ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1128 (and consolidated cases)

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

DELAWARE RIVER KEEPER NETWORK, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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

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Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999)
Certificate	Certificate of Public Convenience and Necessity
CEQ	Council on Environmental Quality
NJDEP	New Jersey Department of Environmental Protection
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FERC Brief	Brief of Respondent Federal Energy Regulatory Commission
Intervenors' Brief	Joint Answering Brief for Respondent-Intervenors PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc.
NEPA	National Environmental Protection Act
Opening Brief	Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel
PennEast	PennEast Pipeline Company, LLC
Rate Counsel	New Jersey Division of Rate Counsel
Rehearing Order	*Order on Rehearing*, Docket No. CP-15-558-001, 164 FERC ¶ 61,098 (August 10, 2018).
ROE	Return on Equity

FERC and PennEast share a basic error—they mischaracterize New Jersey's arguments and rebut a series of straw men. According to respondents, New Jersey wishes to impose an unprecedented burden under NEPA and the NGA—namely, a requirement that every pipeline company survey its entire route, even if landowners refuse to grant access, thereby granting every landowner a veto over construction. And, respondents go on, New Jersey wants to prevent FERC from considering an applicant's precedent agreements with affiliated shippers anytime that it assesses the need for a pipeline—despite case law entitling FERC to do so.

Those are not New Jersey's positions. First, New Jersey has never stated that PennEast must survey the whole route; it just explained why FERC cannot properly evaluate environmental impacts when the record is missing *two-thirds* of the relevant surveys. Nor do landowners have veto authority; on this record, however, PennEast did not do enough to seek access and complete the surveys, and FERC's reliance on unproven mitigation to reduce unknown impacts on unknown resources cannot make up for that missing information. Second, New Jersey does not contend that affiliate agreements are *irrelevant* to FERC's need analysis. But where significant, project-specific evidence is introduced rebutting reliance on the affiliate agreements, FERC must consider that evidence and conduct an independent "need" analysis.

Properly construed, New Jersey's arguments show that FERC's issuance of a certificate was unreasonable on this record. This Court should vacate the Certificate and remand the matter to the Commission.

I. FERC Cannot Issue A Certificate Without Sufficient Information To Conduct An Adequate NEPA Analysis.

At its core, respondents cannot surmount the vast gaps in the record, which prevented any meaningful analysis of the stark environmental impacts. Respondents accept that PennEast failed to survey 65% of the pipeline's New Jersey route. But, they say, New Jersey's argument that PennEast had to do so demands "perfection." FERC Br. 57. That is wrong. NEPA asks if the "EIS's deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017). Expecting PennEast to provide field survey information for more than 35% of a route is hardly perfection—it is the bare minimum to allow for informed decision making. PennEast's pipeline will carve through over 1500 acres of land, including 123 wetlands, 99 waterbodies, 126 acres of forests, and 107 acres of agricultural land, even though alternate routes were available along existing rights-of-way. R10483 at ES-3, ES-8, ES-11, 2-13, 2-10 (JA_____-_____); R9360 at 2-3 (emphasizing need to co-locate and identify alternative routes). Indeed, the record is so sparse—and the risks so consequential—that U.S. Army Corps of Engineers and NJDEP rejected PennEast's applications as

incomplete based on the same data. R10505 at 1-2 (JA_____-_____); R10814 (JA_____-_____). Yet FERC approved PennEast's project anyway.

Respondents do not (and cannot) dispute that the desktop resources on which they relied on in lieu of missing field surveys were less reliable.[1] FERC's Certificate acts as a siting approval—it approves a route, provides PennEast with condemnation authority along that route, *id.* at 61,260, Appendix A ¶ 4 (JA_____-_____), and then attempts to analyze the Pipeline's impacts on resources. *Id.* at 61,259 at ¶ 217 (JA____-_____). But in its FEIS analysis, FERC relied substantially on data from databases that *expressly state* they should not be used for siting decisions. Opening Br. 28-29. New Jersey does not claim that these desktop resources have no place in the analysis. But if only 35% of the route was surveyed, resources that disclaim their reliability for siting purposes cannot support the "hard look" required by law.

FERC's analysis of the impacts on endangered species is illustrative. FERC says on appeal that PennEast "*has* conducted field surveys—or was in the process of conducting surveys at the time the EIS was published." FERC Br. 64. That sleight of hand proves the point; surveys that were "in the process" were useless to FERC

[1] FERC touts its "substantial factual record" by citing a string citation of "staff's data requests, field investigations, the scoping process, contacts with federal, state, and local agencies, and other research and analyses," FERC Br. 11-12. These documents do not explain what FERC staff actually did, when or how they did it, or how those claimed efforts somehow overcame the lack of surveys for 65% of the route. *See, e.g. Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 187-89 (4th Cir. 2005) (discussing Navy staff site investigations).

and to the public. In reality, most were incomplete, R9360 at 8 (JA_____-_____), forcing FERC to use "publicly available information" for state-listed species. FERC Br. 64. But FERC never admits that this information sometimes consisted of two-or-three-page fact sheets, *see* Opening Br. 29, that were inadequate for "identify[ing] [species'] known or potential locations and to assess species impacts." FERC Br. 64. The record supporting the EIS fell far short.

FERC's attempt to excuse the dearth of surveys because it was "impractical" to obtain more is flawed.[2] The record does not support PennEast's attempts to shift blame onto resistant landowners. Contrary to PennEast's claims, the record does not establish that PennEast attempted to work with property owners to obtain temporary survey access. PennEast relies on a single declaration as evidence of "good faith" efforts, but this generic and conclusory document—included in the condemnation actions PennEast has since filed—has no details about specific discussions held with particular property owners and is silent about PennEast's attempts to purchase temporary access rights. Intervenors' Br. 20; Decl. of Jeffrey D. England ¶¶ 12-15,

[2] As a threshold matter, NEPA does not contain an "impracticality" exception for an agency's information-gathering obligation vis-à-vis a defined project. None of the cases FERC cites establish such an exception or suggest one applies here. FERC Br. 58; *see Kleppe v. Sierra Club*, 427 U.S. 390, 414-15 (1976) (impractical to gather information without proposed project); *Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996) (impractical to consider impacts beyond scope of project); *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1144 (D.C. Cir. 1991) (addressing practicality of assessing socioeconomic impacts, not environmental ones).

In re PennEast Pipeline Co., No. 18-cv-2508, 2018 WL 6584893 (D.N.J. Dec. 14, 2018) (ECF No. 1-6). The declaration includes four incident reports involving property owners opposed to the Project, *id.* ¶¶ 35-42, but problems with four owners obviously cannot establish an inability to negotiate access with more than 100 others along the route.

And there is significant evidence that PennEast's deficient negotiation efforts were the source of its problems. For one, PennEast's claim that New Jersey refused survey access is wrong. Intervenors' Br. 19 n. 9. NJDEP issued Special Use Permits to PennEast to conduct surveys on NJDEP's fee simple properties. R9360 at 2 (JA _____-_____). And several condemnation actions against other landowners quickly settled for access rights once PennEast filed them. *See, e.g.*, *In re PennEast Pipeline*, No. 18-cv-2508, 2018 WL 6584893 at 26, n. 16 (describing owner who provided access), 10 (owners testifying about PennEast's negotiation failures). Last, contrary to PennEast's claim, Intervenors' Br. 21, NJDEP's rehearing request asked FERC to limit condemnation authority here to temporary access. R10878 at 8, 59 (JA____-_____); 164 FERC ¶61,098, 61,581 ¶ 33 (JA_____). (And as the non-State Petitioners explain, FERC had the authority to do so.) FERC refused.

FERC's reliance on unproven mitigation measures cannot make up that gap either. To take one example, FERC estimates the impact on New Jersey's wetlands based on an assumption that mitigation measures—especially horizontal directional

drilling—will work perfectly, even though the method's utility in this geographic area is untested and unknown. PennEast never finished all the necessary geological surveys for any of the relevant locations, R10483 at 2-11, Table 2.3.1-1 (JA_____-_____), and yet FERC *never addressed* NJDEP's concerns that drilling might prove geologically infeasible at certain of those locations before relying on it to discount the impact on wetlands, R4744 at 6 (JA_____-_____). But if drilling is not feasible, the alternate construction method is open trenching through waterways, which "will likely result in adverse impacts" to key resources. R10327 at 5 (JA_____-_____). The agency may not rely on unproven mitigation measures as a fallback to save a flawed EIS when the agency does not even know—and refused to address—whether the proposed mitigation will cause greater or fewer impacts to those resources.[3]

None of the cases FERC cites suggest mitigation is an appropriate method to resolve such informational gaps. FERC Br. 60-61; *Midcoast Interstate Transmission v. FERC*, 198 F.3d 960 (D.C. Cir. 2000) (rate case mentioning mitigation in passing); *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137 (D.C. Cir. 1991) (mitigation noted in passing for socioeconomic impacts); *Natural Res. Def. Council v. EPA*, 529

[3] New Jersey recognizes that "all geotechnical investigations must be completed to … finalize a horizontal directional drilling feasibility assessment," FERC Br. 62, but mitigation measures must be sufficiently evaluated to assess their effectiveness even at this stage. *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 231 (5th Cir. 2007) (explaining "an EIS involving mitigation must include 'a serious and thorough evaluation of environmental mitigation options'").

F.3d 1077 (D.C. Cir. 2008) (Clean Air Act case). Indeed, the decisions that discuss mitigation at length show that agencies should consider the impacts of the mitigation measure against the project to determine if the mitigation adequately alleviates the environmental impacts. *See*, *e.g.*, *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 461 (9th Cir. 2016) (explaining mitigation proposal must be "sufficient to allow for an evaluation of effectiveness"); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (concluding that "[i]t is not enough" for an agency "to merely list possible mitigation measures."); *Alaska v. Andrus*, 580 F.2d 465, 478 (D.C. Cir. 1978). FERC's flawed mitigation analysis failed to consider the efficacy of the mitigation measures it relied on or to measure them against the impacts of the Project. 162 FERC ¶ 61,053 at 61,244, ¶133 (JA_____-_____).

Because the record was incomplete, and because neither PennEast's efforts to blame landowners nor FERC's reliance on mitigation suffice, FERC attempts to pass the buck to other agencies. FERC suggests that State-imposed site-specific measures qualify as relevant mitigation measures for some of the affected resources. FERC Br. 61, 65. But "[a] non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency's obligations under NEPA." *S. Fork Bank Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). And PennEast failed to submit a complete permit application to NJDEP, which means the State's conditions could not have been before FERC when it issued

the Certificate. R10814 (JA_____-_____). FERC thus could not have relied on any New Jersey conditions to determine the Project's environmental impacts would be reduced to acceptable levels without *assuming* (without support, contrary to NEPA) what the conditions will be. 162 FERC ¶ 61,053 at 61,222, ¶2 (JA_____).

Finally, FERC's reliance on "reopener clauses" to claim that the agency will consider additional environmental impact information from ongoing field surveys is as surprising as it is incorrect. Br. 71. FERC's own Rehearing Order confirms that "[t]he Environmental Conditions requiring site-specific plans, survey results, and additional mitigation measures are *not designed to allow significant departures from the project as certificated*." 164 FERC ¶ 61,098, 61,585, ¶ 49 (JA_____) (emphasis added). Thus, according to FERC, nothing in the surveys will significantly alter its decision to approve PennEast's project or route. *Id.* at 61,588, ¶ 68 (JA_____). This condition contradicts FERC's promise on appeal and is itself a violation of NEPA. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) ("It would be incongruous with … the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant

proposal has received initial approval.").[4] FERC's efforts to overcome an inadequate record by pointing to re-opener clauses ultimately fall flat.

There is a second, independent issue: FERC's failure to show compliance with the CEQ regulations about missing information. *See* 40 C.F.R. § 1502.22. Although the amount of missing information and the reliance on desktop resources required FERC to disclose the inherent limitations of its databases, FERC did not do so. That is because FERC misunderstands its statutory responsibilities. FERC's interpretation of 1502.22(a) and (b) as always being alternatives is contrary to the language of the regulation and case law. *See, e.g., Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 875 (9th Cir. 2017) ("When [missing] information is deemed 'essential to a reasoned choice among alternatives,'" pursuant to section (a), "the agency must either obtain it or, if the information is not obtainable, include in the EIS" section (b) analysis); *Colo. Envtl. Coal.*, 185 F.3d at 1172-73 (10th Cir. 1999) (addressing sections (a) and (b) without stating they are alternatives). Neither of the cases FERC cites for this proposition support FERC's new theory that sections (a) and (b) are alternatives. *See Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1144 n. 7 (D.C. Cir. 1991) (addressing only whether agency had to make exorbitant cost finding under section

[4] The reopener clauses upheld in *United States Department of Interior v. FERC* differ from the ones at issue here because they permitted FERC and any other State agency to re-open the matter in light of new information. 952 F.2d 538, 542 n. 2 (D.C. Cir. 1992). This Certificate, however, vests reopening authority *solely* in FERC—which it all but promised not to use in its Rehearing Order.

(b)); *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559-60 (9th Cir. 2011) (discussing section (b) generally, but then remanding EIS).

In any event, FERC failed to satisfy the CEQ rule. First, FERC admitted the surveys were missing, but never made a finding whether the surveys were "essential" to making a reasoned decision. 40 C.F.R. § 1502.22(a). FERC's citation to a single sentence that says the "record and mitigation measures sufficiently support reaching a decision" does not satisfy this standard. That conclusory sentence—like the rest of the Certificate—does not explain the relevance of the missing surveys themselves. 162 FERC ¶ 61,053 P.98 (JA_____-_____); FERC Br. 70. Instead, it glosses over the missing information, offering the public nothing to understand FERC's decision to issue the Certificate anyway. And FERC's suggestion that it found the information was not essential is contrary to the conditions requiring further surveys. 162 FERC ¶ 61,260, Appendix A (JA_____-_____). FERC cannot have it both ways.

Nor does this single sentence allow FERC to ignore section (b). FERC failed to acknowledge the shortcomings of the databases on which it relied and why that mattered. But the regulations required FERC to do so. *See Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 560 (9th Cir. 2011). Instead, FERC noted the missing surveys and required them as a condition *after* Project approval—despite failing to admit it did not know which resources were degraded or the extent of the impacts—to "verif[y]" the FEIS's "analyses and conclusions." 162 FERC ¶ 61,053, P 99.

FERC places the cart before the horse, but NEPA insists agencies make decisions only *after* they take the hard look and have sufficient data about environmental impacts. 40 C.F.R. §1500.1(b); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (noting "the appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options"). That especially matters here, where FERC promised in its Rehearing Order to stand by PennEast's Project and its route—even after additional surveying is complete.

For these reasons, FERC fell short of its burden under NEPA.

II. FERC Erred in Relying Exclusively on Affiliate Agreements to Find Need Despite Contrary Project-Specific Evidence.

FERC's flawed finding that the project is "needed" is likewise grounds for reversal. FERC relies on affiliate precedent agreements, notwithstanding contrary evidence in the record and a 1999 Policy Statement indicating FERC's intent to do so. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000). While New Jersey does not challenge that FERC can consider precedent agreements, it cannot, consistent with reasoned decision-making and FERC's policy, rely only on affiliate agreements to demonstrate need where project-specific record evidence cuts the other way.

FERC claims it could rely on affiliate contracts because its Policy Statement "did not compel" applicants to provide any other evidence of need. FERC Br. 37.

Even if true, that does not make it FERC "policy" to ignore countervailing evidence.[5] To the contrary, the Policy Statement promises FERC "will consider all relevant factors reflecting on the need for the project." 88 FERC at 61,747. While those factors can undoubtedly "include ... precedent agreements," the Statement also made clear that FERC "would not be limited to" such agreements, and added that affiliate agreements "raise[] additional issues." *Id.* at 61,744-47.

While FERC says precedent agreements, even with affiliates, are "significant evidence," of need, FERC Br. 18-19, 20, that is beside the point: FERC cannot rely only on such agreements as demonstrating need in the face of significant conflicting record evidence. *Compare* R10771, Glick Dissent at 1 (JA__-__) (FERC "relie[d] exclusively on the existence of precedent agreements with shippers"), *with* 88 FERC at 61,737 (requiring "case-by-case" assessment of all relevant "facts and circumstances"). Here, the evidence included the affiliates' statements to state regulators that they had adequate supply and even had turned back capacity—directly contrary to a determination that the project is "needed." R9179 at 5-6 (JA__-__), Dismukes Aff. ¶¶ 10-15 (JA__-__).

[5] FERC says its interpretation of the 1999 Policy Statement is entitled to "traditional deference," FERC Br. 19 (quoting *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018)), but none is appropriate where its interpretation is contrary to the statement's plain language.

At bottom, FERC wrongly presumes that the only reason to enter an affiliate agreement is to service entirely new demand. *See* FERC Br. 24 (asserting utilization rates are not indicative of firm capacity availability, and noting the EIS determined that available firm capacity was insufficient to service PennEast's proposed supply). That is not the case. In his dissent below, Commissioner Glick described perfectly other possible motivations, including the "parent company's prospect of earning a 14 percent return on equity on an investment" and the "increased profits earned by an affiliated electric generator if new gas pipeline capacity frees up congestion." R10771, Glick Dissent at 3 (JA__-__). Service on a new pipeline may thus be less the result of new demand and more a shift of existing demand from one pipeline to another—especially likely where, as here, some of the same affiliates that signed precedent agreements were telling state regulators that they had been turning back available capacity. In these circumstances, the Commission was obliged not only to "peek under the hood" of these agreements, FERC Br. 22, but should have conducted "an independent analysis of the legitimacy of the claimed need for Project capacity." R10902 at 9 (JA_____).

FERC contends that affiliate agreements are no different than other precedent agreements—despite statements to the contrary in the 1999 Policy Statement. FERC says the Policy Statement was aimed primarily at "preventing undue discrimination" against non-affiliates. FERC Br. 20. But, even if that were the Policy Statement's

primary concern, it nowhere suggests that FERC need not look beyond the affiliate agreements where contrary, project-specific evidence exists. FERC then claims that an affiliation with a pipeline "does not lessen a shipper's need for new capacity and its contractual obligation to pay for such service." *Id.* 21. But as explained above, such affiliation plainly matters to shipper decisions.[6] *See* R10771, Glick Dissent at 3 (JA__-__). That is why this Court and others previously recognized that affiliation can cast doubt on the reliability of affiliate agreements. *See Fina Oil & Chemical Co. v. Norton*, 332 F.3d 672, 677-78 (D.C. Cir. 2003) (in gas lease valuation case, noting that initial price sold to affiliates is "obviously an unreliable indicator of objective value"); *Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369, 374 (5th Cir. 1999) (noting that a circumstance where "the immediate benefits" flow to affiliates should "trigger a hard look"). FERC's insistence that affiliate agreements are equivalent to other precedent agreements is error.

FERC and PennEast both rely on *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019), but it does not resolve this case. For

[6] FERC adds that "the elimination of 'a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers.'" FERC Br. 20 (quoting 88 FERC at 61,748-49). That may be true where FERC "evaluate[s] specific proposals based on the facts and circumstances relevant to the application" and "appl[ies] the criteria on a case-by-case basis." 88 FERC at 61,737. But where FERC focuses entirely on agreements, as it did here, affiliate status once again becomes a paramount concern.

one, *Appalachian Voices* is an unpublished opinion.[7] But even if *Appalachian Voices* were binding, the case is distinguishable. To disprove need, the *Appalachian Voices* challengers just relied on general, region-wide supply and demand studies. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, PP 36-38, 44 (2017). Here, New Jersey offered project-specific evidence discrediting need—including expert analysis and statements by affiliate-shippers to regulators averring no need for capacity, including at least one shipper's report that it had turned back significant capacity. R9179 at 6-7 & n.7 (JA__-__); R9179 at 5-7 (JA_____-_____). Finally, while the *Appalachian Voices* panel said it might be reasonable for FERC to rely on affiliate agreements generally, the court did not address whether doing so was consistent with FERC's prior policy. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (holding "[a]n agency may not ... depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," even if new policy is reasonable). It is not.[8]

Finally, FERC also argues that "Project rates were calculated based on design capacity," leaving PennEast with "financial risk from unsubscribed capacity," and a "'powerful incentive'" to ensure demand for the project. FERC Br. 23. But 90% of

[7] There is especially good reason not to rely on this unpublished decision given the issues with affiliate agreements discussed above and laid out in *Fina Oil & Chemical Co.*, 332 F.3d 672, and *Brooklyn Union Gas Co.*, 190 F.3d 369.

[8] FERC likewise relies on this Court's decisions in *Minisink* and *Myersville*, FERC Br. 19-20, but those cases do not deal with affiliate agreements and thus cannot resolve the question posed here. Opening Br. 20-21.

the pipe's capacity is subscribed under long-term agreements under negotiated rates. R10769 P 6 (JA__-__), P 67 (JA__-__). The project rates to which FERC refers thus apply to, at most, 10% of PennEast's capacity, and nothing in the record substantiates FERC's belief that the revenues from the remaining capacity is critical to PennEast's profitability.[9]

FERC erred in failing to analyze the totality of the evidence regarding need, and in relying on affiliate agreements despite challengers' project-specific evidence to the contrary. In these circumstances, the Commission was obligated to undertake an independent analysis of the legitimacy of the claimed need for Project capacity. Its failure to do so was reversible error.

III. FERC Erred in Setting PennEast's Return on Equity Based on Prior Cases Rather Than Evidence Specific to PennEast.

FERC's defense of PennEast's 14% return on equity consists of general statements about the risks facing a new pipeline rather than findings connected to PennEast's circumstances. FERC Br. 26 (citing *PennEast Pipeline Co.,* 162 FERC ¶ 61,053, P 59 (2018), (JA__)). FERC assumes without support that a new pipeline today faces risks comparable to those in 1997. But the facts on the ground today are different from those in place more than twenty years ago. Indeed, national gas

[9] FERC also points to "additional findings" on the project's public benefits, FERC Br. 24-25, but those findings are generic and cannot cure FERC's otherwise deficient need finding. *See* R10769 P 28 (JA__-__).

reserves in the late 1990s were thought to be more limited and (as a result) natural gas prices were significantly higher. R9179 at 12-13 & n.17 (JA__-__). FERC's attempts to justify its reliance on generalities on the ground that "initial rates are based on estimates … unsupported by any operating history," FERC Br. 28, fails for similar reasons: setting returns turns on *current conditions*, not operating history. Opening Br. 37; *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

Intervenors (but not FERC) claim that initial pipeline rates can be divorced from the "just and reasonable standard." This is contrary to Commission policy, which requires use, to the extent practicable, of its Natural Gas Act Section 4 ratemaking policy in Section 7 cases. *Compare* Intervenors' Br. 15, *with Maritimes & Ne. Pipeline, L.L.C.*, 84 FERC ¶ 61,130, at 61,683 (1998). FERC should have performed its usual return on equity analysis here, and Intervenors' attempts to downplay the significance of the 14% return cannot save FERC's failure to engage in reasoned decision-making. Intervenors' Br. 14.[10]

CONCLUSION

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

[10] Moreover, FERC's and Intervenors' reliance on *Appalachian Voices* to support an inflated ROE is unavailing because that decision lacks precedential value. *See* Part II, *supra*.

Dated: May 6, 2019

Respectfully submitted,

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I certify:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing schedule order dated December 12, 2018. According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 4,259 words. Because the other Petitioners have filed a reply brief containing 4,661 words, the combined word count for all Petitioners' reply briefs is less than 9,000 words.

2. Because this document has been prepared in a proportionally-spaced, 14-point typeface, it 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).

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CERTIFICATE OF SERVICE

I certify that on May 6, 2019, the foregoing Joint Reply Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of the Rate Counsel was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system.

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