UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	Docket No. PL18-1-000

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

The Commission's April 29, 2018, Notice of Inquiry ("NOI") initiating this proceeding[1] seeks input on whether—and, if so, how—the Commission should revise its process for determining when a proposed natural gas pipeline project "is or will be required by the present or future public convenience and necessity"[2] under Section 7 of the Natural Gas Act ("NGA").[3] Specifically, the Commission seeks comments in four areas: (1) its methodology for determining whether there is a need for a proposed project; (2) its consideration of the potential exercise of eminent domain and of landowner interests related to a proposed project; (3) its evaluation of the environmental impact of a proposed project; and (4) whether there are specific changes that could be made to improve the efficiency and effectiveness of the certificate process.[4]

The New Jersey Division of Rate Counsel ("NJ Rate Counsel") appreciates the opportunity to comment on the NOI and will focus its comments on the first two sets of questions posed by the Commission. Specifically, NJ Rate Counsel urges the Commission to revise its procedures for considering certificate applications to conduct a

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[1] Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042, P 1 (2018) ("NOI").

[2] *Id.*

[3] 15 U.S.C. § 717f(c)(1)(A).

[4] NOI P 1.

more rigorous and thorough examination of the need for proposed pipelines. While precedent agreements are an indication of demand, the Commission must evaluate whether they in fact represent new demand or simply a demand shift from an existing pipeline to a new one. If the latter, then any asserted need for the additional capacity may be illusory. If the Commission nonetheless certifies the proposed project, it must act to protect captive customers of existing pipelines to ensure that they are not forced to choose between giving up natural gas service and paying prohibitively expensive rates.

In addition, the Commission needs to revise its procedures to protect landowners from eminent domain proceedings initiated by pipelines that ultimately may fail to secure necessary state permits, especially permits required by the Clean Water Act ("CWA"). To avoid the injustice and waste of resources accompanying the taking of property by a pipeline that will never be built, the Commission should either: (1) condition the exercise of eminent domain on a pipeline obtaining necessary CWA Section 401 permits and other required state permits; or (2) delay the processing of a certificate application until the applicant has obtained the necessary state permits.

INTEREST OF RATE COUNSEL

NJ Rate Counsel is the regulatory agency charged with protecting the interests of New Jersey ratepayers, including natural gas consumers. N.J. Stat. Ann. § 52:27EE-46 *et seq*. NJ Rate Counsel has actively participated in natural gas pipeline proceedings at the Commission and most recently was an active intervenor opposing the certification of the pipeline proposed by PennEast Pipeline Company, LLC in Docket No. CP15-588. NJ Rate Counsel supports efforts to ensure adequate pipeline capacity is available to meet the natural gas needs of New Jersey natural gas consumers in winter, while seeking to protect captive New Jersey customers—*i.e.*, those who lack the ability to shift to another

source of supply—from the excessive costs that may result from non-captive customer shifts to new pipelines. To meet these objectives, NJ Rate Counsel advocates for a rigorous review of need before new pipeline facilities are certificated by the Commission. In addition, NJ Rate Counsel urges that the Commission protect New Jersey citizens from the unjust taking of their land by pipelines that do not have, and may never obtain, the requisite state construction permits.

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COMMENTS

I. NJ RATE COUNSEL SUPPORTS THE COMMISSION'S RE-EXAMINATION OF ITS METHOD FOR EVALUATING THE NEED FOR NEW PIPELINE PROJECTS

A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?

NJ Rate Counsel supports inquiry into the Commission's process for evaluating the need for a proposed pipeline and urges that changes to that process be made to ensure a more rigorous assessment of a project applicant's assertion of need. Specifically, the

Commission should not treat the presence of precedent agreements as dispositive evidence of need or as establishing any form of presumption of need. Such agreements may be evidence of *desire* for a project, but not necessarily *need* for it.

The interstate pipeline system is a network. On that network, some local distribution companies ("LDCs") have the luxury of receiving service from among multiple pipelines or from a newly-proposed pipeline. Such LDCs may temporarily maintain contracts for capacity on an existing pipeline while signing a precedent agreement for capacity on a proposed pipeline. In this case, the precedent agreement is not evidence of need; it is simply evidence of demand being shifted from one pipeline to another.

In the above example, there can be severe consequences if the Commission grants a certificate to the proposed pipeline. Not all LDCs and other pipeline customers have the luxury of choice; many customers are captive to a single pipeline. The Commission must protect these captive customers, who will face rapidly escalating rates as increasing numbers of customers with other options exit their existing pipeline arrangements, leaving the remaining customers to pay for the cost recovery shortfall. The Commission can protect those customers by evaluating carefully whether the proposed new capacity is in fact required to serve new load or expected load growth, or is instead merely intended to parasitically serve existing load through the shift of service from existing to new pipeline facilities.

A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider? For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

Of the factors listed in the Commission's question, NJ Rate Counsel believes the most important considerations in assessing need are market demand and resilience and reliability. These evaluations will necessarily be fact intensive and case-specific. For example, while a precedent agreement can be evidence of market demand, it should not be viewed as *sufficient* evidence of market demand. In the example given above, the LDC may have adequate service on an existing pipeline. But the LDC may recognize that the existing pipeline is an aging facility likely to have ever-increasing maintenance costs. An opportunity may arise for the LDC to sign a precedent agreement for a proposed pipeline at a lower rate. The LDC will, of course, not immediately turn back capacity on the existing pipeline—it will maintain its existing contract until the new pipeline is operational. But, once that happens, the LDC will undoubtedly turn back its now excess capacity on the existing pipeline. In these circumstances, there was no "need" for additional capacity, the precedent agreement notwithstanding.[5] To avoid the waste of overbuilt capacity, the Commission must evaluate not just whether there currently are contracts for existing and proposed pipelines, but whether contracts will continue and whether the regional market demands the proposed additional capacity.

Similarly, resilience and reliability are important goals. As the Commission is aware, natural gas is an increasingly important resource, not just for home heating during

[5] There may be need for a more active regulator to assure economic pipeline service, but that issue is beyond the scope of this NOI.

a "polar vortex" or other winter event, but also as a fuel for electric generation. Of course, in most circumstances, an additional pipeline will provide some added increment of resilience and reliability. But the Commission must carefully examine any such claims, and should require a specific demonstration and quantification of benefits from claimed increases in reliability and resilience.

To illustrate reliability and resilience benefits, a proposed pipeline may demonstrate that its completion will provide access to different gas supplies or storage resources. In such circumstances, the Commission must evaluate whether the proposed pipeline is truly offering a new gas supply. Additionally, proponents of a proposed new pipeline may assert that its completion can alleviate potential gas shortages. But again, the Commission should not accept such a claim at face value and must evaluate carefully whether the new pipeline would in fact solve an identified shortage problem. For example, it may be that the reason for the gas shortage was that wells were frozen-in. Additional pipeline capacity to the same frozen-in well field would not solve the gas shortage problem. Thus, while reliability and resilience are important considerations, any such claims should be accompanied by detailed case-specific data and should be scrutinized by the Commission on a case-specific basis. Moreover, even if the Commission were to conclude that the new facility would alleviate an identified shortage, the Commission should also consider whether the costs associated with alleviating that shortage should be borne in by those customers facing the shortage.

In contrast, claims that a proposed project will promote competition or enhances the functioning of the gas markets should be secondary considerations that should be addressed only after the Commission has required mitigation to protect captive customers

who do not benefit from the competition. Forcing pipelines to provide improved service at lower costs by means of competition is an admirable goal. But competition should not be the desired end; the Commission's goal should be the provision to all customers of economic gas service. The reason this is the case is that less competitively priced pipelines are not the ones punished by their uncompetitive rates. Pipelines are, as a matter of Constitutional law, entitled to an opportunity to recover their cost of service. Because rates are calculated by dividing pipeline costs by contracted demand, rates increase as customers exit the system. In other words, when customers who are able to do so leave, rates for captive customers will increase to continue to give the pipeline the opportunity to recover its costs. Moreover, it is Commission policy that pipelines may offer discounted rates. In doing so, the pipelines are permitted to include a "discount adjustment," that is, an adder that represents revenues the pipeline lost by giving a discount to a customer, to rates paid by captive customers, further inflating their rates. The result can be a "death spiral," which both wastes existing facilities and injures captive customers.

Thus, while increased competition and better functioning gas markets are admirable goals, those goals should be secondary to ensuring that captive customers have adequate and economic service. The Commission should seek first to mitigate harm to customers who will not directly benefit from the competition.

A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that

could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

The Commission should more closely examine precedent agreements and consider additional evidence for a proposed project. In the responses to questions A1 and A2 above, NJ Rate Counsel described a hypothetical example of an LDC taking service from an existing pipeline and being presented with an opportunity to sign a precedent agreement with a proposed pipeline. The LDC in the example has the ability to protect itself from any downside from doing so. First, with respect to the existing pipeline, the LDC can maintain its contracts and negotiate termination dates that reflect the in-service date of the proposed pipeline. When the new pipeline enters service, the LDC will turn back the excess capacity on the existing pipeline—yielding higher rates for captive customers. Presumably, the proposed pipeline will assure the LDC that service will be provided at a lower rate, and the LDC will not have to pay those rates to the new pipeline until it enters service. If the proposed pipeline is not built, the LDC still has its capacity on the existing pipeline, while the LDC has shielded itself from the development costs of the unbuilt pipeline. If the proposed pipeline is sponsored by a corporate affiliate of the LDC, there are even greater benefits to the parent company. Thus, a precedent agreement does not necessarily demonstrate market demand, but only the ability of a customer to take advantage of a market opportunity.[6]

The Commission has substantial additional evidence readily available to it to evaluate precedent agreements and determine whether there is in fact insufficient existing

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[6] *See, e.g.*, Comments of the New Jersey Division of Rate Counsel at 8, *PennEast Pipeline Co.*, Docket No. CP15-558-000 (Sept. 12, 2016), eLibrary No. 20160912-6003 ("NJRC PennEast Comments").

capacity or whether the proposed project will be parasitic to existing pipelines. For example, New Jersey LDCs regularly file long-range forecasts of demand for natural gas, which are publicly available. In some cases, the forecasts are tested in on-the-record proceedings.[7] Rate Counsel understands that many other states, if not all other states, require similar public filings by their LDCs. Thus, if the Commission is presented with evidence that an LDC has signed a precedent agreement for capacity on a proposed project, but it is reporting little or no load growth to its state regulator, it can be presumed absent a contrary showing that the new capacity will only supplant capacity on an existing pipeline. The precedent agreement is parasitic load.

The Commission may be presented with other evidence demonstrating an absence of need for additional capacity. For example, the Commission may be presented with evidence that an LDC is turning back capacity on an existing facility. If that same LDC has signed a precedent agreement on a proposed facility, then—absent another explanation—a reasonable conclusion is that the precedent agreement is parasitic load. Similarly, the Commission may be presented with evidence of unsubscribed pipeline capacity or low utilization rates. While a low utilization rate at certain times of the year is not determinative (for example, a pipeline primarily serving winter heating load will

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[7] *See id*. at 5. *See also, In re Pub. Serv. Elec. & Gas Co.'s 2016/2017 Annual BGSS Commodity Charge Filing for its Residential Gas Customers Under its Periodic Pricing Mechanism and for Changes in its Balancing Charge*, Docket No. GR16060486 (N.J. Bd. Pub. Utils.); *In re the Petition of S. Jersey Gas Co. to Revise the Level of its Basic Gas Supply Serv. ("BGSS") Charge and to Revise the Level of its Conservation Incentive Program Charges for the Year Ending Sept. 30, 2017,* Docket No. GR16060483 (N.J. Bd. Pub. Utils.); *In re the Petition of Pivotal Util. Holdings, Inc. d/b/a Elizabethtown Gas to Review its Periodic Basic Gas Supply Serv. Rate,* Docket No. GR16060485 (N.J. Bd. Pub. Utils.)*; In Re: UGI Utils., Inc. 1307(f) Annual Purchased Gas Cost Filing 2016,* Docket No. R-2016-2543309 (Pa. Pub. Util. Comm'n); *In Re: UGI Penn Gas, Inc. 1307(f) Annual Purchased Gas Cost Filing 2016,* Docket No. R-2016-2543311 (Pa. Pub. Util. Comm'n)*;* and *In Re: PECO Purchased Gas Cost No. 33 Filing Effective Dec. 1, 2016,* Docket No. R-2016-2545925 (Pa. Pub. Util. Comm'n).

have little use in summer), a low utilization rate may be evidence that customers do not need their subscribed capacity and will turn the capacity back when contracts end.

The Commission also asks about the potential litigation risk caused by the examination of factors other than precedent agreements as evidence of regional demand. NJ Rate Counsel sees little additional risk. Questions such as whether a pipeline is needed, does the pipeline provide benefits, and do benefits of the proposed pipeline outweigh harms (whether to the environment or to captive customers on other pipelines), are already fact-intensive and unique to each project. The Commission has no ability to avoid such questions: it has a statutory duty to address them. And the gold standard for resolving these factual issues is an on-the-record hearing before an administrative law judge.[8]

Indeed, rather than limit the evidence that may be considered to precedent agreements, there may be reasons to broaden what is reviewed. The Commission may seek evidence from both the applicant and also intervenors. For example, the Commission has issued substantive data requests in the *Spire STL Pipeline* proceeding (CP17-40) to both the applicant and an intervenor that operates an affected pipeline.[9] While not a participant to that proceeding, NJ Rate Counsel applauds the Commission's

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[8] For example, NJ Rate Counsel submitted evidence in the PennEast proceeding, Docket No. CP15-558, to the Commission in pipeline proceedings that a project was not needed because the LDCs that had signed precedent agreements had sufficient existing capacity, those LDCs were turning back capacity, those LDCs had made public filings with state regulators showing flat demand, and that existing facilities were not fully subscribed. NJRC PennEast Comments at 5-8. NJ Rate Counsel asserted that such evidence demonstrated that the additional capacity on the proposed new pipeline was not needed. NJ Rate Counsel further argued that the competing evidence that the proposed project had precedent agreements was insufficient.

[9] Letter Requesting Additional Information from Spire STL Pipeline, *Spire STL Pipeline, LLC*, Docket No. CP17-40-000 (Feb. 21, 2018), eLibrary No. 20180221-3024 ("Spire STL Pipeline Data Request"); Letter Requesting Additional Information from Enable Midstream Partners, *Spire STL Pipeline, LLC*, Docket No. CP17-40-000 (Feb. 21, 2018), eLibrary No. 20180221-3025 ("Enable Midstream Partners Data Request").

efforts to assess impacts on, among other things, rates of captive customers if the proposed pipeline is built.

In short, by issuing a policy statement that the Commission will consider evidence beyond a precedent agreement, the Commission will be recognizing fully its duty to review a certificate application thoroughly and to determine based on relevant evidence whether there is in fact a need for a proposed project.

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

The Commission's focus should be on the need for a project. As explained in the responses above, a precedent agreement, in isolation, is not determinative of need. However, special scrutiny should be given when the precedent agreement is with an affiliate. If an LDC can choose between substantively equivalent service from an affiliated or unaffiliated pipeline, the LDC will almost certainly choose the affiliate. NJ Rate Counsel does not suggest such a choice is nefarious; it may be a sound business decision. For purposes of this NOI, the important point is that when a customer signs a precedent agreement for service on an affiliate's proposed pipeline, the Commission should investigate why the customers took this action. Can the new contract be explained and justified by load growth, new business, lack of reliable existing transport capacity, demonstrated need for new sources of gas supply, or other explanation? Or is it likely that the LDC will turn back existing capacity when the affiliate's pipeline commences operation? In other words, affiliate precedent agreements merit additional attention due, *inter alia,* to the appearance of a possible conflict of interest between the LDC and affiliated entities.

A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission's consideration of need or should the Commission consider whether the contracts are subject to state review?

NJ Rate Counsel's concern is that precedent agreements, particularly those with affiliates, do not accurately reflect need for additional pipeline capacity. Focusing solely on the proposed pipeline and its precedent agreements provide an inappropriately optimistic view of the need for the project. This narrow focus necessarily excludes the impacts of the new pipeline on existing pipelines, and more importantly, the impacts on captive customers of existing pipelines who will pay rapidly escalating rates following customer shifts to the new pipeline. The Commission needs to look more broadly in order to get the "big picture."

A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission's determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?

Because of the interrelated nature of the questions, NJ Rate Counsel will respond to the Commission's questions at A6 through A8 collectively in the response to A8.

A7. Should the Commission consider requiring additional or alternative evidence of need for different end uses? What would be the effect on pipeline companies, consumers, gas prices, and competition? Examples of end uses could include: LDC contracts to serve domestic use; contracts with marketers to move gas from a production area to a liquid trading point; contracts for transporting gas to an export facility; projects for reliability and/or resilience; and contracts for electric generating resources.

Because of the interrelated nature of the questions, NJ Rate Counsel will respond to the Commission's questions at A6 through A8 collectively in the response to A8.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?

The Commission should of course consider all of the evidence presented in each specific case.

In certain cases, the use of natural gas transported by a pipeline may suggest the need for a proposed pipeline. For example, a facility proposed to serve a new gas-fired electric generator strongly suggests that there is new demand that is not parasitic to existing facilities. While global natural gas markets fluctuate, a proposed pipeline to serve a new LNG terminal also suggests new demand. In other circumstances, however, the Commission may need to inquire further and should not presume the intended usage necessarily indicates new demand. For example, a proposed pipeline may be justified by long-term precedent agreements with LDCs. If those precedent agreements result in an equivalent capacity turn back on existing pipelines once the proposed pipeline enters service, then the precedent agreements with LDCs are not evidence of additional need. Alternatively, the precedent agreements may be with LDCs that are expanding service to underserved territories and may actually reflect new demand. In that case, the LDCs' use of the gas would show additional need.

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

NJ Rate Counsel has illustrated above the harm that may result if the Commission undertakes an unduly narrow inquiry concerning a proposed pipeline and the related precedent agreements. Such a focus fails to account for, or mitigate, harm to captive

customers on existing facilities. Pipelines do not operate in a vacuum; the impacts of a pipeline on other pipelines in the region, and on the captive customers of those other pipelines, should be considered before the Commission determines that a pipeline is needed.

An expanded, regionalized approach is not a radical concept nor one foreign to the Commission. In the electric industry, in Order 1000[10] the Commission mandated the development of interregional transmission planning processes. On a more localized basis, in Order 2003,[11] the Commission adopted generator interconnection procedures that examine the impacts on both the directly connected transmission system, as well as on "Affected Systems." While the physics of electric transmission and gas transportation are radically different, the fact remains that expansion of the natural gas transportation system in one location can have pronounced affects elsewhere. The Commission needs to consider these impacts.

As noted above, the Commission has demonstrated its awareness of the impacts across pipelines. In Docket No. CP17-40, for example, the Commission has asked

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[10] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011), *reh'g denied*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012), *on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *review denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (per curiam), *reh'g en banc denied*, No. 12-1232 (D.C. Cir. Oct. 17, 2014).

[11] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *modified*, 68 Fed. Reg. 69,599 (Dec. 15, 2003), *clarified*, 69 Fed. Reg. 2135 (Jan. 14, 2004), 106 FERC ¶ 61,009 (2004), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008).

detailed questions of the pipeline proponent[12] and the operator of another pipeline in the region[13] about the potential impacts of the proposed pipelines on captive customers. NJ Rate Counsel supports and encourages such inquiries by the Commission where the case-specific facts require them.[14]

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission's environmental review); (2) if demand in a new project's markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

NJ Rate Counsel reiterates the importance of examining the need for a proposed project beyond the presentation of precedent agreements. It is of critical importance to captive customers of existing pipelines that the Commission ensure that the demand purportedly shown by precedent agreements is *new* demand and not simply parasitic demand from existing pipelines. The need to evaluate whether precedent agreements in fact represent new demand is especially important when the precedent agreements are between affiliates.

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[12] Spire STL Pipeline Data Request.

[13] Enable Midstream Partners Data Request.

[14] Similarly, and as mentioned *supra*, if the case-specific facts demonstrate that a proposed pipeline is needed to alleviate problems being faced by a limited set of customers or geographic region, then the Commission should consider how best to ensure that the associated costs flow to those being benefitted.

II. NJ RATE COUNSEL URGES THE COMMISSION TO REFORM ITS PROCESS TO PROTECT LANDOWNER RIGHTS AND TO PREVENT THE TAKING OF LAND WHEN A PIPELINE DOES NOT HAVE, AND MAY NEVER OBTAIN, REQUIRED PERMITS.

B1. Should the Commission consider adjusting its consideration of the potential exercise of eminent domain in reviewing project applications? If so, how should the Commission adjust its approach?

The Commission needs to adjust its consideration of the exercise of eminent domain so as to be more protective of land owner interests and prevent premature use of eminent domain when a pipeline may not be built. To accomplish these objectives, the Commission should condition the exercise of eminent domain on the pipeline having completed its state permitting process, particularly required permits under the CWA. Alternatively, the Commission should only issue a certificate to a pipeline that has obtained necessary CWA and other state permits.

This adjustment is needed because the Commission's practice has been to issue certificates of public convenience and necessity to a proposed pipeline even if that pipeline does not have all necessary permits, including a CWA Section 401 certification from the State.[15] But obtaining a CWA Section 401 is an absolutely critical milestone

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[15] *See, e.g.*, *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, app. A, P 10 (issuing a Certificate to the PennEast Pipeline Company, LLC ("PennEast") conditioned upon it receiving "all applicable authorizations required under federal law" notwithstanding that the New Jersey Department of Environmental Protection ("NJDEP") has not issued a CWA Section 401 certification), *reh'g denied*, 163 FERC ¶ 61,159 (2018); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 187 (2017) (issuing a Certificate to Mountain Valley Pipeline, LLC ("MVP") conditioned upon it "obtain[ing] all necessary federal and state permits and authorizations, including the [Section 401] water quality certifications" notwithstanding that neither the West Virginia Department of Environmental Protection ("WVDEP") nor the Virginia Department of Environmental Quality ("VADEQ") had issued Section 401 certifications at that time), *reh'g denied*, 163 FERC ¶ 61,099 (2018); *Millennium Pipeline Co.*, 157 FERC ¶ 61,096, P 72 (2016) (issuing a Certificate to Millennium Pipeline Company, LLC ("Millennium") conditioned upon it "receiv[ing] all authorizations required under federal law . . . includ[ing] certification under Section 401 of the Clean Water Act" notwithstanding that the New York State Department of Environmental Conservation ("NYSDEC") did not issue a 401 certification), *reh'g denied*, 161 FERC ¶ 61,194 (2017); *Constellation Pipeline Co.*, 149 FERC ¶ 61,199, app. P 8 (2014) (issuing a Certificate to Constitution Pipeline Company, LLC ("Constitution") conditioned upon it "receiv[ing] all applicable authorizations required under federal law" notwithstanding that the NYSDEC did not issue a 401 certification), *reh'g denied*, 154 FERC ¶ 61,046

for a pipeline. The absence of such permits (or a waiver of the permit requirement) is a bar to pipeline construction. The CWA provides that no "Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall be granted until the certification required by" CWA Section 401 is "obtained or has been waived."[16] The CWA Section 401 water quality certification requires an applicant for any federal license or permit to obtain "a certification *from the State* in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions" of the CWA.[17] Thus, at present, the Commission and the state proceedings progress on separate tracks with little apparent coordination.

Under the Commission's current practice, the issuance of a certificate by the Commission also awards the power of eminent domain to a pipeline applicant before it is certain that the applicant will obtain the necessary CWA Section 401 certification to build its pipeline.[18] This practice does not adequately take landowner interests into account because the pipeline may proceed to take land by eminent domain even though the pipeline may never obtain the necessary permits and may never be built. The rationale for granting the power of eminent domain is that the land is designated for a

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(2016).

[16] 33 U.S.C. § 1341(a)(1).

[17] *Id.* (emphasis supplied).

[18] *See, e.g.*, *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, & Maintain a Nat. Gas Pipeline Over Tracts of Land in Giles Cty., Craig Cty., Montgomery Cty., Roanoke Cty., Franklin Cty., & Pittsylvania Cty., Virginia*, No. 7:17-CV-00492, 2018 WL 648376, at *1 (W.D. Va. Jan. 31, 2018), *objections sustained in part and overruled in part*, No. 7:17-CV-00492, 2018 WL 1193021 (W.D. Va. Mar. 7, 2018) (stating that MVP filed for easements on October 24, 2017, eleven days after the Commission issued MVP a Certificate and before either state agency issued a 401 certification to MVP, because "MVP has been unable to acquire the properties identified in the complaint by agreement"); *Constitution Pipeline Co., LLC v. A Permanent Easement for 0.26 Acres & Temporary Easement for 0.26 Acres*, No. 1:14-CV-2047, 2015 U.S. Dist. LEXIS 181579, at *5–6 (N.D.N.Y. Feb. 21, 2015) (granting Constitution an easement despite the fact that it was "undisputed that Constitution's re-application for a CWA 401 certificate [was] still pending").

"public purpose;" but if that purpose cannot be achieved for failure to obtain permits, the grant of eminent domain power is not justified.[19]

The Commission's practice also undermines a State's right to be the primary regulator under the CWA. Through the Section 401 certification requirement, "Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."[20] In fact, the Second Circuit has referred to Section 401 as "a statutory scheme whereby a single state agency effectively vetoes an energy pipeline that has secured approval from a host of other federal and state agencies."[21] By issuing a certificate, and granting the power of eminent domain while a State's decision under CWA Section 401 is pending, the Commission infringes on the State's power to protect its landowners against the unnecessary taking of their land. Furthermore, the Commission strips the State of its right to act on behalf of its landowners.[22]

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[19] *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . ."); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–164 (1896) (interpreting "public use" in the Fifth Amendment as "public purpose"); s*ee also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 774 (9th Cir. 2008) ("eminent domain statutes [such as the NGA] are strictly construed to exclude those rights not expressly granted") (citing *Humphries v. Williams Nat. Gas Co*., 48 F. Supp. 2d 1276, 1281 (D. Kan. 1999)).

[20] *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

[21] *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008).

[22] *See Senate Energy and Natural Resources Committee, Hearing on the Federal Energy Regulatory Commission*, 115th Cong. at *36 (2018) (as transcribed by ProQuest Political Transcript Wire, available on Lexis Advance) [hereinafter *Senate Hearing*] (Statement of Cheryl A. LaFleur, Commissioner, FERC) ("I've spent a lot of time with people . . . [in New England] on what they want their future to be. And . . . I have come to the belief that the region does not want new pipelines, because it -- or many, many people in the region have been very opposed to pipelines that have come before us. Even ones we've certificated have not actually been built yet."). *See also* N.J. Attorney Gen., State Defendants Brief Seeking Dismissal and in Opposition to Preliminary Injunction Application, *PennEast Pipeline Co. v. A Permanent Easement for 1.74 Acres + and Temporary Easement for 2.24 Acres ± in Hopewell Twp., Mercer Cty., N.J., Tax Parcel No. 1106-92-2.011*, No. 3:18-cv-01603-BRM-DEA (D.N.J. Mar. 20, 2018), ECF No. 16-1.

For these reasons, the Commission should require a pipeline to have all necessary permits before the Commission affords that pipeline the power to exercise eminent domain. At minimum, the Commission should condition the exercise of eminent domain on the issuance of a CWA Section 401 permit.

B2. Should applicants take additional measures to minimize the use of eminent domain? If so, what should such measures be? How would that affect a project's overall costs? How could such a requirement affect an applicant's ability to adjust a proposed route based on public input received during the Commission's project review?

NJ Rate Counsel's concern is that the power of eminent domain is exercised when there is still substantial doubt that a pipeline will be built because the pipeline has not obtained necessary permits, particularly a CWA Section 401 permit. The appropriate remedy is to condition the exercise of the eminent domain power on the pipeline having first obtained the requisite state permits, particularly a CWA Section 401 permit.

B3. For proposed projects that will potentially require the exercise of eminent domain, should the Commission consider changing how it balances the potential use of eminent domain against the showing of need for the project? Since the amount of eminent domain used cannot be established with certainty until after a Commission order is issued, is it possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use such that the Commission could use that information during the consideration of an application?

Rate Counsel offers no comments on these questions.

B4. Does the Commission's current certificate process adequately take landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

As described in the response to B1, the Commission's current certificate process fails to take landowner interests into account adequately because a pipeline is permitted to take land before having obtained the state permits necessary to permit construction. Accordingly, the exercise of eminent domain power should be contingent upon the

pipeline having obtained necessary permits, particularly necessary CWA Section 401 permits.

Undoubtedly, pipelines will vigorously protest any delay in the use of the eminent domain power. But it is the pipelines' premature demand for eminent domain authority that causes the delay in the FERC review process. The Commission's current certification practice has sent landowners the clear message that if they want to protect their land rights, they must participate in the FERC process. And, as the Commission knows from first-hand experience, landowners are passionate to protect their land. The essentially compelled participation of hundreds (if not thousands) of landowners in the certification process makes it less efficient. This is contrary to the intent of Executive Order 13807 ("E.O."), which has a stated purpose of "ensur[ing] that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent."[23] The E.O. expresses concern that inefficiencies in the project decisionmaking process have "delayed infrastructure investments" and "increased project costs." *Id.* Furthermore, the E.O. establishes a policy to ensure "Federal authorities make informed decisions concerning the environmental impacts of infrastructure projects," "provide transparency and accountability to the public regarding environmental review and authorization decisions," and "make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years." *Id.* A Commission certification process in

[23] Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 82 Fed. Reg. 40,463, 40,463 (Aug. 15, 2017).

which hundreds of landowners are compelled to participate to advocate for their unique land-specific interests will frustrate, rather than support, the goals of the E.O.

NJ Rate Counsel's proposal to require that a pipeline obtain state permits, especially a CWA Section 401 permit, prior to the commencement of eminent domain proceedings will also avoid wasteful litigation. For example, in the case of the Constitution pipeline, the applicant first submitted to the Commission all of the information needed to receive its Certificate, including the information required for the Commission to conduct its National Environmental Policy Act ("NEPA") analysis.[24] Following the Commission's issuance of the certificate,[25] the pipeline invested significant legal costs in initiating and finalizing eminent domain proceedings against landowners in scores of cases.[26] However, more than two years after the Commission issued a certificate to Constitution, the NYSDEC denied Constitution's application for a CWA Section 401 permit.[27] The courts upheld the NYSDEC's denial of the CWA Section 401 permit,[28] and the Commission denied Constitution's petition for a declaratory order stating that NYSDEC waived its authority under CWA Section 401.[29] Had the Commission conditioned Constitution's exercise of eminent domain authority upon receipt of the requisite permits, the need for landowner participation in the FERC process would have

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[24] Application of Constitution Pipeline Company, LLC for a Certificate of Public Convenience and Necessity Authorizing the Construction and Operation of the Constitution Pipeline, *Constitution Pipeline Co.*, Docket No. CP13-499-000 (June 13, 2013), eLibrary No. 20130613-5078.

[25] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199.

[26] Search PACER in the U.S. District Court for the Northern District of New York with "Constitution Pipeline" as the party name.

[27] *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017).

[28] *Id.* at 101-03.

[29] *Constitution Pipeline Co.*, 162 FERC ¶ 61,014, P 1 (2018).

been minimized and the need for premature state court eminent domain proceedings would have been eliminated, thereby avoiding a substantial waste of applicant and landowner resources.[30]

Recognizing the "effective[] veto[]" that lurks[31] when a proposed pipeline does not have a CWA Section 401 permit, the Commission could conserve its own limited resources[32] by prioritizing the review of pipelines that have obtained a CWA Section 401 permit as well as other required permits. The Commission could also actively seek to coordinate its process with the actions being undertaken by States that must issue construction permits.[33] These uncoordinated and unpredictable outcomes serve neither customers nor developers.[34]

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[30] The Commission's practice leaves a pipeline applicant unsure as to when, or if at all, it will obtain necessary CWA Section 401 permits and be able to move forward with its project. *Compare* Penn. Dept. of Envtl. Protection, *401 Water Quality Certification PennEast Pipeline Project* (Feb. 7, 2017), http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/PennEast/401%20WQC/PennEAST%20401%20Water%20Quality%20Certification%20February%202017.pdf (Pennsylvania Department of Environmental Protection ("PADEP") issuing its 401 certification almost one year before PennEast received its Certificate from the Commission), *and* W. Va. Dep't of Envtl. Protection, State 401 Water Quality Certification, *Mountain Valley Pipeline LLC*, Docket No. CP-16-10-000 (Nov. 1, 2017), eLibrary No. 20171106-0009 (WVDEP waiving its Section 401 certification less than one month after the Commission issued MVP its Certificate), *and* Va. Dept. of Envtl. Quality, *Issuance 401 Water Quality Certification* (Dec. 8, 2017), http://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/MVP_Certification_Final.pdf (VADEQ issuing its 401 certification just over one month after MVP received its Certificate), *with* 162 FERC ¶ 61,053 (where PennEast has received a 401 certification from PADEP and a Certificate from the Commission but still has not received a 401 certification from NJDEP), *and* Pa. Dep't of Envtl. Protection, 401 Water Quality Certification, *Constitution Pipeline Co.*, Docket No. CP13-499-000 (Sept. 5, 2014), eLibrary No. 20140917-0010 (where Constitution received a 401 certification from PADEP and a Certificate from the Commission but never received a 401 certification from NYSDEC and therefore could not build).

[31] *See Constitution Pipeline, LLC*, 868 F.3d at 101; *see also* Clare Ellis, *Second Circuit Upholds State Veto of Constitution Pipeline Project Via Denial of Water Quality Certification*, Hunton Andrews Kurth (Aug. 31, 2017), https://www.pipelinelaw.com/2017/08/31/second-circuit-upholds-state-veto-constitution-pipeline-project-via-denial-water-quality-certification/.

[32] NOI P 25.

[33] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) (NYSDEC petitions for review of two FERC orders. One order authorized construction of Millennium's natural gas pipeline despite the fact that NYSDEC claimed it denied Millennium's application for a Section 401 certification,

Awaiting the issuance of a CWA Section 401 permits is not equivalent to giving states a license to delay. Under CWA Section 401, a State has one year from the time it receives an application for water quality certification from a pipeline applicant to issue a decision on the application or to waive the state's authority.[35] Absent action within a year, the state agency is deemed to have waived its authority under the CWA, regardless of whether the agency deemed the applicant's application to be "complete."[36] CWA's Section 401 regulatory scheme therefore does not leave pipeline applicants without a remedy or in limbo for an indefinite period of time.[37]

A revised process that either requires a pipeline to obtain CWA Section 401 permits prior to Commission completion of its certification process, or that requires a pipeline to have necessary CWA Section 401 permits prior to its exercise of eminent domain, would protect landowners' interests in their land. Such a revised process would also respect the role given to the States by Congress in the CWA to protect local interests.

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and the other order declared NYSDEC waived its authority under Section 401 where NYSDEC claimed it did not waive its authority.).

[34] *See, e.g.*, *Constitution Pipeline Co.*, 868 F.3d at 87 (Constitution did not receive a definitive answer as to whether it could build its pipeline until 32 months after the Commission gave it a Certificate); *see also Senate Hearing* at *24 (Statement of Sen. Shelley Moore Capito, Member, S. Comm. on Env't and Public Works) ("Permitting a pipeline takes too long, it's subject to too much uncertainty, and now states are adding on to the complexities . . .").

[35] 33 U.S.C. § 1341(a)(1) ("If the State . . . fails or refuses to act on a request for a certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."); *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 (holding that NYSDEC "waived its authority under [CWA] Section 401 and that FERC properly issued a waiver order permitting Millennium to proceed with construction without a water quality certification.").

[36] *Id.*

[37] Of course, if a pipeline fails to submit a complete application as determined by a state regulator, subject to the review of the courts, then the pipeline cannot complain of indefinite delay. Moreover, a state that, without justification, fails to timely process a permit application will risk its opportunity to substantively review the application.

This refined process is also more efficient.[38] It provides applicants with the regulatory certainty that, within a maximum timeline of two years from the point at which they request voluntary pre-filing review, the Commission will make a decision on whether to issue them a Certificate.[39] It further provides applicants with the regulatory certainty that, with that Certificate, they can move forward with their pipeline projects without further litigation regarding whether the status of State authority under the CWA. Finally, it preserves the Commission's resources and fulfills the goals of E.O. 13807.

B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

NJ Rate Counsel understands that access to a proposed right-of-way presents challenges. A pipeline's failure to obtain landowner cooperation, however, does not justify taking the land. To the extent applicants for CWA or other permits require expanded rights to access land, the remedy should be provided by Congress or the States.

III. CONCLUSION

For the reasons stated above, NJ Rate Counsel urges the Commission to revise its procedures for considering certificate applications to examine more thoroughly the need for pipelines and to protect landowner interests. The Commission's previous reliance on precedent agreements as an indication of demand for a pipeline has not adequately

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[38] *See Senate Hearing* at *6-7 (Statement of Kevin J. McIntyre, Chairman, FERC) ("I also believe strongly that FERC's policies and procedures should be efficient and effective to ensure that we address in a timely fashion any and all issues validly brought to us in our service of the public, and that we should review our existing policies and procedures from time to time to ensure that they are best enabling us to fulfill . . . our statutory mission and to serve the public.").

[39] *See id.* at *39 (Statement of Robert F. Powelson, Commissioner, FERC) (In "pipeline projects, there's a lot of capital that needs to be deployed. There's a lot of risk capital when there's delays and we need to provide some type of, I'll say regulatory certainty.").

measured market demand. The Commission must evaluate a broader body of evidence—whether obtained by the Commission or presented by participants—to determine whether a precedent agreement represents new demand or parasitic demand from an existing pipeline. NJ Rate Counsel is especially concerned about this issue because of the potential harm to the captive customers of existing pipelines from pipeline shifting by customers with options.

The Commission also needs to revise its procedure to better protect landowners from eminent domain proceedings by pipelines that may not receive necessary state permits. It is unjust and wasteful to take property when a pipeline may never be built. The Commission should either condition the exercise of eminent domain on a pipeline obtaining necessary Clean Water Act Section 401 permits and other required state permits or delay the processing of a certificate application until the applicant has obtained the necessary state permits.

Respectfully submitted,

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