



# Presentation to IECA November 12, 2019

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# James Danly Nomination

- On September 30, 2019, President Trump nominated James Danly, the current FERC General Counsel, to serve as a Republican Commissioner on FERC, with a term ending in 2023. Danly would fill the seat vacated by the passing of Chairman Kevin McIntyre.
- Danly's confirmation will help resolve FERC quorum issues that have arisen from Commissioner Glick's and Commissioner McNamee's recusals. The Democratic Commissioner seat vacated by Commissioner Cheryl LaFleur remains unfilled, but it has been reported that Alison Clements, Clean Energy Markets Program Director at the Energy Foundation, is the preferred choice of Senate Democrats.
- Danly graduated from Vanderbilt University Law School in 2013 and was an associate in the Energy Regulation and Litigation Group at Skadden prior to becoming FERC's General Counsel in September 2017. He has spoken publicly about his philosophy of the "humble regulator," whereby FERC should not use the full extent of its jurisdiction.

# FERC Creates New LNG Division, Houston Regional Office

- On July 23, 2019, FERC Chairman Neil Chatterjee announced that the agency is creating a new division in its Office of Energy Projects to accommodate the growing number and complexity of applications to site, build and operate liquefied natural gas export terminals.
- The new Division of LNG Facility Review & Inspection (DLNG) will consist of 20 existing LNG staff members in Washington, D.C., and eight additional full-time staffers recruited in the Houston area and based in a new Houston Regional Office.
- The creation of DLNG and expansion in Houston will help prepare FERC for the additional work necessary once LNG project applicants make final investment decisions and move toward construction. The Office of Energy Projects and the Office of the Executive Director have begun coordinating with the General Services Administration on space requirements and office configuration in Houston. Postings seeking candidates for the additional staff, starting with the Division Director, will be made in the coming months.

# LNG Exports Continue to Grow

## Five Active Export Facilities Now Operating

- US LNG Monthly Exports by Vessel reached a record high of 156.76 MMcf in September of 2019 (U.S. EIA) from the following 5 facilities:
  - Sabine Pass LNG (LA)
  - Corpus Christi LNG (TX)
  - Cove Point (MD)
  - Cameron LNG (LA)
  - Freeport (TX)

# More LNG Facilities Under Construction

- Elba Island LNG (GA)
  - owner is pipeline operator Kinder Morgan
  - in start up process for 5 of 10 small scale trains
- Golden Pass LNG (TX)
  - owned by Exxon Mobil and Qatar Petroleum
  - estimated 3 trains by 2024
- Calcasieu Pass (LA)
  - Venture Global LNG
  - estimated 2 trains by 2022

# PennEast Declaratory Order Petition

## **Can pipelines use eminent domain to condemn state or federal land to build pipeline facilities?**

- The PennEast Pipeline Company, LLC (“PennEast”) project is a proposed 116-mile pipeline that would transport Marcellus Shale gas from northeast Pennsylvania to New Jersey. On January 19, 2018, the Commission issued a certificate of public convenience and necessity for the PennEast Project (“Certificate Order”). The Certificate Order grants PennEast the power of eminent domain.
- As the certificate holder for the Project, PennEast may acquire “the necessary right of-way to construct” the Project pipeline facilities “by the exercise of the right of eminent domain.”
- Such right is exercised through condemnation actions filed by the pipeline developer in state or federal court subject to the conditions precedent set forth in NGA Section 7(h).
- Soon after the Commission issued the Certificate Order for the Project, PennEast filed eminent domain actions in the federal courts of Pennsylvania and New Jersey to secure easements for portions of the pipeline route where it was unable to reach voluntary agreements with landowners.

# PennEast Declaratory Order Petition

- The State of New Jersey and its agencies (such as the New Jersey Department of Environmental Protection) asserted property interests in 42 of the parcels at issue in certain of the New Jersey condemnation actions. New Jersey moved to dismiss the federal-court actions on the grounds that the State and its agencies enjoyed Eleventh Amendment immunity from suit and, absent their consent, were not subject to suit by PennEast, a private party.
- On December 14, 2018, the District Court of New Jersey rejected New Jersey's sovereign immunity claims.
- On September 10, 2019, the U.S. Court of Appeals for the Third Circuit reversed the New Jersey District Court. In that decision, the Third Circuit concluded that the Eleventh Amendment to the U.S. Constitution bars a certificate holder from bringing an action in federal court under Section 7(h) of the Natural Gas Act ("NGA") to condemn property in which a state or its agencies hold an interest.



# PennEast Declaratory Order Petition

- On October 10, 2019, PennEast filed a petition requesting a declaratory order from the Commission confirming that pipelines could use eminent domain to condemn property owned by the state or federal government:
  - (1) Under NGA Section 7(h), a certificate holder's authority to condemn "the necessary right-of-way to construct, operate, and maintain a [natural gas] pipeline" and the "necessary land or other property, in addition to right-of-way, for the location of compressor stations [and other associated equipment]," applies to property in which a state holds an interest;
  - (2) In NGA Section 7(h), Congress delegated the federal government's eminent domain authority to certificate holders; and
  - (3) In delegating the federal government's eminent domain authority in NGA Section 7(h), Congress necessarily delegated to certificate holders the federal government's exemption from claims of state sovereign immunity.
- FERC has yet to act on PennEast's petition.



# Atlantic Coast Pipeline

- On November 8, Anand Yegan, director of gas transmission business development for Dominion Energy, said that the company remains confident that construction of the Atlantic Coast Pipeline will be complete by 2021. Duke Energy and Southern Company are partners with Dominion Energy in the 600-mile pipeline project to bring fracked natural gas from West Virginia to Virginia and North Carolina.
- The overall budget for the project, not including financing costs, is now between \$7.3 and \$7.8 billion, and has now risen more than \$1 billion since it was originally announced in 2013.
- In December 2018, the Fourth Circuit overturned a decision by the Forest Service to issue a permit allowing the pipeline's route to go through two national forests and across the Appalachian Trail. The court ruled that the U.S. Mineral Leasing Act does not allow the Forest Service to authorize the pipeline in the National Park System.

# Atlantic Coast Pipeline

- Dominion Energy voluntarily halted all major construction activities on the pipeline in December following the Fourth Circuit's decision, which resulted in layoffs for much of the project's workforce.
- The U.S. Supreme Court will hear oral arguments in 2020 regarding the Fourth Circuit's decision.
- In July 2018, the Fourth Circuit Court also overturned a U.S. Fish and Wildlife Service ("FWS") permit that allowed the Atlantic Coast Pipeline to impact endangered species. The court found that the FWS was "arbitrary and capricious" in its decision that the construction of the pipeline would "not likely jeopardize the existence" of the four endangered species in its path: the rusty-patched bumble bee, the Madison Cave isopod, the club shell mussel and the Indiana bat.
- FWS is expected to revise its analysis and issue a new decision regarding the project.

# EPA Clean Water Act Proposed Rule

## **Proposal to Stop States and Tribes from Using CWA Permits to Block Pipeline Projects**

- On August 9, the U.S. Environmental Protection Agency (“EPA”) issued a proposed rule to implement Section 401 of the Clean Water Act (“CWA”).
- Section 401 of the CWA gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed infrastructure projects that may affect navigable waters within their borders. The EPA’s existing certification rules have not been updated in nearly 50 years.
- In April, President Trump issued an executive order and directed the administration to take appropriate action to accelerate and promote the construction of pipelines and other important energy infrastructure. The president’s executive order directs EPA to consult with states and tribes on reviewing and updating guidance and regulations related to Section 401 of the CWA.

# EPA Clean Water Act Proposed Rule

- The rule formalizes the substantial change in current practice proposed by EPA in nonbinding Section 401 guidance that the agency issued in June 2019, which sought to address the increasing use of Section 401 to delay, condition, or deny permits and licenses.
- Consistent with that guidance, the proposed rule limits the scope of Section 401 certification reviews to water quality impacts from a potential point source discharge and establishes a more rigorous process to ensure that certification reviews are completed within a reasonable period not to exceed a year from the date a certification request is received.
- EPA proposes to limit the type of restrictions states and tribes can place on projects by narrowing the scope of Section 401 certification reviews to water quality requirements. Conditions on certification that are not related to water quality impacts—such as requirements to create public access to waters or to reduce the effects of air emissions—would fall outside the scope of certification reviews.

# EPA Clean Water Act Proposed Rule

- The proposed rule also encourages agencies to establish shorter time periods, such as the 60-day timeline for certification provided by the U.S. Army of Corps of Engineers (Corps). See 33 C.F.R. § 325.2(b)(ii). Where an agency does not specify a shorter time period, it may consider:
  - The complexity of the proposed project.
  - The potential for any discharge.
  - The potential need for additional study or evaluation of water quality effects from the discharge in setting a reasonable period through rulemaking or on a project-by-project basis.
- The proposed rule further redefines when the clock starts to run for issuing a certification, defining its trigger as when a state or tribe receives the Section 401 certification request. The period for Section 401 certifications does not toll or pause at any time under the proposed rule, even when the state or tribe requests additional information from the project proponent.

# Northern Natural Section 4 Proceeding

## IECA Members Participating in NNG Rate Case Proceeding

- FERC initiated a Section 5 Proceeding against Northern Natural Gas Company (“NNG”) because its Form 501-G filing on the impact of the corporate income tax rate reduction showed NNG to be over-recovering and NNG did not elect to decrease its rates. Staff’s testimony in the Section 5 proceeding showed NNG’s cost of service for the period ended March, 2019 to be \$586 million in RP19-59-000.
- NNG Section 4 Proceeding in RP19-1353-000
  - NNG filed a Section 4 proceeding on July 1, 2019 with rates effective August 1 (Jan. 1, 2020 effective date with suspension). Effective rate increases for most customers is close to 100 percent.
  - NNG proposed a cost of service increase of \$525 million above existing rates. They filed for a cost of service of over \$1 billion, based largely on projected capital expenditures of roughly \$700 million during the test period of 4/1/19-12/31/19 and increased ROE of 14.2% and increased depreciation rates and negative salvage.

# Northern Natural Section 4 Proceeding

- NNG also filed a prospective case to take effect after a Commission order in the case, likely around 2022, which includes ratemaking changes, including moving to postage stamp rates.
- Several IECA members filed a joint protest of the Section 4 rate increase.
- Staff and Pipeline filed a request for consolidation of Section 4 and 5 proceedings on September 9, 2019.
- The parties held a settlement conference on November 6, 2019 and the next conference is scheduled for December 6, 2019. If a settlement is not reached, the Staff and Intervenors will file testimony in January of 2020 and then attempt to re-engage in settlement discussions.



# Need to Support Reform of Section 5 of the NGA

- As discussed in the last presentation, unlike the Federal Power Act (“FPA”) which provides FERC with authority to order refund of unjust and unreasonable rates from the date of a complaint under Section 206, under the NGA, the Commission does not have refund authority and the only remedy available is to bring a Section 5 action to reduce rates prospectively from the date of a final Commission order.
- We are seeing a growing trend of pipelines faced with Section 5 reductions filing a Section 4 rate case to avoid the rate reduction. (This also happened with Panhandle, which had not been in for a rate case in over 20 years and which Staff also demonstrated is over-recovering in Staff’s Section 5 testimony.)
- These cases demonstrate the need to support reform of Section 5 by reaching out to your representatives in Congress.

# MPACT Act

- On November 5, 2019, Senators Richard Blumenthal, D-Connecticut, and Richard Burr, R-North Carolina, introduced the “Making Pipelines Accountable to Consumers and Taxpayers (MPACT)” Act, S. 2771, “to protect consumers from excessive rates,” according to its title.
- The bill would update the NGA to allow FERC to order refunds in rate cases brought under Section 5 of the act, which lets the commission pursue pipeline companies with rates that the commission finds to be unreasonably high. Under the current law, FERC cannot compel a pipeline to refund its customers for overcharges in a Section 5 proceeding, and new rates instead take effect prospectively.
- The bill would allow the commission to establish a refund effective date as early as the date that a Section 5 complaint is filed or the date the Commission initiates a Section 5 proceeding, and no later than 150 days after the proceeding is initiated by the Commission or a complaint.

# Enable Gas Transmission, LLC

## **FERC rules pipeline must remove PHMSA incident gas losses from fuel tracker calculations**

- On September 20, 2018, Enable Gas Transmission, Inc.'s ("EGT") filed tariff records that included supporting calculations used to derive EGT's proposed system-wide Fuel Use and Lost-and-Unaccounted-For Gas ("LUFG") percentages. On October 22, 2018, the Commission issued an Order in Docket No. RP18-1193 (165 FERC P 61,035 (2018)).
- The Commission accepted the tariff records, subject to condition. In the Tariff Order, the Commission required EGT to remove its PHMSA-reported losses from its LUFG fuel tracker calculations. The Commission explained that fuel tracking mechanisms are appropriate for normal operating costs, but are not appropriate for the recovery of gas losses outside the scope of normal pipeline operations.
- The Commission determined that none of the incidents EGT reported to PHMSA were caused by normal operation of the pipeline, and found that the incidents were "known amounts [of released gas] caused by abnormal events that are required to be included in a PHMSA report."

# Enable Gas Transmission, LLC

- EGT submitted a request for rehearing of the Tariff Order asking the Commission to clarify that it is not replacing its case-by-case analysis of PHMSA-reported losses with a categorical rule that all PHMSA-reported losses are “outside the scope of normal pipeline operation” and must be excluded from a pipeline’s fuel tracker.
- On August 21, 2019 the Commission issued its re-hearing order. The Commission clarified that it did not create a categorical rule that all PHMSA-reported losses must be excluded from a pipeline’s fuel tracker.
- Based on this clarification, it is important to hold pipelines accountable after an incident and make sure they do not include PHMSA-reported losses in their next fuel tracker filing.

# Enable Gas Transmission, LLC

- In the August 21 Order, the Commission reiterated what it stated in the Tariff Order, “[t]he Commission’s policy on fuel trackers has evolved in recent years, and favors a narrow application of tracker mechanisms in assessing the allowable costs to be tracked” and “the Commission intends that fuel tracking mechanisms track only those costs related to normal pipeline operations.”
- The Commission also noted that it does not permit companies to use a fuel tracking mechanism or LUFG to recover the costs of damages that are known, accounted for, and arise from an unusual, non-recurring event, such as from a complete failure of some portion of a pipeline system, or from more common incidents, such as those generally requiring a PHMSA report.

# Enable Gas Transmission, LLC

- Based on the evidence presented in the record, the Commission affirmed the Tariff Order's determination that none of the incidents reported to PHMSA and included in the subject filing were caused by normal operation of EGT's pipeline.
- EGT attempted to recover the following, asserting these were part of its normal operations: (1) 13.5 MMcf lost due to a shifted relief valve set point; (2) 4.6 MMcf from a broken pilot stainless steel tubing; (3) 4.04 MMcf from broken tubing in a feeding controller; (4) 6.3 MMcf from failure of a pressure coupling caused by construction; (5) 21 MMcf from a blowdown valve leak; (6) 3.69 MMcf from a corroded pipe; and (7) 4.45 MMcf from a valve malfunction.

# 2019-2020 Winter Energy Market Assessment

- On October 17, 2019, FERC's Office of Enforcement and Office of Energy Policy and Innovation presented their 2019-2020 Winter Energy Market Assessment.
- Natural gas storage inventories for the 2019 injection season, running from April 1 to October 31, began at 1.2 trillion cubic feet (Tcf), 30 percent lower than the prior five-year average. However, by November, inventories are expected to be slightly above the five-year average, reflecting robust storage injections throughout the season.
- This year, natural gas storage levels have increased at the highest rate since 2015. As of September 6, natural gas inventories were at 3.0 Tcf, which is 15 percent higher than last year's levels at this time.



# 2019-2020 Winter Energy Market Assessment

- Dry natural gas production, or the process of producing consumer-grade natural gas, set new record highs in the first half of 2019, averaging 90 Bcfd through June, a 12 percent increase from the 2018 level over the same period.
- The EIA forecasts U.S. demand will average 100 Bcfd from November to March, a 1 percent increase from the previous winter.
  - Electric power generation is a driver of the forecasted increase in domestic demand this winter, with an expected year-to-year increase of 6 percent to 27 Bcfd, a projected all-time winter high.
  - Industrial natural gas demand is also expected to increase, but only by 2 percent to 25 Bcfd.
  - Residential natural gas demand, which is typically the biggest driver of peak winter demand, is expected to decrease 3 percent to 25 Bcfd.

# 2019-2020 Winter Energy Market Assessment

- More than 12 Bcfd of new pipeline capacity, including 3.9 Bcfd of FERC-jurisdictional capacity, has been placed in-service across the U.S. since last winter.
- Permian Basin natural gas production has exceeded local demand and saturated nearby markets. The regional oversupply caused 41 instances of negative prices at the Waha hub between March and August of this year. In August, spot natural gas prices at the Waha hub averaged just \$0.68/MMBtu. Since Gulf Coast Express began commercial operation on September 25, spot natural gas prices at Waha have converged with other regional hubs.
- Looking forward, two additional natural gas pipeline projects are currently under construction to transport Permian Basin natural gas to the Southeast and Gulf Coast markets. Specifically, the 2.0 Bcfd Permian Highway Pipeline project is planned to be in-service in late 2020 and the 2.0 Bcfd Whistler Pipeline in 2021.

# Vitol Inc. and Federico Corteggiano Enforcement Order

## **Cross-Market Manipulation-Selling Physical Power at a Loss to Benefit Financial Rights**

- On October 25, 2019, FERC issued an order finding that Vitol Inc. (“Vitol”) and Federico Corteggiano (“Corteggiano”) (collectively, “Respondents”) violated Section 222(a) of the FPA and Section 1c.2(a) of the Commission’s regulations, which prohibit energy market manipulation, through a scheme to sell physical power at a loss in the California Independent System Operator Corporation’s (“CAISO”) wholesale electric market in order to eliminate congestion that they expected to cause losses on Vitol’s financial congestion revenue rights (“CRR”).
- Office of Enforcement Staff alleges that, from October 28 through November 1, 2013, Respondents engaged in a fraudulent scheme, in violation of FPA Section 222 and the Commission’s Anti-Manipulation Rule, by undertaking import transactions in the CAISO day-ahead market that were designed to relieve congestion at the Cascade intertie and, thereby, reduce Cragview LMPs, which in turn allowed Respondents to avoid losses on their CRRs sourcing at Cragview.

# Vitol Inc. and Federico Corteggiano Enforcement Order

## **Inferring Intent to Defraud based on Preponderance of the Evidence**

- The Commission found that based on “the totality of the evidence” in the record, Respondents’ imports in the CAISO day-ahead market from October 28 through November 1, 2013 at the Cascade intertie constituted a fraudulent device, scheme, or artifice to defraud the CAISO market and market participants.
- The Commission relied upon the “preponderance of the evidence” to infer intent. Specifically, FERC found that Respondents submitted physical import bids at the Cascade intertie with the intent to eliminate congestion, thereby lowering the Cragview LMP, in order to economically benefit Respondents’ CRR position, and that those actions constitute fraud.
- Based on the totality of the evidence in the record, the Commission finds that Respondents acted with fraudulent intent by engaging in physical transactions not to profit based on supply and demand fundamentals, but instead to prevent losses on their CRR position, and that, by trading for this purpose, Respondents injected false and deceptive information into the marketplace.

# Vitol Inc. and Federico Corteggiano Enforcement Order

## **Civil Penalties and Disgorgement of Profits and Impact of Mitigating Factors**

- A strict application of the Penalty Guidelines to Vitol's conduct would, considering all of the facts and circumstances in this matter, be unfair and unreasonable and apportion too large a penalty to Vitol because it would not adequately account for conduct that was conceived of, and primarily carried out by, an individual trader. Therefore, the Commission only assessed a civil penalty of \$1,515,738 against Vitol. They also found that Vitol is required to disgorge all of its profits from the manipulative scheme of \$1,227,143.
- Taking into consideration Corteggiano's cooperation with this investigation, as well as the other factors described above, the Commission assessed a civil penalty of \$1,000,000 for Corteggiano's conduct and found this sum to be fair and reasonable.

Thank you