creative new ways to exercise market power, particularly when an evidentiary hearing will determine that captive customers are harmed. In this proceeding, appointing an administrative

³⁸ "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.

³⁹ As FERC Commissioner Tony Clark has stated when discussing why FERC is empowered to look beyond strict rules-based enforcement, "[y]ou can't define every possible way that someone could manipulate an energy market." Paul Ciampoli, Public Power Weekly Exclusive: FERC's Clark Discusses Market Enforcement Approaches in Interview, American Public Power Association (Mar. 13, 2015), <https://www.ferc.gov/media/statements-speeches/clark/2015/03-13-15.pdf>.

⁴⁰ The precedent agreements were not intended to replace FERC's entire public interest inquiry, but rather be one element of evidence of demand. Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, 61,390, further clarified, 92 FERC ¶ 61,094 (2000).

law judge to examine the record and provide the opportunity for discovery, expert testimony and cross-examination is necessary to underpin any determination by the Commission that captive customers will not accrue cost obligations in excess of a reasonable expectation of benefit. Only by engaging in this process can FERC develop an appropriate record upon which it can assess whether substantial, credible evidence of significant public need could be developed.⁴¹

1. Additionally, FERC should not assume that Affiliate Shippers made arm's-length decisions based on genuine demand and an evaluation of competitive alternatives.

The Commission has sought for decades to reduce opportunism and foster efficient market parameters in the operation of the natural gas transportation market. Pipeline systems are highly susceptible to opportunistic behavior because of their extreme asset specificity which inevitably leads to either costly transacting through contracts or to vertical integration, designed to internalize those costs. "Uncertainty or commercial opportunism at either end of the pipe, by the pipelines or their users, can strand facilities and wreck the value of the invested capital."⁴²

The regulatory regime, post 2000, depends on healthy competition among regulated operators, and new entrants would normally enhance rivalry and improve outcomes. Dr. Makholm describes an effective regime where "...rivalry among many different potential pipeline capacity developers decides where and

⁴¹ The FERC policy behind this requisite elevated showing of at least significant public need was discussed in Part I, above.

⁴² Makholm, supra, at 12.

how the system expands to create more of those intangible rights without having to appeal to the judgment of the regulator.”⁴³

FERC Commissioners must first be assured that the market for pipeline capacity expansion is competitive before concluding that a specific expansion project provides a public benefit. Dr. Makholm suggests a key question: “do both potential entrants and incumbents compete equally to secure the business of new pipeline customers?”⁴⁴ In the case of PennEast, the answer is no. PennEast, although a new entrant, has an insurmountable advantage in its relationship with potential customers for long-term capacity, LDCs that are, in fact, owned by the same stockholders. 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.

PennEast affiliates contracted for 74.2% of capacity in year one, and 88% of the market interest in long-term capacity, as evidenced in contracts beyond year ten. 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 can result in an uneconomic project.

⁴³ Id. at 21.

⁴⁴ Id. at 91.

During the open season for PennEast, an alternative project was offered at a somewhat lower cost and similar terms.⁴⁵ Diamond East, a Williams project, was proposed as an expansion of an 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

⁴⁵ "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), <http://www.iline.williams.com/1Line/wgp/download?delvid=5977734&hfNoticeFlag=Y&hfDownloadFlag=false&hfFileName=download.htm>.

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

In the case of PennEast, 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.

The Commission can create conditions to support an efficient and competitive solution for the Eastern PA/NJ marketplace in the absence of non arm's length affiliate contracts. If FERC determines through an evidentiary hearing that genuine demand is significantly less than 1 bcf/day proposed by PennEast, and decides not to certificate this project, it enables the market to respond with smaller, more cost-effective projects to meet any remaining genuine need.

Thus, the credibility of PennEast's assertion that it will serve the public interest by exploiting a cost differential must be examined, as FERC discerns through an evidentiary hearing whether PennEast's actual motives are simply to secure affiliated shareholder profit from pipeline operation while captive ratepayers shoulder the attendant risks arising from overcapacity.

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

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, thus calling PennEast's credibility into question. The only data PennEast offers to support assertions of unmet demand are historical

data about 2013 retail sales and peak day sendout,⁴⁶ and estimates of company retail growth over the next 3 to 5 years, obtained directly from the LDCs that are also owners of PennEast. PennEast offers no independent market study that supports claims of market growth. In General Motors Corp. v. F.E.R.C., 656 F.2d 791, 794 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals ruled that a dispute over the applicant's predictions for energy markets did require an evidentiary hearing. General Motors involved an application by the Michigan Wisconsin Pipeline Company to construct a natural gas pipeline. Id. General Motors, one of the company's existing customers, intervened in the application and sought an evidentiary hearing. Id. General Motors asserted that Michigan Wisconsin had not provided substantial evidence that the company had adequate supply to service the new pipeline. Id.

The General Motors Court ruled that the dispute required FERC to conduct a full evidentiary hearing for two reasons. First, the General Motors Court stated that Michigan Wisconsin needed to provide updated adequacy-of-supply information: "The Commission, in holding that adequacy-of-supply hearings are unnecessary... seems to assume that the validity of the previous adequacy-of-supply showings continues uneroded by the passage of time." Id. at 796. Second, the Court ruled that even if Michigan Wisconsin could prove short-

⁴⁶ 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, FERC Docket No. CP15-558, Accession No. 20160414-5202, 10. The inadequacy of the data supporting PennEast's conclusions is another reason to hold an evidentiary hearing.

term adequacy-of-supply, General Motors still deserved the opportunity for a hearing on long-term adequacy-of-supply. Id.

Here, FERC should provide an evidentiary hearing to determine the adequacy of demand. As in General Motors, PennEast's assertions with respect to need and related demand data appear to be based on outdated market analyses. Just as Michigan Wisconsin improperly relied on adequacy-of-supply showings that were years old, PennEast's adequacy-of-demand showing relies on conditions that have changed substantially since the "Polar Vortex" of 2013/2014.

Substantial reforms have occurred at both PJM and FERC to address the issues that led to the Polar Vortex.⁴⁷ The reforms have proven effective in preventing a reoccurrence 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."⁴⁸

In addition, PennEast's forecasts are predicated on insubstantial evidence. Future peak winter constraints are to be expected, and reflect high, but short-

⁴⁷ 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>

⁴⁸ PJM Interconnection, L.L.C., 151 FERC ¶ 61,208, 62,382 (2015) (Bay, Chairman, dissenting)(internal citations omitted).

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. PennEast's conclusion that additional capacity is needed does not stand up to cost-benefit analysis for many customers, and the evidence underlying it must be tested.⁴⁹ For local distribution companies and others requiring firm capacity, there is (or will soon be) 49.9% more capacity in the NJ and Eastern PA region than necessary to handle even the peak demands reached during the Polar Vortex,⁵⁰ and PennEast has not given any reason to think it is insufficient.

PennEast's long-term predictions for the New Jersey natural gas market are no better substantiated as the data source has shifted substantially since its submission. PennEast relied on EIA Annual Energy Outlook 2014's prediction that national natural gas use would rise to 31.6 trillion cubic feet by 2040. Resource Report, FERC Docket No. CP15-558, Accession No. 20150925-5028, at 1-6. However, the following year, EIA reduced that prediction by more than five percent, to 29.7 Tcf. *Id.*; U.S. Energy Information Admin., Annual Energy Outlook 2015 with Projections to 2040, Apr. 2015, at 16. PennEast's reliance on outdated information is another strike against the credibility of the company's submissions, and another reason to test the company's evidence at a hearing.

⁴⁹ As set out in Part I, above, FERC must base its findings on substantial evidence of significant public benefit. Without testing these data and analyses FERC cannot fulfill this legal mandate.

⁵⁰ Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A, at 4.

Next, PennEast points 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.”⁵¹ In the absence of real external evidence of 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, the Consortium members’ self-serving predictions of possible growth and the EIA’s since-downgraded 2014 prediction as the company’s evidence for the need for this pipeline. These items do not meet the Mobil Oil standard for “unimpeachable-or at least persuasive” evidence, and stand in stark contrast to the revised EIA projections, and the proof that the winterization programs described by Commissioner Bay are working. 483 F.2d 1238 at 1260. These items are strong evidence that there is little unmet demand in the New Jersey natural gas market in the short term, and that demand may actually decrease in the near term. At the very least, they create a genuine dispute over the issue of unmet demand, which is clearly a material fact underpinning PennEast’s application. Through an evidentiary hearing, FERC could ensure the careful and searching analysis necessary in this particular case,

⁵¹ Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A, p. 7.

so that the risk of unsubscribed capacity is not wrongly shifted from the shareholders to the captive ratepayers.

C. Additionally, PennEast's attempt to rely on price differentials between Marcellus and Gulf natural gas to support its claim of public need must be tested in an evidentiary hearing.

After unmet demand, the second plank of PennEast's claim of public need is the company's assertion that the pipeline will allow New Jerseyans to take advantage of a basis differential in price between Marcellus Shale natural gas, and natural gas from other sources.⁵² Again, the record must be probed for the credibility of this assertion, which PennEast offers to show public benefit. The record contains data indicating that: a) that PennEast is likely to displace Marcellus supply with other Marcellus supply; b) Marcellus prices will escalate when new pipeline capacity comes online, and in fact, have already started to do so by the buildout of other pipelines into the Marcellus region; c) the cost differential in the region served by PennEast will shrink to zero, with or without PennEast; and d) FERC must take a long view in certifying a major project and not base the decision on fleeting geographic price differentials. An evidentiary hearing is essential to test the applicant's motives and credibility, given that one of the material facts it seeks to rely upon in showing public benefit is widely discredited throughout the industry.

⁵² PennEast acknowledges that FERC will need evidence of a sustained basis differential over a "reasonably long period", but does not state how long that period is. Concentric April 13, 2016 submission, FERC Docket No. CP15-558, Accession No. 20160414-5202. This is an unresolved question that can be addressed at an evidentiary hearing.

While it is clear that PennEast will replace one set of investors in pipeline capacity with a new set of investors, it is not at all clear that PennEast will replace Gulf supplies with Marcellus supplies. PennEast competes directly with Transco, Columbia as well as other major pipelines in New Jersey. With flow reversals and new capacity coming on line, Mid-Atlantic pipelines are either already carrying Marcellus supply or are likely to before PennEast is in service.⁵³ PennEast is a prime example of an overbuilding trend⁵⁴ that would not survive a market-based economic test were it not for affiliate transactions.

The record also casts doubt on PennEast assertions about future gas prices and enduring cost differentials. 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.” But building PennEast creates additional capacity, which economists and other analysts expect will raise, not lower, Marcellus natural gas prices. Now, “[n]ew pipeline investment is expected to increase takeaway capacity from the low cost Marcellus/Utica shale and reduce regional surpluses and increase gas prices by

⁵³ “In the past several months, several new pipeline projects have come online to move natural gas either to nearby market areas in the Mid-Atlantic area (New York, New Jersey, and Pennsylvania) or to feed into existing infrastructure that delivers natural gas to more distant regions, especially the U.S. Gulf Coast.” John Krone and Katie Teller, New Pipeline Projects Increase Northeast Natural Gas Takeaway Capacity, U.S. Energy Info. Admin. (Jan. 28, 2016), <http://www.eia.gov/todayinenergy/detail.cfm?id=24732>

⁵⁴ “With the magnitude of new pipeline projects under development in addition to those deployed over the past 10 years, there are signs that a gas pipeline capacity bubble is forming. A capacity bubble could impose unnecessary costs on energy customers for expensive yet unneeded pipeline capacity, and ultimately constrain deployment of lower cost energy sources like wind and solar in the future considering the long financial lives and expense of new capacity.” Testimony of N. Jonathan Peress Before Senate Energy and Natural Resources Committee, (June 14, 2016), at 4, http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=51079A26-DD96-4FB5-8486-411C8A7F9024.

2018.”⁵⁵ Recent data provides strong support for models that challenge PennEast assertions. In July 2015, Henry Hub natural gas was selling for about \$2/MMBTU more than Marcellus Shale natural gas.⁵⁶ In Q1 2016, that basis differential had fallen to only eighty-nine cents. *Id.*⁵⁷ “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.”⁵⁸

FERC should have an evidentiary hearing to determine if it must take the long view in assessing true need for a major project such as PennEast. “Pipelines should be planned to address longer-term conditions and trends, rather than as a response to a single event, since planning and construction of pipeline capacity takes several years... The gas price situation at that time was wholly different from the price situation today, and five years from now the price situation will be wholly different from today’s, with or without PennEast.”⁵⁹

This expert testimony causes credibility issues with this plank of PennEast’s argument. Because there are credibility issues, an ALJ should be appointed to resolve them within the context of a broader evidentiary hearing.

⁵⁵ Public Service Enterprise Group, Edison Electrical Institute 2015 Financial Conference, 65 <https://www.sec.gov/Archives/edgar/data/81033/000119312515370394/d77337dex99.htm>.

⁵⁶ Natural Gas Weekly Update, U.S. Energy Info. Admin. http://www.eia.gov/naturalgas/weekly/archive/2016/01_07/index.cfm.

⁵⁷ The basis differential exceeded \$2/dth on 72 days during the Polar Vortex. That figure dropped to 63 and then 26 in the next two winters. Concentric April 13, 2016 submission, FERC Docket No. CP15-558, Accession No. 20160414-5202, at 6.

⁵⁸ Arsalan Gul, Megaprojects Linked to Appalachian Shale Top List of Planned Pipelines, SNL Financial, FERC Docket No. CP15-558, Accession No. 20163011-5209, Exhibit B.

⁵⁹ Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A, at 16.

D. PennEast's surficial claims that the pipeline will improve reliability by creating a steady supply of natural gas in the region must be subject to careful evidentiary review.

PennEast also claims that the pipeline will improve the reliability of the region's energy infrastructure. However, the record is replete with data showing otherwise, calling into question basic assumptions underlying any public benefit from this project, which FERC should test at an evidentiary hearing. For example, industry experts question whether the PennEast pipeline is the best way to improve the region's energy reliability, or even whether it improves energy reliability at all. In July 2015, the Eastern Interconnection Planning Collaborative analyzed constraints in existing pipeline infrastructure and identified several alternatives, including LNG storage and dual fuel, that would be more cost-effective than construction of a billion dollar pipeline.⁶⁰ In March 2016, a Skipping Stone Report included a cost-benefit analysis of PennEast and a dual-fuel alternative that shows why pipeline construction is not an efficient solution for meeting peak demand. See FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A ("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.")^{61,62} Thus, PennEast's limited offerings related to

⁶⁰ 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>.

⁶¹ See also Paul J. Hibbard and Craig P. Aubuchon, "Power System Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas," Analysis

reliability as an element of public benefit must be tested against the countervailing data in an evidentiary hearing that reaches beyond the papers.

E. FERC must determine whether PennEast has properly identified, and eliminated or minimized all adverse impacts in an evidentiary hearing.

As set out above, Movants have demonstrated that the record in this proceeding is insubstantial, and claims with respect to demand, cost, and reliability, must be tested in an evidentiary hearing. If, however, FERC were to find that it had substantial evidence upon which to determine presence or absence of public need, it would then either end the inquiry (after finding no need) or proceed to the next step in the review process (after finding need). The next step in the Certificate Policy Statement review process is for the applicant to demonstrate that the company has identified all adverse impacts to private interests, and eliminated or minimized all impacts to (1) the existing customers of the applicant proposing the project; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the route of

Group, Inc. (new pipelines are neither cost-effective nor sustainable, because even under a 'stressed system' scenario, there are cheaper, less carbon intensive ways than additional new natural gas pipelines to ensure electric reliability, like energy efficiency, demand response and renewable energy, that are less risky for ratepayers.), FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit C.

⁶² In re New Jersey Natural Gas Co. for Approval of an Increase in Gas Base Rates and for Changes in its Tariff for Gas Service; Approval of Safe Program Extension; and Approval of Safe Extension and NJ Rise Rate Recovery Mechanisms Pursuant to N.J.S.A. 49:2-21, 48:2-21.1 and for Changes to Depreciation Rates for Gas Property Pursuant to N.J.S.A. 48:2-18, BPU Docket No. GR07110889, Nov. 11, 2015, at 346, <https://www.njng.com/regulatory/pdf/NJNG-2015-Base-Rate-Filing-11-13-2015.pdf>

("Peak shaving facilities, such as local LNG assets, provide a very cost-effective means of meeting peak customer requirements in cold weather markets. ... Pipeline service, designed to provide year-round availability, is less cost-effective to meet this portion of the firm requirements of NJNG's customers.").

the new pipeline. See Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,745 (1999), clarified, 90 FERC ¶ 61,128 further clarified, 92 FERC ¶61,094 (2000). Courts have long recognized the importance of FERC review of applicant's elimination or minimization of adverse impacts. See Fla. Gas Transmission Co. v. F.E.R.C., 604 F.3d 636, 650-651 (D.C. Cir. 2010) ("FERC must ensure the public benefits of the proposal outweigh the adverse effects on other economic interests;...both the Supreme Court and this circuit have made clear that the Commission has a duty to use [this] power to protect consumers."). See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747, 791, 88 S. Ct. 1344, 1372, 20 L. Ed. 2d 312 (1968)("The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress."). As set out in detail above, here, Movants believe that the applicant has failed to develop a record that could support a finding of significant public benefit, much less need. If, however, FERC were to find otherwise, Movants request that FERC hold an evidentiary hearing on the applicant's identification of adverse impacts and attempts to minimize or eliminate those impacts.

III. POLICY CONCERNS ALSO COMPEL FERC TO HOLD AN EVIDENTIARY HEARING.

A. The Potential Anticompetitive Effects From the Proposed Pipeline Amplify the Need For an Evidentiary Hearing

When a proposal before FERC has the potential to cause an anticompetitive effect, FERC must put the proposal under a spotlight, which can best be accomplished by initiating an evidentiary hearing. In Cajun Elec. Power Co-op., Inc. v. F.E.R.C., 28 F.3d 173, 178 (D.C. Cir. 1994), FERC considered proposed tariffs from Cajun Electric Power Cooperative Inc., which included a “stranded investment return” provision. Cajun’s competitors alleged, correctly, that this provision could have anti-competitive effects and therefore required an evidentiary hearing:

As a theoretical matter, then, the petitioners would appear to be correct that the stranded investment provision is anti-competitive. The Commission admitted as much at oral argument stating “if you're charged these costs, there's some dampening of competition ... I cannot deny that.” The question of how much competition in fact is dampened goes to the heart of the complicated issues the Commission faces in these tariffs. The petitioners adequately flagged this issue for the Commission as a specific disputed material issue of fact. We think that there should have been an evidentiary hearing to address it.

Id.

The Cajun Elec. Court stressed that the hearing should be held before FERC could make its decision:

the question of whether Entergy's recovery of stranded investment cost precludes mitigation of its market power must be faced squarely by the Commission *at this juncture*. The provision of procedures to determine stranded investment cost on a case-by-case basis at a later date is no answer if the provision has a present anticompetitive effect.

Id. at 179(emphasis in original).

In the instant case, PennEast's proposal to build a pipeline backed almost entirely by affiliate agreements has the potential to have an anticompetitive effect, by narrowing the available field of economically efficient projects available to market-based participants. As emphasized by the Cajun Elec. Court, the best way to address this potential harm is through close consideration at an evidentiary hearing.

B. Overwhelming public concern about this project also supports FERC's initiation of an evidentiary hearing.

In cases such as this one, where a proposed pipeline has generated overwhelming public concern, FERC has relied on its policy of initiating an evidentiary hearing to ensure that the record is properly vetted. Here, every directly-impacted New Jersey municipality opposes PennEast. Additionally, even those not in the pipeline's path have come forward opposing the project based on multiple grounds, including economic, environmental, safety, and aesthetic. Thousands of New Jersey landowners have requested that FERC deny the application for a certificate of public convenience and necessity. In total, the proposal has generated significant public concern: more than eight thousand

citizens have signed a petition⁶³ opposing the pipeline, more than 5,400 comments have been filed on Dockets CP15-558 and PF15-000, 1,670 parties have filed motions to intervene, 146 parties have filed protests, and both private landowners and elected officials have requested an evidentiary hearing to address their concerns.⁶⁴

In January 2015, Commissioner LaFleur noted that PennEast was facing "unprecedented" opposition.⁶⁵ Since then, thousands of voices have joined the protests against the pipeline. See, e.g., FERC Docket No. CP15-558, Accession No. 20160606-0198 (Letter from U.S. Congressman Fitzpatrick calling for a full evidentiary hearing to determine legitimate public need); FERC Docket No. CP15-558, Accession No. 20160511-0012 (Letter from N.J. State Senator Whelan requesting an evidentiary hearing on need); FERC Docket No. CP15-558, Accession No. 20160510-5053 (Letter from N.J. Assemblyman Zwicker requesting an evidentiary hearing on need); FERC Docket No. CP15-558, Accession No. 20160422-5248 (Letter from N.J. State Senator Turner, N.J. Assemblyman Gusciora and N.J. Assemblywoman Muoio requesting an evidentiary hearing).

⁶³ "Petition Opposing PennEast Pipeline-April 2016," FERC Docket No. CP15-558, Accession No. 20160512-5033.

⁶⁴ Numerous landowners have made statements in public and on the docket about economic and environmental harms this pipeline will cause to their communities as well as their properties, businesses and agricultural operations. These landowners have intervened, contending that the pipeline will have negative economic impacts, such as land devaluation, loss of tax revenue, and economic harm to business operations (e.g., trout fishing, tourism, timber harvesting and farming).

⁶⁵ Keith Brown, Federal Energy Commissioner Concerned About Gas Pipeline Critics: 'We Have a Situation Here', (Mar. 3, 2015), http://www.nj.com/mercercer/index.ssf/2015/03/penneast_pipeline_critics_blast_federal_commission.html.

Historically, when applications have engendered this level of public response, FERC has exercised its authority to initiate evidentiary hearings. See Iroquois Gas Transmission Sys., L.P., 52 FERC ¶ 61,091, 61,371 (1990) (despite applicant having met Mobil Oil and General Motors standard, given “unprecedented” public response of: 400 filed comments, 142 motions to intervene, 13 protests, and seven hearing requests, FERC chose to initiate a trial-type hearing). And here, PennEast has elicited public response an order of magnitude greater than in Iroquois Gas. See also Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1475 (9th Cir. 1994)(supporting FERC’s use of evidentiary hearing in light of public concern, finding that “[i]ndividual comment is a very persuasive indicator of ‘user conflict,’ for determining the existence of conflicts between humans cannot be numerically calculated or counted; rather, the existence of conflict must be evaluated. The court can envision no better way to determine the existence of actual past or likely future conflict between two user groups than to hear from members of those groups.”)⁶⁶ Given the scope and scale of this project -- involving more than one billion dollars of industry money, and

⁶⁶PennEast’s effort to set forth an image of unified public support for its project raises serious issues of credibility to be considered in weighing all data presented by that applicant in trial-type hearing. Although there are many examples of such conduct, one particularly egregious one involves a UGI employee, James V. Reino Jr.. Mr. Reino recently submitted a letter claiming that the Back Mountain Chamber of Commerce supported the project. Yet, another member of that same organization, Scott Cannon, attested that this did not represent a vote or view of that organization, and rather was the product of James Reino, Jr., functioning as a PennEast employee -- and using the guise of his private organization to generate propaganda. FERC Docket No. CP15-558, Accession No. 20160325-5127. When the applicant’s credibility is in doubt, case law and FERC policy support initiation of a hearing. See Williams Gas Pipelines Central, Inc., 95 FERC ¶ 61,028, 61,089 (2001) (when motive, intent, or credibility are at issue, the Commission is not free to resolve factual issues on the basis of a written record). See also Citizens for Allegan Cty., Inc. v. Fed. Power Comm'n, 414 F.2d 1125, 1129 (D.C. Cir. 1969), (“questions of public interest confronting an administrative agency,” such as cases where an applicant’s motive and intent were central questions, ‘will often be illuminated by an exploration in greater depth than can be provided simply by pleadings and documents.’”).

one billion cubic feet of additional natural gas capacity per day -- FERC must initiate an evidentiary hearing to evaluate the massive economic impacts in the Northeast energy market that the project would produce.⁶⁷ See Iroquois Gas Transmission Sys., L.P., 52 FERC ¶ 61091, 61371 (1990) (The decision to grant a trial-type evidentiary hearing rests, in part, on the “investment in, size of, and number of shippers involved” with the pipeline project at issue).

Moreover, since PennEast is still quite far from acquiring all the necessary permits from NJDEP and PADEP, a hearing, whether expedited or not, with discovery and cross-examination, would not cause any delay. Id. (“[T]he Commission believes that the limited delay associated with an expedited trial-type hearing will not...serve to adversely affect consideration of the...applications.”). Finally, since the Natural Gas Act and FERC’s own policy require FERC to address the threshold question of public need, such a hearing could actually provide the most direct path to establishing a credible record for FERC’s ultimate decision on this application.

C. As a matter of policy, FERC should consider whether the potential for future abuse would require standards of conduct, and the present case, therefore, deserves a closer look at this issue in an evidentiary hearing.

FERC policy requires strict adherence to standards of conduct where there is potential for affiliate abuse. The potential advantages to unfair market activity between affiliates -- which the Standards of Conduct were designed to address --

⁶⁷ As set out herein, such an evidentiary hearing must explore potential anticompetitive effects, risk shifting effects that harm ratepayers, and economic impacts to existing landowners.

cast additional doubt on the precedent agreements as a reliable market signal of public need. FERC should initiate an evidentiary hearing to look behind the Consortium's vague assertions of public benefit because of the inherent risk of abuse subsumed in this project.

Exemptions have been granted to LDCs where legacy ownership of pipelines and LDCs in the same company predates this rule. In the present case, LDC parent firms did not have ownership interests in pipelines prior to PennEast, and are creating the pipeline in order to take advantage of their market power. FERC should reexamine the LDC exemption in a new light in its certificate review of this project. At the very least, it should be even more cautious about accepting public need based on the facts in evidence and grant an evidentiary hearing.

The standards' "non-discrimination requirements" provide that a pipeline company must treat all shippers the same with respect to tariff provisions, not "give undue preference to any [shipper] in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing)," or process some transmission requests differently than others. 18 C.F.R. 358.4. The Standards' "independent functioning rule" requires that transmission function employees generally "must function independently" from marketing function employees, including that a pipeline company cannot let employees cannot take on both roles, and that affiliated marketing employees cannot have

greater access to transmission operations facilities than non-affiliated marketing employees. 18 C.F.R. § 358.5. The Standards' "no conduit rule" prohibits the passing of privileged transmission-related information between a pipeline company (regardless of employee function) and affiliated marketing employees. 18 C.F.R. § 358.6. FERC should review this certificate application in light of the Standards' rules, and the potential abuses signaled by this project, within the confines of an evidentiary hearing.

D. Because New Jersey BPU does not reach the issue, FERC is in the best position to determine the necessity of the PennEast pipeline based on the balance of risk between shareholders and captive ratepayers, and can do so by initiating an evidentiary hearing.

An evidentiary hearing is particularly important here, because New Jersey's BPU does not examine the PennEast project until after FERC has acted and the pipeline has been constructed and is in use.⁶⁸ Thereafter, each year, New Jersey LDCs would ask BPU to review whether PennEast transport charges are prudent and least cost. BPU is well positioned to assess that particular issue. The far greater economic impact, however, is likely to be felt by captive customers on existing pipelines. As we have described, a glut of capacity would likely

⁶⁸ By contrast, in 2009, Allegheny Energy and the American Electric Power Company submitted regulatory applications to construct an electric power transmission line through Virginia, West Virginia, and Maryland. See Cathy Kunkel & Tom Sanzillo, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, IEEFA, Apr. 2016, at 6-7. Just as in the instant case, the applicants asserted, without justification, that the transmission line would increase system reliability. *Id.* In January 2011, the Virginia State Corporation Commission ruled that there was not substantial evidence that the transmission line was the most cost-effective way to improve reliability. Of critical importance, the Virginia Commission ruled *prior* to construction of the proposed transmission line, unlike the present case. See Hearing Examiner's ruling, Case # PUE-2010-00115, January 19, 2011, found at <http://www.scc.virginia.gov/docketsearch/DOCS/2bgfo1!.PDF>

destroy significant asset value of such firm contracts. Yet BPU will not have an opportunity to protect ratepayers on existing pipelines. Only FERC is in a position to examine the larger, systemic economic impacts that would be unleashed by the significant overbuilding described above.

FERC is therefore the only regulator that can prevent an overbuild and protect captive customers of existing pipelines. The Natural Gas Act requires FERC to balance the interests of the corporate shareholders with those of the captive ratepayers -- and it can best do so here by by assigning an administrative law judge to scour the record evidence, conduct discovery as to the disputed material questions of fact, and test the data's credibility in an evidentiary hearing.⁶⁹

An evidentiary hearing is especially important in this case because of the harms to ratepayers -- a type of harm that FERC is specifically required to protect against. In the near term, PennEast would cause a glut of unsubscribed capacity on the secondary market and harming ratepayers as prices plummet. Skipping Stone quantified the potential harm by examining the secondary market activity in 2015 on two of the region's most important pipelines, TETCO and Transco.

⁶⁹ Although it is not traditionally a part of FERC's inquiry on public need, PennEast included a claim that pipeline construction will create 12,140 jobs in Pennsylvania and New Jersey. The consultants making this claim did not provide an adequate explanation of the assumptions they made, the methodology they used, or the estimates that they derived. The consultants used a nonstandard and misleading definition for "jobs." Expert Report on PennEast Pipeline Project Economic Impact Analysis for New Jersey and Pennsylvania, Goodman Group Inc., FERC Docket No. CP15-558, Accession No. 20151109-5014. The Goodman Group concludes that PennEast will provide, at most, four thousand low-paying jobs lasting six months on average, with the highest-paying and longest-lasting jobs going to workers brought in from out of state. *Id.* at 1. PennEast has failed to provide anything close to substantial evidence that the pipeline project will provide any number of living-wage jobs to New Jerseyans or Pennsylvanians, and the existing questionable evidence should be examined at an evidentiary hearing, wherein the underlying assumptions and models can be probed.

Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A, at 12-13. The analysis predicted the effect of PennEast on these markets, and concluded that customers of these two pipelines could lose between \$130M and \$230M per year. *Id.* at 13.⁷⁰

Ratepayers can be further harmed if tariffs increase on existing pipelines. As firm contracts are not renewed on existing pipelines and revenues decline, pipeline operators may seek rate increases from the FERC to cover the cost of service. Two recent examples of this harm materializing are the rate cases filed by Tallgrass Interstate Gas Transmission LLC in October 2015, and ANR in January 2016. First, in October 2015, Tallgrass Interstate Gas Transmission LLC filed a new rate case seeking a rate increase to cover annual \$40M deficits. FERC Docket No. RP16-00137, Accession No. 2015030-5356. Tallgrass asserted that increased competition from renewables, and increased competition from natural gas flowing from new production areas, had lowered subscribed capacity on Tallgrass' pipelines. *Id.* Exh. TIG-34 at 29-34.

Second, in January 2016, ANR filed a new rate case seeking a sixty percent cost-of-service increase and a seventy-eight percent rate base increase, in part because of displacement of capacity caused by newer pipelines: "...ANR has been losing its Ohio and Eastern U.S. markets to Marcellus/Utica production....The basis in the Northern Area has already seen downward pressure

⁷⁰ PennEast's consultants acknowledge that the pipeline will cause a loss of capacity release value, and that they have no evidence of the proportion of that loss that will be borne by ratepayers. Concentric April 2016 Submission, FERC Docket No. CP15-558, Accession No. 20160414-5202 at 23. That evidence could be obtained and tested through an evidentiary hearing.

from the increasing Marcellus/Utica supplies flowing into the Midwest...” FERC Docket No. RP16-440, Accession # 20160129-5290, Lee Bennett testimony at 4-6.

The Tallgrass and ANR rate cases demonstrate the risks to ratepayers, if the immediate impact is to create significant unused capacity on competing pipelines. As far back as April 1999, UGI Utilities Inc.⁷¹ submitted a comment to FERC, identifying these risks and arguing persuasively that these risks necessitated a robust FERC review of new greenfield pipelines:

The Commission must reinvigorate its new construction policy. In particular, strong showings of market demand must be made by pipeline applicants proposing to construct “greenfield” pipelines... Otherwise, the Commission risks that its policies will cause the supply and demand for capacity to tilt out of balance where supply significantly exceeds demand, thereby devaluing pipeline capacity below its full embedded cost. This result is dictated by simple supply and demand economics. Such a result is adverse to the interest of the pipelines as well as existing, long-term contract holders.⁷²

The PennEast pipeline would create the same situation for New Jersey captive ratepayers -- and an evidentiary hearing would allow the interested parties to adduce substantial evidence supporting or undermining the validity or relevance of these data.

⁷¹ Wholly owned subsidiary of UGI Corporation, a member of the PennEast Consortium

⁷² FERC Docket Nos. RM98-10-000 & RM98-12-000, Accession No. 19990426-0398, at 32.

IV. CONCLUSION

As demonstrated herein, FERC should initiate an evidentiary hearing, in order to garner substantial evidence to make its requisite evaluation of significant public benefit -- and to balance those findings against evidence of adverse economic impacts that it may discover. An administrative law judge, by providing an opportunity for discovery and cross-examination, can test credibility and marshal the evidence ultimately deemed credible into a cohesive picture showing true public need for this project. The PennEast project deserves this higher level of scrutiny because it would exercise sweeping eminent domain powers against landowners, yet the specific facts of this case indicate that it represents a new form of market abuse, with a corporate structure that requires captive retail ratepayers to shoulder the attendant risks arising from overcapacity.

The PennEast consortium affiliate relationships appear to be driving this project, and distorting the market. There is no evidence in the record that the LDC-affiliates responded to market signals; yet the record contains data showing that they agreed to firm contracts to support corporate goals. In doing so, various LDC-affiliates have has stated their its intention to displace existing supply sources with PennEast supply. This displacement of existing pipeline capacity in a low to no growth market will create excess capacity would have a substantial financial impact on captive customers of existing pipelines. And while it is not

unusual for pipeline capacity to have low utilization over time, here, as regional supply sources shift, excess capacity would develop on competing pipelines in the near term. Moreover, the PennEast Marcellus supply may be displacing other Marcellus supply on existing pipelines, which will continue to reverse flow and add capacity before PennEast would come online. The cost to ratepayers could amount to \$250 million per year -- with profits to the PennEast shareholders of 12-14%. The Natural Gas Act requires FERC to make any decision on this project based upon a fully developed record containing substantial evidence of significant public benefit, which balances these competing concerns. Movants respectfully request FERC to do so by initiating an evidentiary hearing that can develop such a record for its ultimate determination regarding PennEast's certificate of public convenience and necessity.

Respectfully submitted,

Date: 6/15/16



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Statement of Issues Under 18 C.F.R. § 385.206(b)(3)

18 C.F.R. § 385.206(b)(3) requires that a Rule 206 Complainant set forth “the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant.” In accordance with this requirement, we reiterate the basis for this motion by concisely setting forth the issues presented by PennEast’s application, as they relate to the parties opposing PennEast:

1. PennEast has failed to provide “unimpeachable-or at least persuasive-” evidence of significant public need, and the existing docket needs to be developed and tested through initiation of an evidentiary hearing that will enable FERC to resolve the following essential questions underlying any finding with respect to public need.

- A. The economic question of unmet natural gas demand must be resolved.

- B. The economic rationale underlying PennEast’s claim that its project will provide lower cost supply must be tested.

- C. The business assessment that the existing system presents reliability concerns, and that this project is an appropriate means to increase system reliability must be examined.

D. The economic question of whether PennEast has demonstrated that the pipeline will provide any benefits in terms of creating significant regional jobs must be assessed.

2. PennEast has failed to develop a record containing substantial evidence that it has eliminated or minimized all adverse impacts, and the record must be developed as to impacts to existing pipelines, captive ratepayers, and landowners.

Impacts

18 C.F.R. § 385.206(b)(4) and b(5) require a Rule 206 Complaint to set forth “a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction”, and “the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction”.

Financial impact of PennEast

We estimate that existing pipelines could lose \$130M to \$230M per year due to collapse of prices in the secondary capacity market.⁷³

We further estimate that existing pipelines will seek rate increases, which will cost ratepayers another \$50M per year.⁷⁴

Rule 206 Requirements

18 C.F.R. § 385.206(b)(1): “Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;”

PennEast has failed to submit substantial evidence of the project’s public need. PennEast has failed to submit substantial evidence of minimization of the project’s adverse impacts. PennEast has made numerous attempts to distort the record before FERC. All of these alleged violations are described in detail in our Statement of Facts and Argument.

⁷³ Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A, at 5.

⁷⁴Id.

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

Our Argument lays out our explanation of how PennEast's actions and inactions violate FERC rules, and state and federal law.

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

The issues presented by PennEast's application are detailed in the Issues section of this Pleading.

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

We have made a good faith effort to quantify the financial impacts to the landowners and communities that would be impacted by the project. Those are detailed in the Impacts section of this Pleading.

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

If FERC approves the project, then the construction and operation of the pipeline will have severe practical, operational and other nonfinancial impacts to the impacted New Jersey and Pennsylvania communities. Movants' Comments⁷⁵ document PennEast's failure to even address, let alone minimize, the pipeline's irreversible environmental impacts. Numerous other documents on the FERC docket also demonstrate the PennEast Consortium's failure to ensure safety and reliability on their other pipelines around the country.

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

The issues presented herein, as set out in the body of the motion, are not capable of being resolved on the record for the reasons described therein.

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

The specific relief we request is detailed in the Relief Requested section of this Pleading.

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

⁷⁵ Skipping Stone Report, FERC Docket No. CP15-558, Accession No. 20160311-5209, Exhibit A. 4.

We have included links to each publicly available document that supports the facts in our Complaint.

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

Movants and many other Intervenors have raised these genuine disputes of material fact in the existing record, which relate directly to findings FERC must make in reviewing this application. FERC has thus far not addressed those disputes, nor could they absent an evidentiary hearing to test the underlying data and analyses.

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

There is no substitute for a trial-type evidentiary hearing, to assess, test and develop the conflicting data in this record.

(10) Include a form of notice of the complaint suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

The form of notice of complaint is attached to this Pleading.

(11) Explain with respect to requests for Fast Track processing pursuant to § 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

We are not requesting Fast Track processing.

18 C.F.R. § 385.212(c): “(c) Service. Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with 18 CFR § 385.2010(f)(3), facsimile, express delivery, or messenger.”

We will be serving a copy of the Pleading and all attachments upon the Respondent, the affected regulatory agencies, and every party on the Service List for Docket CP15-558-000, by electronic mail in accordance with 18 CFR § 385.2010(f)(3). The Certificate of Service is on the last page of this Pleading.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon PennEast Pipeline LLC (the Respondent), affected regulatory agencies, and each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at pm this 15th day of June, 2016.



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