



**I.**  
**REQUEST TO REJECT PROTEST**

**A. The Commission Should Review NJCF’s Pleading as an Untimely Protest to the Certificate Application.**

NJCF styled its pleading as a complaint and motion filed pursuant to Rule 206 and Rule 212 requesting that the Commission establish a hearing before an Administrative Law Judge under Rule 206(g)(3) for resolution of the alleged complaint.<sup>4</sup> The filing fails to meet the basic requirements of Rule 206 and at best must be treated as an untimely protest with a request for an evidentiary hearing.<sup>5</sup>

NJCF fails to provide any of the justification required by Rule 206 for initiating a separate complaint proceeding when an existing Commission proceeding is in progress to address the types of issues raised by NJCF.<sup>6</sup> Separate complaint proceedings are not appropriate when the separate proceeding would be duplicative of an ongoing certificate proceeding.<sup>7</sup> NJCF asserts that “[t]he issues presented herein . . . are not capable of being resolved on the record.”<sup>8</sup> Much to the contrary, the issues raised by NJCF—project need

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<sup>4</sup> NJCF Protest at 13. NJCF cites to both 18 C.F.R. § 385.206(g)(3) and 18 C.F.R. § 385.502(a)(1) in requesting a hearing. Although NJCF’s citation to the hearing procedures for complaints suggests that it seeks to establish a hearing in a complaint proceeding separate from and duplicative of the certificate proceeding for the PennEast Project, to the extent that NJCF is also requesting an evidentiary hearing on the Project application within the certificate proceeding, such a hearing is unnecessary for the reasons provided in Section II.B below.

<sup>5</sup> See *Florida Southeast Connection, LLC et al.*, 154 FERC ¶ 61,080 at PP 57-59 (2016) (addressing a “complaint” as a protest to the certificate application because the filing party did not satisfy the requirements of Rule 206).

<sup>6</sup> 18 C.F.R. § 385.206(b)(6) (2015) (requiring that a complainant “[s]tate 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”).

<sup>7</sup> See *ConocoPhillips Co. v. Texas Eastern Transmission LP*, 142 FERC ¶ 61,123 (2013) (denying rehearing of order dismissing a complaint because the complainant should instead make its views known in the pre-filing process and any subsequent certificate proceeding addressing an application seeking authority to construct the respondent’s contemplated project).

<sup>8</sup> NJCF Protest at 63.

and mitigation of impacts—are issues that the Commission analyzes in every certificate proceeding on the written record, as it will be able to do for the PennEast Project.<sup>9</sup>

The pleading also fails to meet the requirement that a complaint “[c]learly identify” any “action or inaction which is alleged to violate applicable statutory standards or regulatory requirements” and “[e]xplain how the action or inaction violates” those standards or requirements.<sup>10</sup> NJCF’s general allegations—without citation to specific violations of law, regulation, or policy—claiming a lack of “substantial evidence” of project need or minimization of impacts or that PennEast is attempting to “distort” the record<sup>11</sup> do not satisfy the specific pleading requirements of a complaint.

NJCF’s mere disagreement regarding the evidence in the record does not create a “formal complaint.” The pleading, at best, should be addressed by the Commission as an untimely protest with a request for an evidentiary hearing, and it should be rejected outright as untimely and contrary to longstanding Commission policy and precedent. In the event the Commission accepts the NJCF Protest as a formal complaint filed pursuant to Rule 206, the proper remedy for the deficiencies described herein is for the Commission to find no merit in the complaint.<sup>12</sup>

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<sup>9</sup> In the event the Commission accepts the NJCF Protest as a complaint filed pursuant to Rule 206, the Commission should find that a separate complaint proceeding is not required as it has consistently done when a complaint addresses the same issues to be raised in a certificate proceeding. *See supra* note 7.

<sup>10</sup> 18 C.F.R. § 385.206(a)(1)-(2) (2015).

<sup>11</sup> NJCF Protest at 62.

<sup>12</sup> *See supra* note 7.

**B. The NJCF Protest Should Be Rejected.**

The NJCF Protest, filed over eight months after the deadline set by the Commission in the certificate proceeding for the PennEast Project,<sup>13</sup> should be rejected as untimely and containing no new issues. The NJCF Protest reiterates a request for an evidentiary hearing and arguments regarding project need that NJCF raised in previous filings submitted in the proceeding<sup>14</sup> and that PennEast thoroughly addressed in previous responses.<sup>15</sup>

The Commission regularly performs a public convenience and necessity analysis in certificate proceedings without an evidentiary hearing and should do so regarding the PennEast Project. The extensive written record in the proceeding provides the Commission with all of the information required to determine whether the Project serves the public convenience and necessity. NJCF's arguments regarding a need for an evidentiary hearing fail to address the extensive filings by PennEast, NJCF, and other parties on the exact issues raised in the NJCF Protest. Moreover, a separate proceeding determining whether an applicant has shown a "need" for the project and performing an assessment of impacts and mitigation requirements would not be appropriate while a certificate proceeding is pending because it would bifurcate the certificate review process and undermine Commission Staff's efforts currently underway in the pending certificate

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<sup>13</sup> Notice of Application, Docket Nos. CP15-558-000 et al. (Oct. 8, 2015) (establishing a comment deadline of October 29, 2015).

<sup>14</sup> Motion to Intervene Submitted by New Jersey Conservation Foundation, Docket No. CP15-558-000, at 2, 5-6 (Oct. 28, 2015); Report on Question of Public Need from New Jersey Conservation Foundation, Docket No. CP15-558-000 (Oct. 30, 2015); Intervenors' Comments on PennEast's Application Submitted on Behalf of: New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association, Docket No. CP15-558-000, at Ex. A (Mar. 11, 2016).

<sup>15</sup> Reply of PennEast Pipeline Company, LLC, Docket No. CP15-558-000 (Apr. 14, 2016) ("April 14 Reply"); Motion for Leave to Answer and Answer of PennEast Pipeline Company, LLC, Docket No. CP15-558-000, at 2-4 (Nov. 13, 2015) ("November 13 Answer").

proceeding. The Commission should therefore reject the NJCF Protest and the motion for an evidentiary hearing contained therein.

## **II. ANSWER**

In the event that the Commission does not reject the NJCF Protest as untimely and failing to raise any new issues, PennEast responds below to the issues asserted by NJCF. The NJCF Protest fails to raise any dispute over an issue of material fact that warrants the Commission holding an evidentiary hearing in this case. The Commission, on the basis of the written record, can make conclusive findings of fact, and the Commission is not required to apply a heightened level of scrutiny to determine the need for the Project. PennEast appropriately demonstrated such need consistent with Commission precedent, the requirements of the Certificate Policy Statement, and Section 7 of the Natural Gas Act (“NGA”). Moreover, policy does not favor a shift from the Commission’s longstanding practice of making decisions based on the written record in certificate proceedings, including those for greenfield pipelines similar to the PennEast Project. Accordingly, the arguments in the NJCF Protest should be rejected and its motion for an evidentiary hearing should be denied.

### **A. PennEast Has Established the Need for the Project Under the Standards of Review in the Certificate Policy Statement and Section 7 of the NGA.**

As the record in this proceeding shows, nearly all of the capacity to be created by the PennEast Project has been subscribed under long-term firm transportation precedent agreements. The Commission has consistently recognized that long-term commitments for capacity “constitute strong evidence that there is market demand for the project.”<sup>16</sup>

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<sup>16</sup> November 13 Answer (quoting *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163 at P 23 (2015) (citing Certificate Policy Statement, 88 FERC ¶ 61,227, p. 61,748 (1999) (“Certificate Policy Statement”));

The Commission has explained that precedent agreements are not required to demonstrate need, although such agreements are “significant evidence of need or demand for a project.”<sup>17</sup> In addition to precedent agreements, the Commission will consider a variety of relevant factors to demonstrate need.<sup>18</sup>

As reflected on the written record,<sup>19</sup> PennEast established the need for the Project with the numerous precedent agreements for long-term firm capacity subscribed for almost the entire capacity created by the Project by a broad cross-section of market participants.<sup>20</sup> The demand for and benefits of the Project are further confirmed in the market studies identified and submitted by PennEast showing the price differentials between the Marcellus Shale play and the markets PennEast will serve, which demonstrate the lower costs to end users that will result from the Project.<sup>21</sup> This is

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*Transcontinental Gas Pipe Line Co., LLC*, 147 FERC ¶ 61,102 at P 42 (2014); *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 at P 36 n.26 (2014); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 at P 23 (2012)).

<sup>17</sup> *Arlington Storage Company, LLC*, 128 FERC ¶ 61,261 at P 8 (2009).

<sup>18</sup> *Id.* (providing that the Commission will consider demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market, among other factors, as a demonstration of need).

<sup>19</sup> Application of PennEast Pipeline Company, LLC for Certificates of Public Convenience and Necessity and Related Authorizations, Docket No. CP15-558, at 5, 10 & n.7, Ex. I (Sept. 24, 2015) (“Application”).

<sup>20</sup> November 13 Answer at 2.

<sup>21</sup> Application at 9 (discussing economic benefits to consumers from the PennEast Project); *id.* at Ex. I (providing the precedent agreements filed as privileged); November 13 Answer at 3; Concentric Energy Advisors, Energy Market Savings Report and Analysis (Mar. 2015), available at <http://penneastpipeline.com/ConcentricEconomicStudy>; Econsult Solutions & Drexel University, Economic Impact Report and Analysis: PennEast Pipeline Project Economic Impact Analysis (2015), available at <http://penneastpipeline.com/economic-impact-analysis/>; Eastern Interconnection Planning Collaborative, Interregional Transmission Development and Analysis for Three Stakeholder Selected Scenarios and Gas-Electric System Interface Study (July 2, 2015), available at <http://www.eipconline.com/phase-ii-documents.html>; Reply Comments of Concentric Energy Advisors to Comments Submitted by the New Jersey Conservation Foundation Regarding PennEast Pipeline Company, LLC, Docket No. CP15-558 (Apr. 13, 2016) (“Concentric Reply”).

exactly the evidence contemplated by the Certificate Policy Statement to satisfy the project need portion of the public convenience and necessity showing.<sup>22</sup>

NJCF's reliance on the *Jordan Cove* decision for the argument that the Commission must use a higher level of scrutiny in reviewing the PennEast Project is misplaced.<sup>23</sup> The Commission determined that "generalized allegations of need . . . d[id] not outweigh the potential for adverse impact on landowners" because the applicant had not yet submitted any contracts or begun an open season to demonstrate a need for its project.<sup>24</sup> *Jordan Cove* did not submit any precedent agreements whereas PennEast has submitted executed precedent agreements for ninety percent (90%) of the Project's capacity. Nonetheless, the "sliding scale approach," as applied in *Jordan Cove* to require additional indicators of need when the project sponsor has yet to obtain all rights-of-way, does not require evidence beyond what PennEast has already provided to demonstrate need, nor does it require the Commission to hold an evidentiary hearing.<sup>25</sup>

PennEast has demonstrated the need for the Project under the Certificate Policy Statement with executed precedent agreements for long-term firm service for almost all of the Project's capacity, in addition to market studies, and other evidence of the benefits

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<sup>22</sup> Certificate Policy Statement at p. 61,748 ("[T]he evidence necessary to establish the need for the project will usually include a market study."); *id.* at p. 61,749 ("[I]f an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand . . ."); *id.* at p. 61,750 ("Applicants . . . must submit evidence of the public benefits to be achieved by the proposed project such as contracts, precedent agreements, studies of projected demand in the market to be served, or other evidence of public benefit of the project.").

<sup>23</sup> See NJCF Protest at 20-21.

<sup>24</sup> *Jordan Cove Energy Project, LP*, 154 FERC ¶ 61,190 at P 39 (2016) ("Pacific Connector has presented little or no evidence of need for the Pacific Connector Pipeline. Pacific Connector has neither entered into any precedent agreements for its project, nor conducted an open season . . .").

<sup>25</sup> *Id.*; see also *Guardian Pipeline, L.L.C.*, 91 FERC ¶ 61,285, p. 61,980 (2000) (approving the project although Guardian had not negotiated with any of the landowners for any of the rights of way because the long-term firm capacity agreements executed with customers and the commitment to minimize adverse impacts on landowners provided a sufficient showing of need and benefits outweighing the adverse impacts).

to the public through increased reliability.<sup>26</sup> Furthermore, PennEast is committed to continue working toward minimizing effects on landowners and has adopted numerous route deviations to date to avoid and mitigate impacts. The right-of-way acquisition process is ongoing and PennEast does not expect that all of the currently unacquired property rights will need to be acquired by eminent domain. PennEast will continue the process with good faith negotiations in an effort to avoid unnecessary use of eminent domain. PennEast has established the need for the Project under the appropriate standards of review in the Certificate Policy Statement and Section 7 of the NGA. Thus, the Commission does not need to apply any different standard or conduct an evidentiary hearing to appropriately find that the need has been proven.

**B. A Trial-Type Evidentiary Hearing Is Not Required.**

The NJCF Protest relies on the D.C. Circuit’s decision in *Mobil Oil* concerning the “substantial evidence” standard to suggest that this standard necessitates an evidentiary-type hearing in order for the Commission to conclude findings of fact in this proceeding.<sup>27</sup> Section 19 of the NGA states that the Commission’s findings of fact, if supported by substantial evidence, shall be conclusive.<sup>28</sup> The Commission and the D.C. Circuit, supported by findings in a unanimous Supreme Court decision,<sup>29</sup> have found that nothing in *Mobil Oil* requires an evidentiary hearing be held for the Commission to

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<sup>26</sup> See *supra* note 21.

<sup>27</sup> See NJCF Protest at 22-26; *Mobil Oil Corporation v. Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973).

<sup>28</sup> 15 U.S.C. § 717r(b).

<sup>29</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978).

satisfy the “substantial evidence” standard of review.<sup>30</sup> Contrary to NJCF’s arguments, and as recently affirmed by the D.C. Circuit,<sup>31</sup> the “substantial evidence” standard of review “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence,”<sup>32</sup> and in no event does the “substantial evidence” standard dictate an evidentiary hearing.<sup>33</sup> The evidence submitted by PennEast, discussed above, satisfies the substantial evidence standard under Section 19 of the NGA.

NJCF also asserts that the Commission should establish a formal evidentiary hearing pursuant to the Commission’s procedures for complaint proceedings.<sup>34</sup> NJCF has not met the requirements for submission of a formal complaint, and in any event, the complaint procedures *allow for*, but do not require, an evidentiary hearing. NJCF has not raised any issue that would require a formal evidentiary hearing in the PennEast certificate proceeding.<sup>35</sup> Thus, there is no basis for the Commission to launch an evidentiary hearing. In similar circumstances, the Commission has consistently concluded that an evidentiary hearing is unnecessary,<sup>36</sup> and should do so here.<sup>37</sup>

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<sup>30</sup> *Wisconsin Gas Co. v. F.E.R.C.*, 770 F.2d 1144, 1167 (D.C. Cir. 1985) (“The petitioners’ reading of *Mobil Oil* is a fair one. The case, however, is no longer good law.”); *Producer’s Gas Co.*, 31 FERC ¶ 61,122, p. 61,246 n.11 (1985) (recognizing that *Mobil Oil* was subsequently overturned by the D.C. Circuit).

<sup>31</sup> *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (2015).

<sup>32</sup> *Louisiana Pub. Serv. Comm’n v. F.E.R.C.*, 522 F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL Energy Main Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

<sup>33</sup> See *Wisconsin Gas*, 770 F.2d at 1167-68 (citing *American Public Gas Association v. F.E.R.C.*, 567 F.2d 1016, 1067 (D.C. Cir. 1977)).

<sup>34</sup> NJCF Protest at 13.

<sup>35</sup> *Kinder Morgan Interstate Gas Transmission LLC*, 99 FERC ¶ 61,186, p. 61,750-51 (2002) (finding that an “evidentiary, trial-type hearing is necessary only where material issues of fact are in dispute that cannot be resolved on the basis of the written record” and holding that “[a]n extensive record has been compiled in this proceeding, enabling the Commission to make a reasoned decision”).

<sup>36</sup> *Algonquin Gas Transmission Co.*, 93 FERC ¶ 61,163, p. 61,545 (2000) (establishing that the Commission’s “practice is to hold a ‘paper hearing’ in those cases where the written record provides a sufficient basis for resolving the relevant issues, rather than a formal, in-person, trial-type evidentiary hearing); *Dominion Cove Point LNG, LP, et al.*, 118 FERC ¶ 61,007 at P 33 (2007), *reh’g denied*, 119 FERC ¶ 61,276 (2007) (“When the paper record provides a sufficient basis for resolving the relevant issues,

1. Commission precedent supports the use of affiliate contracts in establishing need and such contracts do not raise an issue of material fact.

The NJCF Protest relies heavily on a misplaced belief that affiliate contracts should be either discredited or given less weight than other contracts when evaluating a project's need.<sup>38</sup> Commission precedent clearly rejects any notion that the Commission should distinguish between pipelines' precedent agreements with affiliates or independent third parties.<sup>39</sup> Contrary to NJCF's erroneous interpretation,<sup>40</sup> the Certificate Policy Statement also rejects distinctions between, and "gives equal weight to[,] contracts between an applicant and its affiliates and an applicant and unrelated third parties."<sup>41</sup> More recently, the Commission confirmed this policy related to affiliate

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it is our practice to provide for a 'paper hearing,' as we did in this case, rather than hold a formal, in-person, trial-type evidentiary hearing pursuant to Part 385, subpart E of our regulations." (citing *NE Hub Limited Partners, LP*, 83 FERC ¶ 61,043 at 61,192 (1998), *order on reh'g*, 90 FERC ¶ 61,142, p. 61,437-38 (2000); *Pine Needle LNG Company, LLC*, 77 FERC ¶ 61,229 (1996)).

<sup>37</sup> See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at PP 21-22 (2016) (determining that a paper proceeding was appropriate and that the written record was sufficient to resolve any material issues of fact regarding project need, environmental impacts, and a variety of other issues raised by an environmental coalition); *Constitution Pipeline Co., LLC et al.*, 149 FERC ¶ 61,199, p. 62,205 (2014) (rejecting a request for a formal evidentiary hearing made by six parties because their contentions could be resolved in a paper hearing).

<sup>38</sup> NJCF Protest at 30.

<sup>39</sup> In responses to NJCF's previous request for an evidentiary hearing in this proceeding, PennEast provided the relevant precedent. See April 14 Reply at 2 (citing *Eastern Shore Natural Gas Co.*, 132 FERC ¶ 61,204 at P 31 (2010) (citing Certificate Policy Statement at p. 61,744; *Midwestern Gas Transmission Co.*, 114 FERC ¶ 61,257 at P 34 (2006); *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142, p. 61,439 (2000)); see also November 13 Answer at 4 & n.11 (citing *Constitution Pipeline Company, LLC, et al.*, 149 FERC ¶ 61,199 at P 28 (2014) ("Constitution"); *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091 at P 21 (2012); *Millennium Pipeline Co., L.P., et al.*, 100 FERC ¶ 61,277 at P 57 (2002); *E. Tennessee Natural Gas Co.*, 98 FERC ¶ 61,331, p. 62,398 (2002); *Texas Eastern Transmission Corp.*, 84 FERC ¶ 61,044, p. 61,191 (1998); *Maritimes & Northeast Pipeline, L.L.C.*, 76 FERC ¶ 61,124, p. 61,667, 61,671 (1996), *on reh'g*, 80 FERC ¶ 61,136 (1997), *on reh'g*, 81 FERC ¶ 61,166 (1997)).

<sup>40</sup> NJCF Protest at 30 (quoting comments filed on the Certificate Policy Statement and arguing that "FERC decided that non-affiliate agreements did in fact have greater evidentiary value than affiliate agreements").

<sup>41</sup> Certificate Policy Statement at p. 61,745; see also *Questar Pipeline Co.*, 93 FERC ¶ 61,279, p. 61,930-31 (2000) ("The Commission in the Policy Statement . . . specifically noted that under the new policy, whether contracts are with affiliated or unaffiliated shippers is no longer of primary significance.").

shipper contracts.<sup>42</sup> The NJCF Protest provides no justification for a departure from the Commission’s longstanding determination that contracts with affiliates constitute valid evidence of market need. NJCF’s motion for an evidentiary hearing on this basis should accordingly be denied.

The NJCF Protest’s “vertical integration” argument—that contracts with affiliated LDC shippers do not demonstrate true market need because they may somehow benefit from their contracts with PennEast through their parent companies—is meritless and does not necessitate a formal hearing.<sup>43</sup> “The mere fact that the . . . local distribution companies are affiliates of [the pipeline company] does not call into question their need for new capacity or their obligation to pay for it, or otherwise diminish the showing of market support.”<sup>44</sup> The Commission has also held that an affiliate relationship between a pipeline and its LDC customers does not constitute unfair competition or illegal leveraging.<sup>45</sup> The direct and active participation of customers in a pipeline project allows customers to ensure that the project constitutes a competitive alternative that is

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<sup>42</sup> *Eastern Shore Natural Gas Company*, 132 FERC ¶ 61,204 at P 31 (2010) (“*Eastern Shore*”) (“the Commission gives equal weight to contacts with affiliates and non-affiliates and does not look behind contracts to determine whether the customer commitments represent genuine growth in market demand”); see also *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091 at P 21 (2012) (“Absent evidence of affiliate abuse, we see no reason not to view marketing affiliates like any other shipper for purposes of assessing the demand for capacity.”); *Guardian Pipeline, L.L.C.*, 91 FERC ¶ 61,285, pp. 61,967, 61,973 (2000) (recognizing that “[t]he mere fact that the resulting interstate pipeline is partially affiliated with the main shipper does not in itself demonstrate self-dealing” and “[t]he Commission has certificated projects that are supported by properly negotiated affiliate contracts” and therefore rejecting an argument that a proposed project should be rejected because “over 87 percent of the total projects’ capacity is subscribed by Guardian’s affiliate”).

<sup>43</sup> NJCF Protest at 29; *id.* at 32-35.

<sup>44</sup> *Eastern Shore* at P 31.

<sup>45</sup> *Guardian Pipeline, L.L.C.*, 91 FERC ¶ 61,285, p. 61,967 (2000) (“*Guardian*”) (rejecting an argument that a proposed project “is the product of unfair competition because [an LDC affiliate shipper on Guardian] is leveraging its monopoly power over the local distribution of gas to facilitate its parent’s entry into the interstate market” and determining that the protesting party had presented “no evidence the proposed projects or the Guardian/Wisconsin Gas contract were the product of any illegal leveraging”).

preferable to remaining a captive customer to an existing pipeline.<sup>46</sup> An affiliated shipper's decision to receive service from a new pipeline when its current contracts with an existing pipeline expire has thus been upheld as "a reasonable business decision that it is in its best interest."<sup>47</sup> There is no issue of material fact related to the affiliate contracts to be evaluated in an evidentiary hearing.

Finally, NJCF's suggestion that the failure of Transco's Diamond East Project can be attributed to the affiliate contracts on the PennEast Project is both entirely speculative and irrelevant.<sup>48</sup> NJCF provides no evidence of this and fails to cite any information confirming that the Diamond East Project is in fact not going forward.<sup>49</sup> The Commission may properly disregard this speculative allegation and not consider it in the evaluation of the PennEast Project or whether an evidentiary hearing is necessary.<sup>50</sup>

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<sup>46</sup> *See id.* at p. 61,967 (recognizing an affiliated LDC-shipper's conclusions that "Wisconsin's energy economy would be better served by the introduction of pipeline competition rather than if it were to remain captive to ANR. Wisconsin Gas states that it had previously committed to capacity on the proposed, unaffiliated, Viking Voyageur project, but that application was subsequently withdrawn. Wisconsin Gas states that as a result of the withdrawal of the Viking Voyageur project, WICOR 'learned that to ensure the successful introduction of a competitive alternative pipeline to serve Wisconsin, direct and active participation was necessary.'").

<sup>47</sup> *Id.*; *Eastern Shore* at P 31 ("The Commission has found it reasonable for LDCs, such as the Chesapeake LDCs, to seek additional sources of supply, and has emphasized its disinclination to second-guess reasoned business decisions by pipelines' customers evidenced by precedent agreements, as well as binding contracts.").

<sup>48</sup> NJCF Protest at 34.

<sup>49</sup> The Commission recently recognized the lack of information on the Diamond East Project's status. *Transcontinental Gas Pipe Line Co., LLC*, 154 FERC ¶ 61,166 at P 5, n.6 (2016).

<sup>50</sup> *Algonquin Gas Transmission Co.*, 75 FERC ¶ 61,351, pp. 62,123-24 (1996) (quoting *General Motors Corporation v. Federal Energy Regulatory Commission*, 656 F.2d 791, 798 n.20 (1981)); *Southern Natural Gas Co.*, 110 FERC ¶ 61,052, p. 61,227 (2005) (same).

2. Disagreement with the evidence provided by an applicant does not trigger a trial-type evidentiary hearing.

The NJCF Protest expresses disagreement with the evidence provided in the proceeding, characterizing it as “conflicting” and “controverted.”<sup>51</sup> To support this assertion that “conflicting” evidence on the docket related to the Project need requires the Commission to hold an evidentiary hearing, NJCF erroneously relies on the *General Motors* case.<sup>52</sup> The *General Motors* case does not stand for the proposition that an evidentiary hearing is required to determine adequacy of supply or demand. In fact, the Commission unequivocally denied a similar request for a formal hearing based on *General Motors*.<sup>53</sup>

NJCF also does not agree that the PennEast Project will increase reliability by providing an additional source of supply for the markets it serves.<sup>54</sup> However, PennEast supported the advantages of the Project related to reliability by including studies identified in the Application and the Eastern Interconnection Planning Collaborative Study discussed in the November 13 Answer.<sup>55</sup> The Commission can make a determination related to reliability from this comprehensive information provided by PennEast side-by-side with the information filed by NJCF and other parties on the docket. Further, the NJCF Protest’s argument that the Project is not “the best way” to improve reliability does not create an issue of material fact that can only be resolved

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<sup>51</sup> NJCF Protest at 36, 64.

<sup>52</sup> *Id.* at 37-38.

<sup>53</sup> *Pac. Gas Transmission Co.*, 56 FERC ¶ 61,192, p. 61,714 (1991) (holding that “there has been no showing that factual evidence developed through the extensive written submissions in the record will not suffice to establish an evidentiary predicate for the Commission to conclude that the . . . project is in the public convenience and necessity”).

<sup>54</sup> NJCF Protest at 38, 44.

<sup>55</sup> *See supra* note 21.

through a hearing.<sup>56</sup> Section 7 of the NGA does not require the Commission to make a “best way” determination when authorizing infrastructure projects.<sup>57</sup> NJCF’s inquiry into whether liquefied natural gas and dual fuel would be more efficient alternatives has no bearing on the Commission’s analysis and thus fails to provide a basis for a formal hearing.

NJCF’s motion for a formal hearing fails to demonstrate any reason why written submissions with differing opinions are an insufficient basis to resolve the issues in this proceeding. The Commission systematically makes decisions based on the written record in proceedings where applicants, landowners, agencies, congressional representatives, and other stakeholders all provide dissenting opinions regarding a project proposal. The Commission can likewise do so in the PennEast proceeding. Each issue raised in the NJCF Protest has been appropriately addressed on the written record providing the Commission all of the information it needs to make a final decision on each point. NJCF’s request for a formal hearing should be denied.

3. NJCF’s characterization of its contentions as “credibility” issues does not require a formal hearing.

The report prepared for NJCF by Mr. Greg Lander of Skipping Stone that was submitted to the written record (“Skipping Stone Report”) also fails to create any need for a formal hearing.<sup>58</sup> NJCF’s assertion that the Skipping Stone Report “causes credibility

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<sup>56</sup> NJCF Protest at 44.

<sup>57</sup> See April 14 Reply at 2 (providing precedent explaining that the Commission does not make a determination of the best option and only considers whether the specific proposal is in the public convenience and necessity).

<sup>58</sup> Intervenors’ Comments on PennEast’s Application Submitted on Behalf of: New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association, Docket No. CP15-558-000, at Ex. A (Mar. 11, 2016).

issues” that must be resolved in a formal evidentiary hearing<sup>59</sup> reflects a failure to understand the Commission’s review process. The April 14, 2016 Reply Comments of Concentric Energy Advisors addressed the speculation and inaccuracies in the Skipping Stone Report.<sup>60</sup> The fact that the two reports provide different vantage points does not raise an issue of material fact that would require a formal hearing.

NJCF’s disagreement with Concentric Energy Advisors’ report and comments does not warrant an evidentiary hearing.<sup>61</sup> The Commission has found that formal evidentiary hearings are unnecessary when parties assert a dispute regarding the “credibility of those offering conflicting viewpoints” because those parties were given “ample opportunity to present their views through the submission of written comments.”<sup>62</sup> Full opportunities have been provided in the pre-filing docket and the certificate proceeding to date and further commenting opportunities will be available for parties during the certificate proceeding to submit their position in written on-the-record documents. Moreover, an evidentiary hearing is unnecessary because studies disputing market need do not affect the Commission’s analysis where precedent agreements are provided supporting the proposal.<sup>63</sup> The Commission will not look behind precedent

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<sup>59</sup> NJCF Protest at 17, 43.

<sup>60</sup> April 14 Reply at 1; *see generally* Concentric Reply.

<sup>61</sup> *See, e.g., Southern Natural Gas Co.*, 85 FERC ¶ 61,134, p. 61,531-32 (1998) (denying request for a formal evidentiary hearing to address “the credibility of the representations of Southern’s consultants” among other issues because “the record contains sufficient facts upon which to base a decision”); *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142, p. 61,439 (2000) (rejecting claim that a “hearing is necessary to explore issues involving motive and credibility” because the Commission exercised “appropriate concern and investigation” into the relevant factual issues); *see also James M. Knott, Sr.*, 103 FERC ¶ 61,315, p. 62,213 n.37 (2003) (denying request for an evidentiary hearing because the “determinations made in this proceeding rest on the facts, to which any attendant motivations are irrelevant”).

<sup>62</sup> *Weaver’s Cove Energy, LLC et al.*, 114 FERC ¶ 61,058 at PP 46-48 (2006); *see supra* note 61.

<sup>63</sup> *See Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (affirming the Commission’s decision that studies submitted by an organization alleging a declining demand did not undermine the showing of public need because “[i]n keeping with its policy, the

agreements to make judgments about the needs of individual shippers,<sup>64</sup> and the D.C. Circuit has agreed that market studies allegedly showing a declining demand do not undermine project need established through precedent agreements.<sup>65</sup>

Finally, NJCF argues that an evidentiary hearing is required to “test the applicant’s motives and credibility” because of its interest in achieving profit for its members’ shareholders and because of “the very presence of” affiliate transactions.<sup>66</sup> Providing economic value to a project sponsor does not raise an issue requiring an evidentiary hearing.<sup>67</sup> If this absurd contention were true, it would effectively require a formal evidentiary hearing for all projects considered by the Commission under Section 7 of NGA—a proposition that the Commission has expressly rejected.<sup>68</sup> The general “allegations or speculations [regarding an applicant’s motive] without an adequate proffer to support them” are unfounded and should be disregarded by the Commission<sup>69</sup> and not further reviewed in a full evidentiary hearing.

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Commission concluded that the evidence that the Project was fully subscribed was adequate to support the finding of market need”).

<sup>64</sup> *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 at P 66 (2012) (“[I]t is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.”).

<sup>65</sup> *Myersville Citizens for a Rural Cmty.*, 783 F.3d at 1311.

<sup>66</sup> NJCF Protest at 25-26, 36, 41.

<sup>67</sup> *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045 at P 84 (2012) (denying a request for an evidentiary hearing on “questions regarding Millennium’s credibility”).

<sup>68</sup> *Midcontinent Express Pipeline LLC et al.*, 127 FERC ¶ 61,164 at P 27 (2009) (“Although section 7 of the NGA provides for a hearing when an applicant seeks a certificate of public convenience and necessity, section 7 does not require that all such hearings be trial-type evidentiary hearings.”).

<sup>69</sup> *Algonquin Gas Transmission Co.*, 75 FERC ¶ 61,351, pp. 62,123-24 (1996) (quoting *General Motors Corporation v. Federal Energy Regulatory Commission*, 656 F.2d 791, 798 n.20 (1981)); *Southern Natural Gas Co.*, 110 FERC ¶ 61,052, p. 61,227 (2005).

4. A paper proceeding allows for thorough consideration of any potential adverse impacts and required mitigation measures.

A formal hearing is not required to analyze adverse impacts and mitigation measures. A paper proceeding provides a full opportunity for public participation and allows for a thorough review of any potential adverse effect. Environmental and economic impacts and mitigation measures are considered as a part of the Commission's certificate review process. The environmental review occurs pursuant to the National Environmental Policy Act. All stakeholders have numerous and sufficient opportunities to present written materials on impacts and requested mitigation measures, including in comments on the draft environmental impact statement.<sup>70</sup> Moreover, this process allows the Commission to gather information on the written record related to impacts and mitigation measures through data requests and to incorporate mitigation measures as certificate conditions.<sup>71</sup> The Commission has actively used the data request process in this proceeding and has received numerous written submissions. A paper proceeding is thus providing a sufficiently thorough record for the Commission's review of the PennEast Project.

### **C. Policy Considerations Weigh Against an Evidentiary Hearing.**

The NJCF Protest raises a series of irrelevant policy arguments in an attempt to bolster its request for an evidentiary hearing. However, these policy considerations provide no basis for the trial-type cross examination that NJCF seeks. With these policy considerations, the NJCF Protest draws the conclusions that the significant public

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<sup>70</sup> See *ANR Pipeline Co. et al.*, 55 FERC ¶ 61,481, p. 62,591 (1991) (affirming on rehearing a denial of a request for a trial-type hearing on environmental issues regarding a compressor station in part because of the sufficient opportunity to comment on the EA); see also *Columbia Gas Transmission Corp. et al.*, 48 FERC ¶ 61,050, p. 61,272 (1989).

<sup>71</sup> See *supra* note 37.

response to the Project in the form of written submissions demonstrates a need for a hearing. To the contrary, it is clear that the paper hearing in this proceeding is effectively providing opportunity for public involvement and giving the Commission an adequate evidentiary record on which to make a final determination. No evidentiary hearing is necessary, nor would it be constructive in assisting the Commission in gathering information needed to make a final determination on the merits in this proceeding.

1. The *Cajun Electric* case affords no basis for an evidentiary hearing.

NJCF relies on *Cajun Electric* as support for its assertion that an evidentiary hearing is required due to “anticompetitive effects.”<sup>72</sup> The *Cajun Electric* case concerned the Commission’s approval of *market-based rates* for an electric utility. Service on the PennEast Project, on the other hand, will be subject to cost of service-based recourse rates, upon receipt of approval from the Commission of the just and reasonable rates. Accordingly, the anticompetitive concerns in *Cajun Electric* due to exertion of monopoly power<sup>73</sup> do not exist in this proceeding and no evidentiary hearing is required.

NJCF fails to allege any “anticompetitive effects” that are comparable to the concerns the Commission addressed in *Cajun Electric*. NJCF’s suggestion that the PennEast Project is the product of unfair competition resulting in other projects in the same market being less viable due to affiliated contracts<sup>74</sup> is unsubstantiated and not consistent with Commission precedent.<sup>75</sup> The fact that PennEast will introduce further

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<sup>72</sup> NJCF Protest at 47.

<sup>73</sup> See *Cajun Elec. Power Co-op., Inc. v. F.E.R.C.*, 28 F.3d 173, 176 (D.C. Cir. 1994) (“The critical issue in this case involves Entergy’s move from regulated to market pricing for its wholesale sales of electric power.”).

<sup>74</sup> NJCF Protest at 48.

<sup>75</sup> See, e.g., *Guardian* at p. 61,967 (rejecting an argument that a proposed project “is the product of unfair competition because [an LDC affiliate shipper on *Guardian*] is leveraging its monopoly power over the

competition in the markets it intends to serve is a benefit, not an adverse impact, under the Certificate Policy Statement.<sup>76</sup> This competition creates an incentive to lower costs and rates and achieve increased efficiency.<sup>77</sup> Accordingly, there are no anticompetitive concerns with the PennEast Project that lead to the type of evidentiary hearing ordered in *Cajun Electric*.

2. An evidentiary hearing would not provide a benefit to the public.

NJCF distorts the holding in the *Iroquois* decision claiming that it requires the Commission to initiate an evidentiary hearing when a Project receives a certain level of public comment.<sup>78</sup> Although the Commission decided based on the circumstances at the time, including the amount of public comments received, to hold a hearing on a limited issue in that case, the *Iroquois* Order expressly stated that “the Commission does not believe it is required *as a matter of law* to hold a trial-type hearing in this matter.”<sup>79</sup>

The level of public response in a proceeding does not necessitate an evidentiary hearing. When a Project receives a significant volume of filings, this demonstrates that the Commission has provided “ample opportunity to present . . . views through the

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local distribution of gas to facilitate its parent’s entry into the interstate market”); *see also Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 at P 37 (2009) (“We find that Ruby’s proposal is consistent with Commission policy, as any adverse impacts of the proposal on competing pipelines and their existing customers will be the result of fair competition.”); *id.* at P 39 (“There is no evidence that, to the extent El Paso may lose throughput as a result of Ruby’s operation, this loss will be the result of unfair competition or improper activities on the part of either Ruby or its affiliate, El Paso.”).

<sup>76</sup> *Guardian* at pp. 61,962, 61,978 (holding that effects on existing pipelines and their customers from new pipeline capacity is competitive in nature and is not considered adverse by the policy statement and that impacts on a competing pipeline and its existing customers will be the result of competition that will lead to future benefits to all market participants).

<sup>77</sup> *Id.* at pp. 61,966, 61,976 (“[T]he Commission’s policy to promote competition is well established” and is furthered giving an incentive for existing pipelines “to discipline costs to maintain their customers and . . . price their services based on competition.”).

<sup>78</sup> NJCF Protest at 52.

<sup>79</sup> *Iroquois Gas Transmission Sys., L.P., et al.*, 52 FERC ¶ 61,091, p. 61,343 (1990) (emphasis added).

submission of written comments.”<sup>80</sup> Moreover, the public comments received on the Project are similar, in both amount and substance, to other recent proceedings where the Commission rejected requests to initiate an evidentiary hearing.<sup>81</sup> A formal hearing would not provide any additional opportunities for stakeholders to express their views and there are no other circumstances presented in the PennEast proceeding suggesting the public would benefit from a hearing. Consequently, the request for a hearing should be denied.

3. The Commission’s standards of conduct are irrelevant to determining if the Project is in the public convenience and necessity.

NJCF claims that a hearing must be held to review the “potential for future abuse” under the Commission’s standards of conduct.<sup>82</sup> The Commission does not include speculation of legal violations in a certificate proceeding—all natural gas companies subject to the Commission’s jurisdiction are required to, and it is presumed that such companies will, comply with all Commission policies, rules, and regulations as well as other applicable laws and regulations. It would be arbitrary and capricious, and therefore not permissible, for the Commission, as suggested by NJCF, to hold a hearing speculating that a pipeline would operate in a noncompliant manner.

Furthermore, the Commission relies on its regulatory oversight, specifically the standards of conduct governing a pipeline’s operations, when explaining why the Commission does “not distinguish between pipelines’ precedent agreements with affiliates or independent marketers in establishing the market need for a proposed

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<sup>80</sup> *Weaver’s Cove Energy, LLC et al.*, 114 FERC ¶ 61,058 at PP 46-48 (2006).

<sup>81</sup> See, e.g., *Florida Southeast Connection, LLC et al.*, 154 FERC ¶ 61,080 at PP 47-48 (2016); *Constitution Pipeline Co., LLC et al.*, 149 FERC ¶ 61,199 at P 20 (2014).

<sup>82</sup> NJCF Protest at 51-52.

project.”<sup>83</sup> Thus, there is no issue to be reviewed in a hearing related to the standard of conduct regulations.

4. An evidentiary hearing is not required to assess the impacts on the New Jersey LDCs’ ratepayers.

NJCF advocates for the Commission to hold an evidentiary hearing to verify the impacts on existing pipelines and their “captive customers.”<sup>84</sup> PennEast has previously demonstrated in the instant proceeding that the Project will create no adverse impacts on existing pipelines and their captive customers.<sup>85</sup> NJCF nevertheless asserts that by allowing affiliated shippers to avoid renewing their contracts with existing pipelines, the “captive customers” of existing pipelines will be forced to pay higher rates.<sup>86</sup> As discussed in the Concentric Reply, this argument relies on numerous unsupported assumptions that (1) shippers on PennEast will in fact relinquish their capacity on existing pipelines, (2) such capacity would not then be re-contracted, and (3) these pipelines would successfully raise their rates in a subsequent rate case. The Concentric Reply addresses and refutes these assumptions in detail as contrary to existing market conditions and finds a lack of harm to existing pipelines.<sup>87</sup> The written record is sufficient for the Commission to make a determination on the existence of any impacts to captive customers.

Moreover, an evidentiary hearing is not required because Commission policy and precedent clearly address competition with existing pipelines and their shippers as a

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<sup>83</sup> *Millennium Pipeline Co., L.P., et al.*, 100 FERC ¶ 61,277 at P 57 (2002).

<sup>84</sup> NJCF Protest at 53.

<sup>85</sup> Application at 14-15.

<sup>86</sup> NJCF Protest at 53.

<sup>87</sup> Concentric Reply at PP 56-59.

benefit, not an adverse impact. The potential that customers may relinquish their capacity on existing pipelines is the type of competition the Certificate Policy Statement is designed to promote. This competition creates an incentive for pipelines to discipline their costs and lower their rates.<sup>88</sup> An evidentiary hearing is not required to determine that competition in existing markets outweighs any alleged potential adverse impacts on an existing pipeline in the same area.<sup>89</sup> The competitive alternative that PennEast will provide furthers “the Commission’s policy to promote competition” by giving an incentive for existing pipelines “to discipline costs to maintain their customers and . . . price their services based on competition.”<sup>90</sup> Accordingly, there is no issue of material fact necessitating a hearing.

### **III. CONCLUSION**

For the reasons stated herein, PennEast respectfully requests that the Commission (i) consider NJCF’s filing as a late protest, (ii) accept PennEast’s motion for leave to answer and the Answer filed herewith, and (iii) reject the NJCF Protest and all the arguments presented therein. In the event that the Commission construes the NJCF Protest as a complaint filed pursuant to Rule 206, PennEast respectfully requests that the Commission (i) consider this Answer PennEast’s timely response, (ii) reject all of the

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<sup>88</sup> See *Guardian* at p. 61,962 (rejecting an argument substantially similar to the one promoted here that a project proposed to serve the same market would economically harm an existing pipeline and its shippers).

<sup>89</sup> See *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, p. 61,647 (1996) (citing *CNG Transmission Corporation*, 43 FERC ¶ 61,500 (1988)) (refusing to initiate a hearing “based on its policy decision that the benefits of competition, which would be lost if the Commission interfered with a customer’s decision to switch suppliers when its contract expired, outweighed the potential adverse impacts on the previous supplier”); see also *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 at P 39 (2009) (“We find any potential adverse impacts on existing pipelines are outweighed by the benefits to gas consumers from the increased reliability and flexibility that will result from being able to access additional supplies of competitively-priced domestic gas.”).

<sup>90</sup> *Guardian* at p. 61,976.

requests made by NJCF, and (iii) find there is no merit in the complaint. PennEast submits that an evidentiary hearing is unwarranted and unnecessary for the reasons stated herein, including the fact that NJCF has raised no disputed issue of material fact that cannot be addressed in a paper proceeding, and respectfully requests that the Commission not initiate an evidentiary hearing in either a separate proceeding or the existing pending certificate proceeding.

Respectfully submitted,

/s/ Frank H. Markle

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July 5, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Houston, TX, this 5th day of July, 2016.

/s/ Daniel Lee

Daniel Lee

Counsel for PennEast Pipeline Company, LLC