173 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Texas Eastern Transmission, LP Docket No. CP20-30-000

ORDER ISSUING CERTIFICATE

(Issued October 15, 2020)

1. On December 19, 2019, Texas Eastern Transmission, LP (Texas Eastern) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations[2] for authorization to construct and operate pipeline facilities, a new metering and regulating (M&R) station, and associated facilities in Middlesex County, New Jersey (Middlesex Extension Project).[3] The project is designed to provide up to 264,000 dekatherms (Dth) per day of firm natural gas transportation service to interconnections with Transcontinental Gas Pipe Line Company, LLC's (Transco) mainline system and Transco's existing Woodbridge Lateral for ultimate delivery to the natural gas-fired Woodbridge Energy Center owned by CPV Shore Holdings, LLC (CPV) in Woodbridge Township, New Jersey.

2. For the reasons discussed below, the Commission will grant the requested authorizations, subject to certain conditions.

[1] 15 U.S.C. § 717f (c).

[2] 18 C.F.R. pt. 157 (2020).

[3] On April 23, and July 13, 2020, Texas Eastern filed supplemental information describing certain modifications and updates to the as-filed project design. *See* Texas Eastern April 23, 2020 Supplemental Information Submission (April 23 Supplemental Filing) and July 13, 2020 Supplemental Information Submission (July 13 Supplemental Filing).

I. Background and Proposal

3. Texas Eastern, a Delaware limited partnership, is a natural gas company as defined by section 2(6) of the NGA,[4] engaged in the transportation of natural gas in interstate commerce. Texas Eastern is an indirect, wholly owned subsidiary of Spectra Energy Partners, LP. Texas Eastern's transmission system extends from Texas, Louisiana, and the offshore Gulf of Mexico area, through the states of Mississippi, Arkansas, Missouri, Tennessee, Illinois, Indiana, Kentucky, Ohio, West Virginia, Maryland, Pennsylvania, and New Jersey, to its principal terminus in the New York City metropolitan area.

4. Texas Eastern states that CPV's Woodbridge Energy Center is a 725-megawatt natural gas-fueled, combined-cycle power generation facility that provides on-demand electricity to approximately 700,000 homes and/or businesses at peak operating capacity and is a vital component of New Jersey's electric system. Texas Eastern states that CPV currently receives supplies of natural gas transported solely on Transco's system, but that CPV requested that Texas Eastern build an extension of its system to connect with Transco in order to provide CPV with the ability to source a more diverse supply of natural gas, including gas accessed from the Texas Eastern system. Texas Eastern asserts that the project is designed to meet CPV's need to ensure the Woodbridge Energy Center is able to consistently and reliably supply power to the PJM region. Texas Eastern contends that providing the Woodbridge Energy Center with an alternative transportation path will enable CPV to access lower-cost natural gas during periods of peak electric demand (when a constraint on the natural gas system increases the cost of gas needed to generate electricity) and reduce the risk of natural gas supply interruption to the Woodbridge Energy Center. Although the project will provide CPV access to alternative natural gas supply sources, it will not increase the Woodbridge Energy Center's existing level of natural gas usage.

5. The proposed Middlesex Extension Project will be located in the Metuchen Borough and Edison Township in Middlesex County, New Jersey, and will extend from an interconnection with Texas Eastern's existing 36-inch-diameter Line 20 to interconnections with Transco's existing Mainline E and Woodbridge Lateral. Texas Eastern proposes to construct and operate: (1) 1.55 miles of 20-inch-diameter pipeline; (2) a new M&R receipt station in Middlesex, New Jersey (Transco M&R station); (3) 0.20 mile of 16-inch-diameter pipeline connecting the Transco M&R station to Transco's Woodbridge Lateral tie-in and to its Mainline E tie-in; and (4) other related facilities and appurtenances. The estimated cost of the project is approximately $53 million.

[4] 15 U.S.C. § 717a (6).

6. Texas Eastern and CPV, the project shipper, entered into a precedent agreement on December 19, 2019, for the full project design capacity of 264,000 Dth per day for a primary term of 20 years at a fixed negotiated rate. Texas Eastern subsequently held a binding open season for service on the Middlesex Extension Project from January 15 to February 14, 2019,[5] but received no additional requests for service.

7. Texas Eastern proposes to establish separate, initial incremental recourse rates under its Rate Schedules FT-1 and IT-1 for service on the project.

II. Notice, Intervention, and Comments

8. Notice of Texas Eastern's application was published in the *Federal Register* on January 10, 2020.[6] Calpine Energy Services, L.P., Consolidated Rail Corporation (Conrail), NJR Energy Services Company, National Grid Gas Delivery Companies, New Jersey Natural Gas Company, New Jersey Department of Environmental Protection (New Jersey DEP), PSEG Energy Resources & Trade LLC, and Philadelphia Gas Works, filed timely, unopposed motions to intervene.[7]

9. Conrail filed comments on the project with its motion to intervene, noting that the proposed pipeline path will cross Conrail's right-of-way and two of its active rail lines at the project's northern end.[8] Conrail raises concerns regarding the impacts of construction of the project on railroad safety and operations and the potential for soil contamination on its property. Conrail requests that, in the absence of a negotiated easement agreement between it and Texas Eastern prior to the issuance of an order in this case, the Commission require Texas Eastern to comply with Conrail's own safety requirements and procedures, and to indemnify Conrail for any environmental remediation arising out of Texas Eastern's disturbance of the land on or near Conrail's right-of-way.

10. Texas Eastern filed a motion for leave to answer and answer to Conrail's comments. Texas Eastern stated that it would comply with all applicable U.S. Department of Transportation (DOT) safety standards, Federal Railroad Administration

[5] Application at Exhibit Z-1.

[6] 85 Fed. Reg. 1311 (Jan. 10, 2020).

[7] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2020).

[8] Conrail requests that if the parties are unable to achieve consensual resolution of the issues it raises in its comments, the Commission treat its comments as a protest. January 27, 2020 Motion to Intervene and Comments (Initial Comments) at 2, n.5.

(FRA) regulations, state regulations, and Conrail safety guidelines, with the exception of those Conrail requirements that are not explicitly prescribed by federal or state regulations and are inapplicable to Texas Eastern's proposed horizontal directional drill (HDD) construction method on Conrail's property or inconsistent with Commission-approved construction methods and practices.[9] Although the Commission's Rules of Practice and Procedure do not permit answers to comments or protests,[10] our rules do provide that we may, for good cause, waive this provision.[11] Because Texas Eastern's answer provides information that has assisted the Commission in its decision-making process, the Commission will, for good cause, waive the regulatory proscription against answers in this case and accept its response. The issues raised in Conrail's comments are addressed below.[12]

III. Discussion

11. Because Texas Eastern's proposed facilities will be used to transport natural gas in interstate commerce, subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[13]

A. Application of Certificate Policy Statement

12. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[14] The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences.

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[9] February 14, 2020 Motion for Leave to Answer and Answer (Answer).

[10] *See* 18 C.F.R. § 385.213(a)(2) (2020).

[11] 18 C.F.R. § 385.101(e) (2020).

[12] Conrail also raised these same issues in its March 9, 2020 environmental comments (Scoping Comments), to which Texas Eastern responded in a March 24, 2020 answer to Conrail's Scoping Comments (Answer to Scoping Comments).

[13] 15 U.S.C. §§ 717f (c) and (e).

[14] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999*)*, *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

13. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the construction of the new natural gas facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

14. The Commission finds that Texas Eastern has satisfied the threshold requirement of the Certificate Policy Statement that it not rely on subsidization from its existing customers. Texas Eastern proposes to establish separate incremental firm and interruptible recourse rates under Rate Schedules FT-1 and IT-1, respectively, for service on the Middlesex Extension Project that are designed to recover the full cost of the facilities. Therefore, Texas Eastern's customers will not subsidize the project and the threshold requirement is met.[15]

15. The Commission also finds that the proposed project will not adversely affect service to Texas Eastern's existing customers, or other pipelines and their captive customers. While the project shipper, CPV, is a current customer of Transco, the purpose of the project is to provide CPV with access to new sources of gas supply, via transportation on Texas Eastern, in addition to the gas supply it receives and will continue to receive via Transco. CPV will remain a customer of Transco and the gas supply it receives through Texas Eastern will also flow through Transco, as CPV is maintaining its sole physical interconnection with Transco. Further, no pipelines or their captive customers have objected to Texas Eastern's proposal.

[15] The Certificate Policy Statement provides that expansion projects built by existing pipelines to provide additional service that are incrementally priced avoid subsidization by existing shippers and meet the threshold requirement. Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,745.

16. Further, we find that Texas Eastern has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities. The proposed project will be located in an area that is a mix of residential, industrial, commercial, and recreational land and upland forest/woodland and will permanently impact approximately 5.7 acres, primarily industrial and commercial land.[16] Texas Eastern states that the project facilities will be co-located within and directly adjacent to an existing utility right-of-way and transportation corridors, including railroads and roadways. The 20-inch-diameter pipeline will cross two railroad corridors and seven roadways, and approximately 82% of the pipeline will be constructed using the HDD construction method, including all railway and roadway crossings.[17] In addition, we note that Texas Eastern has made a design change to reduce the permanent easement at the southern portion of the Line 20 tie-in to the project, eliminating the proposed permanent easement on Conrail's property for the above-ground Line 20 tie-in facilities.[18]

17. Texas Eastern maintains that through its design of the project it has minimized the potential for adverse impacts to landowners and communities affected by the project, by co-locating the facilities in existing right-of-way corridors, and through its use of the HDD construction method, in which the proposed pipeline will be installed at least 86 feet below the surface of Conrail's railroad facilities and within solid rock.[19] In addition, Texas Eastern asserts that it has worked diligently to include landowners, relevant resource agencies, and other interested parties in the development of the project, employing a landowner and stakeholder outreach approach. Texas Eastern states that it has already obtained or expects to obtain voluntary easements or permits as necessary from the property owners whose land the project will cross.

18. We are mindful that, to our knowledge, Conrail and Texas Eastern have not yet reached an agreement on an easement for temporary construction access. On February 26, 2020, Texas Eastern submitted to Conrail its application for a License Agreement to occupy Conrail-owned property, and upon Conrail's request, has agreed to fund an outside engineering firm to conduct an engineering review of its License

[16] *See* Texas Eastern July 13 Supplemental Filing at Attachment 1, Table 1 - Summary of Project Land Requirements.

[17] Application at Resource Report 1 at 1-5.

[18] *See* Texas Eastern's April 23 Supplemental Filing at 2. By moving the HDD entry location further from the railroad, Texas Eastern has eliminated the proposed permanent easement on Conrail's property for the Line 20 tie-in facilities. However, the proposed 20-inch-diameter pipeline will still cross Conrail's railroad.

[19] *Id.* at 3.

Agreement application.[20] In its scoping comments, Conrail indicates that it is still reviewing the License Application and once it has completed such review, it will provide further comments on the potential impacts of the project on railroad safety.[21] Conrail argues that unless an access agreement is reached prior to Commission action on Texas Eastern's application, the Commission must require Texas Eastern to adhere to Conrail's rail safety requirements, specifications, and site-specific safety-related protocols.[22]

19. The Environmental Assessment (EA) for the project, discussed *infra*, determined that Texas Eastern is required to design, construct, operate, and maintain the project to meet or exceed the DOT minimum federal safety standards in 49 CFR Part 192, as well as applicable FRA regulations and state railroad regulations, and that the additional specifications requested by Conrail for its access agreement are outside the scope of the EA.[23] We agree with the conclusion of the EA that the requirement that Texas Eastern meet all minimum federal and state safety standards, along with Texas Eastern's use of the HDD construction method beneath railways, will adequately mitigate any potential impacts on railroad safety or contaminated soil. Therefore, we will not address the various additional safety requirements, policies and procedures urged by Conrail, or Texas Eastern's arguments that those procedures are either inapplicable to the project or the HDD construction method, inconsistent with industry construction standards, technically infeasible, unnecessarily restrictive, or merely differences in practices.[24] The Commission denies Conrail's request that we require Texas Eastern to comply with Conrail's safety policies and procedures.[25] Consistent with the findings of the EA, we

[20] Texas Eastern March 23 Data Response at Response 9.

[21] Conrail Scoping Comments at 7.

[22] Conrail also requests that the Commission condition the certificate upon Texas Eastern's indemnification of Conrail for any environmental remediation obligation arising out of Texas Eastern's or its contractors' disturbance of its land during construction, which it contends could cause the release, or need for containment, of previously disturbed, in-situ chemicals or other materials. Conrail Initial Comments at 11.

[23] EA at 82.

[24] *See* Texas Eastern Answer at 5-12 and Texas Eastern Answer to Scoping Comments at 7-8.

[25] The Commission also denies Conrail's request that Texas Eastern indemnify Conrail for any environmental remediation obligation. *See Texas Eastern Transmission, LP and Algonquin Gas Transmission, LLC*, 143 FERC ¶ 61,043, at PP 97-98 (2013) (dismissing municipal landowner's argument that Texas Eastern indemnify it with respect

conclude that because Texas Eastern would construct and operate the project in accordance with the requirements in 49 CFR Part 192, the project facilities will be constructed and operated safely and represent a minimal increase in risk to the public.

20. We encourage Conrail and Texas Eastern to continue negotiations to reach a satisfactory agreement for Texas Eastern's access to and use of Conrail's property to construct and maintain the project facilities, as well as an agreement to indemnify Conrail for environmental remediation obligations. Texas Eastern indicates it is committed to amicable and good faith negotiations and coordination with Conrail,[26] and both parties have stated that they expect to be able to reach an agreement.[27] However, these are matters of negotiation between Texas Eastern and Conrail, and ultimately for a state or federal court, to the extent that Texas Eastern seeks to acquire property rights under the eminent domain provisions of the section 7(h) of the NGA.[28] The Commission does not get involved in such matters.

21. The project will enable Texas Eastern to provide 264,000 Dth per day of firm natural gas transportation service which is fully subscribed by the project shipper, CPV. We find that Texas Eastern has demonstrated a need for the Middlesex Extension Project, and that the project will not have adverse economic effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the

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to any liability for contaminated soil encountered during construction and any associated remediation, finding that "apportioning potential liability is a matter best resolved by negotiation," and that the Commission "plays no role in either negotiation or adjudication of such potential liabilities."

[26] Texas Eastern Answer to Scoping Comments at 6 and Texas Eastern March 23, 2020 Response to Staff's March 11, 2020 Environmental Information Request (March 23 Data Response) at Response 9.

[27] Even Conrail indicates that "based on its prior experience with Texas Eastern," it "expects to be able to resolve its concerns through a negotiated process, ..." Conrail Initial Comments at 6. *See, also,* Conrail Scoping Comments at 8-9, citing Bayway Lateral Project Order.

[28] 15 U.S.C. § 717f(h).

Certificate Policy Statement and analyze the environmental impacts of the project below.[29]

B. Rates

1. Initial Recourse Rates

22. Texas Eastern proposes to establish separate initial incremental firm and interruptible recourse rates under Rate Schedules FT-1 and IT-1 (Middlesex Extension), respectively, for firm and interruptible service using the additional capacity created by the project. Texas Eastern states the rate structure for the Middlesex Extension Project is similar to the rate structure previously approved by the Commission for its other lateral projects.[30] Under this proposed structure, access to the Middlesex Extension Project capacity requires a new firm or interruptible service agreement separate from an agreement to transport on Texas Eastern's mainline. A customer taking service under a Middlesex Extension Project service agreement will not, thereby, have a right to transport gas on the remainder of Texas Eastern's facilities. Similarly, mainline firm or interruptible rate customers will not be able to use their existing contracts to access service on the Middlesex Extension on a secondary or interruptible basis.

23. Texas Eastern proposes an initial incremental monthly firm recourse reservation charge of $3.902 per Dth,[31] a Usage-1 charge of $0.0000 per Dth, and a Usage-2 charge of $0.1283 per Dth.[32] The proposed incremental recourse reservation charge is based on the fixed-cost portion of the first-year cost of service of $12,360,835 and an annual project design capacity of 3,168,000 Dth. In addition, Texas Eastern proposes an

[29] *See* Certificate Policy Statement, 88 FERC at ¶ 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

[30] Application at 15 (citing *Texas Eastern Transmission, LP,* 163 FERC ¶ 61,020 (2018); *Texas Eastern Transmission, LP,* 162 FERC ¶ 61,119 (2018); *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198 (2014); *Texas Eastern Transmission, LP*, Docket No. RP14-27-000 (unpublished letter order issued Oct. 16, 2013); and *Texas Eastern Transmission, LP*, 129 FERC ¶ 61,151 (2009)).

[31] In its March 12, 2020 response to a Staff data request dated March 5, 2020, Texas Eastern submitted a revised FT-1 reservation charge for the project.

[32] Texas Eastern's tariff has a Usage-1 charge, which reflects variable costs, and a Usage-2 charge, which is an excess or overrun rate applicable when the actual service level is in excess of 110% of the scheduled service level for such day.

interruptible rate of $0.1283 per Dth based on the 100% load factor equivalent of the firm FT-1 Middlesex rate. Texas Eastern proposes a depreciation rate of 5.0% based on the life of the underlying contract and the negative salvage rate of 0.30% and return on equity of 12.75% from its most recent settlement, approved in Docket No. RP19-343-006.[33] Texas Eastern states that because the project is a lateral extension with a long-term contract to serve only one customer, the proposed depreciation rate is appropriately based on the customer's 20-year contract term.[34]

24. We have reviewed Texas Eastern's proposed cost of service and rate design used to develop the incremental rates and find that they reasonably reflect current Commission policy. Therefore, we approve Texas Eastern's proposed rates as the initial recourse rates for the project. Texas Eastern proposes *pro forma* tariff records incorporating changes to rates, rate schedules, and the General Terms and Conditions (GT&C) of its tariff for the implementation of the service provided by the project. We approve the *pro forma* tariff records included in Exhibit P and direct Texas Eastern to file corresponding actual tariff records, reflecting the initial rates for service, at least 30 days, but no more than 60 days, before the proposed the in-service date of the project.

2. Fuel

25. Texas Eastern proposes to recover lost and unaccounted for (LAUF) gas associated with providing service on the project through an incremental Applicable Shrinkage Adjustment (ASA) percentage.[35] Texas Eastern states that its initial incremental ASA percentage is 0.00% and provides a fuel study supporting the proposed ASA percentage.[36] Texas Eastern states it will track changes in LAUF gas for this new service through its ASA mechanism set forth in section 15.6 of the GT&C of its tariff. We approve Texas Eastern's proposal to charge an initial incremental ASA percentage of 0.00% for service using the project capacity.

3. Reporting of Incremental Costs

26. Section 154.309 of the Commission's regulations includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are

[33] *See Texas Eastern Transmission, LP*, 170 FERC ¶ 61,152 (2020).

[34] Application at Exhibit O.

[35] *Id.* at 15.

[36] *Id.* at Exhibit Z-2.

charged.[37] The requirements ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers. Therefore, Texas Eastern must keep separate books and accounting of costs and revenues attributable to the project as required by section 154.309. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.[38]

4. Negotiated Rates

27. Texas Eastern proposes to provide service to the project shipper under a negotiated rate agreement. Texas Eastern must file either its negotiated rate agreement or tariff records setting forth the essential terms of the agreement associated with the project, in accordance with the Alternative Rate Policy Statement[39] and the Commission's negotiated rate policies.[40] Texas Eastern must file the negotiated rate agreements or tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.[41]

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[37] 18 C.F.R. § 154.309 (2020).

[38] *See Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008).

[39] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291(1996), *petition denied sub. nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) .

[40] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

[41] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. *See, e.g.*, *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198, at P 33.

C. Environmental Analysis

28. On February 7, 2020, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Middlesex Extension Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Session* (NOI). The NOI was published in the *Federal Register*[42] and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

29. On February 27, 2020, Commission staff conducted a public scoping session in Edison, New Jersey, to provide the public with the opportunity to identify and comment on environmental issues that should be addressed in the EA. Two individuals provided oral comments on the project at the scoping session. Mr. Michael Makarski, representing the International Union of Operating Engineers, commented in support of the project, and Mr. David Shalit, General Manager of the Metuchen Manor Garden Apartments, expressed concerns with potential odors associated with the venting of the project facilities. The transcript of the scoping session was placed into the public record for the project on February 27, 2020, and made available for viewing electronically.

30. In addition, the Commission received written comments in response to the NOI from Conrail, the New Jersey DEP, and the U.S. Environmental Protection Agency (EPA). As discussed, *supra*, Conrail raised the issue of construction impacts on railroad safety and requested that the Commission require Texas Eastern to comply with Conrail's own safety requirements and procedures. The New Jersey DEP's Office of Permit Coordination and Environmental Review provided recommendations from the state's Division of Land Use Regulation; Division of Fish and Wildlife; Historic Preservation Office; Green Acres Division; Geological and Water Survey; Bureau of Evaluation and Air Planning; Division of Air Quality - Bureau of Mobil Sources; Bureau of Non-Point Pollution Control; and Bureau of Surface Water Permitting. The EPA filed comments suggesting that the analysis of project impacts include a general conformity analysis for all applicable pollutants and precursors for project construction emissions, an evaluation of alternatives, a comprehensive evaluation of cumulative impacts, an evaluation of impacts on environmental justice, and a revegetation plan requiring the use of plants that are native to the project area.

31. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), Commission staff prepared an EA for Texas Eastern's proposal. The analysis in the EA addresses geology, soils, water resources, wetlands, fisheries, vegetation, wildlife, and special status species, cultural resources, land use, visual resources, air

[42] 85 Fed. Reg. 8,271 (Feb. 13, 2020).

quality, noise, safety, cumulative impacts, and alternatives. All substantive comments raised during the scoping process were addressed in the EA.[43] On May 21, 2020, the Commission issued the EA and placed it into the public record, providing for a 30-day comment period.

32. We received one comment on the EA from the Institute for Policy Integrity at New York University School of Law (Policy Integrity) regarding the effect of the project on greenhouse gas (GHG) emissions and the impact of such GHG emissions on climate change. Policy Integrity argues that the Commission fails to fulfill its legal obligations under NEPA to consider and disclose the actual environmental effects of the project by not quantifying potential downstream GHG emissions that will result from burning the natural gas the project will transport and monetizing the resultant impacts on climate change.[44] Policy Integrity claims that the "tons of greenhouse gases emitted by a project are not the 'actual environmental effects' that must be assessed under NEPA," but "[r]ather, the actual effects are the incremental climate impacts caused by those emissions, including property lost or damaged by sea-level rise, coastal storms, flooding, and other extreme weather events, and human health impacts including mortality from heat-related illnesses and changing disease vectors like malaria and dengue fever."[45]

33. Policy Integrity asserts that both NEPA and the NGA require the Commission to monetize the climate impacts from all GHG emissions associated with the project, including downstream emissions, using a readily available social cost of greenhouse gas metric, such as the Social Cost of Carbon tool.[46] Policy Integrity states that a number of agencies have used the social cost of greenhouse gases to assess a project's climate impacts under NEPA.[47] In addition, Policy Integrity maintains that given the Commission's authority under the NGA to approve a project only if it satisfies the public convenience and necessity standard, the Commission's failure to meaningfully assess the

[43] We have addressed Conrail's concerns in our discussion of the Certificate Policy Statement, above.

[44] Policy Integrity June 22, 2020 Comments at 1-2.

[45] *Id.* at 2-3.

[46] *Id.* at 3.

[47] *Id.*

project's climate costs, to ensure they are outweighed by the project's benefits, violates the NGA.[48]

34. The EA finds that no significant emissions would occur from the operation of the project because the project does not include any significant emission sources, such as compressor units or emergency generators, and concludes that there will not be any significant regional or local impacts on air quality during operation.[49] Therefore, the EA does not estimate operational emissions. Nor is it necessary for the EA to quantify downstream GHG emissions resulting from the project because there are no incremental downstream GHG emissions associated with this project. The Middlesex Extension Project is intended to provide the necessary pipeline infrastructure to enhance the reliability of service to the Woodbridge Energy Center during periods of constraint by providing a means of accessing alternative sources of natural gas supplies connected to Texas Eastern's system.[50] Thus, there are no anticipated changes in CPV's natural gas consumption as a result of the construction of this project.[51]

35. The EA estimates the maximum potential GHG emissions from construction of this project to be 21,634 metric tons, or 23,847 short tons, per year of carbon dioxide equivalent (CO_2e).[52] To provide context to the EA's GHG estimate, 6.677 billion metric tons of CO_2e were emitted at a national level in 2018 (inclusive of CO_2e sources and sinks).[53] The construction emissions of the project could potentially increase national CO_2e emissions based on the 2018 levels by 0.0003%. Currently, there are no national targets to use as a benchmark for comparison.[54]

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[48] *Id.* at 4.

[49] EA at 71 and 76.

[50] *Id.* at 22.

[51] *Id*.

[52] *Id.* at 76, Table 15.

[53] U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2018* at ES6-8 (Table ES-2) (2020), *available at* https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2018 (accessed April, 2020).

[54] The national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg.

36. GHG emissions, such as those emitted from the project's construction, will contribute incrementally to climate change, and we have previously disclosed various effects of climate change on the Northeast region of the United States.[55] However, as the Commission has previously concluded, it cannot determine a project's incremental physical impacts on the environment caused by GHG emissions.[56] We have also previously concluded the Commission cannot determine whether an individual project's contribution to climate change would be significant.[57] That situation has not changed.

37. As stated above, Policy Integrity contends the Commission's NEPA analysis is flawed because the EA does not use a social cost of greenhouse gases metric, such as the Social Cost of Carbon tool, to monetize the social cost of the project's total GHG emissions. The Commission has provided extensive discussion on why the Social Cost of Carbon is not appropriate in project-level NEPA review and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.[58] We adopt that reasoning here. It is not appropriate for use in any project-level NEPA review for the following reasons:

32,520, 32,522-32 (July 8, 2019), and the targets in the Paris Climate Accord are pending withdrawal.

[55] *See, e.g., Columbia Gas Transmission, LLC*, Notice of Availability of the Environmental Assessment for the Proposed Buckeye Xpress Project at B-233 – B-235, Docket No. CP18-137-000 (May 20, 2019) (detailing the environmental impacts attributed to climate change in the Northeast and Midwest regions from U.S. Global Change Research Program's 2017 and 2018 Climate Science Special Report: Fourth National Climate Assessment).

[56] *Dominion Transmission, Inc.,* 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

[57] *Id.*

[58] *See Mountain Valley*, 161 FERC ¶ 61,043 at P 296, *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd, Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

(1) the EPA states that "no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations"[59] and, consequently, significant variation in output can result;[60]

(2) the tool does not measure the actual incremental impacts of a project on the environment; and

(3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews.

38. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Texas Eastern's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

D. Conclusion

39. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of Texas Eastern's Middlesex Extension Project, subject to the conditions in this order.

40. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

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[59] EPA, *Fact Sheet: Social Cost of Carbon* (Dec. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf.

[60] Depending on the selected discount rate, the tool can project widely different present-day cost to avoid future climate change impacts.

41. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction/operation of facilities approved by this Commission.[61]

42. At a hearing held on October 15, 2020, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and comments, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Texas Eastern authorizing it to construct and operate the proposed facilities, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on Texas Eastern:

(1) completing construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;

(2) complying with all applicable Commission regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;

(3) complying with the environmental conditions listed in the appendix to this order; and

[61] *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with federal law); *see also Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(4) filing a written statement affirming that it has executed a firm service agreement for volumes and service terms equivalent to those in its precedent agreement, prior to commencing construction.

(C) Texas Eastern's proposals to charge separate incremental recourse rates for firm and interruptible transportation service on the proposed project facilities, and to recover LAUF gas associated with providing service on the project facilities through an ASA percentage, are approved.

(D) Texas Eastern must file actual tariff records, with the initial incremental recourse rates, no more than 60 days, and no less than 30 days, prior to the date the project facilities go into service.

(E) Texas Eastern shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Texas Eastern. Texas Eastern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Environmental Conditions

1. Texas Eastern Transmission, LP (Texas Eastern) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Texas Eastern must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
    b. justify each modification relative to site-specific conditions;
    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
    d. receive approval in writing from the Director of the Office of Energy Projects (OEP) or the Director's designee **before using that modification**.

2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:

    a. the modification of conditions of the Order;
    b. stop-work authority; and
    c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation activities.

3. **Prior to any construction**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Texas Eastern shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of

environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Texas Eastern's exercise of eminent domain authority granted under the Natural Gas Act, (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Texas Eastern's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Texas Eastern shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP, or the Director's designee, **before construction in or near that area**.

   This requirement does not apply to extra workspace allowed by the Commission's Upland Erosion Control, Revegetation, and Maintenance Plan and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

   Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

   a. implementation of cultural resources mitigation measures;
   b. implementation of endangered, threatened, or special concern species mitigation measures;
   c. recommendations by state regulatory authorities; and
   d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the Certificate and before construction** begins, Texas Eastern shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee.

Texas Eastern must file revisions to the plan as schedules change. The plan shall identify:

a. how Texas Eastern will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
b. how Texas Eastern will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
c. the number of EIs assigned (per spread), and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
e. the location and dates of the environmental compliance training and instructions Texas Eastern will give to all personnel involved with construction and restoration;
f. the company personnel (if known) and specific portion of Texas Eastern's organization having responsibility for compliance;
g. the procedures (including use of contract penalties) Texas Eastern will follow if noncompliance occurs; and
h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    (1) the completion of all required surveys and reports;
    (2) the environmental compliance training of onsite personnel;
    (3) the start of construction; and
    (4) the start and completion of restoration.

7. Texas Eastern shall employ at least one EI for the project. The EI shall be:

a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
d. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

e. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Texas Eastern shall file updated status reports with the Secretary on a **weekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. an update on Texas Eastern's efforts to obtain the necessary federal authorizations;
b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
d. a description of the corrective actions implemented in response to all instances of noncompliance;
e. the effectiveness of all corrective actions implemented;
f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
g. copies of any correspondence received by Texas Eastern from other federal, state, or local permitting agencies concerning instances of noncompliance, and Texas Eastern's response.

9. Texas Eastern shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and approval by the Director of OEP or the Director's designee. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems or concerns during construction of the project and restoration of the right-of-way. **Prior to construction**, Texas Eastern shall mail the complaint procedures to each landowner whose property is crossed by the project and/or adjacent to the horizontal directional drill (HDD) entry points.

a. In its letter to affected landowners, Texas Eastern shall:
   (1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
   (2) instruct the landowners that if they are not satisfied with the response, they should call Texas Eastern's Hotline; the letter should indicate how soon to expect a response; and

(3) instruct the landowners that if they are still not satisfied with the response from Texas Eastern's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.

b. In addition, Texas Eastern shall include in its **weekly** status report a copy of a table that contains the following information for each problem/concern:

(1) the identity of the caller and date of the call;
(2) the location of the affected property;
(3) a description of the problem/concern; and
(4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.

10. Texas Eastern must receive written authorization from the Director of OEP, or the Director's designee **before commencing construction of any project facilities.** To obtain such authorization, Texas Eastern must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

11. Texas Eastern must receive written authorization from the Director of OEP, or the Director's designee **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.

12. **Within 30 days of placing the authorized facilities in service**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official:

a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
b. identifying which of the conditions in the Order Texas Eastern has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

13. **Prior to construction**, Texas Eastern shall file a commitment to not conduct any tree clearing activities between April 1 and September 30, to minimize potential impacts on federally listed bat species.

14. **Prior to construction**, Texas Eastern shall file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the New Jersey Department of Environmental Protection.

15. **Prior to construction of the Northern and Southern HDDs,** Texas Eastern shall file with the Secretary, for the review and written approval by the Director of OEP, or the Director's designee, an HDD noise mitigation plan to reduce the projected noise level attributable to the HDD construction at the nearest noise sensitive areas and ensure that noise levels at each HDD entry point does not exceed the mitigated predicted level of 3 decibels over the ambient noise environment. **During drilling operations**, Texas Eastern shall implement the approved plan, monitor noise levels and report those findings on a **weekly basis**, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than the predicted levels at the NSAs.

16. Texas Eastern shall limit project construction outside of the noise-mitigated HDD entry points **to the hours between 7:00 am and 7:00 pm**.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Texas Eastern Transmission, LP Docket No. CP20-30-000

(Issued October 15, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it fails to comply with our obligations under the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to ignore the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Texas Eastern Transmission, LP's Middlesex Extension Project (Project), the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts.[3] The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the Project's direct GHG emissions from construction and operation.[4] That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment,"[5] and, as a result, conclude that the Project is required by the public convenience and necessity.[6] Claiming that the Project has no significant environmental impacts, while at the same time refusing

[1] 15 U.S.C. § 717f(c) (2018).

[2] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

[3] *Texas Eastern Transmission, LP*, 173 FERC ¶ 61,072 (2020) (Certificate Order).

[4] *Id.* P 35; Middlesex Extension Project Environmental Assessment at 76, Table 15.

[5] Certificate Order, 173 FERC ¶ 61,072 at P 39.

[6] *Id.* P 40.

to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. The Commission's failure to meaningfully consider climate change forces me to dissent from certificate orders that I might otherwise support. Prior to issuing a section 7 certificate, the Commission must find both that a proposed project is needed, and that, on balance, its potential benefits outweigh its potential adverse impacts.[7] The Commission cannot make that determination without meaningfully considering the Project's contribution to climate change. That leaves me no choice but to dissent. No matter what I might otherwise think of the merits of a project's request for a certificate, I will not join an order that functionally excludes climate change from the Commission's analysis.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

[7] *See Sierra Club v. FERC,* 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that section 7 of the NGA requires the Commission to balance "'the public benefits [of a proposed pipeline] against the adverse effects of the project,' including adverse environmental effects" (quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).