



October 13, 2016

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: PennEast Pipeline Project, FERC Docket No. CP15-558

Dear Ms. Bose,

Less than two weeks after Homeowners Against Land Taking-PennEast (HALT) and other commenters noted the significant problems and deficiencies presented by FERC's Draft Environmental Impact Statement (DEIS), PennEast submitted 33 route modifications that further emphasize FERC's failure to develop a meaningful record for decision. With a woefully incomplete record, the issuance of a Final Environmental Impact Statement would be unlawful and arbitrary, for the reasons stated in HALT's previous comments and in this letter.

On September 23, PennEast filed 33 route modifications, 11 days after the public comment period for the DEIS had closed.¹ The route now under FERC consideration is different and will have different impacts than the route proposed for public comment in the DEIS. Landowners not subject to eminent domain at the time of public comment are newly subject to property condemnation if FERC grants PennEast a Certificate of Public Convenience and Necessity (Certificate). Approving the modified route would violate the National Environmental Policy Act (NEPA), the Fifth Amendment to the U.S. Constitution, and the Natural Gas Act ("NGA"), and fails to restore landowner rights that already have been violated.

Under NEPA, FERC had to identify affected resources and propose a project route *before* issuing the DEIS. By accepting a significant route change *after* the DEIS comment period ended, FERC deprived the public of any opportunity to participate or comment on the new route's impacts, failed to compare the impacts of the preferred alternative to other reasonable alternatives, and mistakenly drew conclusions about the significance of impacts despite lacking baseline data from the actual route.

PennEast's supplemental filing repeatedly claims that the changed route "will not cause any additional adverse environmental impacts."² But that is not a fact for PennEast to unilaterally determine outside of the DEIS and without public comment. PennEast's filing shows that, since the time of the DEIS, PennEast has discovered new information on affected resources. That discovery has led to route modifications. This filing proves the insufficiency of the DEIS by demonstrating the importance of identifying affected resources before a route has been selected and a DEIS has been published for comment. In this proceeding, where FERC has not identified the affected resources on over 70% of the affected land in New Jersey, later identification of these resources will likely require far more than 33 modifications.

¹ FERC Docket CP-15-558, Accession No. 20160923-5115 (Sept. 23, 2106).

² *Id.*



FERC continues to pretend that it has sufficient information about environmental impacts. Yet, Section 7 of the NGA prohibits FERC from granting a Certificate, conditional or otherwise, until it has finished evaluating (1) potential impacts from the pipeline; (2) whether impacts could be avoided with a different route; and (3) whether **construction** of the pipeline **in a particular place** is in the public convenience and necessity. If PennEast is granted condemnation authority to begin surveying properties, it similarly would discover that its current route creates avoidable adverse impacts that were not analyzed in the DEIS or anywhere else in the record.

That discovery will be too late. Before a Certificate is granted, an applicant is likely to change the route to avoid adverse impacts. In contrast, once it has initiated condemnation proceedings, an applicant already has invested irretrievable time and money to obtain the impacted property and has little to no incentive to reroute to avoid adverse impacts. Precisely for that reason, the NGA does not grant eminent domain until an applicant has submitted complete information to prove that **construction is in the public interest**. Because PennEast's recent filing confirms it is still in the information gathering stage, FERC lacks the information to authorize construction or to grant a conditional certificate before it has documented adverse impacts.

Similarly, the Fifth Amendment is deliberately structured to require a clear record showing a "public use" before any taking of private property. The purpose of this requirement is to require a contemporaneous record at the point when it is relevant to FERC's decision. Eminent domain proceedings cannot be undone; neither can tree clearing or other detrimental "pre-construction" activities that FERC might seek to authorize in a Certificate. Even assuming that this proposed pipeline is for a public use—which significant evidence on the record shows it is not—FERC's practice of granting eminent domain authority through conditional certificates allows a pipeline company to take properties that are not ultimately needed for the pipeline while the company gathers data and decides where the pipeline should be placed. This trial-and-error use of eminent domain violates the Fifth Amendment. At minimum, the Fifth Amendment requires FERC to build a public record showing a "public use" for a specific taking *before* the taking occurs. If the FERC administrative record is missing data, FERC cannot "take" any of the bundle of property rights that belong to the property owner, including the right to exclude surveyors, protect resources on the land, and prevent unauthorized construction. Because the September 23 filing reflects a fatal failure to identify affected resources at the time of the DEIS, FERC has not yet developed the contemporaneous record required under the Fifth Amendment.

HALT submits that FERC should and must revise the DEIS based on the route changes and reissue a complete DEIS for public comment, and that FERC has no authority to grant a Certificate or to authorize eminent domain until it has done so.

Sincerely,

s/ R. Steven Richardson
Counsel for Homeowners Against Land Taking-PennEast