



# STATEMENT

## Statement of Commissioner Richard Glick on the PennEast Project

Date: January 19, 2018

Docket No.: CP15-558-000

"I respectfully dissent from today's order because I believe that the record in this proceeding fails to demonstrate that the PennEast Project satisfies the requirements for a certificate of public convenience and necessity under the Natural Gas Act. Section 7 of the Natural Gas Act requires that, before issuing a certificate for new pipeline construction, the Commission find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms.<sup>1</sup> I disagree with the Commission's conclusion that the PennEast Project meets these standards.

"In today's order, the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed.<sup>2</sup> Pursuant to these agreements, PennEast's affiliates hold more than 75 percent of the pipeline's subscribed capacity.<sup>3</sup> While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline,<sup>4</sup> contracts among affiliates may be less probative of that need because they are not necessarily the result of an arms-length negotiation.<sup>5</sup> By itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer's burden to show that the pipeline is needed.

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<sup>1</sup> 15 U.S.C. § 717f (2012).

<sup>2</sup> *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at P 27 (2018) (explaining that "it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers"); *id.* P 29 ("Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreement to find that the project is needed.").

<sup>3</sup> *Id.* P 6.

<sup>4</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,747 (1999) (Certificate Policy Statement) ("[T]he Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.").

<sup>5</sup> Certificate Policy Statement at 61,744.



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"Under these circumstances, I believe that the Commission must consider additional evidence regarding the need for the pipeline. As the Commission explained in the Certificate Policy Statement, this additional evidence might include, among other things, projections of the demand for natural gas, analyses of the available pipeline capacity, and an assessment of the cost savings that the proposed pipeline would provide to consumers.<sup>6</sup> The Commission, however, does not rely on any such evidence in finding that there is a need for the PennEast Project.<sup>7</sup> Accordingly, I do not believe that the Commission's order properly concludes that the PennEast Project is needed.

"In addition to determining the need for a pipeline, the Natural Gas Act requires the Commission to find that, on balance, the pipeline's benefits outweigh its harms. This includes weighing the risk of harm to the environment, landowners, and communities, as well as public safety more generally.<sup>8</sup> And where, as in this proceeding, there is limited evidence of the need for the proposed project, it is incumbent on the Commission to engage in an especially searching review of the project's potential harms to ensure that the project is in fact in the public interest. In this case, PennEast's certificate application lacks evidence that I believe is important to making the public interest determination.<sup>9</sup>

"The Commission addresses this lack of evidence by conditionally granting the certificate, subject to PennEast's compliance with the environmental conditions. I recognize that the courts have upheld the Commission's authority to issue conditional certificates. Nevertheless, doing so comes with significant consequences for landowners whose properties lie in the path of the proposed pipeline. Although the certificate is conditional, it gives the pipeline developer the authority to exercise eminent domain and condemn land as needed to develop the pipeline.<sup>10</sup> In my view, Congress did not intend for the Commission

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<sup>6</sup> *Id.* at 61,747.

<sup>7</sup> Indeed, the Commission concludes that "the fact that 6 of the 12 shippers on the PennEast Project are affiliated with the project's sponsors does not require the Commission to look behind the precedent agreements to evaluate project need." *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 at P 33.

<sup>8</sup> As the United States Court of Appeals for the District of Columbia Circuit has explained, "[t]he broad public interest standards in the Commission's enabling legislation are limited to 'the purposes that Congress had in mind when it enacted this legislation.'" *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FERC*, 425 U.S. 662, 670 (1976)). The Court explained that, for the Natural Gas Act, these purposes include "'encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices'" as well as "'conservation, environmental, and antitrust issues.'" *Id.* (quoting *NAACP*, 425 U.S. at 670 n.6).

<sup>9</sup> For instance, 68 percent of the project alignment in New Jersey has yet to be surveyed for the existence of historic and cultural resources. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 at P 172. In addition, PennEast has not yet completed the geotechnical borings work needed to ensure that the environmental impacts of planned horizontal directional drilling will be adequately minimized. *Id.* P 120.



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to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest.<sup>11</sup> Further, under the Natural Gas Act, this eminent domain authority is not limited to the extent needed to complete the surveys and other assessments used to satisfy the conditions imposed in the Commission's order. As a result, there will not necessarily be any restriction on a pipeline developer's ability to exercise eminent domain while the Commission waits to confirm that the pipeline is in the public interest.

"I recognize that part of the reason that the record in this proceeding is incomplete is that landowners have denied PennEast access to their land for the purpose of conducting the necessary studies and assessments. However, the question whether landowners should be required to provide pipeline developers with access to their property for the purpose of determining whether it is suitable for a proposed pipeline is one that is and should be left to the states to decide. The Commission should not use the pipeline certification process as an end run around states and landowners that choose not to grant access to their property before a certificate is issued.<sup>12</sup>

"For these reasons, I respectfully dissent."

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<sup>10</sup> 15 U.S.C. § 717f(h) (2012). State supreme courts, including New Jersey's and Pennsylvania's, have long recognized that the power of eminent domain is a harsh and extraordinary power that should be strictly construed. See *Levin v. Twp. Comm. of Twp. of Bridgewater*, 274 A.2d 1, 26 (N.J. 1971) ("Where . . . property is forcibly taken from one party for the purpose of being transferred to another, thereby excluding the consent of the owner and excluding all other prospective ultimate purchasers and developers except the one selected by the municipality, the facts which allegedly give rise to that municipal power should be closely scrutinized."); *Woods v. Greensboro Nat. Gas Co.*, 54 A. 470, 470-72 (Pa. 1903) ("The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is that the authority is to be strictly construed." (internal citations omitted)); see also *Harvey v. Aurora & G. Ry. Co.*, 51 N.E. 163, 166 (Ill. 1898) (similar); *Chesapeake & O. Ry. Co. v. Walker*, 40 S.E. 633, 636 (Va. 1902) (similar); *City of Little Rock v. Sawyer*, 309 S.W.2d 30, 36 (Ark. 1958) (similar); *La. Power & Light Co. v. Lasseigne*, 257 La. 72, 89 (1970) (similar).

<sup>11</sup> See, e.g., *Walker v. Gateway Pipeline Co.*, 601 So. 2d 970, 975 (Ala. 1992) (explaining that section 7(h) of the Natural Gas Act addresses eminent domain needed for the "actual construction of facilities, not entries that may take place prior to such construction and in preparation for acquiring a certificate of public convenience and necessity from the FERC").

<sup>12</sup> Some states allow prospective interstate pipeline companies to rely on state law to access private property for surveying prior to obtaining a certificate of public convenience and necessity. See, e.g., *Texas E. Transmission, LP v. Barack*, 2014 WL 1408058, at \*3 (S.D. Ohio Apr. 11, 2014) (granting a pipeline company access under Ohio law to a property for purpose of surveying, appraising, and conducting any necessary examinations). Other states, including New Jersey and Pennsylvania, do not provide pipeline companies this right prior to obtaining a certificate of public convenience and necessity from the Commission.

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