

ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 18-1128 (Lead)

**DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF THE ENVIRONMENTAL DEFENSE FUND
AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DELAWARE AND RARITAN CANAL COMMISSION,
AND NEW JERSEY DIVISION OF RATE COUNSEL IN SUPPORT OF
REVERSAL OF THE CHALLENGED ORDERS**

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Dated: December 28, 2018

**CERTIFICATE AS TO PARTIES,
RULINGS UNDER REVIEW, AND RELATED CASES**

A. Certificate as to Parties

Per Circuit Rule 28(a)(1)(A), the Environmental Defense Fund (“EDF”) submits that all parties and intervenors appearing in this court are listed in the joint Initial Brief of the New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel. In addition to EDF, EDF understands that Niskanen Center and the Institute for Policy Integrity are amici appearing in this court.

B. Certificate as to Rulings under Review

Per Circuit Rule 28(a)(1)(B), the rulings under review are the following orders of the Federal Energy Regulatory Commission:

- *PennEast Pipeline Co., LLC*, Order Issuing Certificates, 162 FERC ¶ 61,053 (January 19, 2018); and
- *PennEast Pipeline Co., LLC*, Order on Rehearing, 164 FERC ¶ 61,098 (August 10, 2018).

C. Certificate as to Related Cases

Undersigned counsel are not aware of any related cases as defined by Circuit Rule 28(a)(1)(C).

Respectfully submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, the Environmental Defense Fund is a non-profit organization and therefore does not issue stock to the public.

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

SERVICE LIST

RULE 29(a)(4)(E) STATEMENTS

Per Rule 29(a)(4)(E), I certify that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the Environmental Defense Fund or its counsel—contributed money that was intended to fund the preparing or submitting this brief.

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CERTIFICATE FOR SEPARATE BRIEF

To the best of its knowledge, information, and belief, the Environmental Defense Fund (“EDF”) is aware of two other amici curiae, *i.e.*, the Niskanen Center and the Institute for Policy Integrity. EDF understands that the Niskanen Center intends to file a brief as amicus curiae challenging the Respondent Federal Energy Regulatory Commission’s (“FERC”) authorization for PennEast Pipeline Company, LLC (“PennEast”) to use eminent domain in support of New Jersey Conservation Foundation, The Watershed Institute, Delaware Riverkeeper Network, Homeowners Against Land Taking – PennEast, and Hopewell Township (*i.e.*, Non-State Petitioners). In contrast to that challenge, EDF’s amicus curiae brief addresses issues specific to EDF’s organizational interests in enhancing rational economic market signals for new infrastructure development and protecting against buildout that imposes long-term economic and environmental costs on ratepayers. Specifically, EDF files its brief as amicus curiae to the New Jersey Department of Environmental Protection, Delaware Raritan and Canal Commission, and New Jersey Division of Rate Counsel (*i.e.*, the “State Petitioners”) in Case No. 18-1233, which, in pertinent part, challenges FERC’s findings that the proposed project is required by the public convenience and necessity.¹ Consequently, EDF respectfully files this certificate per Circuit Rule 29(d) and submits

¹ See Case No. 18-1128, New Jersey Division of Rate Counsel’s Non-Binding Statement of Issue to Be Raised at 2 (October 12, 2018).

that joining with the other amici in a single brief was not practicable in light of the fact that EDF's legal arguments are specific to its interests and unrelated to Niskanen Center's interests. Moreover, EDF is expressing support for State Petitioners, whereas Niskanen Center is expressing support for Non-State Petitioners. Given those differences, EDF cannot practicably join Niskanen Center in briefing.

EDF first learned of the Institute for Policy Integrity's intention to file an amicus brief on December 26, 2018. EDF understands that the Institute for Policy Integrity's brief will focus on issues unrelated to EDF's briefing and interest in this proceeding. Moreover, due to the short time between learning of the Institute for Policy Integrity's intent and the date on which amicus briefs are due, EDF cannot practicably join the Institute for Policy Integrity in briefing.

EDF's conclusion that its separate amicus curiae brief is necessary is not based on (i) a desire to exceed the allowable length of briefs, (ii) counsels' difficulty or inability to coordinate due to geographical dispersion, or (iii) a claim that separate presentations were allowed in the proceeding below.

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GLOSSARY OF ABBREVIATED TERMS AND TERMS OF ART

Term	Description
Application	PennEast Pipeline Company, LLC's September 25, 2015 application in Docket No. CP15-558 before the Federal Regulatory Energy Commission for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act to construct and operate the PennEast Project
Captive Customer	A ratepayer that does not have access to alternative sources of service
Certificate Policy Statement	<i>Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy</i> , 88 FERC ¶ 61,227, <i>modified</i> by 89 FERC ¶ 61,040 (1999), <i>clarifying</i> , 90 FERC ¶ 61,128, <i>further clarification</i> , 92 FERC ¶ 61,094 (2000)
EDF	Environmental Defense Fund
FERC	Respondent, Federal Energy Regulatory Commission
IB	Initial Brief
Open Season	A public process whereby pipelines solicit prospective customer interest in a potential pipeline project
p.	Citation to pages in orders of the Federal Energy Regulatory Commission
P	Citation to paragraphs in orders of the Federal Energy Regulatory Commission
PennEast	PennEast Pipeline Company, LLC, the applicant in the administrative proceeding below
PennEast Project	PennEast Pipeline Company, LLC's proposed project, consisting of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities
PennEast Certificate Order	<i>PennEast Pipeline Co., LLC</i> , 162 FERC ¶ 61,053 (2018)
PennEast Rehearing Order	<i>PennEast Pipeline Co., LLC</i> , 164 FERC ¶ 61,098 (2018)

Term	Description
Precedent Agreement	An agreement between a shipper and the pipeline that (i) precedes a transportation service agreement, and (ii) sets forth the commercial, financial, and operational terms for new pipeline build, committing the pipeline to build the project and the shipper to enter into a transportation service agreement to ship gas over the expansion capacity
R.	A reference to items in the Certified Index to the Record that Respondent Federal Energy Regulatory Commission filed in these proceedings on October 24, 2018
State Petitioners	New Jersey Department of Environmental Protection, Delaware Raritan and Canal Commission, and New Jersey Division of Rate Counsel
Shipper	A pipeline customer who contracts for pipeline transportation services

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF
AUTHORITY TO FILE**

Amicus Environmental Defense Fund (“EDF”) is a membership organization with over 2 million members. Its mission is to preserve the natural systems on which all life depends. Guided by science and economics, EDF seeks practical solutions to environmental problems. EDF uses the power of markets to speed the transition to clean energy resources and, consistent with its organizational purpose, engages in activities to facilitate cost-effective and efficient energy market designs that encourage investment to modernize the energy grid so that it can support ongoing deployment of renewable energy resources and energy efficiency. Fundamentally, EDF asserts that well-designed markets stimulate competition, reward innovation, advance the public interest, and foster environmental improvement. Of particular relevance here, EDF’s organizational goals include enhancing rational economic market signals to efficiently allocate capital for new energy infrastructure development.

EDF has devoted considerable attention to the development and utilization of natural gas infrastructure, including new pipeline capacity funded by captive customers of pipeline developers’ regulated utility affiliates.¹ The crux of EDF’s opposition to

¹ See, e.g., Testimony of N. Jonathan Peress, EDF’s Senior Director of Energy Market Policy, Before the Senate Energy and Natural Resources Committee, “Oil and Gas Pipeline Infrastructure and the Economic, Safety, Environmental, Permitting, Construction, and Maintenance Considerations Associated with that Infrastructure” (June 14, 2016), *available at*

these types of proposals is that they seek to tax captive retail ratepayers for new pipeline capacity, rather than allow bona fide market forces to dictate need and channel investment. Thus, EDF has a keen interest in this proceeding, which involves review of the Federal Energy Regulatory Commission's ("FERC") orders² purporting to apply its Certificate Policy Statement³ and approving PennEast Pipeline Company, LLC's ("PennEast") September 25, 2015 application for a certificate of public convenience and necessity to construct a pipeline and appurtenant facilities in Pennsylvania and New Jersey ("PennEast Project").⁴ EDF supports the analysis and conclusions in the State Petitioners' Initial Brief, *i.e.*, that FERC failed to protect consumers by uncritically relying on affiliate precedent agreements⁵ to demonstrate need for the PennEast

http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=51079A26-DD96-4FB5-8486-411C8A7F9024.

² R.10769, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) ("PennEast Certificate Order"), [JA ____-____]; R.11024, *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (2018) ("PennEast Rehearing Order"), [JA ____-____].

³ *Certification of New Interstate Natural Gas Pipeline Facilities*, Statement of Policy, 88 FERC ¶ 61,227, *modified by* 89 FERC ¶ 61,040 (1999), *clarifying*, 90 FERC ¶ 61,128, *further clarification*, 92 FERC ¶ 61,094 (2000).

⁴ R.2740, Application at 3-4, [JA ____-____].

⁵ "A precedent agreement is a long-term contract subscribing to expanded natural gas capacity." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015) (citation omitted).

Project.⁶ Thus, the Court should vacate the certificates and remand to FERC for further consideration.⁷

Significantly, the challenged orders are but one example of how FERC subjects consumers to the very anticompetitive behavior that the Natural Gas Act was enacted to protect against⁸ by refusing to meaningfully examine “market need” on the grounds that affiliate-tainted precedent agreements are evidence of such need. FERC also applies this uncritical approach even where 100% of precedent agreements are with affiliates.⁹ EDF submits that its participation here provides helpful context about the scope and significant consequences of FERC’s deficient analysis of project need. Pursuant to Circuit Rule 29(b), all parties have consented to EDF’s filing, and EDF has made every effort to limit verbiage.

ARGUMENT

In the orders below, FERC uncritically relied on precedent agreements between the PennEast pipeline developer and its affiliated shippers as evidence of market need,

⁶ State Petitioners’ IB at 19-20.

⁷ *Id.* at 39.

⁸ *See Cal. Gas Producers Ass’n v. FPC*, 421 F.2d 422, 428 (9th Cir. 1970); *see also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (“The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.”); *Pub. Sys. v. FERC*, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979) (“[The Natural Gas Act] aim[s] to protect consumers from exorbitant prices and unfair business practices.”).

⁹ *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018), *reh’g pending*.

without considering whether such reliance undermines the consumer-protection obligations imposed by the Natural Gas Act. FERC's blatant disregard of its statutory duty—as one FERC Commissioner put it—“lends credence to the critique that [FERC] does not meaningfully review section 7 applications.”¹⁰ The Natural Gas Act demands more, and intervention by this Court is necessary to ensure that FERC fulfills its statutory obligations to consumers in certificate proceedings. Consequently, the Court should vacate FERC's orders and remand to FERC for further consideration.¹¹

In addition to granting that relief, EDF implores the Court to recognize that State Petitioners' challenge is but one example where FERC blindly based its need determination on the existence of affiliate precedent agreements.¹² FERC's practice is

¹⁰ *Id.* (Glick, *dissenting*). Two additional FERC Commissioners have now recognized that precedent agreements may not take into account a variety of considerations resulting from an evolved natural gas market. *Id.* (LaFleur, *dissenting*) (finding that need has not been demonstrated by a single affiliate precedent agreement); *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (Bay, *concurring*) (“There are other long-term issues that weigh in favor of examining whether other evidence, in addition to precedent agreements, can help the Commission evaluate project need.”).

¹¹ State Petitioners' IB at 39.

¹² In addition to the proceedings below, the certificate applications in Docket Nos. CP16-22 (Nexus Gas Transmission), CP16-10 (Mountain Valley Pipeline), and CP17-40 (Spire STL Pipeline) all involved precedent agreements supported by affiliated captive customers. In fact, the main takeaway from the 2017 American Gas Association conference was that “[p]ipeline and midstream investments look increasingly popular for their low risk and steady earnings profile. Credit Suisse, “Electric Utilities – AGA Conference Takeaways,” at 1 (May 24, 2017), <https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&sourceid=csplusesearchcp>

to apply that uncritical approach to certificate applications across the country. Most egregiously, FERC recently found need for a project where the only precedent agreement is with a regulated utility affiliate of the pipeline developer, with no new load growth, in a market that already has excess capacity.¹³ Consequently, in vacating the certificate orders and remanding to FERC, the Court should make clear that: (1) FERC's statutory obligation to protect consumers tempers any discretion FERC may have to refuse to look beyond regulated utility affiliate precedent agreements; (2) FERC cannot rely on *Minisink*¹⁴ or *Myersville*¹⁵ to justify not looking beyond affiliate precedent agreements because neither case addresses affiliate issues; and (3) neither shipper acquiescence, nor state commissions' authority to review pipelines' contracts with affiliated shippers, satisfies FERC's independent obligations under the Natural Gas Act.

A. FERC's Review of Certificate Applications is Bounded by Its Primary Statutory Duty to Protect Consumers.

FERC's "primary duty under the Natural Gas Act is the protection of the consumer."¹⁶ The Natural Gas Act's certificate provisions form the heart of the Act by

https://www.docketmanager.com/documents/view.asp?document_id=1075481631&serialid=02QPUI5CqBO4PqahEIZhuPWLs2N4eW1A8FAAwRV8AU%3D&cspId=9206471333448761344.

¹³ *Spire STL Pipeline*, 164 FERC ¶ 61,085.

¹⁴ *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014).

¹⁵ *Myersville*, 783 F.3d 1301.

¹⁶ *Cal. Gas Producers*, 421 F.2d at 428; *see also Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) (Congress enacted Natural Gas Act section 7(c) "to afford

requiring initially that any new construction satisfies the public convenience and necessity standard.¹⁷ This *ex ante* requirement is of critical importance because it ensures that consumers are only responsible for the costs of projects that the pipeline has demonstrated to be necessary.¹⁸

FERC's 1999 Certificate Policy Statement articulates the current framework for determining whether a project satisfies the public convenience and necessity standard.¹⁹ The economic theory underpinning the Certificate Policy Statement is that non-subsidized price signals provide the appropriate incentive for the optimal level of construction.²⁰ Under that theory, companies' willingness to invest in a project without subsidies serves as an important indicator of market-based need for that project.²¹ When properly applied, FERC's Certificate Policy Statement fulfills the Natural Gas Act's consumer-protection obligation by avoiding the imposition of costs on consumers when there is an inadequate demonstration of need. As explained below,

consumers a complete, permanent and effective bond of protection from excessive rates and charges").

¹⁷ *Atl. Ref. Co.*, 360 U.S. at 388 (emphasis added) (citing 15 U.S.C. § 717f(e)).

¹⁸ *Id.* at 389 ("[T]he initial certificating of a proposal under § 7 (e) of the [Natural Gas] Act as being required by the public convenience and necessity [is] crucial").

¹⁹ R.10769, PennEast Certificate Order at P 16, [JA ____].

²⁰ Certificate Policy Statement at p. 61,747.

²¹ *Id.* ("Companies willing to invest in a project, without financial subsidies, will have shown an important indicator of market-based need for a project.")

the economic theory underpinning the Certificate Policy Statement is distorted where the pipeline developers' regulated utility affiliates subscribe to the majority of the project's capacity. FERC's practice of accepting regulated utility affiliate precedent agreements as evidence of market need contravenes FERC's consumer protection obligations under the Natural Gas Act and should be redressed by this Court.

B. Uncritical Reliance on the Existence of Affiliate Precedent Agreements to Demonstrate Project Need Is Contrary to FERC's Consumer-Protections Obligation.

Despite the requirement to consider all relevant factors reflecting on the prospective need for a project,²² FERC's actual practice is to rely heavily, if not exclusively, on only one factor—the existence of precedent agreements.²³ Indeed, FERC relied on the existence of precedent agreements in the proceeding below as the principal basis for finding that the PennEast Project was needed.²⁴ Precedent agreements may constitute substantial evidence of need in many cases, particularly

²² *Atl. Ref. Co.*, 360 U.S. at 391; *see also* Certificate Policy Statement at p. 61,747.

²³ *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 at P 35 (“[A]pplicants have generally elected to present, and [FERC] has accepted, customer commitments as the principal factor in demonstrating project need.”).

²⁴ *See* R.10769, PennEast Certificate Order at P 28, [JA ____]; *see also* R.10771, Statement of Commissioner Glick on PennEast Certificate Order, (FERC “relie[d] exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed.”) (citing R.10769, PennEast Certificate Order at PP 27, 29), [JA ____].

where the pipeline conducted an open solicitation for pipeline customers,²⁵ and if the precedent agreements are arms-length agreements between the pipeline and unaffiliated shippers.²⁶ That is not the case under appeal here. To find need, FERC uncritically relied on the existence of affiliate precedent agreements, without any examination of the self-dealing nature of those contracts.²⁷ FERC's reliance on affiliate precedent agreements to demonstrate need for the PennEast Project was arbitrary or capricious, an abuse of discretion, not in accordance with law, and not supported by substantial evidence.

²⁵ If sufficient interest materializes during the open season process, developers are likely to move forward with the project. If insufficient interest is shown, the project is usually dropped or placed on indefinite hold. U.S. Energy Information Administration – Natural Gas Pipeline Development and Expansion, *available at*: http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/develop.html.

²⁶ EDF acknowledges that precedent agreements supported by affiliate producers or affiliate marketers are more indicative of market need than affiliate agreements supported by captive customers of regulated utilities, as is the case with PennEast.

²⁷ FERC asserts that shippers have signed up for 90% of the project's capacity, although approximately 62% of the capacity is supported by affiliates. R.10769, PennEast Certificate Order at P 6, [JA ____]. The probative value of this finding is diminished significantly by the Certificate Policy Statement's determinations that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates." Certificate Policy Statement at p. 61,744.

1. The Natural Gas Act's Consumer-Protection Obligation Required That FERC Examine and Look Beyond PennEast's Regulated Utility Precedent Agreements.

FERC has recognized “[t]he hallmark characteristic of arm’s length bargaining is that it is negotiated rigorously, selfishly and with an adequate concern for price. If the negotiating parties have a common economic interest in the outcome of the negotiations, their bargaining is not at arm’s length.”²⁸ FERC has also acknowledged that “[t]ransactions between affiliates create special concerns due to the fact that these are not arms-length transactions.”²⁹ FERC’s Certificate Policy Statement expressly recognizes 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.”³⁰

The absence of arms-length negotiations in affiliate transactions has led FERC to apply a higher level of scrutiny, in other circumstances, to these types of transactions.³¹ For example, in Order No. 707, which adopted new regulations to

²⁸ *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶ 61,070 at P 93 (2016) (citations omitted).

²⁹ *Transcon. Gas Pipe Line Corp.*, 60 FERC ¶ 62,153 at p. 63,378 (1992).

³⁰ Certificate Policy Statement at p. 61,748.

³¹ *See Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 at P 49 (2009) (“We will apply a higher level of scrutiny . . . due to the absence of arms’ length negotiations as a basis for the commitment [and] concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate”); *see also Am. L.A. Pipe Line Co.*, Opinion No. 387, 29 F.P.C. 932, 935-36 (May 16, 1963) (“sales to affiliates present possibilities of abuse and should be scrutinized with care”).

protect against affiliate abuse, FERC explained its concern “that a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders.”³² In other contexts, FERC is acutely aware of the need to carefully scrutinize affiliate transactions³³ and take steps to ensure such transactions were the product of arm’s-length negotiations.³⁴

These same concerns—*i.e.*, cross subsidization between a regulated utility and its affiliates—are present in certificate applications where the determination of need is based on regulated utility affiliate precedent agreements. Parties to the proceeding below emphasized that affiliated shippers with captive ratepayers (such as a local gas distribution company with captive retail ratepayers) have incentives to contract for

³² *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11013 at P 4 (citing *Heartland Energy Serv’s. Inc.*, 68 FERC ¶ 61,223 at p. 62,062 (1994)); *order on reh’g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008).

³³ *Commonwealth Atl. Ltd. P’ship*, 51 FERC ¶ 61,368 at p. 62,244 (1990) (citing *Ocean State Power Co.*, 44 FERC ¶ 61,261 (1988) and *Portland General Exch., Inc.*, 51 FERC ¶ 61,108 (1990)).

³⁴ *Ocean State Power*, 44 FERC at pp. 61,977-78 (noting, among other safeguards, that power sales agreements were negotiated in a competitive power supply market, numerous suppliers were considered, and a cost analysis was performed by a state regulator).

unnneeded capacity on an affiliated pipeline.³⁵ FERC had an obligation to address these arguments and it erred in refusing to do so.³⁶

If FERC had properly analyzed those arguments and supporting evidence, it would have been compelled to conclude that the affiliate precedent agreements do not demonstrate need for the PennEast Project. For shippers signing 15- to 20-year precedent agreements, total costs to consumers—both the shippers on the affiliate pipeline and the shippers on competitor legacy pipelines—can be astronomical. For example, the financial burden created by the glut of capacity the PennEast Project would introduce is estimated at \$180 million to \$280 million per year on just two legacy pipelines.³⁷ Thus, any promise of “cheap” natural gas is eviscerated by expensive, long-term transportation contracts that require end-use customers to pay for transportation capacity every hour of every day for decades to come, regardless of whether that

³⁵ R.11024, PennEast Rehearing Order at P 15, [JA ____].

³⁶ See *PPL Wallingford, LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (“An agency’s ‘failure to respond meaningfully’ to objections raised by a party renders its decision arbitrary and capricious.”) (quoting *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (“The court’s responsibility [is] to assure itself that [FERC] has given reasoned consideration to each of the pertinent factors.”).

³⁷ Lander, Greg, “Analysis of Public Benefit Regarding PennEast Pipeline” at 11 (March 9, 2016), available at: <https://rethinkenergynj.org/wp-content/uploads/2016/03/PennEastNotNeeded.pdf>.

capacity is in fact used.³⁸ At the same time consumers are financing the new pipeline, the affiliates' shareholders enjoy a return in excess of risk.³⁹

In addition, regulated utility affiliate agreements also threaten the "fair competition" assumed by the Certificate Policy Statement.⁴⁰ In explaining that increased competition is an underlying goal of FERC's policies, FERC observed that market participants must "all compete on equal footing."⁴¹ Affiliate-tainted transactions, by circumventing or subverting rational market outcomes, also diminish fair competition among market-based operators of existing capacity or prospective new capacity investment.⁴² Fulfilling the Certificate Policy Statement's goal of promoting

³⁸ Under FERC's straight fixed variable rate design, shippers pay reservation fees for the facilities' fixed costs regardless of whether they actually ship any gas. 18 C.F.R. § 284.7(e) (2018).

³⁹ *Spire STL Pipeline*, 164 FERC ¶ 61,085 (Glick, *dissenting*) ("There are several potential business reasons why [a] corporate parent might prefer to own a pipeline rather than simply take service on it, such as the prospect of earning a 14 percent return on equity rather than paying rates to . . . another pipeline company.").

⁴⁰ Certificate Policy Statement at p. 61,748 ("[FERC] need not protect pipeline competitors from the effects of competition, but it does have an obligation to ensure fair competition.").

⁴¹ *Peoples Natural Gas Co. v. Williams Natural Gas Co.*, 59 FERC ¶ 61,121 at p. 61,475 (1992).

⁴² Protest of Enable Mississippi River Transmission, LLC, Docket No. CP17-40 at 37-39 (February 27, 2017) (the result of the affiliate-backed project is "skewed and unfair competition"), available at: <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=14502453>.

fair competition should result in rejection of projects not supported by legitimate market demand.

Given the magnitude of consumers' potential cost exposure and the well-documented concerns with affiliate transactions, the Natural Gas Act's consumer protections demand more. Thus, FERC should have been compelled to look beyond the affiliate precedent agreements to make a "market need" determination based on review of record evidence other than the affiliate-tainted evidence upon which it relied.⁴³ Below, FERC expressly refused to do so, resulting in multiple reversible errors.⁴⁴ In addition to failing to fulfill its primary duty under the Natural Gas Act, FERC's refusal constitutes an impermissible failure to respond meaningfully to parties' arguments⁴⁵ and undermines any claim that the record contains substantial evidence to support FERC's findings about a lack of anticompetitive effects.⁴⁶ Its unwillingness to

⁴³ *Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369, 374 (5th Cir. 1999) (explaining that an affiliate relationship is "a circumstance that ought to trigger a hard look"); *cf. KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (The Court "cannot ignore [FERC's] unwillingness to address an important challenge[.]").

⁴⁴ R.10769, PennEast Certificate Order at P 33, [JA ____].

⁴⁵ *PPL Wallingford*, 419 F.3d at 1198 (quoting *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299).

⁴⁶ FERC found "[t]here is no evidence in the record of any impropriety or abuse in connection with any of the affiliate agreements." R.10769, PennEast Certificate Order at P 33, [JA ____]. Rather than supporting FERC's conclusions, that finding merely affirms that FERC did not find evidence it did not look for.

scrutinize the affiliate precedent agreements also demonstrates FERC's improper presupposition that consumers will benefit from the PennEast Project.⁴⁷

Based on these errors, the Court should grant the State Petitioners' requested relief and vacate the challenged orders.⁴⁸ In addition, because FERC continues to uncritically rely on regulated utility affiliate precedent agreements to establish need for proposed projects,⁴⁹ the Court should make clear that FERC's statutory obligation to protect consumers from the costs of potentially unneeded projects tempers any authority or discretion FERC may have with regard to whether to look beyond affiliate precedent agreements when making a need determination. Otherwise, FERC will continue to render Section 7 of the Natural Gas Act an empty vessel.

2. FERC Does Not Have Discretion to Violate Its Primary Statutory Duty of Protecting Consumers.

EDF acknowledges that precedent agreements may constitute substantial evidence of need in many cases. For example, precedent agreements are likely probative of need if they result from an open season process or are with unaffiliated arm's length shippers. Determining whether, in fact, precedent agreements are probative of need

⁴⁷ R.10769, PennEast Certificate Order at P 34, [JA ____].

⁴⁸ State Petitioners' IB at 39.

⁴⁹ See, e.g., *Spire STL Pipeline*, 164 FERC ¶ 61,085; *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 53 (2017), *order granting clarification*, 162 FERC ¶ 61,191 (2018), *order on reh'g*, 163 FERC ¶ 61,197 (2018); *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 at P 41 (2017), *order on reh'g*, 164 FERC ¶ 61,054 (2018).

requires FERC to analyze the facts and circumstances underlying those agreements. FERC's practice, however, is to merely presume that precedent agreements are substantial evidence of need in all cases, even where all or a substantial portion of capacity is subscribed to by regulated utility affiliates. To support that presumption, FERC stated that "nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, [FERC] to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers."⁵⁰ Despite the legitimate challenges to relying on affiliate precedent agreements to demonstrate need for the PennEast Project, FERC declined to exercise its "authority" in the proceeding below.⁵¹ That decision was patently arbitrary and capricious and contrary to law.

Given FERC's obligations to meaningfully address record evidence and arguments by parties below, it is insufficient to simply conclude that the Certificate Policy Statement and precedent construing it suggest that FERC's decision to look beyond precedent agreements is permissive.⁵² Even where FERC has discretion, it is

⁵⁰ See R.10769, PennEast Certificate Order at P 27, [JA ____].

⁵¹ *Id.* (citing *Minisink* and *Myersville*).

⁵² Below, New Jersey Division of Rate Counsel—whose primary duty is to safeguard the interests of captive utility customers—submitted record evidence demonstrating that, based on its participation in the relevant gas utility planning proceeding before the New Jersey Board of Public Utilities, the affiliate utility shippers have no legitimate need for the capacity being developed by their affiliate PennEast.

prohibited from exercising that discretion in ways that violate its primary statutory duties. Thus, the proper analysis considers whether FERC's refusal to look beyond the regulated utility affiliate precedent agreements violated FERC's primary duty to protect consumers. As explained above, the answer to that question should be an emphatic "yes."

Even if the Court declines to vacate the challenged orders, it should confirm that FERC cannot rely on *Myersville* and *Minisink* to support its refusal to look beyond precedent affiliate agreements given that both cases involved arms-length transactions among unaffiliated entities. Because "[t]ransactions between affiliates create special concerns due to the fact that these are not arms-length transactions,"⁵³ the Court should confirm that *Myersville* or *Minisink* do not support FERC's refusal to look beneath and beyond regulated utility affiliate precedent agreements, especially where parties raise legitimate challenges to the probative value of those agreements.

C. Affiliate Shipper Acquiescence to Precedent Agreements Does Not Relieve FERC of Its Independent Statutory Obligation to Protect Consumers.

As further support for its needs determination, FERC relied on regulated utility affiliate shippers' claims that, in addition to meeting load growth, the PennEast Project

⁵³ *Transcon. Gas Pipe Line Corp.*, 60 FERC at p. 63,378.

provides benefits in terms of a reliable, flexible, and diverse supply of natural gas.⁵⁴ Citing these claims, FERC found “no reason to second guess the business decisions of these shippers that they need the service to which they have subscribed.”⁵⁵

There are two principal flaws with FERC’s finding. First, based on well-documented concerns about affiliate transactions, FERC should be skeptical of self-serving claims by affiliates.⁵⁶

Second, FERC has independent obligations that, by definition, cannot be satisfied by relying on shipper acquiescence. This Court has made clear that, “before relying on contracts between a pipeline and its wholesale customers, FERC must ‘address the question of whether’ the interests of those customers are sufficiently likely to be congruent with those of ultimate consumers’ . . . ‘who, presumably, will bear the cost’ of the agreed-upon rates in their monthly energy bills.”⁵⁷ This Court has deemed FERC’s orders to be arbitrary and capricious if they do not consider these relevant factors.⁵⁸ In the proceeding below, parties argued that captive customers of the affiliated shippers would be burdened with the cost of a project for which need was

⁵⁴ R.10769, PennEast Certificate Order at P 30, [JA ____]. FERC attributes these claims to five shippers, four of which are PennEast affiliates. *Id.* at n.40, [JA ____].

⁵⁵ *Id.* at P 30, [JA ____].

⁵⁶ *Seaway Crude Pipeline*, 154 FERC at P 93.

⁵⁷ *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003).

⁵⁸ *Id.*

only substantiated by precedent agreements, the majority of which were with affiliates. FERC erred in relying on shippers' claims about purported benefits instead of looking beyond the agreements to determine whether, in fact, the PennEast Project would benefit ultimate consumers.

For these reasons, the Court should grant the State Petitioners' requested relief and also confirm that affiliate regulated utility shipper acquiescence to precedent agreements does not relieve FERC of its independent obligation to fulfill its explicit statutory duties.

D. State Commissions' Authority to Perform Prudence Reviews Does Not Relieve FERC of Its Independent Statutory Obligation to Protect Consumers.

FERC also responded deficiently to an assertion that regulated utility affiliates bear less market risk because they expect to pass PennEast transportation costs through to their customers. FERC maintained that its "jurisdiction does not extend to costs incurred by [local distribution companies] or the rates they charge to their retail customers."⁵⁹ Thus, FERC determined that "state regulatory commissions will be responsible for approving any expenditures by state-regulated utilities."⁶⁰ The Court should reject this rationale for two reasons.

⁵⁹ R.11024, PennEast Rehearing Order at P 18, [JA ____].

⁶⁰ *Id.*

First, state review may not occur until after the pipeline is placed into service and the utility takes transportation service.⁶¹ Congress vested FERC, not state commissions, with authority to issue certificates of public convenience and necessity.⁶² Waiting until after the pipeline is constructed to review regulated utility affiliate precedent agreements is functionally too late as the economic and environmental harm would have already occurred. As acknowledged by FERC, “[it] is important for the participants to know the economic consequences that can result before construction begins. After the economic decisions have been made it is difficult, if not impossible, to undo those choices.”⁶³

Given FERC’s independent obligations under the Natural Gas Act to only issue certificates of public convenience and necessity if need has been demonstrated by substantial evidence, and FERC’s plenary authority over interstate wholesale rates, FERC cannot use a jurisdictional shield to justify its failure to fulfill its statutory

⁶¹ R.10845, Request for Rehearing and Motion for Stay on Behalf of New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association, Docket Nos. CP15-558, at 43-44 (February 12, 2018) (“In New Jersey, regulators do not require pre-approval of precedent agreements by LDCs. There is no regulatory role until after a pipeline is built and LDCs seek cost recovery for transportation contracts from the NJ Board of Public Utilities. Such an outcome would result in a long-term glut in capacity that state regulators have no ability to remedy, and constitutes a significant regulatory gap.”), [JA ____-____].

⁶² 15 U.S.C. § 717f(e).

⁶³ Certificate Policy Statement at p. 61,751.

responsibilities. The fact that state commissions will make prudency determinations on utility expenditures does not eliminate FERC's obligation to consider whether precedent agreements constitute sufficient evidence of market need. Given concerns about affiliate transactions, more is demanded from an agency tasked as the "guardian of the public interest"⁶⁴ whose primary obligation under the Natural Gas Act is the protection of consumers.⁶⁵

Second, a state commission finding that a utility expenditure is imprudent is not the supposed bulwark FERC claims. In practice, state commission review is likely to be limited and retrospective.⁶⁶ As explained by the New Jersey Board of Public Utilities, "the Board does not have the authority to look behind the wholesale gas agreements or to alter FERC mandated pricing and operational terms and conditions."⁶⁷ Rather, the Board has the ability to regulate the terms and conditions of service and can disallow

⁶⁴ *FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961).

⁶⁵ *Cal. Gas Producers*, 421 F.2d at 428-29.

⁶⁶ As FERC has acknowledged, "State commissions would be limited to holding prudency hearings on these purchases and disallowing them from cost recovery. This process could be lengthy, resource-consuming and uncertain in its outcome." *Cove Point LNG Limited P'ship*, 68 FERC ¶ 61,128 at p. 61,619 (1994).

⁶⁷ *In the Matter of the Petition of Public Service Electric and Gas Company's Proposal to Transfer its Rights and Obligations Under its Gas Supply and Capacity Contracts and Operating Agreements to an Unregulated Affiliate and Other Relief*, Docket No. GM00080564, 2002 N.J. PUC Lexis 187 at *21 (2002).

any costs that are deemed to be imprudent.⁶⁸ Other state commissions have found that their pass-through mechanisms for natural gas service remain just and reasonable because of FERC's role in regulating the transportation charges that are passed through that mechanism.⁶⁹ At the same time that state commissions are depending upon FERC's review of rates for protections, FERC is solely relying on the backstop prudence review of state commissions to protect consumers from excessive rates. FERC's disclaiming of its role to look beneath affiliate precedent agreements supported by captive customers fails to satisfy its obligations under Section 7 of the Natural Gas Act.

FERC has also asserted that any attempt "to look behind the precedent agreements . . . might infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate."⁷⁰ This claim directly contravenes FERC's findings in *Cove Point LNG Limited Partnership*, involving a state-regulated affiliate's purchase of liquefied natural gas peaking services from an affiliate, Cove Point LNG. There, the applicant pointed to state public utility commissions' comprehensive regulation as a factor that mitigates self-dealing. FERC found this

⁶⁸ N.J.S.A. 48:3-58(r).

⁶⁹ *In the matter of the investigation of certain PGA-related issues involving Missouri Gas Energy*, Case No. GO-94-318 Phase II, January 31, 1996 Order at p. 38.

⁷⁰ *Mountain Valley Pipeline*, 161 FERC at P 53.

reasoning “insufficient to eliminate the exercise of market power by Cove Point and a regulated affiliate.”⁷¹ FERC explained that:

if a regulated affiliate purchased a very large portion or all of the peaking services offered by Cove Point LNG, then there would be no ‘similarly situated non-affiliates’ to which [FERC] could turn for information on reasonable prices. And, because [FERC] had approved market-based rates, state commissions could not reduce these prices. State commissions would be limited to holding prudency hearings on these purchases and disallowing them from cost recovery. This process could be lengthy, resource-consuming and uncertain in its outcome.⁷²

FERC’s strained reliance on a supposed infringement upon state regulation, if accepted, would perversely allow it to circumvent the very role Congress has prescribed for it in the Natural Gas Act. Moreover, it is nonsensical given that state commissions are *asking* FERC to take a more thorough review of affiliate precedent agreements.⁷³

⁷¹ *Cove Point LNG Ltd. P’ship*, 68 FERC ¶ at p. 61,619.

⁷² *Id.*

⁷³ Certificate Policy Statement at p. 61,740 (“Ohio [Public Utilities Commission] states that pipelines should shoulder the increased risk and that [FERC] should look behind contracts with affiliates”); *E. Shore Natural Gas Co.*, 132 FERC ¶ 61,204, at P 31 (2010) (“The Delaware [Public Service Commission] suggests the mere fact that the agreements are with affiliates of Eastern Shore somehow raises questions regarding the shippers need for the service”); Conditional Protest of the Missouri Public Service Commission, Docket No. CP17-40 at 9, n.18 (February 27, 2017) (disputing that an affiliate precedent agreement reflects fair competition); Comments of the Public Utilities Commission of the State of California, Docket No. PL18-1 at 7-8 (July 25, 2018) (asking FERC to examine whether affiliate precedent agreements contain perverse incentives).

Based on the foregoing, the Court should vacate FERC's orders and remand to FERC for further consideration.⁷⁴ The Court should also confirm that the authority state commissions may have to review regulated utility affiliate contracts does not relieve FERC of its independent obligation to fulfill its explicit statutory duties. This confirmation is necessary given FERC's continuing practice of uncritically relying on regulated utility affiliate precedent agreements to make needs determinations in certificate proceeding involving billions of dollars of investment.

CONCLUSION

Wherefore, the Court should vacate the challenged orders and remand for further consideration.

Respectfully submitted,

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⁷⁴ State Petitioners' IB at 39.

CERTIFICATE OF COMPLIANCE

Per Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 29(a)(5), and the Court's December 13, 2018 order, I certify that this amicus brief complies with the type-volume limitations because its textual portions, including headings, footnotes, and quotations contain 5,456 words, as counted by the "Word Count" feature of Microsoft Word 2010, the program with which this brief was prepared. This word count excludes: (1) the cover page; (2) the table of contents; (3) the Rule 26.1 corporate disclosure statement; (4) certificates; (5) the glossary of abbreviated terms and terms of art; and (6) the signature block.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this 28th day of December 2018, served the foregoing Amicus Brief of the Environmental Defense Fund, by first class mail, postage prepaid or electronic mail through the Court's CM/ECF system upon the parties to the proceeding below as listed in the Service Preference Report.

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Current Associated Cases: [18-1144](#) New Jersey Department of Envir et al v. FERC, [18-1256](#) New Jersey Department of Envir et al v. FERC, [18-1225](#) New Jersey Conservation Founda et al v. FERC, [18-1220](#) Delaware Riverkeeper Network et al v. FERC, [18-1274](#) Township of Hopewell New Jers v. FERC, [18-1233](#) New Jersey Division of Rate Co v. FERC, [18-1226](#) Homeowners Against Land Taking v. FERC

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