ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-1128 *et al.* (consolidated)

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

DELAWARE RIVERKEEPER NETWORK, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

PENNEAST PIPELINE COMPANY, LLC, *et al.*,

Intervenors.

On Petitions for Review of Orders of the Federal Energy Regulation Commission

JOINT ANSWERING BRIEF FOR RESPONDENT-INTERVENORS PENNEAST PIPELINE COMPANY, LLC AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Frank H. Markle
PennEast Pipeline Company, LLC
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610.768.3625
Email: marklef@ugicorp.com

James D. Seegers
Vinson & Elkins LLP
1001 Fannin St.
Suite 2500
Houston, TX 77002
Phone: 713.758.2939
Email: jseegers@velaw.com

Michael B. Wigmore
Jeremy C. Marwell
Matthew X. Etchemendy
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: mwigmore@velaw.com
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com

Counsel for PennEast Pipeline Company, LLC

(Names and addresses of additional counsel appear inside cover.)

Neil H. Butterklee
Associate General Counsel
Sebrina M. Greene
Associate Counsel, Regulatory Services
4 Irving Place, Room 1875-S
New York, NY 10003
Phone: 212.460.1089
Email: butterkleen@coned.com
Email: greenes@coned.com

Counsel for Consolidated Edison Company of New York, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc. submit this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICI

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Petitioners' Opening Briefs.

The following parties have filed *amicus* briefs in support of Petitioners: Niskanen Center, the Environmental Defense Fund, and the Institute for Policy Integrity at New York University School of Law.

The Interstate Natural Gas Association of America has filed an *amicus* brief in support of Respondent.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief of Respondent Federal Energy Regulatory Commission.

C. RELATED CASES

The case on review has not previously been before this Court or any other court. Counsel is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Date: April 4, 2019

Respectfully submitted,

/s/ Jeremy C. Marwell

Michael B. Wigmore
Jeremy C. Marwell
Matthew X. Etchemendy
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: mwigmore@velaw.com
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com

Frank H. Markle
PennEast Pipeline Company, LLC
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610.768.3625
Email: marklef@ugicorp.com

James D. Seegers
Vinson & Elkins LLP
1001 Fannin St.
Suite 2500
Houston, TX 77002
Phone: 713.758.2939
Email: jseegers@velaw.com

Counsel for PennEast Pipeline Company, LLC

/s/ Neil H. Butterklee (by permission)

Neil H. Butterklee
Associate General Counsel
Sebrina M. Greene
Associate Counsel, Regulatory Services
4 Irving Place, Room 1875-S
New York, NY 10003
Phone: 212.460.1089
Email: butterkleen@coned.com
Email: greenes@coned.com

Counsel for Consolidated Edison Company of New York, Inc.

CORPORATE DISCLOSURE STATEMENTS

1. Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor PennEast Pipeline Company, LLC ("PennEast") makes the following disclosures:

PennEast is a Delaware limited liability company to be engaged in the interstate transportation of natural gas.

Southern Company Gas is a direct, wholly owned subsidiary of The Southern Company. Southern Company Gas, through an indirect subsidiary, owns a 20 percent interest in PennEast.

The Southern Company (NYSE:SO) is a publicly held corporation that has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in The Southern Company.

NJR Pipeline Company is a direct, wholly owned subsidiary of NJR Midstream Holdings Corporation; which is a direct, wholly owned subsidiary of NJR Energy Investments Corporation; which is a direct, wholly owned subsidiary of New Jersey Resources Corporation. NJR Pipeline Company owns a 20 percent interest in PennEast.

New Jersey Resources Corporation (NYSE:NJR) is a publicly held corporation that has no parent companies. BlackRock, Inc., which is a publicly held corporation, has a greater than 10% ownership interest in

New Jersey Resources Corporation. The Vanguard Group, a privately held registered investment advisor, also owns a greater than 10% interest in New Jersey Resources Corporation.

BlackRock, Inc. (NYSE:BLK) is a publicly held corporation that has no parent companies. The PNC Financial Services Group, Inc., which is a publicly held corporation, has a greater than 10% ownership interest in BlackRock, Inc.

The PNC Financial Services Group, Inc. (NYSE:PNC) is a publicly held corporation that has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in The PNC Financial Services Group, Inc.

SJI Midstream, LLC is a direct, wholly owned subsidiary of South Jersey Industries, Inc. SJI Midstream, LLC owns a 20 percent interest in PennEast.

South Jersey Industries, Inc. (NYSE:SJI) is a publicly held corporation that has no parent companies. The Vanguard Group, a privately held registered investment advisor, and BlackRock, Inc., which is a publicly held corporation, each own a greater than 10% ownership interest in South Jersey Industries, Inc.

UGI PennEast, LLC is a direct, wholly owned subsidiary of UGI Energy Services, LLC; which is a direct, wholly owned subsidiary of UGI Enterprises, LLC; which is a direct, wholly owned subsidiary of UGI Corporation. UGI PennEast, LLC owns a 20 percent interest in PennEast.

UGI Corporation (NYSE:UGI) is a publicly held corporation that has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in UGI Corporation. The Vanguard Group, a privately held registered investment advisor, and BlackRock, Inc., which is a publicly held corporation, each own interests greater than 10% in UGI Corporation.

Spectra Energy Partners, LP is a limited partnership, whose partnership interests are owned by: (i) Spectra Energy Partners (DE) GP, LP (45.9%); (ii) Spectra Energy Southeast Supply Header, LLC (1.8%); and (iii) Spectra Energy Transmission, LLC (52.3%). Spectra Energy Partners (DE) GP, LP and Spectra Energy Southeast Supply Header, LLC are both wholly owned subsidiaries of Spectra Energy Transmission, LLC. Spectra Energy Transmission, LLC is a wholly owned subsidiary of Spectra Energy Capital, LLC, which, in turn, is a direct wholly owned subsidiary of Spectra Energy Corp. Spectra

Energy Corp is a direct wholly owned subsidiary of Enbridge (U.S.) Inc., which in turn is a wholly owned subsidiary of Enbridge US Holdings Inc., which in turn is a wholly owned subsidiary of Enbridge Inc.

Enbridge Inc. (NYSE:ENB), is a publicly held corporation that has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in Enbridge Inc.

2. Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor Consolidated Edison Company of New York, Inc. ("Con Edison") makes the following disclosures:

Con Edison is a regulated public utility, incorporated in the State of New York, engaged in the generation, transmission, distribution and the wholesale and retail sale of electric power throughout the five boroughs of New York City and in the County of Westchester, the retail sale of gas in parts of New York City and County of Westchester, and the retail distribution and sale of steam in parts of Manhattan. Con Edison has outstanding shares and debt securities held by the public and may issue additional securities to the public. Con Edison is a subsidiary of Consolidated Edison, Inc., which also has outstanding shares and debt held by the public and may issue additional securities to the public.

Con Edison is also affiliated with Orange & Rockland Utilities, Inc. ("O&R"), a subsidiary of Consolidated Edison, Inc., which also has outstanding debt securities held by the public and may issue additional securities to the public. O&R has a subsidiary, Rockland Electric Company, which may issue debt securities to the public. No other publicly held companies have a 10% or greater ownership interest in Con Edison.

Date: April 4, 2019

Respectfully submitted,

/s/ Jeremy C. Marwell

Michael B. Wigmore
Jeremy C. Marwell
Matthew X. Etchemendy
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: mwigmore@velaw.com
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com

Frank H. Markle
PennEast Pipeline Company, LLC
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610.768.3625
Email: marklef@ugicorp.com

James D. Seegers
Vinson & Elkins LLP
1001 Fannin St.
Suite 2500
Houston, TX 77002
Phone: 713.758.2939
Email: jseegers@velaw.com

Counsel for PennEast Pipeline Company, LLC

/s/ Neil H. Butterklee (by permission)

Neil H. Butterklee
Associate General Counsel
Sebrina M. Greene
Associate Counsel, Regulatory Services
4 Irving Place, Room 1875-S
New York, NY 10003
Phone: 212.460.1089
Email: butterkleen@coned.com
Email: greenes@coned.com

Counsel for Consolidated Edison Company of New York, Inc.

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GLOSSARY

As used herein,

Certificate Order means Order Issuing Certificates, *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018);

Con Edison means Consolidated Edison Company of New York, Inc.;

Environmental Petitioners means Petitioners Delaware Riverkeeper Network, New Jersey Conservation Foundation and the Watershed Institute, Hopewell Township, and Homeowners Against Land Taking – PennEast, Inc.;

FEIS means Final Environmental Impact Statement;

FERC or **the Commission** means Federal Energy Regulatory Commission;

NEPA means National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*;

New Jersey means Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel;

NJDEP means New Jersey Department of Environmental Protection;

P means the internal paragraph number within a FERC order;

PennEast means PennEast Pipeline Company, LLC;

PennEast Project or **the Project** means the PennEast Pipeline Project;

R. means the Record Item Number in the Commission's Certified Index to the Record, filed on Oct. 24, 2018 (Document 1756805);

Rehearing Order or **Reh'g Order** means Order on Rehearing, *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098 (2018);

Riverkeeper means Delaware Riverkeeper Network.

COUNTER-STATEMENT OF JURISDICTION

Respondent-Intervenors adopt the jurisdictional statement of the Federal Energy Regulatory Commission ("FERC" or "Commission"). *See* FERC Br. 4-5. In addition, and as discussed below, this Court lacks jurisdiction over arguments not properly raised on rehearing by the party seeking to raise those arguments in this Court. *See Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-74 (D.C. Cir. 1985).

STATEMENT OF THE ISSUES

Respondent-Intervenors adopt FERC's statement of issues. *See* FERC Br. 1-3.

STATUTES AND REGULATIONS

Except for provisions reproduced in the addendum to this brief, relevant statutes and regulations are attached to FERC's brief.

INTRODUCTION

This case involves challenges to the Commission's approval of the PennEast Pipeline Project ("Project"), a billion-dollar natural gas pipeline project that will expand and improve access to natural gas in Pennsylvania, New Jersey, New York, and surrounding states. Respondent-Intervenors PennEast Pipeline Company, LLC ("PennEast") and Consolidated Edison Company of New York, Inc. ("Con Edison") are, respectively, the Project's developer and one of its foundation shippers. The

PennEast Project is designed to meet growing regional demand for clean and affordable energy, serving the needs of customers like Con Edison and, ultimately, the millions of residential, commercial, and industrial end-users who increasingly depend on natural gas for heating, electricity, and other uses.

Petitioners are three New Jersey state agencies (collectively, "New Jersey") and several environmental organizations, landowner groups, and one municipality (collectively, "Environmental Petitioners"). Some Petitioners oppose discrete aspects of FERC's decision; others oppose the Project (or all natural gas infrastructure) outright. However, "given our nation's increasing demand for natural gas" resulting from economic and population growth, the need for more interstate natural-gas transportation capacity is "inescapable." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 100 (D.C. Cir. 2014). Congress has charged the Commission with "overseeing the construction and expansion of interstate natural gas facilities," including decisions about "where those facilities can and should be sited." *Id.* Here, the Commission concluded that "the public convenience and necessity requires approval" of the PennEast Project. *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, P 40 (2018) ("Certificate Order"), JA____.

The Commission's decision followed an exhaustive multi-year review, was supported by ample record evidence, and closely adhered to precedent. Petitioners fail to identify any fault in the Commission's decision-making. Indeed, less than

two months ago in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (per curiam), this Court rejected the core legal contentions also advanced by Petitioners in this case, including the issues related to the Commission's assessment of market need, return on equity, and eminent domain. Petitioners' remaining arguments are similarly flawed. Therefore, the petitions for review should be denied.

STATEMENT OF THE CASE

I. The PennEast Project Will Provide Critical New Natural Gas Transportation Capacity To Meet Growing Regional Demand.

The Project is a proposed underground natural gas pipeline designed to satisfy growing demand for natural gas transportation capacity by local distribution companies, electric generators, and end users in eastern and southeastern Pennsylvania, New Jersey, New York, and surrounding states. Certificate Order P 4, JA____. The Project will bring lower-cost natural gas from multiple upstream supply sources located at various receipt point interconnections to natural gas consumers in the surrounding states. *See id.* Once constructed, the Project—which will provide up to 1,107,000 dekatherms per day of new firm natural gas transportation capacity—will consist of approximately 116 miles of 36-inch diameter mainline transmission pipeline, extending from Luzerne County, Pennsylvania to Mercer County, New Jersey. *Id.* PP 4-5, JA____.

II. After An Exhaustive Review, FERC Found That The Public Convenience And Necessity Required Approving The Project.

Following its announcement of the Project, PennEast held an open season in August 2014 to solicit potential interest from shippers, resulting in long-term precedent agreements for about 90% of the Project's capacity. Certificate Order P 6, JA____. PennEast participated in the Commission's pre-filing environmental review process, which included more than 200 meetings with public officials, fifteen informational sessions for affected landowners, and several public scoping meetings. *Id.* PP 39, 93, JA____, ____. This iterative and interactive process among PennEast, Commission staff, and Project stakeholders resulted in the evaluation of over 100 route alternatives (many of which were incorporated into the final proposed pipeline route) to address landowner concerns, community impacts, and environmental considerations. *Id.* at P 39, JA____.

In September 2015, PennEast filed with the Commission an application for a certificate of public convenience and necessity. Certificate Order P 1, JA____. Various parties intervened, including Petitioners. Pursuant to the National Environmental Policy Act ("NEPA"), Commission staff prepared and issued a draft environmental impact statement in July 2016, on which numerous parties submitted comments. *Id.* PP 94-95, JA____-____. The Commission twice delayed completion of the final environmental impact statement ("FEIS"), which was ultimately issued in April 2017. *Id.* P 97, JA____. The FEIS found the Project's adverse

environmental impacts would be less than significant given proper mitigation. *Id.* P 98, JA____.

On January 19, 2018, the Commission issued the Certificate Order providing its authorization for the Project, concluding "that the public convenience and necessity requires approval of PennEast's proposal." Certificate Order P 40, JA____. A number of parties, including Petitioners, filed rehearing requests with the Commission; those requests were variously rejected, dismissed, or denied in the Commission's Rehearing Order issued on August 10, 2018. *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, PP 3-4 (2018) ("Reh'g Order"), JA____. Petitioners sought review in this Court.

III. Project Construction Has Not Yet Commenced.

Building an interstate natural-gas pipeline is a complex, multi-step process typically involving numerous state and federal approvals, as well as eminent domain actions to secure easements where necessary. As relevant here, in April 2017, PennEast sought a freshwater wetlands individual permit from Petitioner New Jersey Department of Environmental Protection ("NJDEP"). *See* 2/1/18 NJDEP Denial of Freshwater Wetlands Permit With Associated NJDEP Letters, FERC Docket No. CP15-558-000 (Feb. 6, 2018) ("NJDEP Denial"), R.10814, JA____. Shortly thereafter, NJDEP "administratively close[d] [PennEast's] Application because" PennEast had not gained access to portions of the right-of-way in New Jersey to

conduct environmental surveys and, in the agency's view, "[c]ompleted surveys and analysis for all regulated impacts is required" before "initiating a full review" of PennEast's permit application. *Id.*, JA____-____. However, PennEast could not access the entire right-of-way without using eminent domain, *see* Reh'g Order P 44, JA____, and could not use eminent domain until it had a FERC certificate, *see* 15 U.S.C. § 717f(h). In February 2018, NJDEP denied PennEast's permit application "without prejudice" to submitting "a new complete application." NJDEP Denial, JA____.

After FERC issued the Certificate Order, PennEast commenced eminent domain proceedings in federal district court to acquire easements. *See, e.g.*, *In re PennEast Pipeline Co.*, No. 18-cv-1585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018), *appeal docketed*, No. 19-1191 (3d Cir. Jan. 25, 2019). PennEast has not yet been authorized to begin physical construction, tree-felling, or trench-digging. However, preliminary relief granted by the district courts in the eminent domain cases has allowed PennEast to begin surveying areas to which it previously lacked access, to obtain the information NJDEP has required to process PennEast's permit application.

SUMMARY OF ARGUMENT

FERC's decision complied with the Natural Gas Act, NEPA, and the Fifth Amendment. Petitioners' contrary arguments—many of which this Court has already rejected—uniformly lack merit.

New Jersey's challenge to FERC's determination of market need cannot overcome the fact that 90% of the Project's capacity is *already subscribed* under long-term precedent agreements. New Jersey's skepticism about precedent agreements with affiliated shippers would improperly second-guess FERC's expert judgment in an area "peculiarly within [its] discretion," *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (citation omitted), on the basis of unfounded speculation. This Court recently rejected a materially identical argument in *Appalachian Voices*, for a pipeline with a larger percentage of its capacity subscribed to affiliates.

New Jersey's challenge to FERC's approval of a 14% return on equity for PennEast's initial recourse rates also fails. New Jersey's argument distorts the record and governing legal standards, and this Court rejected the same argument on indistinguishable facts in *Appalachian Voices*.

Petitioners' challenges to the Commission's environmental review are similarly flawed. New Jersey's argument that it was unlawful for FERC to proceed in the absence of field surveys that neither the Commission nor PennEast could

legally complete in advance of certificate issuance (due to landowner objections) finds no support in NEPA, and would eviscerate the Natural Gas Act by giving protesting landowners a *de facto* veto over proposed infrastructure projects. The various NEPA arguments raised by Environmental Petitioners likewise fail. The Commission's multi-year environmental review of the Project scrupulously complied with NEPA, and its analysis of upstream production impacts—the primary focus of Environmental Petitioners' NEPA arguments—went well *beyond* NEPA's requirements.

Finally, Environmental Petitioners raise a host of statutory and constitutional arguments regarding eminent domain. But their Takings Clause arguments are contrary to a century of Supreme Court case law; their statutory arguments lack any basis in the Natural Gas Act; and their due process claims are foreclosed by numerous precedents, including a recent decision of this Court. *See Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110-11 (D.C. Cir. 2018). Moreover, this Court rejected a range of closely related (and in some cases identical) contentions in *Appalachian Voices*.

ARGUMENT

I. Standard Of Review

Petitioners' Natural Gas Act claims are reviewed under the deferential arbitrary-and-capricious standard. *Minisink*, 762 F.3d at 105-06. This Court asks

whether FERC's decision-making was "reasoned, principled, and based upon the record," and the Commission's factual findings are "conclusive" if "supported by substantial evidence." *Id.* at 106, 108 (citations omitted). As the agency entrusted with administering the Natural Gas Act, FERC's interpretation of the statute is likewise entitled to deference. *See Myersville*, 783 F.3d at 1315; *N. Nat. Gas Co. v. FERC*, 827 F.2d 779, 784 (D.C. Cir. 1987) (en banc). Petitioners' NEPA claims are reviewed under similarly deferential standards. *See* FERC Br. 16-17. This Court reviews Petitioners' constitutional claims *de novo*. *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009).

II. The Commission Reasonably Found Market Need For The Project Based On Overwhelming Evidence.

New Jersey challenges FERC's determination that there is market need for the Project, N.J. Br. 15-24, even though "approximately 90 percent of the project's capacity" is already subscribed under "long-term, firm precedent agreements." Certificate Order P 28, JA____; *see* Reh'g Order P 12, JA____. Its arguments are unavailing.

A. The Commission Reasonably Found Market Need For The Project Based On Precedent Agreements.

New Jersey cannot credibly dispute that long-term agreements subscribing *90%* of the Project's capacity constitute overwhelming evidence of market need.

Instead, New Jersey seeks to cast doubt on the precedent agreements because some of them are with corporate affiliates of the pipeline. *See* N.J. Br. 16-21.

This Court very recently rejected that exact argument. In upholding FERC's approval of the Mountain Valley Pipeline project—where at the time of FERC's order *all* of the precedent agreements were with affiliates[1]—this Court explained that "[t]he fact that Mountain Valley's precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious." *Appalachian Voices*, 2019 WL 847199, at *1. The Court affirmed as "reasonabl[e]" FERC's explanation "that '[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.'" *Id.* (quoting *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 45). The Commission provided the same explanation here. Reh'g Order P 17, JA____. Moreover, New Jersey's claim is even weaker than the unsuccessful argument in *Appalachian Voices*, since many of PennEast's shippers are *non*-affiliates. *See* Certificate Order PP 6, 33, JA____, ____.

In seeking to cast doubt on affiliate agreements, New Jersey distorts FERC's Certificate Policy Statement. Under prior policy, the Commission "required a new pipeline project to have contractual commitments for at least 25 percent of the

[1] *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 10 & nn.12-16 (2017).

proposed project's capacity." Certificate Order P 27 n.31, JA____. The current Certificate Policy Statement relaxed the 25% contractual subscription requirement. *Id.* P 27, JA____. Current policy "permits" (but does not "require[]") FERC "to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Myersville*, 783 F.3d at 1311 (quoting *Minisink*, 762 F.3d at 111 n.10).

New Jersey seizes on the Certificate Policy Statement's observation that affiliate contracts can "raise[] additional issues" and 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." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744, 61,748 (1999) (emphasis added), *clarified* 90 FERC ¶ 61,128, *clarified* 92 FERC ¶ 61,094 (2000). PennEast *does* have long-term precedent agreements with "multiple new customers" that are non-affiliates, including Intervenor Con Edison. Regardless, a "shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated" with PennEast. Reh'g Order P 17, JA____.

New Jersey speculates about improper motives that affiliate shippers "might" have under certain circumstances. N.J. Br. 19-20 (citation omitted). But it cites nothing in the record raising doubts about the particular agreements here. Moreover,

New Jersey ignores the commercial reality that relationships change over the course of a 15- or 20-year contract. For example, as New Jersey concedes, one of the shippers that was affiliated with PennEast when it signed its precedent agreement is no longer an affiliate. *See* N.J. Br. 6 n.3.

B. Nothing In The Record Undermines The Commission's Finding Of Project Need.

New Jersey also argues that "significant record evidence demonstrates that new capacity is not necessary." N.J. Br. 21. This gets the standard of review backwards. Even if there were "significant evidence" going the other way (and there is not), FERC's decision must be affirmed if it is supported by substantial evidence—which it plainly is, *see supra* Part II.A. *E.g.*, *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005). New Jersey quotes an economist's affidavit claiming the region does not need more gas. N.J. Br. 21-22. The Commission considered this evidence, reasonably concluding that data on actual gas flows do not indicate whether there is available firm capacity, *see* FERC Br. 23-24, and finding signed contracts more reliable than uncertain regional forecasts. Certificate Order P 29, JA____-____; Reh'g Order P 20, JA____-____. New Jersey cites statements and forecasts from a few shippers; but FERC considered and reasonably found these statements less persuasive than signed, long-term contracts

for capacity. *See* Certificate Order P 29, JA____-____.[2] Finally, New Jersey discounts gas company shippers' "substantial financial commitment" (Certificate Order P 28, JA____), on grounds that "the financial commitment is borne by their ratepayers," N.J. Br. 23-24. But "state regulatory commissions will be responsible for approving any expenditures by state-regulated utilities." Reh'g Order P 18, JA____; *see* Certificate Order P 34, JA____. New Jersey offers no response.[3]

III. The Commission Appropriately Approved A Fourteen Percent Return On Equity.

New Jersey argues that the Commission erred in approving a fourteen percent return on equity for initial recourse rates, asserting that FERC relied too heavily on its precedents. N.J. Br. 36-39. Opponents of the Mountain Valley Pipeline raised

[2] New Jersey says three shippers made filings "documenting adequate pipeline supply through 2020." N.J. Br. 22-23. But even if that characterization of the data were correct (which is dubious), the need for this Project—approved in 2018 and with an expected operational lifetime of decades—would not be diminished by adequate supply "through 2020."

[3] *Amicus* Environmental Defense Fund speculates that state regulatory oversight may be an imperfect "bulwark." EDF Br. 20-21. But under the statutory scheme dividing authority between FERC and the states, *see* 15 U.S.C. § 717(b), local distribution companies and other utilities are answerable to state authorities if they attempt to pass unjustified costs onto ratepayers. FERC can reasonably place weight on Congress' division of regulatory authority in declining to attribute improper motives to regulated-utility shippers absent record evidence to the contrary (of which none exists here).

an identical argument under materially indistinguishable facts,[4] and this Court emphatically rejected it. *Appalachian Voices*, 2019 WL 847199, at *1. The Court should do the same here, as the Commission explains. *See* FERC Br. 25-29.

New Jersey argues that initial recourse rates will determine "the profits [PennEast's owners] will make" and that the 14% return on equity has "enormous consequences" for ratepayers. N.J. Br. 36 & n.12. Not so. About 90% of the Project's capacity is subscribed under long-term agreements and PennEast will "provide service to the project shippers at negotiated rates," Certificate Order P 6, JA____-____; *see id.* at P 67, JA____-____—*i.e.*, not the recourse rate. *Cf. Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1300-01 (D.C. Cir. 2010) (discussing difference between negotiated and recourse rates).

Regardless, as in *Appalachian Voices*, "FERC's approval of [PennEast]'s requested fourteen percent return on equity was reasonably based on the specific character of the Project and [PennEast]'s status as a new market entrant." 2019 WL 847199, at *1; Certificate Order PP 59-61, JA____-____; Reh'g Order P 36, JA____-____.[5] New Jersey mistakenly relies on precedents dealing with the "just

[4] *See* Pet'rs' Joint Opening Br. 33-37, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (Document 1765663) ("*Appalachian Voices* Pet'rs' Br.").

[5] In proposing a 14% return on equity, PennEast cited financial facts specific to the Project. *See* PennEast Pipeline Co. Application for Certificates 32-33, FERC Docket No. CP15-558-000 (Sept. 25, 2015), R.2740, JA____-____; *contra* N.J. Br. 37.

and reasonable" standard for existing pipelines under Sections 4 and 5 of the Natural Gas Act. *See* N.J. Br. 37-39; *cf.* 15 U.S.C. §§ 717c-717d. Precedents addressing Sections 4 and 5 are inapposite in the Section 7 context, where a less exacting "public interest" standard applies. Reh'g Order P 37, JA____-____; FERC Br. 25, 28-29. Similarly, data on "average, state-authorized equity returns for gas companies," N.J. Br. 38, "are not relevant because there is no showing that these companies face the same level of risk as faced by greenfield projects proposed by a new natural gas pipeline company," Certificate Order P 61, JA____. Again, New Jersey offers no response.[6]

IV. The Commission's Environmental Review Fully Complied With NEPA And The Natural Gas Act.

A. The Commission's Environmental Review Was Based On Adequate Information.

New Jersey argues that FERC's environmental analysis did not satisfy NEPA because field surveys were not conducted for portions of the route. N.J. Br. 24-35.[7]

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[6] In a footnote, New Jersey challenges FERC's acceptance of a 6% imputed debt cost. N.J. Br. 39 n.14. This Court generally declines to address "cursory arguments made only in a footnote." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1241 (D.C. Cir. 2004) (citation omitted). Regardless, New Jersey's argument is meritless. *See* FERC Br. 29; Certificate Order P 65 & n.87, JA____.

[7] New Jersey occasionally frames this purported failure as a "violation[] of both NEPA and the Natural Gas Act." N.J. Br. 12; *see id.* at 31. But it does not claim the Natural Gas Act requires more in-depth environmental review than NEPA, and the substance of its argument concerns only NEPA. *Accord id.* at 24.

As the Commission explains, it satisfied NEPA with respect to each of the environmental impacts New Jersey now raises. FERC Br. 57-67. PennEast adds the following points.

New Jersey concedes that "PennEast lacked access due to resistant landowners," but nonetheless contends that incomplete field surveys "should have forestalled project approval." N.J. Br. 25, 31. That is incorrect. NEPA does not create that kind of Catch-22. NEPA requires the Commission to take a hard look at environmental impacts. But it does not "impose a requirement that an impact statement can never be prepared until *all* relevant environment effects [a]re known"—indeed, if it did, "it is doubtful that any project could ever be initiated." *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) (citation omitted), *vacated in part on other grounds sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). "NEPA simply does not specify the quantum of information that must be in the hands of a decisionmaker before the decisionmaker may decide to proceed with a given project." *Id.* Where relevant information "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," agencies may proceed in the absence of that information so long as they make the requisite findings. 40 C.F.R. § 1502.22(b); *accord* FERC Br. 57-58, 67-70.

Here, "[t]he Certificate order specifically recognized the existence of incomplete surveys, primarily due to lack of access to landowner property." Reh'g

Order P 44, JA____. However, the Commission found that the conclusions in the FEIS and affirmed by the Certificate Order were based on "sufficient information," "including PennEast's application and supplements, as well as information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternatives analysis, and contacts" with government agencies and members of the public. *Id.* "For each relevant resource area, the Final EIS identified where and why information was incomplete, what methods were used to best analyze the resource impacts given the incomplete information, and any additional measures to mitigate any potential adverse impacts on the resource." *Id.* P 46, JA____-____; *see id.* PP 46-48, JA____-____. NEPA and its implementing regulations require nothing more.[8]

New Jersey argues that field surveys could provide improved analysis of certain environmental issues. N.J. Br. 27-31. But the Commission recognized that additional surveys could be useful; that is why the Certificate Order included conditions requiring completion of the surveys and, as appropriate, additional requirements such as survey data submission and coordination regarding avoidance and mitigation measures. *See* Reh'g Order PP 45, 49, JA____, ____; Certificate

[8] New Jersey fleetingly asserts that FERC committed four supposed procedural errors. N.J. Br. 32. Even if these one-sentence assertions properly present an issue for this Court's consideration, *but see, e.g.*, *Ry. Labor Executives' Ass'n v. U.S. R.R. Ret. Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984), the Commission complied with the requirements of 40 C.F.R. § 1502.22. *See* FERC Br. 67-70.

Order PP 120, 123, 129, 146-48, 150, 172, 191, JA____-____, ____, ____, ____-____, ____, ____, ____.

In issuing a pipeline certificate while conditioning project construction on the satisfactory completion of environmental and other permitting requirements, the Commission appropriately balanced its statutory responsibilities. As New Jersey no doubt understands (as it was among the parties denying PennEast survey access), only after FERC issued the Certificate Order could PennEast use eminent domain to obtain full survey access. *See* 15 U.S.C. § 717f(h). Demanding that FERC "forestall[] project approval" (N.J. Br. 31) because of incomplete surveys would therefore "hamstring the agency" by requiring FERC to "have perfect information before" issuing a certificate, even when such information is unobtainable. *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992). Indeed, the Commission has long observed that "[l]andowners cannot deny access to their property and then use this as a basis for claiming that the Commission's NEPA analysis is insufficient because all studies have not been completed." *Midwestern Gas Transmission Co.*, 114 FERC ¶ 61,257, P 62 (2006); *see also id.* PP 61-63; *S. Nat. Gas. Co.*, 85 FERC ¶ 61,134, at 61,534 (1998).

New Jersey concedes that "PennEast lacked [survey] access due to resistant landowners," but claims PennEast and FERC "had other options." N.J. Br. 25. What were these options? New Jersey suggests only two: "do[] more" to persuade

landowners to grant voluntary access; or "cho[ose] another project route." *Id.* at 33-34. In other words, obtain landowner consent (at apparently any cost) or build the pipeline elsewhere (in the apparent hope landowners along the new route would not resist surveys). New Jersey tacitly concedes that its position would, as FERC put it, "allow protesting landowners to exercise veto power" over the Project. Reh'g Order P 44 n.112, JA____. That would eviscerate Congress' intent—manifest in its conferral of regulatory authority on the Commission and eminent domain authority on certificate holders, *see* 15 U.S.C. § 717f(h)—to prevent individual landowners from blocking construction. It would convert NEPA into a game that impedes natural-gas infrastructure development, contravening FERC's congressional "charge to promote the orderly production of plentiful supplies of . . . natural gas at just and reasonable rates." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976).[9]

New Jersey's suggestion that PennEast could overcome the problem by "do[ing] more" (N.J. Br. 33) to secure voluntary access is disingenuous. For years,

[9] It is particularly unreasonable for NJDEP to make this argument given that NJDEP itself rejected PennEast's application for a freshwater wetlands individual permit due to incomplete survey access. *See supra* pp. 5-6; *see also* N.J. Br. 31. To be clear: having demanded surveys as a prerequisite for *even considering* PennEast's application, NJDEP now asks this Court to vacate the very Certificate Order that allows PennEast to complete those surveys. Meanwhile, NJDEP and its co-petitioner Delaware and Raritan Canal Commission have vigorously opposed PennEast's efforts to gain even preliminary access to various portions of the route using eminent domain. *See In re PennEast*, 2018 WL 6584893, at *8, *12, *22-23. And those state agencies have likewise refused to negotiate for or grant PennEast even temporary access to conduct surveys.

PennEast has made continuous efforts to "negotiate in good faith for the acquisition of . . . Rights of Way, or, at a minimum, to secure permission to access" properties "for survey purposes." Decl. of Jeffrey D. England ¶¶ 12-13, *In re PennEast Pipeline Co.*, No. 18-cv-1585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018) (ECF No. 1-6). While PennEast obtained permission to survey most of the parcels within the pipeline corridor, *id.* ¶ 14, the reality is that many landowners have simply refused to negotiate. *See generally id.* ¶¶ 35-36, 41 (discussing landowner opposition); *id.* Ex. P (landowner letter rejecting "financial offers," requesting that PennEast cease all "phone calls & letters" attempting to negotiate access, and stating that "we will not willingly allow you on our property for any reason"). Indeed, one Petitioner in this case (Homeowners Against Land Taking – PennEast, Inc.) was formed specifically to organize landowner opposition to this Project. *Cf.* Envtl. Br. 4.

Perhaps recognizing the problems with its primary argument, New Jersey suggests that FERC should have limited PennEast's eminent domain authority to securing temporary survey easements. *See* N.J. Br. 35. But the Natural Gas Act's grant of eminent domain authority to certificate holders is an unambiguous statutory mandate. "The Commission does not have the authority to limit a pipeline company's use of eminent domain once the company has received its certificate." Reh'g Order P 33, JA____; *cf. Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion

to deny a certificate holder the power of eminent domain."); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (same), *cert. denied*, 139 S. Ct. 941 (2019).

While New Jersey suggests the Commission could limit eminent domain under Section 7(e), 15 U.S.C. § 717f(e), it did not make a Section 7(e) argument on rehearing. *See* NJDEP & Del. & Raritan Canal Comm'n Reh'g Request 8, 57-62, FERC Docket No. CP15-558-001 (Feb. 20, 2018), R.10900, JA____, ____-____. The issue is therefore not properly before the Court. *See* 15 U.S.C. § 717r(b). In any event, as the Commission explained, the statute automatically confers eminent domain authority on certificate holders. *See* Reh'g Order P 33, JA____. Eminent domain is not a "right[] granted []under" a certificate by FERC, 15 U.S.C. § 717f(e)—unlike, say, the right to build or operate a facility. *Congress* has conferred authority on "*any* holder of a certificate of public convenience and necessity" to use eminent domain to "acquire . . . the necessary right-of-way to *construct, operate, and maintain* [the] pipe line," not merely survey the route. 15 U.S.C. § 717f(h) (emphasis added). That authority is not limited to temporary survey access, and is exercised through separate condemnation actions that proceed without Commission involvement. *See* Reh'g Order P 33 & n.82, JA____ (discussing statute). Even if it were ambiguous whether Section 7(e) permits fine-

tuning certificate holders' statutory eminent domain authority, FERC's interpretation receives deference. *See N. Nat. Gas Co.*, 827 F.2d at 784.[10]

B. The Commission's Review Of Upstream Impacts Went Well Beyond NEPA's Requirements.

Environmental Petitioners criticize FERC's treatment of two aspects of upstream "gas well development and associated impacts"—specifically, "land development impacts and greenhouse gas emissions from" new "well-pad development." Envtl. Br. 6. In fact, FERC's analysis of these issues went well *beyond* NEPA's requirements.

Here, the Commission correctly concluded that the Project would not be the legal cause of additional upstream gas production, and that even if it were, impacts resulting from such production are not reasonably foreseeable. *See* FERC Br. 46-51. Nonetheless, the Commission went beyond NEPA's requirements by providing conservative upper-bound estimates of greenhouse gas emissions and land impacts from upstream production. *See* Certificate Order PP 203-04, JA____. This Court has recently upheld a similar approach for downstream greenhouse gas emissions in

[10] *Amicus* Niskanen Center cites *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653 (4th Cir. 2011) (per curiam), for the proposition that FERC can use its conditioning power to limit the use of eminent domain. Niskanen Br. 12-14. But FERC's actual statutory authority to impose such conditions was not addressed in that case or the administrative order Niskanen Center cites. *See AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, PP 21-25 (2009). Nor was it "arbitrary" (Niskanen Br. 14) for the Commission not to address *sua sponte* a decade-old case cited nowhere in Petitioners' rehearing requests.

other cases. *See Appalachian Voices*, 2019 WL 847199, at *2; *Town of Weymouth v. FERC*, No. 17-1135, 2018 WL 6921213, at *2 (D.C. Cir. Dec. 27, 2018) (per curiam).[11]

1. *NEPA Does Not Require The Commission To Analyze Impacts Related To Upstream Natural Gas Production.*

As the Commission concluded, "the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline . . . project nor are they reasonably foreseeable consequences of [FERC's] approval" of such a project. Certificate Order P 197, JA____. Whether or not there might be exceptions in other circumstances not present here, *see id.*, "[t]he record in this proceeding does not demonstrate" either "the requisite reasonably close causal relationship" or foreseeability, *id.* PP 200-01, JA____-____; *see also* 40 C.F.R. § 1508.8.

As to causation, natural gas production—which Congress expressly excluded from FERC's regulatory authority, *see* 15 U.S.C. § 717(b)—is driven by factors "such as domestic natural gas prices and production costs." Certificate Order P 200, JA____-____. Thus, "[i]f this project were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate" means. *Id.* Moreover, increasing gas production

[11] The Commission also provided upper-bound estimates of downstream greenhouse gas emissions from end-user consumption, *see* Certificate Order PP 207-10, JA____-____, but Environmental Petitioners limit their challenge in this Court to FERC's analysis of upstream impacts.

generally drives new transportation capacity, not the other way around. *See id.* P 197, JA____.

Environmental Petitioners' opening brief fails to address the Commission's reasoning on these points, forfeiting any objection to it. Instead, Environmental Petitioners mistakenly claim that FERC "concedes" causation. Envtl. Br. 8, 11; *see id.* at 7. The record contradicts that assertion. *See supra*. That the Commission in the alternative provided conservative "upper limit" estimates of impacts from upstream production, including potential land impacts and greenhouse gas emissions, "to provide the public additional information," Certificate Order P 202, JA____,[12] did not concede either causation or foreseeability.

Nor are impacts from new upstream production reasonably foreseeable. "[T]he location, scale, and timing of any additional wells are matters of speculation, particularly regarding their relationship to the proposed project." Certificate Order P 201, JA____.[13] Environmental Petitioners argue that FERC should have scoured "[h]istorical drilling and permitting activity" to divine "the specific locations" of future wells that might produce gas transported on the Project over its multi-decade operational lifetime. Envtl. Br. 10. But as this Court explained in rejecting an earlier

[12] Such estimates effectively place upper bounds on upstream impacts by using maximally conservative assumptions, *e.g.*, that "all gas transported represents new, incremental production." Certificate Order P 203, JA____.

[13] Many "production-related impacts"—such as land impacts—"are highly localized." Reh'g Order P 109, JA____.

attempt to require analysis of induced upstream production for a natural-gas infrastructure project, NEPA does not require agencies "to drill down into increasingly speculative projections" about causally and geographically attenuated impacts, especially where (as here) it "lacks any authority to control" such impacts. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017) ("*Sierra Club (Freeport)*").

Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017), does not help Environmental Petitioners. There, this Court addressed a project where "[t]wo major utilities" had "committed to buying nearly all the gas the project [was] able to transport," to be used as fuel for identifiable "power plants in Florida" that either "already exist[ed]" or were "in the planning stages." *Id.* at 1363-64, 1371. A divided panel concluded FERC was a legally relevant cause of foreseeable downstream greenhouse gas emissions produced by the power plants burning the transported gas. *Id.* at 1371-73. But that case did not address upstream impacts. The causal relationship between upstream production and new transportation projects is far more tenuous. *Accord* Certificate Order P 197, JA____.

2. *In Any Event, FERC's Analysis Of Upstream Impacts Was Sufficient.*

Even if NEPA required analysis of upstream land impacts or upstream greenhouse gas emissions, the Commission's analysis was sufficient. Based on the highly conservative assumption that the Project would continuously transport 100%

of its capacity and all the gas would come from new production (*i.e.*, not production that would have occurred anyway), the Commission developed an "upper-bound estimate" of "upstream [greenhouse gas] emissions," land acreage "impacted by well drilling," and water used for drilling and well development. Certificate Order PP 203-05, JA____.

Environmental Petitioners point out that these estimates were not included in the FEIS. Envtl. Br. 6, 8, 11. But they are included in the Certificate Order, and this Court may consider an agency's reasoning supporting its decision beyond that in the environmental impact statement. *See, e.g.*, *Sierra Club (Freeport)*, 867 F.3d at 197; *Friends of the River v. FERC*, 720 F.2d 93, 106-08 (D.C. Cir. 1983). Environmental Petitioners suggest FERC should have done more to "analyze the context and intensity" of land impacts from upstream production. Envtl. Br. 8. But the Commission cited and discussed a Department of Energy report "examin[ing] the potential environmental issues associated with unconventional natural gas production." Certificate Order P 199, JA____-____. Given that the specific location of future wells cannot be known, *see supra* pp. 24-25, FERC realistically could do nothing more. *See Sierra Club (Freeport)*, 867 F.3d at 195-201 (upholding Department of Energy's use of same document and rejecting argument that localized analysis of unforeseeable new natural-gas wells was required). Nor, as Environmental Petitioners suggest (Envtl. Br. 8), do Commission staff's

calculations represent "significant new circumstances or information," 40 C.F.R. § 1502.9(c)(1)(ii), that could require a supplemental environmental impact statement. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002); *Friends of the River*, 720 F.2d at 109.

Finally, Environmental Petitioners argue that FERC was required to further "evaluate the context and intensity" of upstream greenhouse gas emissions. Envtl. Br. 11. But the Commission qualitatively discussed the physical impacts associated with greenhouse gas emissions and climate change, *see* Certificate Order P 210, JA____; FEIS 4-332 to 4-335, R.10483, JA____-____, quantified upstream greenhouse gas emissions, and placed those figures in the context of regional and national emissions, Certificate Order P 209, JA____-____. FERC also explained why it did not use the Social Cost of Carbon tool. Reh'g Order P 123, JA____-____. This Court recently upheld precisely that approach. *See Appalachian Voices*, 2019 WL 847199, at *2.

C. The Commission Was Not Required To Monetize Certain Impacts Using The Social Cost Of Carbon Tool Or "Ecosystem Services Analysis."

Environmental Petitioners also argue that the Commission erred by not using two analytic "tool[s]" for monetizing certain environmental impacts—the "Social Cost of Carbon" tool and "ecosystem services" analysis. Envtl. Br. 12-16.

To begin, both arguments suffer from fatal procedural flaws. Delaware Riverkeeper Network ("Riverkeeper") was the only Petitioner to raise these issues on rehearing. But the Commission dismissed Riverkeeper's rehearing request—a sprawling 190-page document (with over 1,000 pages of miscellaneous addenda) that was filed five days after FERC issued the certificate, largely just copied and pasted Riverkeeper's earlier comments on the draft environmental impact statement, and did not even "address the Certificate Order itself"—because, *inter alia*, Riverkeeper failed to "'set forth specifically the ground or grounds upon which' [its] request for rehearing [was] based." Reh'g Order P 9, JA____-____ (quoting 15 U.S.C. § 717r(a)); *cf. ASARCO*, 777 F.2d at 773-74. Environmental Petitioners do not challenge that procedural determination, and the Social Cost of Carbon and ecosystem services issues are accordingly not properly before this Court. *See* 15 U.S.C. § 717r(b).

Regardless, Environmental Petitioners' arguments fail. As to the Social Cost of Carbon tool, the Commission has repeatedly explained why it views that tool as inappropriate for project-level NEPA analysis, and it adopted its prior reasoning here. Reh'g Order PP 122-23, JA____-____. This Court has already upheld that approach as reasonable. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016). Environmental Petitioners disagree with the Commission, but "their opening brief . . . fails to address . . . the reasons FERC gave for rejecting the Social

Cost of Carbon tool." *Appalachian Voices*, 2019 WL 847199, at *2. The issue is thus "forfeited," *id.* (quoting *Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015)), and, by the same token, Environmental Petitioners show no flaw in the Commission's reasoning on the merits.[14]

Environmental Petitioners' underdeveloped "ecosystem services" argument is even more flawed. FERC exhaustively considered the types of environmental impacts Environmental Petitioners describe,[15] and nothing required it to monetize those impacts. *See Minisink*, 762 F.3d at 112; 40 C.F.R. § 1502.23 (NEPA does not require "monetary cost-benefit analysis"). Environmental Petitioners fault the Commission for not "explain[ing] why" it did not use "ecosystem services" models, Envtl. Br. 15, but no explanation was needed here. Although Riverkeeper appended a report on "ecosystem services" to its rehearing request (along with over 1,000 pages of other documents), the subject was not mentioned in its statement of issues, and was discussed only fleetingly in a 190-page narrative. *See* Riverkeeper Reh'g

[14] The Institute for Policy Integrity's *amicus* brief cannot make up for these flaws. This Court "ordinarily do[es] not entertain arguments not raised by parties," *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998), and it lacks jurisdiction to consider issues not properly presented on rehearing, *see supra* p. 1. Regardless, as the Interstate Natural Gas Association of America explains in its *amicus* brief, the Institute's arguments are meritless. *See* INGAA Br. 11-25.

[15] *Compare* Envtl. Br. 14-15 (describing environmental factors figuring into "ecosystem services"), *with* Certificate Order P 97, JA____-____ (summarizing environmental factors addressed in FEIS).

Request 4-7, 65, 67, 118, 185, FERC Docket No. CP15-558-001 (Jan. 24, 2018), R.10777, JA____-____, ____, ____, ____, ____. The "requirement of agency responsiveness to comments" only demands responses to "sufficiently central" points, *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988) (per curiam).

D. The Commission Reasonably Analyzed Alternatives.

Environmental Petitioners mistakenly argue that FERC inadequately considered alternatives. Envtl. Br. 16-18. NEPA requires agencies to "[r]igorously explore . . . all *reasonable* alternatives," but an agency need only "briefly discuss" reasons for eliminating other alternatives from consideration. 40 C.F.R. § 1502.14(a) (emphasis added). An alternative is "reasonable" under NEPA only if it meets the proposed action's "purpose and need." *See City of Alexandria v. Slater*, 198 F.3d 862, 866-67 (D.C. Cir. 1999); *see also Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 550 (8th Cir. 2006). The Commission adequately evaluated alternatives, including the no-action alternative, system alternatives, pipeline route variations, aboveground facilities alternatives, and the "Hopewell Alternative." *See* FEIS 1-3 to 1-5, 3-1, 3-37 to 3-39, JA____-____, ____, ____-____; Certificate Order PP 211, 215, JA____, ____; FERC Br. 72-75.

V. Environmental Petitioners' Eminent Domain And Due Process Arguments Are Meritless.

Environmental Petitioners raise a variety of statutory and constitutional arguments related to eminent domain. All fail. Under Section 7(h) of the Natural Gas Act, "any holder of a certificate of public convenience and necessity . . . may acquire" "the necessary right-of-way" "by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). The Certificate Order brought PennEast within the scope of Congress' statutory grant of eminent domain authority—a necessary predicate, among other things, for PennEast to complete surveys where landowners refused access—but PennEast has not yet received approval to begin physical construction. *See* Reh'g Order P 31, JA____.

A. The Commission Did Not Violate The Takings Clause.

Environmental Petitioners argue that the Certificate Order violates the Takings Clause. Not so. The Takings Clause requires that takings "serve[] a 'public purpose.'" *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). "[T]he [Supreme] Court has never held a compensated taking to be proscribed by the Public Use Clause" "where the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Here, there can be no serious dispute that Congress' authorization of eminent domain and FERC's issuance of a certificate to PennEast are "rationally related to a conceivable public purpose." *Id.* "Congress passed the Natural Gas Act

and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices." *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004). Given that "the Commission . . . explicitly declared that the" Project "will serve the public convenience and necessity," "the takings . . . serve[] a public purpose." *Midcoast*, 198 F.3d at 973; *see also Appalachian Voices*, 2019 WL 847199, at *2; *cf. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 221 (4th Cir. 2019).

Environmental Petitioners' unsupported assertion that FERC "fail[ed] entirely to explore" whether the Project "will serve a *public* need," Envtl. Br. 23, is contradicted by the record, *see, e.g.*, Certificate Order P 28, JA____. Environmental Petitioners may disagree with the Commission's balancing of economic and environmental factors. *See* Envtl. Br. 20-24. But "Congress and its authorized agenc[y] have made determinations" on those issues, and "[i]t is not for [courts] to reappraise them." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Environmental Petitioners separately argue that the Takings Clause forbids "convey[ing] eminent domain authority before the Project has received all necessary state and federal approvals," claiming that FERC only made a "preliminary determination[] of public interest." Envtl. Br. 25. But there was nothing "preliminary" about the Commission's determination that the Project will provide numerous public benefits. *See, e.g.*, Certificate Order P 28, JA____. And the

Commission's central finding—that "the PennEast Project is in the public convenience and necessity," Reh'g Order P 29, JA____-____—was not conditioned on receiving other permits.[16]

Environmental Petitioners' assertion that FERC "cannot factor environmental impacts into its public use analysis" until all other permitting decisions have been made, Envtl. Br. 24-25, ignores FERC's exhaustive *three-year* environmental review of the Project. Environmental Petitioners also speculate that other permits needed to finish the Project "*may* never be issued." Envtl. Br. 25 (emphasis added); *cf. generally* Niskanen Br. But *Kelo v. City of New London* expressly rejected an argument that the Court "should require a 'reasonable certainty' that the expected public benefits will actually accrue." 545 U.S. at 488-89. Precedent forecloses efforts to convert Takings Clause review into a debate over "whether in fact" FERC's approval of the Project will "succe[ed] in achieving its intended goals." *Midkiff*, 467 U.S. at 242-43 (citation omitted).[17] This Court rejected virtually the same argument in *Appalachian Voices*. *Compare Appalachian Voices* Pet'rs' Br. 38-42, 44-45, *with Appalachian Voices*, 2019 WL 847199, at *1-2.

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[16] In *Appalachian Voices*, this Court rejected a very similar argument. 2019 WL 847199, at *1 ("FERC's issuance of the certificate . . . did not hinge, as petitioners claim, on [other agencies'] . . . respective decisions to grant" permits).

[17] Niskanen Center's reliance (Br. 9) on *National Fuel Gas Supply Corp. v. Schueckler*, 88 N.Y.S.3d 305 (N.Y. App. Div. 2018), is misplaced. "[T]he dispositive issue of *state law* in th[at] case," *id.* at 313 n.3, is irrelevant here.

B. The Certificate Order Is Fully Consistent With The Natural Gas Act.

Nothing in Section 7(h) limits eminent domain authority to certificate holders that have already secured every permit required to begin physical construction. The statute confers eminent domain authority on "any holder" of a certificate. 15 U.S.C. § 717f(h). In *Appalachian Voices*, project opponents argued that "Congress never intended for certificates with conditions precedent—such as [conditioning construction on] not-yet-obtained permits and authorizations from other governmental bodies—to justify the exercise of the takings power." *Appalachian Voices* Pet'rs' Br. 39. This Court rejected that argument. *Appalachian Voices*, 2019 WL 847199, at *1 (pipeline opponents' argument "that FERC violated the [Natural Gas] Act by issuing [a] certificate" conditioning construction on receipt of other permits "lacks merit"); *accord Myersville*, 783 F.3d at 1319.

Environmental Petitioners note that Section 7(h) limits eminent domain to "the necessary right-of-way to construct, operate, and maintain" the certificated project. 15 U.S.C. § 717f(h). But they err in interpreting this to mean a certificate holder lacks eminent domain authority until the moment it can commence physical construction. *See* Envtl. Br. 28, 29-31. The right-of-way is *necessary* to construct the Project because the Project *cannot* be built unless the right-of-way is first secured.

Environmental Petitioners' passing arguments based on Section 7(c)(1)(A), *see* Envtl. Br. 27, 30, are not properly before the Court because Petitioners did not rely on that provision in their rehearing requests. Regardless, Section 7(c)(1)(A) neither addresses nor defines the scope of eminent domain under Section 7(h). It simply *prohibits* various activities—including construction, operation, or acquisition of FERC-jurisdictional natural gas facilities, or engaging in FERC-jurisdictional sales—"unless there is in force . . . a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c)(1)(A).

Environmental Petitioners nonetheless suggest eminent domain authority under Section 7(h) only extends to holders of "the type of certificate described" in Section 7(c)(1)(A), Envtl. Br. 27 (quoting *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 281 (D.C. Cir. 2015) (Rogers, J., dissenting in part and concurring in the judgment)), or only to certificates that immediately and unconditionally authorize construction, *id.* at 30. But Section 7(h) by its terms applies to "*any* holder of a certificate of public convenience and necessity," 15 U.S.C. § 717f(h) (emphasis added). And it certainly is not unambiguously limited to certificates immediately authorizing the holder to "begin" construction, *see* Envtl. Br. 27, a word that does not appear anywhere in Section 7.

Finally, Environmental Petitioners argue that FERC cannot condition construction on receipt of other permits *at all*, Envtl. Br. 32-33, urging that such conditions are not "reasonable" under Section 7(e). *Cf.* 15 U.S.C. § 717f(e). Their passing assertion that such conditions violate the Clean Water Act, *see* Envtl. Br. 33, is foreclosed by precedent, *see Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397-99 (D.C. Cir. 2017). As to their argument that FERC "is 'emasculating' 717f(h) and 717n by authorizing the right of eminent domain even when pipelines may not be constructed," Envtl. Br. 32, they offer no independent argument regarding 15 U.S.C. § 717n—an irrelevant procedural provision with no relationship to eminent domain. *See infra* note 19. As for 717f(h), that is simply a repackaging of Environmental Petitioners' meritless interpretation of Section 7(h), and materially indistinguishable from arguments this Court rejected in *Appalachian Voices*, 2019 WL 847199, at *1. Regardless, it is Environmental Petitioners' interpretation of the statute, not FERC's, that raises interpretive problems. As is typical when the Commission approves new pipelines, "FERC has tasked PennEast with a number of environmental conditions which must be satisfied before [it] can begin construction." *In re PennEast*, 2018 WL 6584893, at *22. "Many of these conditions require immediate access to the properties . . . ." *Id*. Among other things, PennEast needs access "to survey and collect information needed to complete its Application to [NJDEP] for a Freshwater Wetlands Individual Permit and Water

Quality Certificate." *Id.* In practice, Environmental Petitioners—no less than New Jersey, *see supra* Part IV.A—seek to give individual landowners power to veto the Project outright, undermining the primary reason eminent domain is needed for pipelines. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 74-76 (1986).

C. The Commission Did Not Violate Due Process.

Environmental Petitioners also argue that the Commission violated due process, claiming the right to a "pre-deprivation hearing" not only on objections to the Certificate Order, but on "*all required permits*" for the project—*e.g.*, permits issued by state agencies. Envtl. Br. 37 (emphasis added); *see id.* at 34 (similar).

To begin, Environmental Petitioners' due process arguments falter because "in the context of takings . . . there is no right to a pre-deprivation hearing," *Del. Riverkeeper Network*, 895 F.3d at 111; *see Appalachian Voices*, 2019 WL 847199, at *2 (same).[18] To be sure, landowners are "entitled to just compensation, as established in a hearing that itself affords due process." *Del. Riverkeeper Network*, 895 F.3d at 110. "But the Natural Gas Act ensures such a hearing" by providing for separate condemnation actions. *Id.* at 110-11. "Due process requires no more . . . ."

[18] The sole protected interest Environmental Petitioners assert is real property subject to eminent domain. *See* Envtl. Br. 34, 36-37.

Id. at 111. Moreover, Petitioners have (and have exercised) ample means to challenge the Certificate Order. *See* FERC Br. 42-43.

Environmental Petitioners claim that FERC somehow deprived them of "notice and comment" in *other* proceedings involving state-level permits. Envtl. Br. 35. To begin, Environmental Petitioners have not identified what protected property or liberty interest they had in state environmental permitting decisions. *See Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010). Granting a state environmental permit to PennEast does not extinguish landowners' (or anyone's) property rights. Environmental Petitioners assert a constitutional right to participate in state-agency permit proceedings simply because permit denials might "block construction of the Project." Envtl. Br. 35; *see id*. at 34. Precedent is to the contrary. *See, e.g.*, *Bragg v. Weaver*, 251 U.S. 57, 58 (1919); *see also Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 678 (1923). Regardless, FERC's orders did not prevent Environmental Petitioners from participating in separate state administrative proceedings.[19]

[19] Environmental Petitioners passingly assert that FERC "violated [15 U.S.C. §] 717n(c)(1)(B)" by "issuing a ninety-day schedule" "for federal authorizations," Envtl. Br. 35—evidently referring to FERC's environmental review schedule (which was postponed twice). But Petitioners identify no actual conflict; FERC's schedule runs from publication of the FEIS, while Section 401 of the Clean Water Act requires a state to act on a certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request," 33 U.S.C. § 1341(a)(1). *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-04 (D.C. Cir. 2019). Environmental Petitioners do not explain how FERC's schedule impeded New

VI. If The Court Grants Any Form Of Relief, It Should Remand Without Vacatur.

Petitioners' claims lack merit, and this Court should not grant any relief. However, even if the Court finds merit in any claims, the relief sought—vacatur—is inappropriate.[20] Rather, under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), the appropriate remedy, if any, would be remand without vacatur.[21]

First, even if the Court finds aspects of FERC's analysis deficient, there is "a serious possibility that the Commission will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. Most of Petitioners' claims assert that FERC based its conclusions on insufficient evidence or analysis. For example, Petitioners argue that FERC's analysis of market need over-relied on certain precedent agreements, *see* N.J. Br. 16; that FERC insufficiently evaluated "current market conditions . . . to justify a 14% ROE," *id.* at 37; and that it failed to "[a]dequately [a]ssess" upstream production impacts, use certain methodological

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Jersey's Section 401 review process or public participation in the same. Regardless, FERC's routine scheduling does not "den[y] notice and comment" in separate state proceedings. Envtl. Br. 35.

[20] One Environmental Petitioner also "requests associated easements to be nullified." Envtl. Br. 40. This Court's "jurisdiction in this case is limited to review of 'order[s] issued by the Commission,'" *Appalachian Voices*, 2019 WL 847199, at *2 (quoting 15 U.S.C. § 717r(b)), not district court orders in separate eminent-domain actions.

[21] Either *Allied-Signal* factor alone can justify remand without vacatur. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008) (per curiam).

"tools" in its environmental review, or sufficiently analyze specific alternatives. Envtl. Br. 5, 12, 16. Even if those claims had merit, it would be eminently "plausible that FERC [could] redress its failure . . . on remand while reaching the same result." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013).

Second, vacatur would have severe "disruptive consequences" to PennEast, Project shippers like Con Edison, and the public. *Allied-Signal*, 988 F.3d at 150. Vacatur would disrupt a critical, billion-dollar infrastructure project—among other things, potentially delaying PennEast's ability to complete environmental surveys based on the eminent domain courts' orders, and to secure additional environmental permits. The Project is almost fully subscribed under long-term, firm contracts. Vacatur would risk interfering with these contracts, "preclud[ing] a set of voluntary transactions that [parties] find advantageous," *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003), and harming shippers. Delaying the Project would also harm the gas-consuming public, which will enjoy numerous benefits from the Project. *See* Certificate Order P 28, JA____. Thus, the proper remedy, if any, would be remand without vacatur.

CONCLUSION

The petitions for review should be denied.

Date: April 4, 2019

Respectfully submitted,

/s/ Jeremy C. Marwell

Michael B. Wigmore
Jeremy C. Marwell
Matthew X. Etchemendy
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: mwigmore@velaw.com
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com

Frank H. Markle
PennEast Pipeline Company, LLC
460 North Gulph Road
King of Prussia, PA 19406
Phone: 610.768.3625
Email: marklef@ugicorp.com

James D. Seegers
Vinson & Elkins LLP
1001 Fannin St.
Suite 2500
Houston, TX 77002
Phone: 713.758.2939
Email: jseegers@velaw.com

Counsel for PennEast Pipeline Company, LLC

/s/ Neil H. Butterklee (by permission)

Neil H. Butterklee
Associate General Counsel
Sebrina M. Greene
Associate Counsel, Regulatory Services
4 Irving Place, Room 1875-S
New York, NY 10003
Phone: 212.460.1089
Email: butterkleen@coned.com
Email: greenes@coned.com

Counsel for Consolidated Edison Company of New York, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of D.C. Cir. R. 32(e)(2)(B) and this Court's order dated December 13, 2018, because this brief contains 9,081 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Date: April 4, 2019

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037-1701
Phone: 202.639.6507
jmarwell@velaw.com

Counsel for PennEast Pipeline Company, LLC

ADDENDUM

Statutes and Regulations

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(e) Testimony of witnesses

The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his att orney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his depos ition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and p roduce documentary evidence before the C ommission, as hereinbefore provided. Such tes timony shall be reduced to writing by the person taking deposition, or under his directi on, and shall, after it has been reduced to writing, be subscribed by the depo- nent.

(f) Deposition of witnesses in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witness fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 21, 1938, ch. 556, §14, 52 Stat. 828; Pub. L. 91–452, title II, §218, Oct. 15, 1970, 84 Stat. 929.)

AMENDMENTS

1970—Subsec. (h). Pub. L. 91–452 struck out subsec. (h) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on sixtieth day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this sec- ti on by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

STUDY AND REPORT ON NATURAL GAS PIPELINE AND STORAGE FACILITIES IN NEW ENGLAND

Pub. L. 107–355, §26, Dec. 17, 2002, 116 Stat. 3012, provided that:

''(a) STUDY.—The Federal Energy Regulatory Commission, in consultation with the Department of Energy, shall conduct a study on the natural gas pipeline transmission network in New England and natural gas storage facilities associated with that network.

''(b) CONSIDERATION.—In carrying out the study, the Commission shall consider the ability of natural gas pipeline and storage facilities in New England to meet current and projected demand by gas-fired power generation plants and other consumers.

''(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage cap acity problems in New England.''

§717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term ''Federal authorization''—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and

officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, §15, 52 Stat. 829; Pub. L. 109–58, title III, §313(a), Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(1), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''Process coordination; hearings; rules of procedure'' for ''Hearings; rules of procedure'' in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, §16, 52 Stat. 830.)

§717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.
(b) Summary.
(c) Table of contents.
(d) Purpose of and need for action.
(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).
(f) Affected environment.
(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).
(h) List of preparers.
(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.
(j) Index.
(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term pr oductivity, and any irreversible or irretrievable commitments of resources which would be involved in the pro-posa l should it be implemented. This secti on should not duplicate discus- sions in § 1502.14. It shall include dis- cussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such informa- ti on is incomplete or unavailable; (2) a s tatement of the relevance of the in- c omplete 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 f oreseeable 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. For the pur-p oses of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, pr ovided that the analysis of the im-pacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on April 4, 2019, I electronically filed the foregoing *Joint Answering Brief for Respondent-Intervenors PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc.*, and the addendum thereto, with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037-1701
Phone: 202.639.6507
jmarwell@velaw.com

Counsel for PennEast Pipeline Company, LLC