UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC	Docket No. CP15-558-000

MOTION FOR LEAVE TO ANSWER AND ANSWER OF NEW JERSEY DIVISION OF RATE COUNSEL TO COMMENTS OF PENNEAST PIPELINE COMPANY, LLC

On September 12, 2016, the New Jersey Division of Rate Counsel ("NJ Rate Counsel") timely filed comments[1] on the Commission's Draft Environmental Impact Statement ("DEIS") for the 118-mile greenfield pipeline project (the "Project") proposed by PennEast Pipeline Company, LLC ("PennEast") and at issue in this proceeding. Although the procedural schedule does not provide for the submission of reply (or other) comments after September 12, PennEast filed on October 17, 2016 a report[2] ("PennEast Answer") authored by a consultant, Concentric Energy Advisors, Inc. ("Concentric"), that purports to respond to NJ Rate Counsel's comments on the DEIS.[3] Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, NJ Rate Counsel moves for leave to answer and submits this Answer to the PennEast Answer.

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[1] PennEast Pipeline Co., Comments of the New Jersey Rate Counsel (Sept. 12, 2016), eLibrary No. 20160912-6003 ("Rate Counsel Comments").

[2] PennEast Pipeline Co., Reply to New Jersey Division of Rate Counsel Comments (Oct. 17, 2016), eLibrary No. 20161017-5038.

[3] PennEast did not seek leave to submit its unauthorized reply.

I. MOTION FOR LEAVE TO ANSWER

As noted, the Commission's orders in this proceeding do not provide for the submission of replies to comments submitted on the DEIS; more generally, the Commission's procedural rules prohibit answers to answers.[4] The Commission will, however, waive this rule where an otherwise impermissible answer provides information that assists the Commission in its decision-making process.[5] Such is the case here.

PennEast has submitted a newly-prepared report authored by Concentric that purports to provide additional support for the development of the Project and its associated return on equity ("ROE"), debt rate, and capital structure. The PennEast Answer is effectively a supplemental submission that modifies its application in this proceeding. As newly-filed data, no party has had a prior opportunity to address PennEast's claims. To the extent the Commission accepts the PennEast Answer, the Commission should as a matter of procedural fairness afford parties the opportunity to address the Concentric Report.

In addition, NJ Rate Counsel respectfully submits that an answer will be of assistance to the Commission by helping to clarify the record. As explained below, while PennEast purports to respond to NJ Rate Counsel's earlier comments, its Answer continues to fail to demonstrate an actual need for the Project. Specifically, the crux of the NJ Rate Counsel comments was the simple point that there has been no showing that the local gas distribution companies ("LDCs") that would be served by the Project lack adequate existing capacity. PennEast does not even purport to rebut the evidence

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[4] 18 C.F.R. § 385.213(a)(2).

[5] *See, e.g.*, *E. Shore Nat. Gas Co.*, 156 FERC ¶ 61,053 (2016).

tendered by NJ Rate Counsel. Instead, the Company simply repeats the truism that construction of an additional pipeline can increase reliability—thereby ignoring the Commission's obligation under the National Environmental Policy Act ("NEPA") to determine whether there is a need for the Project sufficient to justify its associated environmental impacts. In addition, PennEast's Answer fails to rebut the contentions in the NJ Rate Counsel comments concerning the Project's excessive proposed ROE. PennEast fails to show a nexus between the specific "risks" associated with construction of the proposed pipeline and the requested ROE, proposed debt rate, and proposed capital structure. Instead, PennEast repeats the mantra that other pipelines have received approval of the same generous 14% ROE, ignoring that those approvals were under very different economic conditions and in a different interest rate environment.

II. ANSWER

A. PennEast continues to fail to demonstrate actual need for the Project.

PennEast continues to argue that the Project is needed because several New Jersey and Pennsylvania LDCs—a number of which are PennEast affiliates—have subscribed to a substantial share (approximately 60%) of the Project's anticipated capacity.[6] NJ Rate Counsel's September 12 Comments demonstrate, and the PennEast Answer fails to rebut, that those same LDCs have no need for additional capacity. And, contrary to PennEast's claims[7], NJ Rate Counsel does not seek to substitute its judgment for that of the relevant LDCs. NJ Rate Counsel's position is based instead on statements made by the LDCs

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[6] PennEast Answer, P 9.

[7] *Id.*

themselves; the annual filings these LDCs submit to state regulators make plain that they have sufficient capacity without the new pipeline to meet forecasted load growth.

PennEast does not dispute this evidence, choosing instead to seek to justify the Project by engaging in a lengthy discussion of "other factors" that may support the need for the Project, "such as cost savings, supply security and reliability, supply diversity, supply flexibility, price stability, and the ability to grow and meet incremental demand."[8] PennEast does not explain how these other factors justify the Project, however. While NJ Rate Counsel does not dispute that these other factors may play a role in evaluating a proposed pipeline, they are ancillary to an even more basic demonstration: that the LDC customers of the pipeline in fact need the capacity in order to serve customers. Rather than address that fundamental concern, the PennEast Answer seeks to deflect attention toward the ancillary considerations.

1. PennEast cannot justify the Project based on "cost savings."

An examination of the "other factors" PennEast cites further supports NJ Rate Counsel's claim that the Project is not justified. For example, PennEast cites "cost savings," referencing the current $0.75 per dekatherm ("Dth") basis differential between Gulf Coast and Marcellus commodity prices. PennEast estimates that this basis differential will continue for the next 36 months.[9] However, as shown in the Dismukes Affidavit, basis differentials are inherently temporary and tend to equalize, especially over the 30 or more years that a new pipeline will be in service.[10] According to the most

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[8] *Id.* PP 10, 11.

[9] *Id.* P 25.

[10] Affidavit of David E. Dismukes, Ph.D. ¶ 6 of Motion for Leave to Answer and Answer of New Jersey

recent U.S. Energy Information Administration analysis, that basis differential may already be shrinking.[11] Similarly, PennEast has neither made any commitment nor offered a guarantee that ratepayers in the Project area will have reduced costs for either commodity or transport. PennEast rebuts its own point that consumers will benefit from the existing basis differential, stating that "[i]n addition, it is Concentric's understanding that the transportation cost on PennEast is effectively the same as accessing the Gulf Coast supplies."[12] In other words, PennEast appears to concede that the enormous cost of construction of the Project translates into transportation costs that eliminate any current, perhaps temporary, basis differential between Gulf Coast gas and Marcellus gas. Rather than guaranteeing any financial benefit to ratepayers, PennEast notes only that its precedent agreements are negotiated rates. But that serves only to highlight the inter-affiliate negotiations that have taken place. Of course, as the Commission is aware, "negotiated rates" are not "discounted rates" and a "negotiated rate" could exceed the recourse rate. Thus, far from demonstrating "need," the evidence furnished by PennEast's own consultant demonstrates that the Project will not result in cost savings.

2. The Project will not increase supply diversity or supply flexibility in the Mid-Atlantic region.

PennEast also attempts to justify the Project as a means to increase "supply diversity" and "supply flexibility."[13] But PennEast does not even allege, much less show, that there is an existing lack of supply diversity or flexibility. PennEast fails to

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Division of Rate Counsel to Comments of PennEast Pipeline Company, LLC ("Dismukes Aff.").

[11] Dismukes Aff. ¶ 8.

[12] PennEast Answer, P 25.

[13] *Id.* P 7.

acknowledge that numerous outlets currently exist for gas produced from the Marcellus and Utica shales. NJ Rate Counsel is likewise unaware of any complaints that gas is locked into either field due to a lack of pipeline capacity. Moreover, PennEast acknowledges that its LDC-affiliates that have executed precedent agreements already obtain substantial amounts of gas from the Marcellus and Utica shales.[14] If LDCs are already able to and do obtain required gas from the Marcellus and Utica shales,[15] providing increased and redundant transport to the same suppliers increases neither supply diversity nor supply flexibility. To the contrary, by increasing reliance on the Marcellus and Utica Shales, LDCs are *decreasing* supply diversity and flexibility.[16]

3. PennEast's assumption that the Project would mitigate price spikes such as those during the 2014 Polar Vortex is unsupported.

PennEast next raises the specter of the gas and electric commodity price spikes experienced during the "Polar Vortex" events of the 2013-14 winter, and implies that the Project could lessen the likelihood of a recurrence.[17] During the Polar Vortex, regional natural gas prices throughout the Northeast saw record setting highs as natural gas transmission pipelines into New England became congested. PennEast's argument appears to be that if more pipeline capacity into the Mid-Atlantic had existed, such price spikes would have moderated or been eliminated. However, PennEast has not

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[14] *Id.* P 31.

[15] PennEast also seeks to support the need for the Project with a presentation by PJM from the October 20, 2016 Commission Meeting entitled "Winter Operations and Market Performance." PennEast Pipeline Co., Supplemental Information – PJM Slide Presentation to FERC, eLibrary No. 20161025-5067. The PJM presentation, however, simply states the obvious that "more is better," with no consideration of the Project's environmental or financial impacts or whether and how the Project is necessary to meet peak demand.

[16] Dismukes Aff. ¶ 11.

[17] PennEast Answer, P 30.

demonstrated how the Project would have mitigated (or, once completed, will mitigate) price spikes.

The Polar Vortex price spikes would not have been eliminated simply by increasing pipeline capacity. In particular, the increase in capacity offered by PennEast would have had limited, if any, effect. The majority of the gas transportation congestion encountered during the Polar Vortex occurred in New England[18]—far north of the area to be served by the Project.

In addition, as the Commission is aware from its detailed study of the 2013-14 winter,[19] there were multiple significant causes of the price spikes--many of which were unrelated to pipeline capacity. The Commission Staff Report and analysis by PJM[20] establish that the price spikes were caused by a very high demand event[21] combined with substantial forced generation outage issues.[22] PJM reported that 42% of forced outages during the Polar Vortex event were due to equipment failure.[23] Commission Staff has calculated that at least 1.5 Bcfd of gas could not be injected due to well freeze-offs and that Northeast gas production was down 800 MMcfd.[24] Compounding the gas production

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[18] Dismukes Aff. ¶ 16.

[19] Fed. Energy Regulatory Comm'n, "Winter 2013-2014 Operations and Market Performance in RTOs and ISOs" at 3 (April 1, 2014), FERC Docket No. AD14-8-000, eLibrary No. 20140403-4009 ("Commission Staff Report").

[20] PJM Interconnection L.L.C., Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events at 56-63 (May 8, 2014), http://www.pjm.com/~/media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx ("PJM Winter Report").

[21] Dismukes Aff. ¶ 15.

[22] Dismukes Aff. ¶ 17.

[23] PJM Winter Report at 24.

[24] Commission Staff Report at 4.

problem, PJM also reported that some pipelines restricted withdrawals from storage due to low inventories in storage.[25]

Even if PennEast had been operational at that time, it would have had no impact on forced outages caused by frozen coal piles or equipment failures.[26] An operational PennEast pipeline could not have transported gas that simply wasn't there. And to the extent gas-fired generation did not obtain fuel due to "onerous" and "inflexible" pipeline tariff conditions,[27] PennEast's proposed tariff has similar terms and conditions.[28] Thus, the PennEast pipeline, had it been operational in January 2014, would not have mitigated substantial causes of the price spikes.

4. PennEast has not demonstrated that the Project is necessary to meet projected load growth.

PennEast also cites the ability to grow and meet incremental demand as demonstrating need for the Project. While the faith demonstrated in "if you build it, they will come" makes for a wonderful movie plot, it cannot be the basis for building an enormously expensive greenfield pipeline. Rather, as PennEast's affiliate-LDCs' own filings with state regulators demonstrate, these LDCs: (1) currently have adequate capacity; (2) have experienced minimal load growth during the past years of very low gas prices; and (3) project very limited new load growth. While PennEast asserts that 2020 is too short a planning horizon for determining the need for pipeline capacity, it offers no substitute date. More importantly, PennEast offers no studies or other evidence showing

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[25] PJM Winter Report at 58-63.

[26] Dismukes Aff. ¶ 17.

[27] PJM Winter Report at 56.

[28] See e.g., PennEast Pipeline Co., Part 6 – General Terms and Conditions § 36.1, *Pro Forma* FERC Gas Tariff Original Volume No. 1 of PennEast Pipeline Company, LLC (Sept. 24, 2015), eLibrary No. 20150925-5028 (requiring uniform, ratable hourly flows over a 24 hour period).

that there will be some event at some unknown point after 2020 that will suddenly change the existing flat rate of growth to a much higher rate of growth that would necessitate the Project's capacity. In other words, PennEast has failed to show that the Project is needed to meet load growth.

5. PennEast's citations to state regulator certifications of need illustrate the deficiencies in PennEast's Application.

PennEast provides citations to several instances in which state regulators have certificated pipeline facilities or transport capacity purchases from pipelines. In each of these cases, the state regulator conducted fact-specific inquiries and concluded the transaction was necessary to meet a specific need. But this hardly helps PennEast; indeed, it is the other way around. The absence of a specific showing of need is why PennEast's Application[29] in this proceeding fails.

Among the cases cited, PennEast includes a lengthy quote from a decision by a Pennsylvania Public Utility Commission (PaPUC) Administrative Law Judge to demonstrate that state utility commissions have recognized benefits associated with expanding gas service.[30] In that case, the PaPUC approved a settlement proposal that would "provide public benefits by allowing approximately 10,000 or more new customers to receive the benefits of natural gas service." But that consideration is not present in this proceeding. The PennEast Application nowhere states that completion of the Project will enable any new service that cannot already be obtained from existing pipelines.

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[29] PennEast Pipeline Co., Application of PennEast for Certificates of Public Convenience and Necessity and Related Authorizations (Sept. 24, 2015), eLibrary No. 20150925-5028 ("Application").

[30] PennEast Answer P 16.

Similarly, PennEast cites to a California Public Utility Commission proceeding considering Pacific Gas & Electric's request for capacity on the Ruby pipeline.[31] Again, the facts presented in that case are unlike those before the Commission in this one. In *Ruby Pipeline*, PG&E had very limited, if any, access to gas from the Rockies region, and relied heavily on Canadian gas supplies. By subscribing to the Ruby pipeline, PG&E diversified its gas supply. In contrast, the PennEast Project provides no access to new gas supplies. As PennEast acknowledges, New Jersey and Pennsylvania LDCs already have extensive access to Marcellus and Utica Shale gas.[32] Increasing access to and, in turn reliance on, gas supplies from the Marcellus shale will concentrate rather than diversify the gas supplies on which PennEast's subscribers rely.

PennEast also cites to a proposed decision[33] in Florida Public Service Commission proceedings involving Florida Power & Light's subscription to the Sabal Trail and the Florida Southeast Connection pipelines. As the Commission is well aware, Florida is a long narrow peninsula and gas flows from north to south. On the electric side, there are serious constraints that substantially limit the flow of power from Georgia to Florida. As a result, in contrast to the instant facts, FPL needed new, gas-fired electric generation and required new pipeline capacity to fuel that resource because there was no other available pipeline capacity. The situation in the Mid-Atlantic region is vastly different. The region includes a network of reticulated pipelines; unlike other areas of the

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[31] *Id.* P 18. (citing *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009), *Clarified decision on rehearing*, 131 FERC ¶ 61,007 (2010), *stay denied*, 134 FERC ¶ 61,103, *petition for review dismissed sub nom. Defenders of Wildlife v. FERC*, 2011 WL 3240455 (D.C. Cir. 2011) ("*Ruby Pipeline*")).

[32] *Id.* P 31.

[33] *Id.* (citing Proposed Agency Action Order on Florida Power & Light Company's Proposed Sabal Trail Transmission, LLC and Florida Southeast Connection Pipelines, Florida Public Service Commission, Order No. PSC-13-0505-PAA-EI, Oct. 28, 2013).

country, Mid-Atlantic LDCs are turning back pipeline capacity to the Gulf Coast region in favor of more local supplies. The electric grid in the Mid-Atlantic is also heavily networked, enabling power generated hundreds—if not more than a thousand—miles away to reach the region on a cost-effective basis.

In sum, in the cases cited by PennEast, the proponents demonstrated the need for additional pipeline capacity. By contrast, PennEast's Answer—which does little more than demonstrate that the benefits associated with the pipelines at issue in those cases outweighed the impacts—fails to demonstrate that such circumstances exist here.

B. PennEast fails to support its requested ROE, debt rate, and capital structure.

PennEast defends its exorbitant requested ROE and debt rate with arguments that other pipelines have received similar rates.[34] In its prior comments, NJ Rate Counsel explained that the Commission first authorized a 14% ROE under vastly different capital market conditions and in the context of pipelines predominantly financed with debt.[35] In contrast, PennEast's proposed capital structure shows that it is financing the Project predominantly with equity and it is doing so in capital market conditions in which investors demand a significantly lower rate of return. Similarly, NJ Rate Counsel explained that current interest rates on debt issuances are far below PennEast's request.[36] NJ Rate Counsel will not repeat those arguments here. Instead, NJ Rate Counsel urges the Commission to recognize that PennEast neither can nor does dispute the underlying facts of current capital and debt markets. Instead, PennEast attempts to distract the

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[34] *Id.* PP 48, 52.

[35] Rate Counsel Comments at 11-14.

[36] *Id.* at 14-16.

Commission with arguments that boil down to "keeping up with the Joneses." But such arguments do not justify an above-market ROE or debt interest rate.

In addition, rather than address the arguments that NJ Rate Counsel has made, PennEast creates and knocks down certain straw arguments. For example, PennEast claims that NJ Rate Counsel cited Commission pipeline rate cases to argue that PennEast was of comparable risk to existing pipelines.[37] NJ Rate Counsel made no such claim. In fact, NJ Rate Counsel *expressly disclaimed that it was making such an argument*. In its September 12 Comments, NJ Rate Counsel made clear that "[w]hile the median result of the Commission's Discounted Cash Flow analysis may not yield the appropriate ROE for a greenfield pipeline, it provides the measure of the return investors require."[38] Thus, contrary to PennEast's assertions, NJ Rate Counsel's reliance on those cases was intended to demonstrate that capital market conditions have changed—not to demonstrate that the Project faces risk comparable to existing pipelines. As applicable to PennEast, it is simply inappropriate to continue to award the same overly generous 14% ROE to new greenfield pipelines over the course of 20 years when conditions in the capital markets have undergone substantial upheaval during this period. The Commission should not be misled by PennEast's straw argument, and should recognize that investors do not require the same 14% return now that they required 20 years ago under very different capital market conditions.

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[37] PennEast Answer PP 47-50.

[38] Rate Counsel Comments at 13.

Similarly, PennEast claims that NJ Rate Counsel argued that the state-approved ROEs for LDCs should inform PennEast's ROE.[39] To support this erroneous characterization, PennEast provides a quote from NJ Rate Counsel's comments that has been stripped of context. In the quoted language, NJ Rate Counsel was not arguing that this Commission is in any way bound by a state determination of ROE. Rather, NJ Rate Counsel asks the Commission to recognize the broader context of this case, in which it appears that state-regulated LDCs are using an affiliate that is not state regulated to generate radically higher returns for the shareholders of their respective corporate parents. In other words, one factor that NJ Rate Counsel believes supports the Commission taking a hard look at PennEast's evidence of a physical need for the pipeline is that, due to the difference in rates of return, there is substantial financial incentive to build a new pipeline. NJ Rate Counsel urges the Commission, before granting any approval, to determine with certainty that the Project is driven by a genuine need for new capacity rather than a desire for an excessive investment return.

PennEast would also have the Commission authorize the 14% ROE because the shippers that have signed precedent agreements will pay "negotiated rate[s]" rather than recourse rates calculated using the 14% ROE.[40] PennEast seeks to dismiss NJ Rate Counsel's concerns for New Jersey ratepayers but ignores that the Project is not 100% subscribed. The remaining capacity may be sold, at the recourse rates, to New Jersey LDCs who will collect those costs from New Jersey ratepayers. Moreover, while PennEast discusses the "fundamental difference" between negotiated rates and cost-based

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[39] PennEast Answer PP 40-41.

[40] *Id.* P 39.

recourse rates,[41] as the Commission is aware, there is also a fundamental difference between negotiated rates and discount rates. PennEast has not made any commitment to discount the recourse rates to customers in New Jersey. Rather, PennEast and its affiliates have negotiated a rate; that rate could over its life be higher than the recourse rate that retail customers of New Jersey LDCs must ultimately pay. Thus, PennEast's reference to negotiated rates is no protection for retail customers.

III. CONCLUSION

For the forgoing reasons, NJ Rate Counsel respectfully requests that the Commission accept this Answer to the PennEast Answer, consider these comments and the accompanying Dismukes Affidavit, and take actions that accord with NJ Rate Counsel's requests in this proceeding.

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[41] *Id.* P 38.

Respectfully submitted,

/s/ Scott H. Strauss

Scott H. Strauss
Stephen C. Pearson
Amber L. Martin

Attorneys for
New Jersey Division of
Rate Counsel

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

November 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 14th day of November, 2016.

/s/ Amber L. Martin
Amber L. Martin

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000