

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1128 (Consolidated with 18-1144, 18-1233, and 18-1256)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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DELAWARE RIVER KEEPER NETWORK, ET AL.,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

On Petition for Review an Order of the  
Federal Energy Regulatory Commission

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**JOINT BRIEF OF PETITIONERS NEW JERSEY DEPARTMENT  
OF ENVIRONMENTAL PROTECTION, DELAWARE AND  
RARITAN CANAL COMMISSION, AND NEW JERSEY DIVISION  
OF THE RATE COUNSEL**

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

### **A. Parties:**

This case is a Petition for Review. The parties, amici and entities who intervened and will participate in this proceeding are as follows:

#### *Petitioners*

The following parties appear in these consolidated cases as petitioners:

In Case Nos. 18-1128, filed on May 9, 2018, and 18-1220, filed on August 13, 2018, Delaware Riverkeeper Network and Maya van Rossum (collectively, “Delaware Riverkeeper”).

In Case Nos. 18-1144, filed on May 21, 2018, and 18-1256, filed on September 28, 2018, New Jersey Department of Environmental Protection (“DEP”) and the Delaware and Raritan Canal Commission.

In Case No. 18-1225, filed on August 21, 2018, New Jersey Conservation Foundation and the Watershed Institute.

In Case No. 18-1226, filed on August 23, 2018, Homeowners Against Land Takings – PennEast, Inc.

In Case No. 18-1233, filed on August 20, 2018, in the Third Circuit and transferred to this Court on September 12, 2018, New Jersey Division of Rate

Counsel (“Rate Counsel”) is a Petitioner. New Jersey Division of Rate Counsel is an Intervenor in Case No. 18-1128, but is filing its briefs solely as a Petitioner in these consolidated matters.

In Case No. 18-1274, filed on September 14, 2018, in the Third Circuit and transferred to this court on or about October 4, 2018, Township of Hopewell, New Jersey.

*Respondent*

Federal Energy Regulatory Commission (“FERC”)

*Intervenors*

PennEast Pipeline Company, LLC (“PennEast”) and Consolidated Edison Company of New York, Inc. have been granted leave to intervene on behalf of the respondents.

*Amici*

There are presently no amici.

**B. Rulings Under Review:**

All Petitioners seek review of FERC’s January 19, 2018, Order Issuing Certificates to PennEast Pipeline Company, LLC pursuant to the Natural Gas Act, Docket No. CP15-558-000, 162 FERC ¶ 61,053, and FERC’s August 10, 2018, Order on Rehearing, Docket No. CP-15-558-001, 164 FERC ¶ 61,098.

### C. Related Cases

The foregoing FERC orders have not been reviewed in this or any other court to counsel's knowledge.

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## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES .....	i
TABLE OF AUTHORITIES .....	vi
GLOSSARY .....	x
INTRODUCTION .....	1
JURISDICTIONAL STATEMENT .....	3
STATEMENT OF ISSUES.....	4
STATUTES AND REGULATIONS .....	4
STANDARDS OF REVIEW .....	4
STATEMENT OF THE CASE .....	5
SUMMARY OF THE ARGUMENT .....	11
STANDING.....	13
ARGUMENT .....	14
I. FERC ERRED IN FINDING THAT PENNEAST ESTABLISHED A NEED FOR ITS NEW PIPELINE BASED ON CONTRACTS WITH ITS AFFILIATES. ....	15
A. FERC Erred In Relying Exclusively On Affiliate Agreements.....	16
B. Significant Record Evidence Casts Doubt On Market Need. ....	21
II. FERC ERRED IN RELYING ON INADEQUATE INFORMATION TO FIND THE PIPELINE’S BENEFITS OUTWEIGHED ITS ADVERSE ENVIRONMENTAL IMPACTS.....	24
III. FERC ERRED IN BASING PENNEAST’S RETURN ON EQUITY ON PRIOR DECISIONS AND NOT ON THE RECORD EVIDENCE. ....	36

CONCLUSION ..... 39

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT ..... 41

CERTIFICATE OF SERVICE..... 42

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Am. Gas Ass’n v. FERC</i> 593 F.3d 14 (D.C. Cir. 2010) .....	4
<i>Am. Rivers &amp; Ala. Rivers Alliance v. FERC</i> 895 F.3d 32 (D.C. Cir. 2018) .....	26
<i>Atl. Ref. Co. v. Pub. Serv. Comm’n</i> 360 U.S. 378 (1959).....	36
<i>Brooklyn Union Gas Co. v. FERC</i> 190 F.3d 369 (5th Cir. 1999).....	20
<i>Citizens Against Rails-to-Trails v. Surface Transp. Bd.</i> 267 F.3d 1144 (D.C. Cir. 2001).....	5
<i>Ctr. for Biological Diversity v. U.S. Forest Serv.</i> 349 F.3d 1157 (9th Cir. 2003).....	26
<i>Emera Maine v. FERC</i> 854 F.3d 9 (D.C. Cir. 2017).....	37, 38
<i>FCC v. Fox Television Stations, Inc.</i> 556 U.S. 502 (2009).....	16
<i>Grand Canyon Trust v. FAA</i> 290 F.3d 339 (D.C. Cir. 2002) .....	5
<i>Idaho v. Interstate Commerce Comm’n</i> 35 F.3d 585 (D.C. Cir. 1994) .....	14
<i>In re PennEast Pipeline Co.</i> No. 18-1585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018) .....	14, 35
<i>Indigenous Envtl. Network v. U.S. Dep’t of State</i> No. 17-29, 2018 WL 5840768 (D. Mont. Nov. 8, 2018).....	35

<i>Marsh v. Oregon Natural Res. Council</i> 490 U.S. 360 (1989).....	25, 34
<i>Minisink Residents for Envtl Pres. &amp; Safety v. FERC</i> 762 F.3d 97 (D.C. Cir. 2014) .....	20, 21
<i>Missouri Pub. Serv. Comm’n v. FERC</i> 337 F.3d 1066 (D.C. Cir. 2003).....	36
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.</i> 463 U.S. 29 (1983).....	4
<i>Myersville Citizens for a Rural Community, Inc. v. FERC</i> 783 F.3d 1301 (D.C. Cir. 2015).....	1, 14, 15, 21, 24
<i>Nat’l Audubon Soc’y v. Dep’t of the Navy</i> 422 F.3d 174 (4th Cir. 2005).....	26
<i>Native Vill. of Point Hope v. Salazar</i> 730 F.Supp. 2d 1009 (D. Alaska 2010) .....	32
<i>New Mexico ex rel. Richardson v. BLM</i> 565 F.3d 638 (10th Cir. 2009).....	25
<i>North Carolina Util. Com’n v. FERC</i> 42 F.3d 659 (D.C. Cir. 1994) .....	38
<i>Robertson v. Methow Valley Citizens Council</i> 490 U.S. 332 (1989).....	25
<i>Sierra Club v. FERC</i> 827 F.3d 36 (D.C. Cir. 2016) .....	5
<i>Sierra Club v. FERC</i> 867 F.3d 1357 (D.C. Cir. 2017).....	5
<i>Sw. Power Pool v. FERC</i> 736 F.3d 994 (2013).....	16
<b>FEDERAL STATUTES</b>	
15 U.S.C. § 717f(c)(1)(A).....	1, 3, 6
15 U.S.C. § 717f(e).....	6, 11, 14, 35



15 U.S.C. § 717f(h).....	6
15 U.S.C. § 717r(a).....	3
28 U.S.C. § 1331.....	3
42 U.S.C. § 4332(1).....	26
42 U.S.C. § 4332(2)(C).....	25

## **FEDERAL REGULATIONS**

40 C.F.R. § 1502.22.....	26, 32
40 C.F.R. § 1502.22(a).....	32
40 C.F.R. § 1502.22(b) .....	32

## **STATE STATUTES**

N.J. Stat. Ann. § 13:13A-2.....	14
N.J. Stat. Ann. § 13:1D-9(f).....	14
N.J. Stat. Ann. § 52:27EE-48(a).....	14
N.J. Stat. Ann. § 52:27EE-55 .....	14

## **ADMINISTRATIVE ORDERS**

<i>Certification of New Interstate Natural Gas Pipeline Facilities,</i> 88 FERC ¶ 61,227 (Sept. 15, 1999), <i>clarified</i> , 90 FERC ¶ 61,128 (Feb. 9, 2000), <i>further clarified</i> , 92 FERC ¶ 61,094 (July 28, 2000) .....	11, 14, 15, 16, 17
Order Directing Briefs, <i>Coakley v. Bangor Hydro-Electric Co.</i> , 165 FERC ¶ 61,030 (2018) .....	37, 38
Order Issuing Certificates, <i>PennEast Pipeline Company, LLC</i> , 162 FERC ¶ 61,053.....	5, 6, 7, 8, 9, 16, 18, 19, 20, 23, 34, 38
Order on Initial Decision, <i>El Paso Natural Gas Co.</i> , 145 FERC ¶ 61,040 (2013), <i>denying stay</i> , 145 FERC ¶ 63,107	

(2013), <i>denying reconsideration</i> , 146 FERC ¶ 63,001 (2014), <i>reh’g denied</i> , 154 FERC ¶ 61,120 (2016) .....	39
Order on Initial Decision, <i>Portland Nat. Gas Transmission Sys. Op.</i> , 142 FERC ¶ 61,197 (2013), <i>reh’g denied</i> , 150 FERC ¶ 61,107 (2015) .....	39
Order on Rehearing, <i>Dominion Transmission, Inc.</i> , 163 FERC ¶ 61,128 (2018) .....	10
Order on Rehearing, <i>PennEast Pipeline Company, LLC</i> , 164 FERC ¶ 61,098.....	9, 10, 11, 13, 17, 19, 20, 23, 24, 31, 33, 34, 35, 38, 39
Preliminary Determination on Non-Environmental Issues, <i>Alliance Pipeline L.P.</i> , 80 FERC ¶ 61,149 (1997) .....	38

**GLOSSARY**

1999 Policy Statement	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶61,227 (Sept. 15, 1999)
Certificate	Certificate of Public Convenience and Necessity
Council	Council on Environmental Quality
DEP	New Jersey Department of Environmental Protection
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Protection Act
PennEast	PennEast Pipeline Company, LLC
Rate Counsel	New Jersey Division of Rate Counsel
ROE	Return on Equity

## INTRODUCTION

The Natural Gas Act places careful safeguards around the construction of new pipelines. After all, building gas pipelines typically requires a developer to condemn hundreds of property interests along the route and can harm the local environment. So the Act requires the developer to obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) before it can begin construction. *See* 15 U.S.C. § 717f(c)(1)(A). Before FERC can grant such a Certificate, the Commission must ensure that the new pipeline is “needed,” and that its potential harms—including environmental harms—do not outweigh the project’s benefits. *See, e.g., Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).

PennEast Pipeline Company, LLC’s (PennEast) proposed project is exactly the sort of pipeline that calls for close review. The pipeline would run approximately 116 miles, from Luzerne County, Pennsylvania, to Mercer County, New Jersey. The pipeline has implications for communities, landowners, and natural resources along its route. PennEast’s planned route would disturb about 1,588 acres of pristine land, cross at least 123 wetlands and 99 waterbodies in New Jersey, and clear 126 acres of forests and 107 acres of New Jersey agricultural land. R10483 at ES-3, ES-8, ES-11, 2-13, 2-10 (JA\_\_\_\_\_ - \_\_\_\_\_). To construct the pipeline, PennEast also has to condemn hundreds of property interests in New Jersey and Pennsylvania.

But FERC brushed by the Natural Gas Act's rules and granted a Certificate to PennEast without properly evaluating the need for the pipeline or its environmental impacts. The parties put evidence into the record demonstrating that a new pipeline is unnecessary—including expert analysis showing the region has sufficient access to natural gas, and sworn statements by shippers telling state regulators the same thing. FERC rejected all this evidence, stating instead that it was the Commission's "policy" to consider one factor, namely that PennEast previously signed agreements with twelve shippers to supply gas once the pipeline enters service. FERC, however, disregarded the fact that six of the shippers (together representing more than 60% of the capacity) are PennEast's own affiliates. It is thus no exaggeration to say that FERC found this pipeline was needed because PennEast and its affiliates said so. That runs contrary to FERC's own governing documents, which reject such reliance on affiliate agreements.

FERC's environmental analysis was no better. FERC could not complete a full review of the pipeline's impacts because PennEast never surveyed *two-thirds* of the route in New Jersey. For those areas, FERC cannot know the proposed pipeline's true impacts on a range of New Jersey's natural resources, such as water, wetlands, endangered species, and historic resources. Yet FERC allowed PennEast to move forward and granted the company eminent domain authority—a power PennEast has already successfully begun exercising in Pennsylvania and New Jersey.

FERC authorized PennEast to condemn hundreds of interests and build a 116-mile pipeline, without engaging in adequate assessments of whether the pipeline is necessary or whether potential environmental harms overwhelm any benefits. That is beyond FERC's power, and this Court should vacate its Certificate Order.

### **JURISDICTIONAL STATEMENT**

The Natural Gas Act requires any entity seeking to build a pipeline to obtain a Certificate of Public Convenience and Necessity. 15 U.S.C. § 717f(c)(1)(A). Any person aggrieved by a FERC order granting a Certificate may seek rehearing within 30 days. 15 U.S.C. § 717r(a). The Natural Gas Act grants this Court jurisdiction to review FERC Certificate orders, but it limits judicial review to objections raised on rehearing. *Id.* § 717r(b). Petitioners each filed timely rehearing requests of the orders at issue. *See* R10777, R10845, R10896, R10900, R10902, R10905 (JA\_\_\_\_\_ - \_\_\_\_\_).<sup>1</sup> This Court thus has jurisdiction to hear these challenges.

Certain claims in this action—raised in Non-State Petitioners' Joint Opening Brief—arise under the Fifth Amendment to the U.S. Constitution. This Court has federal question jurisdiction to review them under 28 U.S.C. § 1331.

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<sup>1</sup> "R\_\_\_\_\_" refers to citations to the Certified Index to the Record, court document #1756805.

## STATEMENT OF ISSUES

I. Whether FERC erred in finding that PennEast established a need for its new pipeline based on contracts with its affiliates.

II. Whether FERC erred in relying on inadequate information to find the pipeline's benefits outweighed its adverse environmental impacts.

III. Whether FERC erred in basing PennEast's return on equity rate on prior decisions and not on the record evidence.

## STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are in the attached Addendum.

## STANDARDS OF REVIEW

This Court reviews de novo whether FERC applied the proper legal standard in granting a Certificate. In making its decisions, FERC must "examine the relevant data and articulate a satisfactory explanation for its actions." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). FERC must "fully articulate the basis for its decision;" mere "passing reference to relevant factors ... is not sufficient." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) (citation omitted).

FERC's interpretation of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality's regulations also receives de novo review. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C.

Cir. 2001). FERC’s interpretations merit no deference. *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016); *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002). An Environmental Impact Statement (EIS) under NEPA is “deficient” if it “does not contain ‘sufficient discussion of the relevant issues’ or ‘does not demonstrate ‘reasoned decisionmaking.’” *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

### STATEMENT OF THE CASE

On September 24, 2015, PennEast applied to construct a new natural gas pipeline. *See* PennEast Pipeline Company, LLC, Order Issuing Certificates, 162 FERC ¶ 61,053, ¶1 (JA \_\_\_\_\_). PennEast is comprised of five corporations: New Jersey Natural Gas Company, Texas Eastern Transmission LP, South Jersey Gas Company, Elizabethtown Gas, and UGI Energy Services, Inc. *Id.* ¶6 (JA\_\_\_\_\_ - \_\_\_\_\_).<sup>2</sup> The mainline of PennEast’s proposed project runs roughly 116 miles, from Luzerne County, Pennsylvania, to Mercer County, New Jersey, using 36-inch diameter pipes. *Id.* ¶5 (JA\_\_\_\_\_ - \_\_\_\_\_). The project costs an estimated \$1.13 billion and would provide up to 1,107,000 dekatherms per day of firm service—*i.e.*,

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<sup>2</sup> When PennEast filed its Certificate application, PSEG Power, LLC was a sixth corporate affiliate. PSEG sold its 10% interest to Spectra Energy Partners, LP in June, 2017. Press Release, PSEG, Enbridge Purchase of PSEG Equity Position in PennEast Pipeline Project Completed (June 6, 2017), available at <https://investor.pseg.com/press-release/other-ir-news-releases/enbridge-purchase-pseg-equity-position-penneast-pipeline-projec>.



natural gas intended to be available at all times. *Id.* ¶¶1, 5 (JA\_\_\_\_\_, \_\_\_\_\_). To complete this construction, PennEast needs a Certificate of Public Convenience and Necessity, which allows it to exercise eminent domain over properties all along its route. 15 U.S.C. §§ 717f(c)(1)(A), 717f(h).

In applying for the Certificate, PennEast had to prove, *inter alia*, that there is a “market need” for the project. *See* 15 U.S.C. § 717f(e). In support, PennEast provided evidence of “precedent agreements”—industry jargon for binding contracts between the pipeline developer and expected customers (usually shippers), who commit to pay for space (capacity) on the future pipeline. PennEast introduced agreements with twelve shippers to purchase 90% of the transport capacity. 162 *See* FERC ¶ 61,053 at 61,223 (JA\_\_\_\_\_ - \_\_\_\_\_). PennEast’s five affiliates were among the signatory shippers—agreeing to purchase approximately 62% of the contracted capacity. *Id.*<sup>3</sup>

On July 22, 2016, FERC issued a draft EIS, R6057, in which it recognized that PennEast’s proposed route would cause significant disturbances. As FERC later wrote, the project would disturb approximately 1,588 acres of pristine land, and that the pipeline’s operation would permanently mar 717 acres. R10482 at ES-3 (JA\_\_\_\_\_ - \_\_\_\_\_). The project would cross at least 123 wetlands and 99

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<sup>3</sup> Before PennEast sold its interest in PSEG Power, PennEast’s affiliates were slated to purchase approximately 74% of the overall volume. *Id.*

waterbodies in New Jersey alone, *id.* at 2-13, 2-10 (JA\_\_\_\_\_ - \_\_\_\_\_), and would clear 126 acres of forests and 107 acres of New Jersey agricultural land, *id.* at ES-8, ES-11 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC had limited information about the overall environmental impacts of the project, however, because PennEast failed to access roughly 65% of land along the New Jersey portion of the route. R10566 at 1 (JA\_\_\_\_\_ - \_\_\_\_\_). PennEast had thus never done field surveys identifying the project's impacts in those areas on a range of natural resources, such as groundwater or wetlands.

Petitioners explained that there was no market need for the project; that the EIS was based on an insufficient record due to missing surveys; that FERC failed to adequately address Project alternatives; and that FERC failed to address the project's impacts on greenhouse gas emissions. *See* R9027, R9063, R9178, R9179, R9360, R9391 (JA\_\_\_\_\_ - \_\_\_\_\_). Without obtaining further information to address these concerns, however, FERC issued its final EIS on April 7, 2017. R10483 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC also issued a 90-day schedule for federal authorizations before PennEast had even applied for a water quality certification from the State of New Jersey. R10359, R13814 (JA\_\_\_\_\_ - \_\_\_\_\_).

FERC then issued a Certificate to PennEast. 162 FERC ¶ 61,053. (JA\_\_\_\_\_ - \_\_\_\_\_). FERC found there was a need for the pipeline by relying, “as a matter of policy,” only on PennEast's precedent agreements with shippers—notwithstanding

that PennEast's own affiliates had contracted for a majority of the Project's volume. *Id.* ¶¶ 27-36 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC ignored the missing environmental impact information in New Jersey, and instead simply conditioning the Certificate on PennEast verifying its conclusions after acquiring access to the relevant lands via eminent domain. *Id.* ¶¶ 99-101 (JA\_\_\_\_\_ - \_\_\_\_\_). PennEast received authority to condemn easements along the route, including acquiring "necessary land or property to construct the approved facilities." *Id.* ¶42 (JA\_\_\_\_\_ - \_\_\_\_\_). As to greenhouse gas emissions, FERC said that "the potential environmental impacts resulting from such production are not reasonably foreseeable," but still found that its calculations of downstream emissions satisfied NEPA. *Id.* ¶¶ 197-98, 201, 207 (JA\_\_\_\_\_ - \_\_\_\_\_). Finally, FERC required PennEast to consider an alternate Project end point to avoid 2.5 miles of pipeline in Hopewell, but FERC itself never considered the alternate end point in the final EIS. *Id.* ¶215.

Commissioner Glick dissented. He explained that PennEast had failed to show a need for the project. In particular, he disagreed with the majority's "exclusive[]" reliance "on the existence of precedent agreements" to support its finding where PennEast's affiliates held a majority share of the subscribed capacity. R10771, 162 FERC ¶ 61,053 at 61,269 (JA\_\_\_\_\_ - \_\_\_\_\_). Commissioner Glick also found the project's benefits did not outweigh its harms, noting the dearth of information regarding the need for the pipeline and the significant gaps in the environmental

record. *Id.* (JA\_\_\_\_\_ - \_\_\_\_\_). As for the conditions FERC added to the certificate, Commissioner Glick responded that “Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest.” *Id.* at 61,260 (JA\_\_\_\_\_ - \_\_\_\_\_).<sup>4</sup>

Petitioners all timely filed rehearing requests, *see* R10777, R10845, R10896, R10900, R10902, R10905 (JA\_\_\_\_\_ - \_\_\_\_\_), which FERC denied on August 18, 2018, for substantially the same reasons as in its original order. PennEast Pipeline Company, LLC, Order on Rehearing, 164 FERC ¶ 61,098 (JA\_\_\_\_\_ - \_\_\_\_\_). Regarding need, FERC reiterated that “it is current Commission policy not to look behind precedent or service agreements.” *Id.* ¶ 16 (JA\_\_\_\_\_ - \_\_\_\_\_). Regarding the EIS, FERC stated that it was not required to rely on “perfect” information, and that New Jersey landowners had blocked PennEast’s access to their properties. *Id.* at ¶¶ 43-44, n. 112 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC also included as a “condition” in the Certificate that PennEast had to provide further information on environmental impacts after gaining access to these lands and conducting surveys, but FERC

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<sup>4</sup> Commissioner Chatterjee filed a concurrence that also expressed misgivings about “the order’s impact on landowners,” recognizing “[i]t is important that [FERC] have as much data as possible on which to base a determination that has such a momentous effect.” 162 FERC ¶ 61,053, at 61,269 (JA\_\_\_\_\_ - \_\_\_\_\_). Commissioner LaFleur agreed that “the record reflects a significant number of environmental surveys that are incomplete due to lack of access.” *Id.* at 61,268 (JA\_\_\_\_\_ - \_\_\_\_\_).

warned that these conditions “are *not* designed to allow significant departures from the project as certificated.” *Id.* ¶¶45, 49 (JA\_\_\_\_\_-\_\_\_\_\_). FERC then asserted that it “does not have the authority to limit a pipeline company’s use of eminent domain” once it issues the Certificate. *Id.* ¶33 (JA\_\_\_\_\_-\_\_\_\_\_). FERC rejected the arguments that no Certificate should have issued until all other federal, State and local permits were issued, arguing that state permitting rights are “fully protected” and that “there can be no impact on the environment” “because construction cannot commence before” PennEast obtains all the necessary permits. *Id.* ¶55 (JA\_\_\_\_\_-\_\_\_\_\_). Finally, relying in part on its decision in *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018), FERC refused to reconsider its greenhouse gas emission calculations. 164 FERC ¶ 61,098 at 61,595-96 at ¶¶ 105, 111 (JA\_\_\_\_\_-\_\_\_\_\_).

On rehearing, Commissioners Glick and LaFleur dissented. Commissioner Glick reiterated that affiliate agreements alone are insufficient to demonstrate market need, and that the missing survey information rendered the EIS deficient. 164 FERC ¶ 61,098, at 61,610-12 (JA\_\_\_\_\_-\_\_\_\_\_). He explained that FERC’s treatment of NEPA fell substantially short of the “‘hard look’ that Congress intended.” *Id.* at 61,612 (JA\_\_\_\_\_-\_\_\_\_\_). Commissioners Glick and LaFleur both objected to FERC’s approach evaluating impacts on greenhouse gas emissions. *Id.* at 61,612-613 (JA\_\_\_\_\_-\_\_\_\_\_); *Id.* at 61,608-09 (JA\_\_\_\_\_-\_\_\_\_\_).

Petitioners timely filed petitions for review.<sup>5</sup>

## SUMMARY OF THE ARGUMENT

I. FERC erred in finding that PennEast demonstrated a “market need” for its project, as the Natural Gas Act requires. 15 U.S.C. § 717f(e). FERC’s finding relies exclusively on agreements PennEast signed with shippers to supply gas if the pipeline enters service. But even assuming that “precedent agreements” typically provide sufficient evidence to establish need, they cannot be determinative here, where a majority of the agreements were with *PennEast’s own affiliates*, and where substantial record evidence disproved need. As FERC’s governing Policy Statement states, “[u]sing contracts as the primary indicator of market support” necessarily “raises ... issues when the contracts are held by pipeline affiliates.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at 61,648, 61,743 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000) (“Policy Statement”). Because agreements with affiliates are not the result of arms-length negotiations, *see* 164 FERC ¶ 61,098 at 61,610 (JA \_\_\_\_\_ - \_\_\_\_\_), exclusive reliance on affiliate agreements is akin to

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<sup>5</sup> Using the eminent domain authority FERC conferred in the Certificate, PennEast subsequently filed condemnation actions involving 100-plus New Jersey and Pennsylvania properties. *See In Re PennEast Pipeline Co., LLC*, No. 18-1885, 2018 WL 6584893, \*21 (D.N.J. Dec. 14, 2018). The district court granted PennEast access to all of the outstanding properties along the project route, relying heavily upon FERC’s Certificate and EIS. *Id.*

finding “demand for the pipeline exists because the Project’s stakeholders have said it is needed,” R9179 at 4 (JA\_\_\_\_\_ - \_\_\_\_\_). Affiliates have economic incentives to sign contracts with PennEast even absent need for a new pipeline—*i.e.*, to “shift pipeline fee revenue from existing pipelines to the owners of PennEast.” R9086 at 8 (JA\_\_\_\_\_ - \_\_\_\_\_). And other evidence in the record—including expert analysis of the region’s needs, and shippers’ own statements—undercuts the conclusion that this new pipeline is necessary.

II. FERC erred in relying on substantially incomplete information to draft its Environmental Impact Statement (EIS) and to find that the pipeline’s benefits outweighed potential adverse environmental impacts, violations of both NEPA and the Natural Gas Act. To ensure that agencies have adequate information to take the required “hard look” at the environmental consequences of their actions, NEPA requires them to complete an EIS that reflects all complete and relevant information. FERC could not do so here because PennEast failed to survey *sixty-five percent* of the land on the New Jersey portion of the route. FERC relied instead on publicly available information, which is much less complete than direct field surveys. FERC’s truncated data set leaves significant questions open about the project’s impacts on water, wetlands, endangered species, and historic resources. FERC’s action likewise ignored the Council on Environmental Quality’s rules for handling situations where complete information proves unavailable. FERC blamed the

absence of field surveys on resistant landowners, but PennEast had other options—as did FERC. Instead, FERC granted PennEast “eminent domain authority to gain access to land for the purpose of gathering missing information that is necessary to inform a finding of public interest in the first place”—a decision that is as “circular” as it is unlawful. 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_).

III. FERC erred in setting the initial rate that PennEast can charge for new service without reference to current market conditions. These rates give stockholders who invest in a new pipeline the chance to profit, but if FERC sets the rate too high, the consumers (ratepayers) end up footing the bill. The initial rate is based in part on FERC’s calculated return on equity (ROE)—*i.e.*, how much the pipeline’s investors profit. In this case, FERC applied the wrong methodology to calculate PennEast’s ROE. FERC relied heavily on its prior cases, but this is not a matter of legal doctrine where precedents can supply a final answer. Instead, the proper ROE is a matter of current capital market conditions—something that a previous decision in the 1990s is poorly equipped to resolve. FERC erred by not considering the market conditions in calculating ROE, which recent case law makes clear it should have done.

### STANDING

New Jersey has standing. Pursuant to the Certificate, PennEast obtained a court order to condemn interests in more than 40 properties in which the State has a preservation interest. *In re PennEast Pipeline Co.*, No. 18-1585, 2018 WL 6584893,



\*21 (D.N.J. Dec. 14, 2018). Impacts to the state's property are a clear injury for standing purposes. *See Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 591 (D.C. Cir. 1994) (finding state standing based on impacts to state property). New Jersey also has an interest in protecting the health and safety of its citizens. The Department of Environmental Protection (DEP) implements "Statewide, regional and local programs of conservation and environmental protection," N.J. Stat. Ann. § 13:1D-9(f); the Delaware and Raritan Canal Commission is primarily responsible for water quality preservation of the Delaware and Raritan Canal, N.J. Stat. Ann. § 13:13A-2; and Rate Counsel is charged with protecting utility ratepayers, N.J. Stat. Ann. §§ 52:27EE-48(a), -55.

### ARGUMENT

FERC may issue a certificate authorizing a proposed pipeline's construction where FERC finds construction "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 U.S.C. § 717f(e). The "threshold question" FERC must resolve is whether "there is market need for the project." *Myersville*, 783 F.3d at 1309; 15 U.S.C. § 717f(e) (same). FERC must "balance[] the [project's] public benefits against the potential adverse consequences." *Myersville*, 783 F.3d at 1309. The greater a project's potential adverse impacts, the more the applicant must do to demonstrate the project's need. 88 FERC ¶ 61,227 at 61,648. FERC must also account for any "negative impact on

the environment or landowners' property," meaning that it must complete an "environmental review" in compliance with NEPA's strictures. *Myersville*, 783 F.3d at 1309. FERC failed to satisfy these responsibilities.

**I. FERC ERRED IN FINDING THAT PENNEAST ESTABLISHED A NEED FOR ITS NEW PIPELINE BASED ON CONTRACTS WITH ITS AFFILIATES.**

In finding a "need" for PennEast's project, FERC exclusively relied on the precedent agreements PennEast signed with shippers to provide natural gas if the pipeline enters service. But even if FERC can typically rely exclusively on shipper agreements to establish need, it could not do so here—because the majority of the agreements were with *PennEast's affiliates*, and because there was strong evidence undercutting the purported need. As FERC's governing approach—its 1999 Policy Statement—lays out, "[u]sing contracts as the primary indicator of market support" necessarily "raises ... issues when the contracts are held by pipeline affiliates." 88 FERC ¶61,744. For good reason: by relying entirely on the applicant's agreements with affiliates, FERC is effectively saying "demand for the pipeline exists because the Project's stakeholders have said it is needed." R9179 at 4 (JA\_\_\_\_\_-\_\_\_\_\_). Still more, other evidence in this record—including the shippers' statements and actions—casts serious doubt on the need for this project.

**A. FERC Erred In Relying Exclusively On Affiliate Agreements.**

The question this Court must ask here is whether FERC commits reversible error when it finds “market need” for a new pipeline based solely on the applicant’s contracts with its affiliates, while rejecting out-of-hand contrary evidence. It does. An agency must base its decisions on all the record evidence—not just one factor. *See, e.g., Sw. Power Pool v. FERC*, 736 F.3d 994, 999 (2013). And that’s precisely what FERC’s Policy Statement mandates.<sup>6</sup> Before 1999, FERC was finding market need anytime an applicant had obtained agreements with shippers for at least 25% of a project’s capacity. 88 FERC at 61,743. But in the Policy Statement, FERC concluded that such agreements were “not a sufficient indicator by itself of the need for a project”—especially given the various “issues” that would arise “when the contracts are held by pipeline affiliates.” *Id.* at 61,744. FERC instead chose to engage in a more comprehensive analysis to decide whether project benefits “outweigh the potential adverse effects,” *id.* at 61,748, including consideration of “contracts, precedent agreements, studies of projected demand in the market to be served, or other evidence of the public benefit,” *id.* at 61,750; *see also id.* at 61,748 (concluding

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<sup>6</sup> While FERC is free to amend its Policy Statement, there is no dispute that FERC remains bound by its terms until it does do. *See* 162 FERC ¶ 61,053 at 61,224 (JA\_\_\_\_\_ - \_\_\_\_\_) (agreeing the Policy Statement “establishes criteria for determining whether there is a need for a proposed project”); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not ... depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”)

any “relevant evidence could be presented to support any public benefit the applicant may identify. This is a change from the current policy which relies primarily on one test to establish the need for the project.”); *id.* at 61,747 (relevant evidence includes “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market”). FERC also noted that “the evidence necessary to establish the need for the project will usually include a market study.” *Id.* at 61,748. Following the 1999 Policy Statement, the Commission cannot make a need finding by “seriously consider[ing]” affiliate agreements to the exclusion of other evidence; if FERC does so, it cannot “simultaneously claim to have given the record evidence the review it deserves and that the [APA] demands.” 164 FERC ¶ 61,098 at 61,610(JA\_\_\_\_\_-\_\_\_\_\_).

The affiliates issue was at the heart of FERC’s new approach. *See* 88 FERC at 61,737-38 (three of seven questions directly address affiliate issues). FERC noted that “applicants’ use of contracts with affiliates” to show need “generated opposition from affected landowners and competitor pipelines.” *Id.* at 61,739-40. FERC agreed that “[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.” *Id.* at 61,748. But under its pre-1999 policy, FERC was giving “equal weight” to affiliate contracts and third-party contracts, and would “not look behind the contracts.” *Id.* at 61,744. In discussing the “[d]rawbacks of the [c]urrent

[p]olicy,” FERC found the “amount of capacity under contract ... is not a sufficient indicator by itself” of need, and that it “raises additional issues when the contracts are held by pipeline affiliates.” *Id.* Precedent agreements were still “significant,” but they would no longer be the only determination of market need. *Id.* at 61,748.

In finding that PennEast’s project satisfied a market need, FERC disregarded the Policy Statement’s references to evidence beyond precedent agreements. Despite the presence of such record evidence—reviewed in Part I.B, *infra*—FERC claimed “it is *current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.*” 162 FERC ¶ 61,053 at 61,226 (emphases added) (JA\_\_\_\_\_ - \_\_\_\_\_). FERC’s need determination relied on PennEast’s “long-term, firm precedent agreements with 12 shippers” to the exclusion of other evidence. *Id.* (JA\_\_\_\_\_ - \_\_\_\_\_); *see id.* at 61,269 (JA\_\_\_\_\_ - \_\_\_\_\_) (agreeing FERC had “relie[d] exclusively on the existence of precedent agreements with shippers”). Contrary to the Policy Statement, FERC did so even though most of these agreements (measured by contracted capacity) were with its affiliates. *See* 162 FERC ¶ 61,053 at 61,223 (JA\_\_\_\_\_ - \_\_\_\_\_) (6 of 12 agreements with affiliates, for 62% of contracted capacity). Without acknowledging its diversion from the Policy Statement, FERC relied on affiliate agreements to find market need, *id.* ¶33 (JA\_\_\_\_\_ - \_\_\_\_\_), asserting that it was “not required to look behind

precedent agreements to evaluate project need, regardless of the affiliate status of some of the project shippers,” 164 FERC ¶ 61,098 at 61,577. (JA\_\_\_\_\_ - \_\_\_\_\_).

FERC’s arguments for why it could exclusively rely on affiliate agreements do not hold water. First, FERC says affiliate status does not matter because “[t]here is no evidence in the record of any impropriety or abuse in connection with any of the affiliate agreements,” or record evidence of “discrimination” or “anticompetitive behavior.” 162 FERC ¶ 61,053 at 61,227-29 (JA\_\_\_\_\_ - \_\_\_\_\_); 164 FERC ¶ 61,098 at 61,577-78 (JA\_\_\_\_\_ - \_\_\_\_\_). But that ignores FERC’s recognition in the Policy Statement, 88 FERC at 61,744, that agreements with affiliates are less probative evidence of need than those with non-affiliates as a general matter.

Affiliates, after all, have incentives to contract with PennEast absent market need, even without impropriety or abuse. As Commissioner Glick explained, it “does not take much imagination to understand why an affiliate shipper might be interested in contracting with a related pipeline developer for capacity that may not be needed, such as the parent company’s prospect of earning a 14 percent return on equity on an investment, or increased profits earned by an affiliated electric generator if new gas pipeline capacity frees up congestion that has been restraining gas and electric prices in a particular zone.” 162 FERC ¶ 61,053 at 61,269 (JA\_\_\_\_\_ - \_\_\_\_\_); *see also* 164 FERC ¶ 61,098 at 61,610 (JA\_\_\_\_\_ - \_\_\_\_\_) (explaining that “contracts among affiliates may be less probative of need because they are not necessarily the

result of arms-length negotiation”). Even without need for new capacity, affiliates could still benefit from “shift[ing] pipeline fee revenue from existing pipelines to the owners of PennEast.” R9086 at 8 (JA\_\_\_\_\_ - \_\_\_\_\_). Affiliate transactions “often ... have motivations beyond pure market forces,” including the “motivations of the parent companies and executive compensation” (this is especially troubling because “boards between regulated utilities and their parents are often comprised of the same individual”). *Id.* at 10 (JA\_\_\_\_\_ - \_\_\_\_\_); *cf. Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369, 374 (5th Cir. 1999) (finding that when “the immediate benefits flow” to a shipper affiliate, it is “a circumstance that ought to trigger a hard look”). Precedent agreements are “valuable in assessing the market demand,” but contracts with affiliates “cannot be sufficient in and of themselves to demonstrate that a pipeline is needed.” 164 FERC ¶ 61,098 at 61,610 (JA\_\_\_\_\_ - \_\_\_\_\_).

Second, FERC claims that this Court already blessed its exclusive reliance on precedent agreements in both *Minisink Residents for Env'tl Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014), and *Myersville*. *See* 162 FERC ¶ 61,053 at 61,226 (JA\_\_\_\_\_ - \_\_\_\_\_); 164 FERC ¶ 61,098 at 61,577 – 61,578 (JA\_\_\_\_\_ - \_\_\_\_\_). That reply misses the mark. Both cases stated that particular petitioners could “identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project’s benefits by looking beyond the market need reflected by the applicant’s existing contracts with

shippers.” *Minisink*, 762 F.3d at 111 n.10; *Myersville*, 783 F.3d at 1311. But neither *Minisink* nor *Myersville* addressed an applicant’s reliance on contracts with its *affiliates* and thus neither could have resolved this issue.<sup>7</sup> See 164 FERC ¶ 61,098 at 61,610 (JA\_\_\_\_\_ - \_\_\_\_\_). To the contrary, “no court has found that the Commission can rely solely on affiliated precedent agreements to demonstrate need.” *Id.* (JA\_\_\_\_\_ - \_\_\_\_\_). The distinct economic incentives at play render it inappropriate to extend *Minisink*’s language to the affiliate agreement context.

**B. Significant Record Evidence Casts Doubt On Market Need.**

FERC’s refusal to evaluate a project’s need by looking behind affiliate agreements is particularly inappropriate here, where significant record evidence demonstrates that new capacity is not necessary to meet market demand.

First, Dr. David Dismukes—Professor and Director of the Center for Energy Studies at Louisiana State University and practicing economist—studied the demand for natural gas transportation service in the region and testified that no market need exists for PennEast’s capacity. Dismukes Aff., R9179, ¶¶10-12 (JA\_\_\_\_\_ - \_\_\_\_\_)

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<sup>7</sup> The petitioner in *Minisink* actually conceded the expanded project was necessary. Brief of Petr. at 13-14, *Minisink Residents for Environmental Preservation v. FERC*, No. 12-1481 (D.C. Cir. July 19, 2013). And while there was a need-based challenge in *Myersville*, the petitioners there failed to preserve parts of this argument and the remaining elements were answered by sworn statements in FERC’s record that new capacity was subscribed. 783 F.3d at 1310-11. While there is no need to reconsider *Minisink* and *Myersville* here, this background provides additional reason not to extend these decisions for the first time to affiliate agreements.



(“Dismukes 1”). Dr. Dismukes identified three major pipelines already serving New Jersey, and he explained that in the previous 10 years these pipelines experienced a halving (or more) of utilization rates—*i.e.*, the amount of gas actually flowing through a pipeline. *Id.* ¶13. He concluded that “the region currently has adequate alternative means to obtain natural gas supply.” *Id.* ¶15 (JA\_\_\_\_\_ - \_\_\_\_\_). Dr. Dismukes also showed that electricity and gas price spikes during extreme weather events in the Mid-Atlantic were not caused by a lack of pipelines and would not be remedied by construction of a new one. Dismukes Aff., R9760, ¶¶ 15-16 (JA\_\_\_\_\_ - \_\_\_\_\_) (“Dismukes 2”); *see also* R5470 (JA\_\_\_\_\_ - \_\_\_\_\_) (consulting firm study confirming that natural gas supply problems resulted from local delivery constraints in the winter and not a lack of sufficient pipelines). Studies in the record thus showed no need for additional capacity in the region PennEast intends to serve, which is precisely the evidence FERC said in the Policy Statement would be relevant in making market need determinations. *See* 88 FERC at 61,747 (identifying “demand projections” and “comparison of projected demand with the amount of capacity currently serving the market” as “relevant factors reflecting ... need”).

Second, record evidence relating to five of the twelve shippers who signed precedent agreements undermines FERC’s claim of market need. Three of them—

South Jersey Gas Co., Elizabethtown Gas,<sup>8</sup> and UGI Energy Services—submitted filings with state regulators documenting adequate pipeline supply through 2020. R9179 at 5-6 (JA\_\_\_\_\_ - \_\_\_\_\_); Dismukes 1 ¶¶ 10-12 (JA\_\_\_\_\_ - \_\_\_\_\_) (explaining “the 2020 forecast is appropriate because it reflects a reasonable time period in which an LDC [a local distribution company] could identify and procure capacity resource needs and alternatives”). A fourth shipper (which has the largest capacity reservation for the project), informed state regulators that the company has adequate access to nearby Marcellus Shale gas.<sup>9</sup> R9179 at 7 (JA\_\_\_\_\_ - \_\_\_\_\_) (noting that “[t]he majority of the market area assets of the Company are positioned to take advantage of the natural gas produced in the Marcellus Shale”). An affiliate of a fifth shipper recently turned back significant capacity. R9179 at 6-7 & n.7 (JA\_\_\_\_\_ - \_\_\_\_\_).

FERC acknowledged that the record includes “general forecasts for load growth” in New Jersey and Pennsylvania and “supply forecast projections through 2020 made to state commissions,” 162 FERC ¶ 61,053 at 61,226 (JA\_\_\_\_\_ - \_\_\_\_\_), but responded that the shippers with precedent agreements made financial commitments, *id.* ¶28 (JA\_\_\_\_\_ - \_\_\_\_\_). That is inapposite; for gas company

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<sup>8</sup> When PennEast filed its application, Elizabethtown Gas was owned by Pivotal Utility Holdings, Inc., but has since been acquired by South Jersey Industries.

<sup>9</sup> While FERC ignored this statement, FERC attributed significance to the access to Marcellus Shale gas that PennEast’s pipeline would provide. 162 FERC ¶ 61,053 at 61,227 (JA\_\_\_\_\_ - \_\_\_\_\_); 164 FERC ¶ 61,098 at 61,579 (JA\_\_\_\_\_ - \_\_\_\_\_).

shippers, the financial commitment is borne by their ratepayers. FERC also noted that “projections regarding future demand often change,” *id.* ¶29 (JA\_\_\_\_\_-\_\_\_\_\_), and that it “deem[ed] the precedent agreements to be the better evidence of demand.” *Id.* (JA\_\_\_\_\_-\_\_\_\_\_). But that assertion is just another consequence of FERC’s inappropriate over-reliance on affiliate agreements. The 1999 Policy Statement and economic logic establish show that precedent agreements are less compelling evidence when they involve affiliates, and are not better evidence of demand than expert analyses. *See* 164 FERC ¶ 61,098 at 61,611 (JA\_\_\_\_\_-\_\_\_\_\_ ) (noting that “[s]electively highlighting evidence of market demand”—just as FERC did here—“while summarily ignoring the same type of evidence when it does not, is arbitrary and capricious”). “Reasoned decisionmaking” required FERC to “grapple with” all the relevant evidence, “rather than merely brushing it off and restating its absolute commitment not to look behind precedent agreements.” *Id.* (JA\_\_\_\_\_-\_\_\_\_\_).

## **II. FERC ERRED IN RELYING ON INADEQUATE INFORMATION TO FIND THE PIPELINE’S BENEFITS OUTWEIGHED ITS ADVERSE ENVIRONMENTAL IMPACTS.**

FERC cannot approve a pipeline unless it finds that the proposal’s benefits outweigh “potential adverse consequences,” including “negative impact[s] on the environment or landowners’ property.” *Myersville*, 783 F.3d at 1309. FERC assesses environmental impacts by compiling a Final EIS compliant with NEPA’s mandates.

The EIS must reflect all complete and relevant information, and the Council on Environmental Quality (Council) has rules for what to do when relevant information is unavailable. Despite these mandates, FERC granted PennEast's application based on incomplete information. PennEast failed to survey sixty-five percent of the land on the New Jersey route, leaving significant questions about the pipeline's potential impacts on water, wetlands, endangered species, and historic resources. While PennEast lacked access due to resistant landowners, it had other options—as did FERC. Yet FERC ignored the framework laid out in the Council's regulations and took an unlawful action: granting PennEast condemnation authority for rights-of-way on these lands, without basing its determination that construction is in the public interest on complete and accurate information.

To ensure that FERC has sufficient information to take a “hard look” at the environmental consequences of its actions, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), it must complete an EIS for any “major” action with significant environmental impacts. 42 U.S.C. § 4332(2)(C)(i)-(iii). An EIS relying on insufficient information is arbitrary and capricious. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989) (“NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 638, 715 (10th Cir. 2009) (EIS overturned where impact findings were based on insufficient record);

*Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174 (4th Cir. 2005) (same). In short, courts “cannot evaluate the reasonableness of the unexplained.” *Am. Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018).

Federal law explains what agencies must do when key information is missing. The Council’s regulations, which are “entitled to substantial deference,” lay out the step-by-step process. *Id.* at 372. First, the relevant agency shall “make clear that such information is lacking.” 40 C.F.R. § 1502.22. Second, the agency must determine if the incomplete information “is essential to a reasoned choice among alternatives.” *Id.* If so, the agency must include it if the related costs are not exorbitant. *Id.* If the agency cannot obtain the information, it must include:

1) A statement that such information is incomplete or unavailable, 2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment, 3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and 4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

*Id.* An agency must follow each step. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (“The procedures ... in NEPA and the implementing regulations are to be strictly interpreted ‘to the fullest extent possible’ in accord with the policies embodied in the Act.” (quoting 42 U.S.C. § 4332(1))).

FERC failed to meet this burden. Acknowledging that PennEast conducted no field surveys for 65% of the route through New Jersey, R10566 (JA \_\_\_\_\_ - \_\_\_\_\_),

FERC relied only on “desktop reviews” of those areas. Field surveys require the project manager to visit the site in person and collect data based on observations, expertise, and testing (the particular tests vary by resource). *See, e.g.*, Field Work, National Geographic, <https://www.nationalgeographic.org/encyclopedia/field-work/> (last accessed December 20, 2018). Desktop studies involve reviewing only computer-accessible information, which may include incomplete or inaccurate databases. For example, one cannot see an endangered salamander on an aerial photograph. DEP’s website advises would-be permit applicants that there is no substitute for a site visit:

[M]aps may not be accurate and in general can only give you a broad idea as to what [resources] may impact your site. ... In order to truly find out, in a *definitive way*, ... [DEP] must visit a site, possibly take samples, and submit a report on their findings.

Before you Buy, Before you Build, <https://www.nj.gov/dep/landuse/bybob.html> (last accessed December 18, 2018) (emphasis in original).

Failure to conduct field surveys affects information about numerous natural resources. For example, groundwater provides 36% of public and at least 16% of private water supply along the pipeline route in New Jersey. R10483 at 4-31 (JA\_\_\_\_\_-\_\_\_\_\_). Reviewing the N.J. Geological and Water Survey, FERC identified 59 Public Community Water Supply wells within 5 miles of PennEast’s project route, resulting in 120 potentially impacted zones. *Id.* at 4-37 (JA\_\_\_\_\_-\_\_\_\_\_). But public wells are only part of a project’s potential impact on access to

clean water. PennEast had not yet “identified private wells in the project’s vicinity in New Jersey.” *Id.* 4-37 to 4-38 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC cannot count on desktop reviews to find affected private wells because publicly available sources only identify permitted wells. Some private wells lack permits, because they were drilled either before permits were required or without State knowledge. R9360 at 13 (JA\_\_\_\_\_ - \_\_\_\_\_).

The problem is similar for wetlands. FERC acknowledged that only 38% of the wetlands field surveys in the state were completed. R10483 4-77, 4-79 (JA\_\_\_\_\_ - \_\_\_\_\_). But none of the public resources on which FERC relied here—including aerial photographs, National Wetlands Inventory data, soil data from the Department of Agriculture, FEMA flood data, and DEP’s mapping and datasets, *see* 164 FERC ¶ 61,098 at 61,584; R10483 4-76—can match the accuracy of field surveys. *See, e.g.*, R10483, App’x K at K-4 (FWS. 2009) (U.S. Fish & Wildlife Service noting National Wetlands Inventory dataset relies on “high altitude imagery” and “on-the-ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis”); *id.* at K-15 (USDA. 2010) (noting the Department of Agriculture’s “data set is not designed for use as a primary regulatory tool in permitting or [s]iting decisions, but may be used as a reference source”); *id.* at K-6 (NJDEP. 1986) (DEP noting “information required to make wetlands determinations for jurisdictional purposes requires on-

site investigations,” “obviously cannot be generated through photographic interpretation,” and “are the most difficult land cover category to map from aerial photography”).<sup>10</sup>

Endangered species raise similar concerns. FERC admitted that surveys were not “completed for all potential suitable habitats for federal and state listed” threatened or endangered species, R10483 at 4-107 to 108 (JA\_\_\_\_\_ - \_\_\_\_\_), meaning the EIS “is not a comprehensive list of all species that could potentially be present ... in the Project area,” *id.* at 4-95 (JA\_\_\_\_\_ - \_\_\_\_\_). For multiple state-listed species, PennEast did no surveys *at all*. *Id.* at 4-126, Table 4.6-2 (JA\_\_\_\_\_ - \_\_\_\_\_). Yet still FERC found—based on 2-3 page DEP informational fact sheets—that the impacts would not be severe for the species. *See, e.g.*, R10483, App’x K at K-7 (NJDEP-DFW. 2002a, 20002b, 2002c) (JA\_\_\_\_\_ - \_\_\_\_\_) (referring to, *inter alia*, the bobcat, wood turtle, and long-tailed salamander). But these fact sheets were created only for general public informational purposes and not as site-specific decisional documents. And, if anything, those fact sheets *undercut* FERC’s position.

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<sup>10</sup> Wetlands delineations rely on digging borings to pull soil from potential wetlands and examining them. *See* U.S. Army Corps of Engineers, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region, 34-42 (2012). This cannot be done through desktop reviews. The Manual adds, “[s]oil survey information [from desktop sources] can be valuable for planning purposes, but is not site-specific and does not preclude the need for an on-site investigation.” *Id.* at 43.



*See, e.g., Id.* at K-7 (NJDEP-DFW. 2002a) (JA\_\_\_\_\_ - \_\_\_\_\_) (noting bobcat sightings in the area).

As to historic resources, PennEast completed archaeological surveys for only 38% of the project route in New Jersey; about 839 acres of land still require archaeological investigations. R10483 at 4-227 (JA\_\_\_\_\_ - \_\_\_\_\_). One study suggests there may be deeply buried archaeological sites where PennEast would cross the Delaware River. *Id.* at 4-221 (JA\_\_\_\_\_ - \_\_\_\_\_). The EIS notes, but disregards, that PennEast has not demonstrated compliance due to the missing field surveys. *Id.* at 4-228.

And there is more. In its application, PennEast proposed using “Horizontal Directional Drilling” to route the pipeline *under* certain wetlands and streams, ostensibly avoiding environmental damage. R10483 at 2-11 to -12 (JA\_\_\_\_\_ - \_\_\_\_\_). But that technique’s efficacy depends on the geologic formations in the area—the drill cannot pierce a number of soil types and formations. R4744 at 6 (JA\_\_\_\_\_ - \_\_\_\_\_). PennEast had to complete geotechnical investigations for FERC to evaluate the use of this method. PennEast did not do so, and the geology of the proposed drilling areas remains unknown. R10483 at 2-11, Table 2.3.1-1 (JA\_\_\_\_\_ - \_\_\_\_\_). And PennEast submitted no contingency plans if drilling fails. R10483 at 2-12 (JA\_\_\_\_\_ - \_\_\_\_\_). This matters—because FERC relied on this

kind of drilling to mitigate impacts to wetlands, waterbodies, and protected species. *Id.* at 4-66, 4-132 (JA\_\_\_\_\_ - \_\_\_\_\_).

These informational gaps should have forestalled project approval, as FERC does not know how consequential environmental impacts on myriad resources will be for approximately two-thirds of the route in New Jersey, nor whether PennEast's planned drilling method will work. These are "critical" issues that require a "hard look" before FERC can move forward under NEPA (and under the Natural Gas Act); they cannot be so "lightly brushed aside." 164 FERC ¶ 61,098 at 61,611 (JA\_\_\_\_\_ - \_\_\_\_\_); *see also id.* (JA\_\_\_\_\_ - \_\_\_\_\_) (highlighting the incomplete information on horizontal directional drilling and historic and cultural resources).

The environmental evidentiary gaps are especially troubling given the market need questions; if "there is limited evidence of the need for the proposed project, it is incumbent on the Commission to engage in an especially searching review of the project's potential harms to ensure that the project is in the public interest." *Id.* (JA\_\_\_\_\_ - \_\_\_\_\_). DEP and the U.S. Army Corps of Engineers both previously denied PennEast's application based on incomplete information; the Corps explained that the application lacked the required field surveys, "including a delineation of waters and wetlands." R10814; R10404 at 1-2. FERC should have done the same here. *See* 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_) (noting that FERC nowhere "explain[s] how the incomplete information is sufficient to

permit the Commission to adequately balance the Project's adverse effects against its benefits").

Still more, FERC failed entirely to follow NEPA and the Council's procedures for missing information. FERC never determined whether the missing surveys were "essential"—which the Council established is necessary to make a reasoned decision on this application. 40 C.F.R. § 1502.22(a), (b); *see also Native Vill. of Point Hope v. Salazar*, 730 F.Supp. 2d 1009 (D. Alaska 2010) (rejecting EIS that failed to make "essential" filing). FERC also never disclosed the relevance of missing field surveys "to evaluating reasonably foreseeable significant adverse impacts." 40 C.F.R. § 1502.22. Relying instead on desktop resources, FERC failed to disclose the myriad differences between desktop and survey data, or to determine whether the scientific community accepts them as equivalent. *See id.* And contrary to FERC's assertion, the identification of missing data is not limited to noting an incomplete record; the regulations expressly require analysis of the *impact* of that missing information. *See* 40 C.F.R. § 1502.22(b). FERC did no such analysis.<sup>11</sup>

None of FERC's responses pass muster. First, FERC claims it does not need "perfect information before it takes any action" because NEPA "does not require all

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<sup>11</sup> FERC's failure curtailed the public's ability to meaningfully comment, as DEP explained. R10565 at 2 (JA\_\_\_\_\_ - \_\_\_\_\_) ("[C]omments on the final EIS are limited because of the lack of specific, technical information for this project.")

environmental concerns to be definitively resolved” or for “every study or aspect of an analysis to be completed.” 164 FERC ¶ 61,098 at 61,583 (JA\_\_\_\_\_ - \_\_\_\_\_). Perfection is not the issue; FERC approved a pipeline route while missing 65% of the New Jersey field surveys. At a certain point, a “significant amount of missing information on environmental impacts fails to meet a basic threshold of ensuring [FERC] ‘carefully consider[s] ... environmental impacts,’” or NEPA means nothing. 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_) (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)). Wherever the line is, two-thirds of the route is not even close.

FERC next blames the lack of data on recalcitrant landowners, not PennEast. 164 FERC ¶ 61,098 at 61,583 – 61,584 (JA\_\_\_\_\_ - \_\_\_\_\_). But “[i]t is the project developer’s responsibility to reach agreements with landowners so that necessary surveys can be performed,” 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_), and PennEast could have done more here. The record contains some evidence of PennEast’s attempts to obtain perpetual rights-of-ways, but nowhere suggests that PennEast had offered landowners inducements to permit *temporary* property access. *See* R2741, App’x I (JA\_\_\_\_\_ - \_\_\_\_\_). Such temporary rights would have been sufficient and less intrusive. While perhaps arduous, PennEast’s “difficulties in satisfying that responsibility is no reason [for FERC] to shirk [its] statutory mandates.” 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_). PennEast also could

have chosen another project route; DEP urged PennEast to consider co-locating its pipeline along existing rights-of-ways, thereby reducing environmental impacts and increasing the likelihood of obtaining voluntary property access. R9360 at 2 (JA\_\_\_\_\_ - \_\_\_\_\_). But PennEast instead chose a route only 37% collocated with existing rights-of-ways. 162 FERC ¶ 61,053 at 61,248 (JA\_\_\_\_\_ - \_\_\_\_\_).

Finally, FERC observes that the Certificate is “conditional,” and PennEast still must comply with a significant number of requirements. But that is insufficient due to the vast amount of missing information. By granting the certificate, PennEast can now “use eminent domain authority to gain access to land for the purpose of gathering missing information that is necessary to inform a finding of public interest in the first place”—a kind of “circular logic” that in no way supports this dramatic use of eminent domain authority. 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_ - \_\_\_\_\_). FERC also gave reason to doubt that the conditions were substantive, asserting in advance that the information gathered by compliance with the conditions would *not* change the project in any meaningful way. *See* 164 FERC ¶ 61,098 at 61,584-85 (JA\_\_\_\_\_ - \_\_\_\_\_) (“The Environmental Conditions ... are not designed to allow significant departures from the project as certificated.”); *but see Marsh*, 490 U.S. at 371 (“It would be incongruous with . . . the act’s manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action

simply because the relevant proposal has received initial approval.”). FERC cannot claim that these conditions address environmental concerns while simultaneously asserting that the conditions’ implementation will not change the project.

Even were FERC determined to go down this road, the very most FERC could have done is allow PennEast to use eminent domain to obtain *temporary* access to conduct field surveys and gather the requisite information. *See* 15 U.S.C. § 717f(e) (authorizing FERC to add any “reasonable terms and conditions” to Certificates “as the public convenience and necessity may require”). Authority to condemn perpetual rights-of-ways should occur only after PennEast completes these surveys and FERC conducts a supplemental EIS. *See, e.g. Indigenous Env'tl. Network v. U.S. Dep't of State*, No. 17-29, 2018 WL 5840768 (D. Mont. Nov. 8, 2018) (ordering supplemental EIS to address unsurveyed archaeological sites along pipeline). But the Certificate conditions are not so limited. Just the opposite: PennEast, applying its overbroad authority, obtained a court order condemning for immediate access all the properties along the route. *In re PennEast*, 2018 WL 6584893, \*21. PennEast can now have easements over approximately 40 properties in which the State of New Jersey has a property interest. This was possible only because FERC granted a Certificate “with little heed for the rights of landowners or the harms they may suffer as a result,” and despite the statutory requirements to ensure market need outweighs environmental harms. 164 FERC ¶ 61,098 at 61,612 (JA\_\_\_\_\_-\_\_\_\_\_).

### III. FERC ERRED IN BASING PENNEAST'S RETURN ON EQUITY ON PRIOR DECISIONS AND NOT ON THE RECORD EVIDENCE.

Once FERC decides to grant a Certificate, the Commission must “determine the initial rates that a pipeline may charge for newly certificated service.” *Missouri Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003) (citing *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 390-91 (1959)) (“*MoPSC*”). The Natural Gas Act requires FERC to set initial rates consistent with “the public interest.” *Id.* In *MoPSC*, this Court reminded FERC of its “duty to use its § 7 power to protect consumers,” 337 F.3d at 1070, and quoted *Atlantic Refining* which required “a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7,” 360 U.S. at 391. In establishing initial rates, the Commission must set a return on equity (ROE)—in other words, the profits its stockholders will make.<sup>12</sup> This Court must ensure that the rate is “the product of reasoned decisionmaking,” and so will “examine ‘the method employed in reaching that result.’” *MoPSC*, 337 F.3d at 1070 (quoting *City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981)). FERC and this Court previously agreed that a range of market condition evidence

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<sup>12</sup> The initial ROE has enormous consequences for a utility ratepayers. The ROE is intended to reflect the return an investor would demand before investing in the utility. A utility’s net investment in plant is multiplied by the ROE to calculate a profit that ratepayers must fund every year. If a utility has \$1 billion of undepreciated investment in plant, a 14% ROE will allow the utility to add \$140 million in “costs” to its calculation of rates. If FERC settles on an ROE that is higher than the relevant costs of equity capital at the time, then pipeline ratepayers will be subsidizing returns to stockholders.

bears on the proper ROE. In this case, however, FERC relied on its precedents—and not record evidence of current market conditions—to justify a 14% ROE. That flawed methodology produced an excessive initial rate in the tariff, which future customers will ultimately have to pay.

This Court and FERC have previously been clear about the need to base ROEs on current market conditions. *See Coakley v. Bangor Hydro-Electric Co.*, 165 FERC ¶ 61,030 (2018); *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017). In evaluating whether an existing ROE has become unjust and unreasonable, FERC has stated that it may consider changes in capital market conditions, prime interest rates, bond yields, and returns on investments having corresponding risks to set ROEs. *Coakley*, 165 FERC ¶ 61,030, ¶29. (highlighting, as examples of such evidence, “a significant decrease in financial indicators such as prime interest rates and U.S. Treasury and public utility bond yields, as well as changes in the returns on investments in other enterprises having corresponding risks, since the existing ROE was established may indicate that the existing ROE has become unjust and unreasonable”).

In the proceedings below, PennEast proposed a 14% ROE without providing any analysis of capital market conditions, instead citing only FERC’s prior decisions and Commission “policy.” R1 at 32-33 (JA\_\_\_\_\_ - \_\_\_\_\_). But setting ROE is not a legal question--where *stare decisis* requires applying the same rule time and again. Identifying the ROE requires an analysis of actual capital market conditions in the



industry, which can change over time. That is why this Court requires more than a “naked citation of prior authority” before applying one hypothetical to another. *North Carolina Util. Com’n v. FERC*, 42 F.3d 659, 664 (D.C. Cir. 1994).

Worse, the “policy” on which the Commission claims to rely does not exist. The 14% ROE “policy” stems from a 1997 Commission award of a 12% base ROE plus a 2% ROE “incentive” adder. *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149, at 61,592 (1997).<sup>13</sup> Thereafter, pipelines have routinely sought, and received, a 14% equity return, despite numerous boom and bust cycles, including the Great Recession. R9179 at 12-13 & n.17 (JA\_\_\_\_\_ - \_\_\_\_\_). That makes little sense from a consumer perspective. While both this Court’s decision in *Emera Maine*, FERC’s subsequent ruling in *Coakley*, and prior precedent all look to set ROEs based on an assessment of changing market conditions, FERC here—without explanation or justification—simply parrots past decisions and disregards the vastly changed capital market conditions since 1997. 162 FERC ¶ 61,053 at 61,231; 164 FERC ¶ 61,098 at 61,582. That methodology was arbitrary and capricious.

The Commission’s disregard notwithstanding, record evidence shows that a 14% ROE is excessive. The evidence includes a showing that the average, state-authorized equity returns for gas companies declined from 9.94% in 2012 to 9.45%

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<sup>13</sup> Rate Counsel describe the history of the policy in more detail in its comments to FERC. *See* R9719 at 12 & n.17 (JA\_\_\_\_\_ - \_\_\_\_\_).

in 2016. R9179 at 10 (JA\_\_\_\_\_ - \_\_\_\_\_). The most recent FERC decision evaluating ROEs in the pipeline context did analyze capital market conditions and adopted a 10.55% ROE benchmark. *El Paso Natural Gas Co.*, 145 FERC ¶ 61,040, at ¶ 642 (2013), *denying stay*, 145 FERC ¶ 63,107 (2013), *denying reconsideration*, 146 FERC ¶ 63,001 (2014), *reh'g denied*, 154 FERC ¶ 61,120 (2016). Even a pipeline that was deemed non-creditworthy and that received an ROE at the top of the range of reasonableness received only an 11.59% ROE. *Portland Nat. Gas Transmission Sys. Op.*, 142 FERC ¶ 61,197 (2013), *reh'g denied*, 150 FERC ¶ 61,107 (2015). FERC's reliance on precedent and its failure to engage with record evidence in this case was error.<sup>14</sup>

## CONCLUSION

For the foregoing reasons, this Court should vacate FERC's Certificate Order and remand to the Commission for further consideration.

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<sup>14</sup> Similarly, PennEast proposed an imputed debt cost of 6.00% to calculate the initial rate. R1 at 32, 34. The Commission accepted that rate, relying entirely on a 2014 FERC decision involving another facility, and not PennEast-specific analysis. The record contained data showing that interest rates were generally declining, and were down to 3.57% for an "A" rated utility and 4.16% for a "Baa" utility (July 2016). R9179 at 14-15. The Commission's award of a 6.00% debt rate based on precedent rather than the facts associated with a proposed pipeline that has sold most of its capacity and is owned by creditworthy utilities was arbitrary and capricious. On rehearing, the Commission cited benchmark utility debt rates of 5.06% and 4.68%, and asserted that PennEast's 6.0% debt rate "reasonably reflects the higher business risks." 164 FERC ¶ 61,098 at 61,583. But FERC never quantified those risks or otherwise explained why a premium over benchmark debt rates is reasonable. *Id.*

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I certify that on December 21, 2018, the foregoing Joint Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of the Rate Counsel was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system.

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