

**BEFORE THE UNITED STATES  
FEDERAL ENERGY REGULATORY COMMISSION**

Trans-Pecos Pipeline, LLC

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Docket No. CP15-500

**MOTION TO INTERVENE OF THE BIG BEND CONSERVATION ALLIANCE  
(BBCA), PROTEST AND COMMENTS IN OPPOSITION TO THE  
APPLICATION OF TRANS-PECOS PIPELINE LLC FOR NATURAL GAS ACT  
SECTION 3 AUTHORIZATION AND PRESIDENTIAL PERMIT TO  
CONSTRUCT CROSS-BORDER FACILITIES**

On May 28, 2015, Trans-Pecos Pipeline, LLC filed an application for Section 3 authorization under the Natural Gas Act and a presidential permit to construct, operate and maintain natural gas pipeline facilities for export and/or import of natural gas between the between the United States and the Republic of Mexico (“Mexico”) at a point on the International Boundary between the United States near the City of Presidio, in Presidio County, Texas, and Mexico in the vicinity of the City of Manuel Ojinaga, State of Chihuahua (“Cross-Border Facilities”).<sup>1</sup> The cross-border facilities -- 1093 feet of 42-inch pipeline that will be installed by horizontal directional drill (HDD) under the Rio Grande River – will irreparably damage more than 8 acres (Application at 7) demarked as Palustrine forested wetlands by the USFWS National Wetlands Inventory (Environmental Report at 9) and containing a minor aquifer (Environmental Report at 10), migratory bird and endangered species habitat (Environmental Report at 15-17) and archeologically and culturally significant resources.

Of course, these are just the impacts that Trans-Pecos admits. Because even as Trans-Pecos attempts to portray the cross-border facility as a discrete, stand-

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<sup>1</sup> Trans-Pecos Pipeline, LLC Section 3/Presidential Permit Certificate

alone project, it is actually a small piece of a larger, unified 143-mile pipeline system that would originate at a natural gas hub near Coyanosa, in Pecos County, Texas to accept gas deliveries bound for export to the border - while plowing through more than 2167-acres<sup>2</sup> of the Big Bend region of Texas, home to some of the most pristine, environmentally sensitive parts of Texas, as well as culturally and archeologically significant sites and privately-owned ranch and grazing areas.<sup>3</sup> Moreover, to add insult to injury, the resulting destruction is entirely unnecessary: the project will have a short shelf life since Mexico intends to import U.S. gas through the cross-border facility only long enough to bridge the gap until it can exploit its own resources. Further, Energy Transfer Partners, Trans-Pecos' parent has also proposed the Comanche Trail Project in Docket No. CP15-503, and other pipelines such as the Los Ramones and Roadrunner will further diminish the need for the Trans-Pecos Project.

In light of the significant threat that the Trans-Pecos project poses to the Big Bend region, the Big Bend Conservation Alliance moves to intervene in the above-captioned proceeding and files this protest and comments in opposition to the Trans-Pecos cross-border project.

## I. CONTACT INFORMATION

Notice and communications in this proceeding should be addressed to the following:

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<sup>2</sup> Acreage calculation based on pipeline easement 125-feet wide multiplied by the 143 miles length of the pipeline (755,040' x 125') amounts to 2,167 acres.

<sup>3</sup> The extent of the pipeline's impacts to cultural resources is yet unknown because information on these resources was filed as "privileged" and are not in the public docket. BBCA has already filed a FOIA request to obtain these materials, and reserves the right to comment further when additional cultural resources materials are disclosed.

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**II. STATEMENT OF INTEREST FOR MOTION TO INTERVENE**

**A. Description of BBCA**

The Big Bend Conservation Alliance (BBCA) is a Texas non-profit corporation headquartered in Alpine, Texas. Founded in July of 2014, the BBCA’s mission is to preserve and protect the natural and cultural resources of the Big Bend region of Texas (specifically Brewster, Jeff Davis, and Presidio Counties including the adjacent portion of the Rio Grande) as well as the rights of those living in the Big Bend area.

The BBCA serves its members through education, public advocacy, and participation in legislative, executive, and judicial processes of local, state, and federal government. To this end, the BBCA seeks to preserve and protect the democratic and due-process rights guaranteed under the laws of the State of Texas and the United States of America, which are necessary and useful in preserving and protecting the environment, cultural resources, citizens' rights, and public health and welfare.

**B. Interest of BBCA and Its Members in the Proceeding**

BBCA’s forty plus members represent a varied cross-section. Some reside in the in communities such as Presidio, Alpine, Jeff Davis, Hudspeth, and Brewster counties where the cross-border facilities and 143-mile feeder pipeline will be

located, while others own property such as ranches, farms or small businesses that serve the area's burgeoning tourist population. Other members do not live directly along the pipeline route, but avail themselves of recreational activities such as nature photography, bird-watching, astronomy, camping and hiking at area park and preserve systems at the Federal and State level, including Big Bend National Park, the Fort Davis National Historical Site, the Big Bend Ranch State Park, and the Davis Mountains State Park. Still other members – archeology scholars and hobbyists or “heritage tourists” – are drawn by the Big Bend region's rich prehistoric and historic cultural resources, which are nationally acclaimed.<sup>4</sup>

BBCA opposes the proposed pipeline. The pipeline will harm BBCA and its members by irreparably damaging the Big Bend region. Installation of the border-crossing facilities will destroy seven acres of wetlands that may never be restored, while drilling or chemical leakage may damage or contaminate the Rio Grande Aquifer, used by residents, in a region where water is particularly scarce. Meanwhile, construction of the 143-mile pipeline will sully scenic vistas enjoyed by BBCA's members – and native vegetation removed from the 125 foot swath (construction corridor) may never fully recover due to easement restrictions on above-ground plants and facilities. Destruction of the pristine wildlife habitat, cultural resources, and open space will deprive BBCA members of enjoyment of these resources and reduce tourism in the region, which in turn depresses the regional economy and may cause financial loss for BBCA members whose livelihood depends on tourism. Finally, the pipeline will reduce property values of BBCA members across whose property the pipeline would pass as well as BBCA

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<sup>4</sup> See BBCA Appendix, Exhibit 1 (collection of affidavits of BBCA members describing impacts of proposed pipeline).

members who own adjacent lands by diminishing the gazing, hunting, and eco-tourism potential of these lands as well as threatening the safety of BBCA members who live in close proximity to the pipeline.

Because of the myriad of adverse impacts that the proposed pipeline will cause for BBCA and its members, they are directly aggrieved and as such, intervention is justified under 18 C.F.R. § 214(b)(2)(ii). In addition, as a non-profit organization that seeks to protect the Big Bend region and informs and educates others on use of governmental processes to protect environmental and cultural resources, BBCA's intervention serves the public interest within the meaning of 18 C.F.R. § 214(b)(2)(iii). Accordingly, BBCA is entitled to intervene in this proceeding.

### **III. PROTEST AND COMMENTS**

#### **A. Overview of Project and Applicant**

The Presidio Crossing Project, approximately 1,093 feet of 42-inch pipeline installed by horizontal directional drill that will traverse under the Rio Grande to the middle of the riverbed and end at the International Boundary with Mexico (Application at 5), is a small section of pipeline connecting the proposed 143 miles of 42-inch pipeline commencing at the hub on the pipeline grid located in Pecos County, Texas (Application at 4) and 907 feet of 42-inch pipeline from the HDD exit point at the Mexican border to an interconnect with the pipeline grid in Mexico (Application at 7). The Presidio Crossing Project will have a design capacity of approximately 1.3 billion cubic feet per day ("Bcf/day") with a maximum allowable operating pressure of 1,440 pounds per square inch gauge and will have a cost of \$3.6 million (Application at 7). This project will require approximately 7.1 acres of temporary workspace and a 50-foot wide permanent easement consisting of approximately 1.3 acres in Presidio County Texas (Application at 7).

The applicant for the Presidio Crossing Project is Trans-Pecos Pipeline, LLC, is owned and operated by Energy Transfer Mexicana, LLC; a subsidiary of Energy Transfer Partners, L.P. (Application at 3). The project is in response to a Request for Proposals (“RFP”) submitted by the Comisión Federal de Electricidad (“CFE”), the company that provides the public service of transmission and distribution of electricity, for and on behalf of the Mexican State (BBCA Appendix, Exhibit 3, RFP at 1). The request for proposals solicited proposals from bidders for the design, development, construction and operation of a new natural gas transmission pipeline of at least 42-inches from the CFE Waha Header to the Mexico/United States border at Presidio County, Texas (RFP at 1). The RFP requires the winning bidder to be responsible for the FERC Presidential Permit and the 143-mile pipeline (RFP at 2).

Because the cross-border facilities will deliver power into Mexico, Trans-Pecos contends that the proposed project is comprised only of the 1093 feet of cross-border facilities, its application described only those impacts related to this shorter piece. Even so, the impacts are substantial, as discussed below.

## **B. Impacts of Cross-Border Facilities**

BBCA has submitted six reports from experts in different disciplines that either criticize the applicant’s Environmental Reports or opine on the pipeline’s impacts to sensitive and unique resources. These reports are attached as BBCA Appendix, Exhibit 2 – and are referenced in the critique of the applicant’s Environmental Report, below.

### **1. The Methodologies Used for the Environmental Reports Grossly Under Estimate Impacts.**

Most of the reports in the application underestimate the scope of the impacts because the methodologies employed for determining baseline conditions were inaccurate. A review of the environmental report shows that some of the surveys – endangered species, migratory birds – took place over a day and (not surprisingly), no species were observed. Likewise, the report notes that some of the visits – such as wetland review or surveys- were done in arid conditions with no water in the river. Because the studies do not reflect non-drought conditions when other species might be present, they seriously underestimate the project’s impacts both on the cross-border facility and the length of the 143-mile pipeline.

Michael Eason, a Texas Flora Biological Consultant with extensive expertise in plant conservation projects in Texas, likewise criticized the careless nature of the surveys included in the Environmental Report. Eason observes:

...I can confidently state this area is much more diverse than the summary of the species [noted at p. 19 of the Environmental Report]. Furthermore, given the spelling mistakes, complete lack of using the standard format of either underlining or italicizing binomials and lack of any species within the Poaceae or Euphorbiaceae families, which are both quite common along this stretch of the river, I highly doubt the person who performed this survey has any knowledge of the flora of the Chihuahuan Desert or spent enough time on site to properly survey the location.

BBCA Appendix, BBCAE2-0009.

To correct these deficiencies, Eason recommends that a thorough botanical survey be performed in a “boots on the ground fashion” rather than relying simply on data. As Eason emphasizes, “Only a property environmental survey will determine the absence or presence of sensitive species found in the region. Furthermore, if proper restoration is to follow construction, a baseline of which species and vegetation are in the region is needed. *Id.*”

Given that Trans-Pecos' reports departs from accepted practices and overlooks many serious project impacts, Commission cannot rely on any of the cursory studies from the applicant's Environmental Report. Instead, the Commission must conduct its own independent analysis of the project's impacts or direct the applicant to retain an independent third party, approved by the intervenors, to conduct a boots on the ground survey.

Gremminger and Associates, based out of southeast Texas, uses its own personnel for these studies who likely have no prior experience in the Chihuahuan Desert, and possibly not even in arid western lands, where plant and animal occurrence, density, behavior, etc. is very different from the humid areas further east.

## 2. Substantive Issues

The proposed pipeline raises numerous environmental and safety concerns that are not adequately addressed in the Application or the environmental reports. These include:

**Wetlands** The Environmental Report briefly mentions the fact that USFWS National Wetlands Inventory (NWI) found the entirety of the Projects temporary workspace, permanent easement, and 867 feet of access occur in a Palustrine forested wetland (Environmental Report at 9). The means of access to the temporary workspace alone will affect 0.17 acres of emergent wetland. *Id.* The short field assessment done on May 6, 2105, during a period of low water, found the soil to be non-hydrophytic and Trans-Pecos based the entire environmental impact analysis of the surrounding wetlands on that inadequate survey. *Id.* Trans-Pecos plans to use laminated or equipment mats to lie over the wetland areas



before construction as the only protective measure for this delicate, important wetland ecosystem (Environmental Report at 10). A full EIS analysis is required to determine the entire environmental impact the temporary workspace, permanent easement, and 867 feet of access way will have on this wetland. In addition, there are certainly other wetlands along the 143-mile pipeline that must be delineated and the impacts studied; a full EIS is required for such an extensive analysis as well.

**Cultural Resources** At the outset, it bears noting that David Keller of BBCA and an expert on archeological and cultural resources, was unable to fully assess the Environmental Report on cultural resources since it was filed as privileged or remains in draft form. (See Letter at BBCAEX2-005) Accordingly, BBCA reserves the right to supplement these comments when this information is produced.

Even lacking this information, it is apparent that the proposed project will threaten cultural resources. As Keller describes, the use of HDD at the 7 acre tract that will be used for the cross-border facility will destroy any buried archeological deposits within or adjacent to the bore hole – indeed, anything in its path. *Id.* at BBCAEX2-006. The cross-border facilities would also occupy lands include within the LaJunta Historic Cultural District, and studies are needed to assess the vast array of impacts that might result. *Id.*

Still, more pressing are the cumulative impacts of the entire project – specifically, the 143-mile length of the rest of the proposed pipeline. This portion of the pipeline crosses through a wide range of eco-zones, with a high archeological site density. Few of these resources have been studied, explains Keller, and if they are not, they could be lost to science forever. For that reason, Keller argues “in the strongest language possible that:

“FERC should require a proper boots on the ground archeological assessment of the **entire** pipeline route. This would minimally involve a 100 percent intensive pedestrian survey of the 125 foot wide construction corridor the entire 143-mile length of the pipeline route. Where there is a likelihood of buried deposits, shovel testing should be conducted. In areas where there is a high likelihood of deeply buried archeological deposits, deeper testing should take place, including backhoe trenches at regular intervals to a depth concurrent with the depth of disturbance of the pipeline construction (approximately seven feet).

Keller Letter, BBCAEX2-007.

**Endangered Species and Plants** As note previously, the surveys conducted by Trans-Pecos to identify endangered species are utterly inadequate – either of too short a duration or during a period of low water when the species are not present. More seriously, the Environmental Report fails to address the potential impacts of the cross-border facility on the *kinsoternon hirtipes* species of aquatic turtle which occur in Presidio County – the only known location for these turtles in the United States. Professor Jennifer Smith, who has studies this species expressed concern that contamination from pipeline could terminate this rare population of turtles. BBCA Appendix, BBCAEX2-0014. Thus, a full EIS is required to assess these impacts.

Nor did the Applicant’s Environmental Report adequately address the habitat for 24 rare plants listed in the Texas Natural Diversity Database of the Texas Parks and Wildlife Department. According to Retired Botanist Jackie Poole, the cross-border facility site should have been surveyed for these species. *See* BBCA Appendix at BBCAEX2-0012. In addition, the 143-mile segment of the pipeline will impact many more federally listed plants, as well as many rare plant species. *Id.* Unless an EIS is prepared and the entire pipeline is surveyed, many of these plants will be harmed by the proposed pipeline.

**Impacts to Aquifer** The Environmental Report fails to discuss the substantial threat posed by the cross-border facility to area aquifers. As described in the Environmental Report, the proposed route will cross over the following aquifers as delineated by the Texas Water Development Board: Pecos Valley, Dockum, Rustler, Edwards-Trinity, Igneous and West Texas Bolsons. It also is very near to the Capitan reef complex and the spring complex at Balmorhea. The Dockum, Rustler and Edwards-Trinity in the northern part of the area are the mostly likely of these to exhibit karst development.

As Dr. Kevin Urbanczyk, a professor of physical and earth sciences at Sul Ross University discusses in his report (BBCA Appendix, Exh. 2 at EX20022-23, these aquifers are critical to water supply. in particular, the Rustler is described to have karst development (TWDB GAM) and is thought to be the chief source of flow at Diamond Y spring (Boghici). The Edwards-Trinity aquifer is part of the Edwards Plateau landform that “is capped with a thick layer of Cretaceous limestone, forming one of the largest contiguous karst regions in the United States” (TWDB GAM, 2009 and Kastning, 1984)

Urbanczyk’s report continues:

The proposed pipeline route is over inferred groundwater flow paths toward Diamond Y springs (Sharp). Farther to the south, the proposed route travels mostly over rocks of the Trans Pecos Magmatic Province (TPMP). The TPMP is the eroded remnants of an extensive volcanic event that occurred between 48 and 17 million years ago. The topography of this area is varied due to the differences in resistance to erosion of the multiple different rock types associated with the TPMP. The proposed route is in the vicinity of numerous landslide deposits, for example near Last Chance Mesa (northeast of Alpine). **The landslide deposits are relatively recent deposits that indicate unstable bedrock (from the TPMP) and could possibly have been triggered by seismic activity.**

Southwest of Alpine the route continues over TPMP related rocks until it crosses into the Presidio bolson near the Chinati mountains. The Presidio bolson is a “bolson” or valley that is filled with sediment (Groat). **The valley is bounded on the north and the south by faults of relatively recent geologic age (<~20 million years).**

BBCA Appendix at Ex20022.

**Seismicity** The West Texas region is vulnerable to seismic activity, according to Professor Urbanczyz:

West Texas has a dynamic geologic history that is recorded in the various rock types that are in the proposed pipeline vicinity. Of particular interest is the most recent of the events that involves “extension” or “stretching” of the earth’s crust in the west Texas region. This extension is related either to the “Basin and Range” event or to the “Rio Grande Rift” event. One or the other (or both) have resulted in the development of faulted valleys (see Presidio bolson discussion above) since about 20 million years ago. **The recent seismic activity experience in west Texas most likely indicates the continued effects of this type of geologic activity. *An earthquake with the magnitude of 5.6 occurred in 1995 with an epicenter between Alpine and Marathon. Prior to that, an earthquake occurred near Valentine (~40 miles west of the proposed route) in 1931 with a magnitude of 5.8.***

This seismic activity poses a threat of rupture or instability to the pipeline. Yet, Trans-Pecos’ application makes no mention of seismic activity as a potential impact. At the very least, the Commission must prepare an EIS to study seismic activity in the area and impacts to the proposed pipeline.

#### **Operator Safety Record and Cross-Border Concerns Energy Transfer**

Partners, the parent company of Trans-Pecos, has had multiple pipeline accidents in Texas and other areas of the United States within the past five years. One 42-inch pipeline similar to the project proposed in this application and owned and operated by Energy Transfer Partners in Cuero, Texas ruptured on June 15, 2015

causing a massive fire that melted nearly a half-mile of roadway.<sup>5</sup> In Missouri, November 28, 2013 another Energy Transfer pipeline, a 30-inch natural gas line 75 miles east of Kansas City, exploded, setting fire to barns, farm outbuildings, equipment and hay bales.<sup>6</sup> A 30-inch natural gas line owned by Florida Gas Transmission Co., a subsidiary of Energy Transfer Partners, exploded on June 18, 2013, causing 55 people to be evacuated from their homes and melted the siding off of one of those residents mobile home.<sup>7</sup> A compressor station northwest of North Zulch, Texas on January 17, 2013 burst into flames due to a malfunction of the compressor station at that Energy Transfer site. Fernando Castro.<sup>8</sup> Another explosion occurred in Texas on July 28, 2010 by an Energy Transfer 36-inch pipeline that created a 70 by 80 foot crater in the ground due to unexplained causes.<sup>9</sup> Fortunately no one was seriously injured in any of these incidents but

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<sup>5</sup> See Sergio Chapa, *Pipeline explosion in Cuero has residents rattled, clean up underway*, (June 17, 2015, 12:38 PM), online at <http://www.bizjournals.com/sanantonio/blog/eagle-ford-shale-insight/2015/06/pipeline-explosion-in-cuero-has-residents-rattled.html>.

<sup>6</sup> See Paul Ausick, *Second Natural Gas Pipeline Explodes; That's Two in Two Weeks*, (November 29, 2013, 10:22 AM), online at <http://247wallst.com/energy-business/2013/11/29/second-natural-gas-pipeline-explodes-thats-two-in-two-weeks/>

<sup>7</sup> See Mark Schleifstein, et al, *Gas line explodes in Washington Parish*, (June 18, 2013, 8:27 PM), online at [http://www.nola.com/traffic/index.ssf/2013/06/gasline\\_explosion\\_reported\\_in.html](http://www.nola.com/traffic/index.ssf/2013/06/gasline_explosion_reported_in.html).

<sup>8</sup> See Fernando Castro, *Fire at facility quickly doused*, (January 23, 2013, 9:08 AM), online at [http://www.madisonvillemeteor.com/news/article\\_bb02293e-656e-11e2-b466-0019bb2963f4.html](http://www.madisonvillemeteor.com/news/article_bb02293e-656e-11e2-b466-0019bb2963f4.html).

<sup>9</sup> See Joel Williams, *Natural gas pipeline explosion rocks FM 949 community*, (August 5, 2010, 12:00 AM), online at

many of them occurred in lines similar to the proposed Trans-Pecos line and arose from unexplained causes.

These safety concerns are exacerbated by the cross-border nature of the pipeline. Trans-Pecos' application did not provide any information on how the pipeline will guard against security threats that originate on the Mexico-side of the project. At the very least, the Commission must examine how these matters will be addressed as the proceeding moves forward, and allow the parties an opportunity to comment further.

### **C. There Is No Need for the Proposed Project**

The Commission holds that the Certificate Policy Statement's underlying principles are applicable in our determination of the public interest for projects under NGA section 3.<sup>10</sup> One of the factors that the Commission considers under the Certificate Policy is whether a need exists for the project. The applicant carries the burden of proof on demonstration of need.

Here, Trans-Pecos failed to show a need for the project. There are currently two other applications that have been filed at FERC within a month of the Trans-Pecos application that also plan to supply CFE, the Mexican Federal Electricity Commission. Roadrunner Gas Transmission, LLC proposed a 30-inch pipeline project filed on April 9, 2015 planning a 900-foot line that will import and/or export natural gas from San Elizario in El Paso County, Texas to Mexico near the City of

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[http://www.sealynews.com/news/article\\_a34ea00f-e53d-5551-b2ac-c371adbf1948.html](http://www.sealynews.com/news/article_a34ea00f-e53d-5551-b2ac-c371adbf1948.html).

<sup>10</sup> *Bradwood Landing LLC*, 126 FERC ¶61,035 (2009) (applying Policy Statement principles to evaluation of LNG facility under NGA Section 3). *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), order on clarification, 90 FERC ¶61,128, order on clarification, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

San Isidro. Comanche Trail is a 42" pipeline that will also transport natural gas from San Elizario in El Paso Country, Texas to Mexico near the City of San Isidro. Comanche is also a subsidiary of Energy Transfer Partners, L.P. and filed the application for the Comanche Trail on May 29, 2015, a day after the Trans-Pecos application was filed.

CFE contracted Roadrunner, Trans-Pecos, and Comanche and is the pipelines' gas customer. The intended end users of the three pipelines include four new combined cycle electrical power plants due to be constructed between 2018 and 2028. All four will likely never run at maximum all day, therefore, they would produce significantly less than 91 gigawatt-hours per day (gWh/d) of electricity. At a constant flow, the pipelines would deliver enough gas to generate 130 gWh/d.

The combined capacity of the Trans-Pecos and Comanche Trail pipelines exceeds the demand by the proposed generation systems by a factor of 1.4X, and all three pipelines deliver more gas, by a factor of 1.9X than required for generation. Any two of the pipelines could deliver more than sufficient fuel to operate the future power plants. Because natural gas is a network-transported commodity, it can be argued that the Trans-Pecos is not necessary, based on the combination of Roadrunner and Comanche Trail.<sup>11</sup>

#### **D. The Commission Must Consider the Entire Project Under NEPA**

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<sup>11</sup> Related to project need is also the issue of project alternatives. Trans-Pecos has not proposed any project alternatives that might meet the claimed need for the project. The Commission must evaluate these alternatives under NEPA. BBCA reserves the right to propose project alternatives for consideration once additional information about the project and the purported need is disclosed.

Trans-Pecos included only the impacts of the cross-border facilities in its application. But, the Commission must prepare an environmental impact statement (EIS) to consider the impacts of the 143-mile non-jurisdictional intrastate pipeline as required by (1) the Commission's four-factor test in *Algonquin Gas Trans. Co.*,<sup>12</sup> (2) NEPA's anti-segmentation policy and (3) CEQ regulations on evaluation of cumulative impacts,<sup>13</sup> and (4) CEQ regulations governing preparation of an EIS. Discussion of each topic follows.

**1. The Commission must review impacts of the 143-mile pipeline under the *Algonquin Gas Trans. Co.* four factor test:**

The Commission's standard of environmental review for non-jurisdictional facilities, when authorizing jurisdictional facilities under NGA Section 3, is set out in *Algonquin Gas Trans. Co.*<sup>14</sup> Under the *Algonquin* test, the Commission balances the following four factors:

- 1) Whether the non-jurisdictional facility is "merely a link" in a corridor-type (e.g., transportation/utility transmission) project;
- 2) whether aspects of the upland intrastate facility, in the immediate vicinity of the regulated activity, affect the location and configuration of the regulated activity;
- 3) the extent to which the entire project will be within FERC jurisdiction; and
- 4) the extent of cumulative federal control and responsibility.

Applying the *Alonguin* test, the Commission must extend environmental review to Trans-Pecos's proposed intrastate pipeline facilities.

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<sup>12</sup> *Algonquin Gas Trans. Co.*, 59 FERC ¶ 61,255

<sup>13</sup> *See Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

<sup>14</sup> 59 FERC ¶ 61,255, at \*11- \*12. *See also*, National Committee for New River v. FERC, 373 F.3d 1324 (D.C. Cir. 2004)(citing with approval Commission's *Algonquin* test for determining scope of authority to review non-jurisdictional facilities).



**a. Trans-Pecos’s Proposed Intrastate Pipeline Is Not Merely a Link in a Corridor-Type Project.**

In *SunShine Interstate Trans. Co.*,<sup>15</sup> the Commission applied the first *Algonquin* factor in its preliminary determination to find that 144.8 miles of proposed jurisdictional pipeline (the SITCO pipeline)—designed to connect to 569.3 miles of proposed intrastate pipeline (the SunShine pipeline)—was “not merely a link” but rather comprised “crucial mainline facilities.”<sup>16</sup>

Without the jurisdictional facilities, the intrastate pipeline would “not be connected to crucial natural gas supplies or the national pipeline grid” and, “[a]bsent approval of [the jurisdictional facilities]...[the intrastate pipeline would] not be built.”<sup>17</sup> These circumstances merited the Commission’s inclusion of the intrastate pipeline in environmental review.<sup>18</sup>

In Trans-Pecos’ Environmental Report accompanying its Application, the company noted that the 143 mile segment of 42-inch pipeline would have as its principal business the “transportation of natural gas from a hub on the pipeline grid...located [near] Coyanosa in Pecos County[,] proceed[ing] generally southwest until reaching the connection to the [Project] in Presidio County, Texas.”

(Environmental Report at 6). Trans-Pecos admits that the intrastate pipeline is a “corridor type project” but argues that the border-crossing facility “does not

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<sup>15</sup> *SunShine Interstate Trans. Co.*, 67 FERC P.61,229 (2003) (vacated upon SunShine’s withdrawal of application due to market changes).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See also* *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1116 (9th Cir. 2000) (noting that the Court only upholds agencies’ decisions to limit the scope of NEPA review “to [jurisdictional] activities...where the [non-federal] and federal portions of the project could exist independently of each other.”).

comprise any kind of link” thereto because exporting and importing natural gas with Mexico is not interstate commerce. (Environmental Report at 7).

That foreign trade is not interstate commerce does not diminish the crucial role of the cross-border facilities to the project as a whole. Trans-Pecos’ proposal substantially echoes SunShine Pipeline’s in that, there, the jurisdictional facility was “designed to connect” to the intrastate pipeline. Here it is likewise true that, without Trans-Pecos’s intrastate pipeline, there would be very little use for its proposed border-crossing facility. The conjoined nature of these two facilities must, as in *SunShine Pipeline*, result in environmental review of the intrastate pipeline.

**b. Aspects of Trans-Pecos’s Upland Pipeline Directly Affect the Location and Configuration of its Border-Crossing Facility.**

In *SunShine Pipeline*, FERC noted that “the location and capacity of [the intrastate] pipeline [would] directly impact the location and capacity of [the jurisdictional] pipeline, since all of [the former]’s volumes will be transported by [the latter].”<sup>19</sup> This represents the flipside of the first *Algonquin* factor, by inquiring about the necessity of locating a jurisdictional facility in a certain place based on the assumed location for a nonjurisdictional facility.

In its Environmental Report, Trans-Pecos states that, to construct its border-crossing facility, it would use “6.6 acres of the connecting intrastate pipeline permanent easement to access the [temporary workspace].” (Environmental Report at 1). The Environmental Report continues that the location of the border crossing was “dictated by the interconnect location inside Mexico.” *Id.* at 36. If, as Trans-Pecos stated in its Environmental Report, its intrastate pipeline is meant to transport gas to the border crossing, then it seems only natural that the *SunShine*

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<sup>19</sup> 67 FERC P.61,229.

“location and capacity” finding would apply just as well to Trans-Pecos—not to mention its use of the 6.6 acres of intrastate easement for constructing the jurisdictional facility.

**c. FERC’s Jurisdiction Over the Entire Project Is Sufficient For Review of Intrastate Facilities.**

In *SunShine Pipeline*, the Commission found that even though the nonjurisdictional facilities, which were 569 miles in length would be “more extensive” than the 144-mile jurisdictional, segment, the latter were “nonetheless significant.”<sup>20</sup> Still, the Commission ultimately concluded that the smaller size of the jurisdictional segment, when compared to the non-jurisdictional segment weighted against an assertion of jurisdiction.

Here, while the intrastate pipeline, at 143 miles, is more extensive than the 1,093-foot cross-border portion, the impacts of the cross-border pipeline are significant nonetheless. As discussed *supra*, the cross-border pipeline will irreparably damage wetlands and cultural resources, potentially contaminate an aquifer in a region where water is a precious commodity and jeopardize the safety of residents. Nevertheless, even if the Commission finds that the third *Algonquin* factor – *i.e.*, the proportionate significance of the jurisdictional segment to the overall project – does not warrant “federalizing” the entire project, as in *SunShine*, the Commission can still assert jurisdiction over the 143-mile non-jurisdictional segment based on the other three *Algonquin* factors alone.

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<sup>20</sup> *Id.*

**d. There Is Sufficient Federal Control Over, and Responsibility For, the Project, to Conduct Environmental Review of Nonjurisdictional Facilities.**

In *SunShine Pipeline*, FERC found that the fourth *Algonquin* factor -- “the extent of cumulative Federal control and responsibility” over the project -- would be “substantial.”<sup>21</sup> The Commission cited the applicant’s need to obtain necessary permits and approvals from the Army Corps of Engineers, the U.S. Forest Service (USFS), and the U.S. Bureau of Land Management (BLM) because of the nonjurisdictional facilities’ crossing of “forested areas, rivers and streams, wetlands, swamps, and other environmentally sensitive areas.” *Id.*<sup>22</sup> Likewise, when a project does not implicate federal lands, courts have upheld the Commission’s decision to decline jurisdiction.<sup>23</sup>

Here, Trans-Pecos must obtain certain federal permits for the nonjurisdictional portion of the facility, specifically, a permit from the Corps of Engineers for the 143-mile stretch of pipeline. *See* Table of Required Permits,

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<sup>21</sup> 67 FERC P.61,229, at 61,703

<sup>22</sup> In *Gas Co. N.M.*, 64 F.E.R.C. P.61,226, at 62,669 (1993), FERC found that, “[w]hile factor 4 evidences federal control over the nonjurisdictional facilities,” the fact that BLM was already performing an environmental analysis of the project meant that FERC could decline to perform environmental review of nonjurisdictional facilities. *Gas Co. N.M.* is distinguishable because the project was located almost entirely on *federal* lands owned by BLM and given that most of the impacts would be to BLM properties, not surprisingly, the Commission deferred review to BLM. Here, while other federal agencies such as the Corps have permitting authority, they will not take as expansive a review as the Commission and therefore, the duplication of effort that concerned the Commission in *Gas Co. NM* is not an issue here.

<sup>23</sup> *See e.g., National Committee for the New River, Inc. v. FERC*, 373 F.3d 1323, 1334 (D.C. Cir. 2004)(affirming Commission decision to decline jurisdiction given its determination of insufficient federal control (made on grounds of “no [federal] financial involvement[,]” “no federal lands...at stake[,]” or any other form of federal involvement).

Environmental Report. Moreover, the Commission also retains residual regulatory control over the rates and practices of the Trans-Pecos pipeline. Although ordinarily, an intrastate pipeline lies beyond the scope of the Commission's regulatory purview, at the same time, the Commission must also ensure nondiscriminatory treatment between a pipeline's jurisdictional and nonjurisdictional services.<sup>24</sup> While the Commission limits its determination to cases where a company "voluntarily offers" such service on the interstate portion of its system in order to insure that the intrastate portion complies,<sup>25</sup> the Commission's reciprocity policy will apply here, Trans-Pecos will host an open season for shippers to add onto the Project's capacity, as per the terms of the RFP. See Exh. 3.

- e. **If FERC Declines to Apply *Algonquin* Factor By Factor to Review Intrastate Pipelines, It Should Come to the Same Conclusion By Following *Cameron LNG's* Application of *Algonquin*.**

In a recent case, FERC applied the *Algonquin* test summarily to conclude that it should conduct environmental review of nonjurisdictional facilities. Prior to *Cameron LNG*,<sup>26</sup> the Commission had authorized Cameron LNG to build a liquefied natural gas (LNG) terminal under NGA Section 3, and a takeaway pipeline under NGA Section 7, alongside nonjurisdictional transmission lines supplying the terminal with power. In the 2007 proceeding, FERC considered an expansion to that

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<sup>24</sup> *Oasis Pipeline, LP*, 127 FERC P.61,263 (2009).

<sup>25</sup> *Id* at ¶ 14.

<sup>26</sup> *Cameron LNG*, 118 FERC P.61,019 (2007) (vacated due to missed construction deadline).

LNG terminal.<sup>27</sup> FERC noted that the jurisdictional facilities for this project would be built on Cameron-leased land.<sup>28</sup>

FERC then applied the *Algonquin* test, but did so without outlining its reasoning factor by factor: “The Commission has applied its four-factor test” and “determined that the proposed electric transmission line and substation...are subject to our review, and discuss their potential environmental impact in the EA.”<sup>29</sup> In FERC’s Environmental Assessment, however, the *Algonquin* inquiry is nearly as limited:

Cameron would require electric power to service the proposed Terminal Expansion Project. *Although not regulated by the FERC, local electric transmission lines that supply power to the terminal are an integral component to the operation of this facility. Therefore, we are including them in our discussion in this EA....*

Entergy, the regional power company, would design and construct this new transmission line and substation....

[W]e do not anticipate significant impacts from the construction and operation of the electric transmission line.<sup>30</sup>

Given that no further environmental analysis appears in the docket, nor any other mention of the *Algonquin* test, this means that FERC may summarily extend its review to nonjurisdictional facilities. We add, however, that its environmental review should be comprehensive rather than cursory (as it was in the Cameron LNG Environmental Assessment).

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<sup>27</sup> *Id* at 61,085-87.

<sup>28</sup> *Id.*

<sup>29</sup> *Id* at 61,091.

<sup>30</sup> Cameron LNG Terminal Expansion Project — Environmental Assessment, FERC Docket No. CP06-422-000, at 16-17 (Nov. 17, 2006) (italics added).

**2. Separate Review of the Cross-Border Facilities and the Rest of the Pipeline Violates NEPA's Anti-Segmentation Policy.**

The CEQ regulations implementing NEPA require that an EIS include: (1) connected actions, including those that are “interdependent parts of a larger action and depend on the larger action for their justification;” (2) cumulative actions, “which when viewed with other proposed actions have cumulatively significant impacts;” and (3) similar actions, “which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together.”<sup>31</sup>

The purpose for the rule against segmentation is to “prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”<sup>32</sup> In other words, the anti-segmentation rule prevents applicants and agencies from thwarting their NEPA obligations by chopping projects into smaller components in order to avoid considering their collective impact and to “conceal the environmental significance of the project or projects.”<sup>33</sup>

An agency “impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate pieces under consideration.”<sup>34</sup> In *Delaware Riverkeeper*, the court found that the Commission had

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<sup>31</sup> 40 C.F.R. § 1508.25(a).

<sup>32</sup> *See, e.g.,* Wilderness Workshop v. BLM, 531 F.3d 1220, 1228 (10th Cir. 2008) (emphasis added); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006).

<sup>33</sup> *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005).

<sup>34</sup> *Delaware Riverkeeper*, 753 F.3d at 1313.

unlawfully segmented environmental review of four separate proposals by the same pipeline companies to upgrade different sections of the same line. In concluding that the projects were “inextricably intertwined” as part of the same pipeline, the court relied on facts showing a physical, functional and temporal nexus between the four proposals – such that [t]he end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades.”<sup>35</sup> The *Delaware Riverkeeper* court also found that due to the physical and functional connection and interdependence on the three other proposed pipelines that were part of the Eastern Leg of the 300 Line, the segment at issue had no independent utility.<sup>36</sup>

One reason the Northeast Project in *Delaware Riverkeeper* was considered to be interdependent on the other lines was because the gas entered the system at one end and passed through each of the other pipe sections to reach its extraction points.<sup>37</sup> Likewise, the Presidio Crossing Project is dependent on the 143-mile section of the pipeline because the natural gas enters the line at the beginning of the 143-miles and travels through the Presidio Crossing Project to reach its end destination in Mexico. This project does not have its own independent purpose because it relies on the gas that travels from the 143-mile pipeline to supply the end consumer across the Mexican border. The Presidio Crossing merely acts as a short 1,093-foot connector between the 143-mile pipe and the pipeline on the other side of the Rio Grande River. The end result of the proposed pipeline in this case and the 300 Line

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<sup>35</sup> *Id* at 1308-09.

<sup>36</sup> *Id* at 1308.

<sup>37</sup> *Id* at 1309.



upgrade in *Delaware Riverkeeper* is a new pipeline that functions as a unified whole and therefore should be considered as such under the cumulative environmental impacts reviewed by FERC.<sup>38</sup>

*Delaware Riverkeeper* emphasizes the importance of the timing of the projects when deciding whether the FERC review must look at the combined environmental impacts of multiple projects.<sup>39</sup> The review of the Northeast Project application by FERC overlapped with its review of the other proposed projects along the 300 Line.<sup>40</sup> Similarly, the Presidio Crossing Project and the Texas Commission's review of the 143-mile pipeline will overlap as well.

The geographic, temporal and functional correlation between the Presidio Crossing Project and the 143-mile pipeline show that the Presidio Project does not have an independent utility without the longer line. Therefore, as in *Delaware Riverkeeper*, the Commission must consider the intrastate pipeline to avoid unlawful segmentation of the project and prevent the company from evading environmental review.

### 3. Cumulative Impacts

When FERC is conducting an environmental review of a proposed project NEPA requires consideration of actions that are connected, similar or cumulative to the proposed action.<sup>41</sup> Cumulative effects are defined as "the impact on the environment which results from the incremental impact of the action when added

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1318.

<sup>40</sup> *Id.*

<sup>41</sup> 40 C.F.R. § 1508.25.

to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."<sup>42</sup> Here, where the impacts of the cross-border facility are added to the 143-mile pipeline, there are substantial environmental impacts as discussed in Part III.A *supra*.

In *Delaware Riverkeeper*, the court determined not only that the Commission had improperly segmented four different project proposals, but also that it failed to consider the cumulative impacts of each segment. As the court explained, a meaningful assessment of cumulative impacts must identify:

(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions — past, present, and proposed, and reasonably foreseeable — that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."<sup>43</sup>

The court found that the Commission's conclusory statement that the project "is not expected to contribute to cumulative impacts" failed to satisfy the NEPA.

The Commission's consideration of cumulative impacts here is likewise conclusory. The Environmental Report references cumulative impacts, but in a cursory manner that falls far short of the analysis required by NEPA. The only mention to cumulative impacts states that the 143-mile segment is not under the jurisdiction of FERC and therefore an environmental review of that larger segment is not warranted (Environmental Report at 7).

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<sup>42</sup> 40 C.F.R. § 1508.7.

<sup>43</sup> *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002).

A similar pipeline located in Texas, owned by NET Mexico, also involved a short 1,400 foot segment of cross-border pipeline connected to a longer, 120 mile, non-jurisdictional pipeline segment.<sup>44</sup> The environmental impacts section of the Order Issuing a Presidential Permit to NET Mexico points the reader to the cumulative impacts section of the EA.<sup>45</sup> The EA makes clear that the non-jurisdictional segment of the pipeline must be included in the review of cumulative environmental impacts.

“In accordance with the NEPA and FERC policy, we considered the cumulative impacts of the Project with other projects in the general project area...Because the planned non-jurisdictional intrastate facilities would be built in close proximity to the Project, there would be cumulative impacts.”<sup>46</sup>

The EA goes on to explain how the non-jurisdictional facilities will impact each of the different environmental considerations including construction procedures, geology, wetlands, wildlife, vegetation, land use, and air quality.<sup>47</sup> FERC’s environmental review of the Presidio Crossing Project must review the cumulative effects of the 143-mile non-jurisdictional segment in order to comply with NEPA and FERC policy as it was done in the case of NET Mexico’s cross-border pipeline.

#### **4. The Commission Must Prepare An EIS**

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<sup>44</sup> *NET Mexico Pipeline Partners, LLC*, 145 FERC ¶ 61,112, P.4 (2013).

<sup>45</sup> *Id.* at P.23.

<sup>46</sup> Environmental Assessment Report, FERC Docket No. CP13-482-000 (May 20, 2013).

<sup>47</sup> *Id.*

Given the project's extensive impacts on the Big Bend region, as well as the Commission's obligation to consider the effects of both the proposed cross-border facility and the 143-mile pipeline, the Commission must prepare an EIS. Indeed, under the factors set forth in the CEQ regulations, the Commission has no choice but to prepare an EIS under applicable factors.

As is already well-established, NEPA requires an EIS for major federal actions that significantly affect the quality of the human environment. NEPA's CEQ regulations list ten factors for evaluating the significance and intensity of an action for purposes of determining whether an agency must prepare an EIS. 40 C.F.R. §1508.27 As relevant here, the list includes:

- Unique characteristics of the geographic area such as proximity to
- Historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- The degree to which the effects on the quality of the human environment are likely to be highly controversial;
- The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources; and
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

The existence of just one of these factors may trigger the need for an EIS.<sup>48</sup> As discussed below, each of these factors below are present in this case and require closer scrutiny of environmental effects through an EIS:

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<sup>48</sup> See *Ocean Advocates v. US Army Corps of Engineers*, 402 F.3d 846 (9<sup>th</sup> Cir 2004), citing *National Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 731

**Unique geographic characteristics:** As the nineteen affidavits and expert reports bear out, the Big Bend region is a unique location characterized by sensitive environmental habitat, rare plants and species not found anywhere else, and rich archeological and cultural resources. These resources – which have not been examined in the Environmental Report submitted by the applicant - will be irreparably harmed by the proposed pipeline.

**Degree to which effects on quality of human environment are controversial:** As evidenced by the level of interest in this case, the potential impacts of the proposed projects are highly controversial. Yet despite the project’s potential for harm, the applicant’s studies submitted are cursory and fail to capture the project’s true impacts. Complicating matters, there is no indication that the proposed project is even needed given the other pipeline development taking place in the region. Because the issues related to the proposed project’s impacts are so complex, an EIS would allow the opportunity to gather data so that the Commission can arrive at a well-reasoned conclusion on both need for the project and impacts.

**Impacts to Endangered Species and Loss of Culturally Significant**

**Resources:** Several expert reports submitted by BBCA, and summarized in Part III.A, *supra* document the project harm to endangered species and threat to loss of historic resources. These impacts further justify the need for preparation of an EIS.

The proposed pipeline is a major action that will have significant impacts as defined by 40 C.F.R. §1508.27. Applying these factors, the Commission has no

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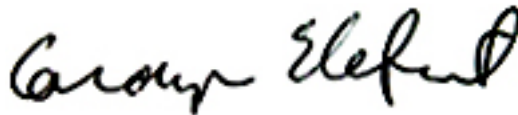
(applying 40 C.F.R. §1508.27 and finding EIS is required prior to allowing cruise ships in Glacier Bay).

choice but to prepare an EIS to evaluate the need for, and impacts of the entire pipeline.

## CONCLUSION

Wherefore, in light of the foregoing, the BBCA respectfully requests that (the Commission (1) GRANT this motion to intervene and allow BBCA to participate in this proceeding with full rights of party status, including the right to request a hearing, cross examine witnesses and seek rehearing and appeal; (2) prepare a full environmental impact statement (EIS) on both the cross-border segment and intrastate segment of the 143-mile pipeline, and direct Trans-Pecos to conduct or submit additional studies to enable the Commission to undertake a meaningful environmental review and (3) conduct public hearings and scoping sessions to afford the public the right of notice and meaningful participation in the EIS process.

Respectfully submitted,



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June 30, 2015

## CERTIFICATE OF SERVICE

Wherefore on this 30<sup>th</sup> day of June, I caused to be served the foregoing Motion to Intervene electronically on all parties on the Commission's electronic service list in this proceeding, in accordance with Commission regulations.

*/Carolyn Elefant/*

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Carolyn Elefant