ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Nos. 20-1016 and 20-1017 (Consolidated)

ENVIRONMENTAL DEFENSE FUND,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF DR. SUSAN TIERNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS THE ENVIRONMENTAL DEFENSE FUND IN SUPPORT OF REVERSAL OF THE CHALLENGED ORDERS

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Dated: July 2, 2020

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Certificate as to Parties

Per D.C. Circuit Rule 28(a)(1)(A), Dr. Tierney submits that all parties and intervenors appearing in this court are listed in the Initial Brief of the Environmental Defense Fund. Dr. Tierney understands one or more entities may also seek to participate as amicus curiae. However, as of the time of this brief, no entity has filed a notice of intent or motion for leave to file.

B. Certificate as to Rulings under Review

Per D.C. Circuit Rule 28(a)(1)(B), the rulings under review are the following orders of the Federal Energy Regulatory Commission:

- *Spire STL Pipeline LLC, Order Issuing Certificates, Docket No. CP17-40-000, 164 FERC ¶ 61,085 (August 3, 2018); and*
- *Spire STL Pipeline LLC, Order On Rehearing, Docket No. CP17-40-002, 169 FERC ¶ 61,134 (November 21, 2019).*

C. Certificate as to Related Cases

Undersigned counsel are not aware of any related cases as defined by D.C. Circuit Rule 28(a)(1)(C).

Respectfully Submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, Dr. Tierney is an individual and not a company that issues stock to the public.

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RULE 29(a)(4)(E) STATEMENTS

Per D.C. Circuit Rule 29(a)(4)(E), I certify that: (1) the party's counsel authored this brief in whole; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person contributed money that was intended to fund preparing or submitting this brief.

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CERTIFICATE FOR SEPARATE BRIEF

To the best of her knowledge, information, and belief, Dr. Susan Tierney is aware that the American Antitrust Institute intends to file a brief as amicus curiae challenging the Respondent Federal Energy Regulatory Commission's authorization for Spire STL Pipeline LLC, in support of Petitioner Environmental Defense Fund. Dr. Tierney became aware of their interest in doing so on June 24, 2020. She understands that the American Antitrust Institute intends to leverage analytical principles from antitrust law to bolster Federal Energy Regulatory Commission reviews. In contrast to that support, Dr. Tierney's amicus curiae brief addresses issues specific to her professional expertise in gas industry regulation, environmental regulation, and interest in ensuring that the Federal Energy Regulatory Commission properly applies its public convenience and necessity test to account for long-term adverse economic and environmental impacts. Due to the short time between learning of the American Antitrust Institute's intent and the date on which amicus briefs are due, Dr. Tierney cannot practicably join it in briefing. Consequently, Dr. Tierney respectfully files this certificate per D.C. Circuit Rule 29(d) and submits that joining with the other potential amicus in a single brief is not practicable. Dr. Tierney's conclusion that her separate amicus curiae brief is necessary is not based on (i) a desire to exceed the allowable length of briefs, (ii) counsel's

difficulty or inability to coordinate due to geographical dispersion, or (iii) a claim that separate presentations were allowed in the proceeding below.

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GLOSSARY OF ABBREVIATED TERMS AND TERMS OF ART

Term	Description
1999 Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, No. PL99-3-000 (Sept. 15, 1999)
Captive customers	Captive customers are those who may only purchase gas from one source because they lack access to any alternatives and therefore cannot avoid charges. Captive customers may also be retail customers of an electric utility whose rates include the costs of operating a gas-fired power plant.
Certificate	Certificate of Public Convenience and Necessity, Issued under 15 U.S.C. 717f of the Natural Gas Act
Certificate Policy	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), clarified, 90 FERC ¶ 61,128 (Feb. 9, 2000), further clarified, 92 FERC ¶ 61,094, 61,373 (July 28, 2000) (collectively)
Commission (or FERC)	Federal Energy Regulatory Commission
EDF	Environmental Defense Fund
LDC	Local Distribution Company

Missouri Commission	Missouri Public Service Commission
PUC	State public utility commission (also known in some states, such as Missouri, as the public service commission)
Regulated Affiliate	Utility companies subject to state rate regulation and affiliated with a pipeline company within a common corporate ownership structure. Such utilities could include natural-gas LDCs and electric utilities owning gas-fired power plants whose operating costs are recovered in state-regulated retail rates.
Section 7	15 U.S.C. 717f (2018)
Shipper	A customer of a pipeline who purchases transportation service for delivery of natural gas
Spire	The Spire STL pipeline, as approved through Spire STL Pipeline LLC, 169 FERC ¶ 61,134 (2019) and Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018), collectively.

STATEMENT OF IDENTITY

Dr. Susan Tierney is an expert on energy economics, regulation, and policy, particularly in the electric and gas industries. She served as Assistant Secretary for Domestic and International Energy Policy in the U.S. Department of Energy and, in Massachusetts, as Secretary of Environmental Affairs, Executive Director of the Energy Facilities Siting Council, and Commissioner at the Department of Public Utilities. For over 25 years, Dr. Tierney has consulted with businesses, federal and state governments, tribes, and others, on energy projects and markets, and economic and environmental regulation. She is deeply familiar with issues in energy markets, including natural gas, wholesale and retail market design, electric and gas infrastructure project siting, and utility ratemaking.

INTEREST IN CASE

As an expert on energy infrastructure and sound state and federal regulation of private energy markets, Dr. Tierney has observed troubling trends in federal gas pipeline approvals. She previously provided the Federal Energy Regulatory Commission (the "Commission") with recommendations to realign its current pipeline certification practices with the Natural Gas Act (the "Gas Act"), detailing the public harm from its current practices. Commission inaction and the stunning

facts of this case spurred Dr. Tierney to participate as amicus curiae, recognizing that this Court has an opportunity to serve justice by setting the Commission back on the correct course. As amicus curiae, she will use her expertise to assist the Court in understanding the significant harms resulting from the Commission misapplying the Gas Act. The Commission's *Spire* approval perfectly elucidates these harms and underscores the critical importance of this Court's intervention. *Spire* is what happens when the Commission fails its Gas Act obligations, and threatens to become a new industry norm absent the Court's enforcement of that law.

SOURCE OF AUTHORITY TO FILE

Pursuant to D.C Circuit Rule 29(b), undersigned counsel represents that all parties have consented to filing this brief and further certifies that a separate brief is necessary.

SUMMARY OF ARGUMENT

The court must act to ensure that the Commission fulfills its statutory duty to protect the public interest. Congress enacted the Gas Act expressly to protect the public while fostering adequate access to reasonably priced gas. Gas Act Section 7 instructs the Commission to deny gas pipeline certification unless the applicant

affirmatively demonstrates that the pipeline is required by the public convenience and necessity.[1] The Commission no longer adheres to these requirements; it has transformed its public need analysis into a singular inquiry: does the project have at least one shipping contract? If so, the requisite searching public convenience and necessity review simply ends. The Commission ignores market studies, economic data, and capacity analyses. But those other data are critically important to assessing public benefit, particularly when the shipping contracts are between affiliated entities able to pass risks and costs to captive customers.

The Commission's lack of scrutiny deeply harms the public. Pipeline companies only make significant profits on capital investments, so they have an incentive to build new capacity regardless of public need.[2] Their ability to keep this profit within a corporate family incentivizes affiliates to turn back capacity on legacy pipelines in favor of contracting for this newly proposed capacity, particularly when, as for Regulated Affiliate shippers, the cost of new capacity will be passed through to the public. This creates unchecked potential for -- or in this case, fully-realized -- gas infrastructure over-building because the Commission fails to address the Gas Act's fundamental question: does the public need new

[1] Unlike the presumptive public interest accorded Section 3 projects, Section 7 applicants bear the burden of proving public interest. *Compare* 15 U.S.C. § 717b (2018) *with* 15 U.S.C. § 717f(e) (2018).
[2] *See* Part IV, *infra*.

capacity? This failure produces projects like *Spire*: new construction imposing real public costs -- condemnation, increased transportation costs from new pipeline investment, and environmental destruction -- but benefitting only private parties.

The court must act to remedy this situation by compelling the Commission to engage in a critical and fulsome review of the public interest. At a minimum, the court should require the Commission to grapple seriously with additional and contrary evidence of public benefit, and to balance any substantiated public benefit against the adverse impacts it now arbitrarily ignores, finding that the Commission cannot predicate Gas Act findings of public convenience and necessity solely on Regulated Affiliate contracts. The Commission is fully capable of such review, and has an existing roadmap for implementing the Gas Act's public convenience and necessity standard.[3] The stakes of FERC abdicating its responsibilities are high, and *Spire*, although alarming, is not atypical.[4] With this case, the court has an important opportunity to protect consumers and the public interest.

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[3] *See infra* nn. 20-25 and accompanying text.

[4] *See e.g.*, *Del-Mar Energy Pathway Project*, 169 FERC ¶ 61,228, Certificate Order (Dec. 19, 2019); *Rio Bravo Pipeline Project*, 170 FERC ¶ 61,046, Order on Rehearing & Stay, p. 6, P 12 (Jan. 23, 2020); *Cheniere Corpus Christi Pipeline, L.P.*, 169 FERC ¶ 61,135, Order Granting Authorizations Under Sections 3 and 7 of the NGA (Nov. 22, 2019); *Driftwood Pipeline LLC*, 167 FERC ¶ 61,054, Order Granting Authorizations Under Sections 3 and 7 of the NGA (Apr. 18, 2019); *TransCameron Pipeline, LLC*, 166 FERC ¶ 61,144, Order Granting Authorizations Under Sections 3 and 7 of the NGA (Feb. 21, 2019); *Jordan Cove Energy Project*, 171 FERC ¶ 61,136, Order on Rehearing and Stay (May 20, 2020).

ARGUMENT

I. The Gas Act Requires the Commission to Protect the Public interest and Promote the Orderly Development of Natural Gas at Reasonable Prices.

The Gas Act was Congress's response to corporate abuse. In the 1930s, large utility holding companies exerted unacceptable monopoly power over gas markets. State regulators were unable to restrain them,[5] so Congress acted. After ordering a comprehensive investigation,[6] it discovered the depth of industry exploitation.[7] Utility companies were charging exorbitant rates, and employing "unsound and/or needless financial structures and practices which [were] a detriment and frequently a menace to the investor or the consumer."[8] Congress passed the Gas Act to protect

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[5] S. Rep. No. 1162, 75th Cong., 1st Sess. (1937). *See, e.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 308-09 (1923).

[6] *See* S. Res. 83, 70th Cong., 1st Sess., approved February 15, 1928 (as extended by S. J. Res 115, 73d Cong., 2d Sess., approved June 26, 1934).

[7] Annual Report of the Federal Trade Commission for the Fiscal Year ended June 30, 1949 at p. 135 (https://books.google.com/books?id=y8YjiMY2400C&pg=RA1-PA69&lpg=RA1-PA69&dq=ftc+investigation+of+utility+holding+companies+1935&source=bl&ots=X46NabRDed&sig=ACfU3U3QdLheqEI48LBhc5-4mh_P4H9lqg&hl=en&sa=X&ved=2ahUKEwjmg8e2gc3pAhUQJt8KHbkoAwgQ6AEwB3oECAoQAQ#v=onepage&q=ftc%20investigation%20of%20utility%20holding%20companies%201935&f=false).

[8] Annual Report of the Federal Trade Commission for the Fiscal Year ended June 30, 1935 at p. 26

consumers from such abuse,[9] instituting a searching certification inquiry that only permits approval of projects that the public needs and will serve the public interest: The Gas Act stipulates that no interstate gas facility may be constructed unless the Commission certifies that it is *required* by the public convenience and necessity.[10] If an applicant demonstrates its project is required, it receives a certificate of public convenience and necessity (a "Certificate"), securing delegated federal eminent domain power to seize privately-owned land necessary for pipeline construction.[11]

The history of the public convenience and necessity standard demonstrates that the standard requires a searching review of a proposed project's public impact. States created it to prevent applicants from proceeding with projects that would result in infrastructure duplication, unfair competition, or community harm.[12] The standard required a fulsome analysis considering externalities like public safety impacts and environmental harm.[13] Both courts and the Commission understood

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(https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1935/ar1935_0.pdf at 26-27) [hereinafter "1935 Report"].

[9] *See* Natural Gas Act, Pub. L. No. 75-688, § 1(a), 52 Stat. 821 (1938) (codified at 15 U.S.C. § 717(a)) (noting that regulation of interstate natural gas was in the public interest "as disclosed in the reports of the Federal Trade Commission").

[10] *See* 15 U.S.C. § 717f(c)(1)(A) (2018); 15 U.S.C. § 717f(e) (2018).

[11] *See* 15 U.S.C. § 717f(h) (2018).

[12] William K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States 1870–1920, 79 Columbia L. Rev. 426, 428 (1979). *O'Keefe v. Chicago Rys. Co.*, 188 N.E. 815, 817 (Ill. 1933) ("The convenience and necessity required to support an order of the commission are those of the public and not of the individual. . . .").

[13] Jones, *supra*, at 428 (collecting cases).

that Congress adopted this conception of the standard in the Gas Act.[14] The Supreme Court found that the Gas Act's purpose is "to protect consumers against exploitation at the hands of natural gas companies,"[15] while ensuring "orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[16] To implement this core purpose, the Commission is "required to" evaluate *all* factors bearing on the public interest.[17]

The Commission purports to meet this standard by following the framework it created[18] to ensure "proper incentives for pipelines to invest in new facilities that are needed to meet increased demand, and avoid problems of excess capacity that may be caused by construction of facilities to compete for existing market share."[19] This framework commands a three step analysis. First, the project cannot depend on subsidies from the applicant's existing customers.[20] Second, if, and only if, that

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[14] *See, e.g.*, *Kansas Pipeline & Gas Co. and North Dakota Consumers Gas Co.*, 2 FPC 29 (1939) (citing state regulatory and court adjudicating fulsome standard); *In the Matter of Michigan-Wisconsin Pipeline Co.*, 6 FPC 1 (1947) (same).
[15] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944).
[16] *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976).
[17] *Henry v. FPC*, 513 F.2d 395, 403 (D.C. Cir. 1975); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1421 (10th Cir. 1992).
[18] Certificate Policy.
[19] Regulation of Interstate Natural Gas Transportation Services, 63 Fed. Reg. 42974-01, 42980 (July 29, 1998).
[20] 1999 Policy Statement, at ¶ 61,744-45. The no-subsidization requirement was necessary to preclude "wrong price signals" that could result in "overbuilding of capacity," limitations on competition and customer choice, "inefficient investment and contracting decisions" that could "exacerbate adverse environmental impacts, distort competition between pipelines for new customers, and financially penalize

test is met, the Commission must weigh the project's public benefits against its adverse economic impacts on three groups: the applicant's existing customers, competing existing pipelines and their captive customers, and landowners and surrounding communities.[21] Then, if the public benefits outweigh any adverse economic impacts that remain after the applicant's efforts to mitigate them, the Commission proceeds to a final step:[22] a *second* cost-benefit analysis. The public benefits the Commission considers at this stage are the ones identified in the preceding stage, but the scope of adverse impacts expands to include *all* adverse project impacts.[23] The animating force behind each step of the Commission's certification process is its Gas Act mandate to serve the public and shield it from energy companies' abusive practices.

The Commission's Gas Act implementation yielded a robust interstate pipeline system. By 1999, there was a large gas pipeline system serving customers around the country.[24] Since then, there has been dramatic expansion. Incredibly,

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existing customers of expanding pipelines and of pipelines affected by the expansion." *Id.*

[21] *Id.* at ¶ 61,745.

[22] *Id.*, at ¶ 61,745-46.

[23] Costs of adverse environmental impacts, *inter alia*, are to be weighed in this step. *Certification of New Interstate Pipeline Facilities*, 90 FERC ¶ 61,128, 61,397-98 (Feb. 9, 2000).

[24] *See* James Tobin, About Natural Gas Pipelines, Energy Information Administration (EIA), Powerpoint Presentation on "Major Changes in Natural Gas Pipeline Transportation Capacity, 1998-2008,"

the amount of capacity approved since 1999 is nearly ***double*** the all-time record for gas use in a single day.[25] From 1999 to 2017, the Commission added 180 billion cubic feet per day (bcf/d) of pipeline capacity; this is equivalent to **193%** of the capacity used (on average) during a month with seasonally high use, and 131% of the capacity used during the all-time peak-day (a 2014 polar vortex occurrence).[26] Although some regions may still experience wintertime peak day gas-transportation constraints (and resulting pricing impacts),[27] building expensive pipelines is often the least economic and most environmentally damaging means of meeting demand occurring only a few days per year. Excess capacity renders many

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https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/compare mapm.pps.

[25] *See* Tierney Testimony Before the U.S. House Subcommittee on Energy of the Committee on Energy and Commerce Subcommittee Hearing on "Modernizing the Natural Gas Act to Ensure It Works for Everyone," at 2, Feb. 5, 2020 [hereinafter "Tierney Testimony"].

[26] *See* Susan F. Tierney, Analysis Group, Natural Gas Pipeline Certification: Policy Considerations for a Changing Industry 1-2 (2017); *see also* EIA, *Natural Gas Monthly* (Mar. 31, 2017), https://www.eia.gov/naturalgas/monthly/archive/2017/2017_03/ngm_2017_03.php ; EIA, *Record winter withdrawals create summer storage challenges* (June 12, 2014), https://www.eia.gov/naturalgas/review/winterlookback/2013/#tabs_Consumption-4

[27] Marie Cusick, *Northeast needs more gas pipelines, says new report*, Pennsylvania State Impact, April 25, 2017, https://stateimpact.npr.org/pennsylvania/2017/04/25/northeast-needs-more-gas-pipelines-says-new-report/; Alan Kovski, *Fast Growth Coming for Northeast Shale Gas Pipelines*, Bloomberg BNA, March 5, 2017, https://www.bna.com/fast-growth-coming-n57982084782/.

pipelines underutilized or assets that are stranded long before their useful life ends, a cost the public bears.[28] There is currently far more pipeline capacity than needed.

How did the Gas Act's mandate to ensure *adequate* gas capacity allow for an amount nearly *double* the one-day usage record to be added to an already robust system? The cause of this dramatic overbuilding lies in the Commission's dereliction of its Gas Act duties.

II. Regulated Affiliate-Supported Projects Are the New Face of Corporate Abuse.

The threat of "needless financial structures and practices"[29] still exists, but now comes in the form of Regulated Affiliate coordination. *Spire* demonstrates that such coordination is one of the most egregious causes of gas infrastructure overbuilding and public harm. Recent applications often rely on contracts

[28] For gas pipelines, stranded assets are those whose investment costs are no longer recoverable. Overbuilding and concurrent cost reductions for clean energy alternatives will create significant stranded assets in gas infrastructure. *See* Mark Dyson, *A Bridge Backward? The Risky Economics of New Natural Gas Infrastructure in the United States*, Rocky Mountain Institute (Sept. 9. 2019), https://rmi.org/a-bridge-backward-the-risky-economics-of-new-natural-gas-infrastructure-in-the-united-states/; *see also* J. Shelor, *Marcellus/Utica On Pace for Pipeline Overbuild, Says Braziel*, Natural Gas Intelligence (June 8, 2016), http://www.naturalgasintel.com/articles/106695-marcellusutica-on-pace-for-pipeline-overbuild-says-braziel.

[29] 1935 Report, *supra*, at 26-27.

(precedent agreements) with the project applicant's Regulated Affiliate.[30] Precedent agreements can be grouped into three categories: (1) agreements with third-parties unrelated to the applicant; (2) agreements with shipping companies owned by the same corporate parent as the applicant but are not state-regulated utilities; and (3) agreements with companies that are both owned by the same corporate parent as the applicant and are state-regulated utilities (such as Regulated Affiliates). To support its project, *Spire* relies entirely on one Regulated Affiliate contract.[31] Regulated Affiliates are unique pipeline customers because they have a legally protected right to bill their own customers for the costs they are charged by a pipeline operator in FERC-approved rates.[32]

The Commission admits it does not require evidence of public need beyond these private agreements, accepting all three types as unassailable evidence of public need and public benefit.[33] While the four corners of Regulated Affiliate

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[30] *See Certification of New Interstate Nat. Gas Facilities*, 163 FERC ¶ 61,042 (2018) at 47 (noting "increase in the number of shippers that are affiliated with pipeline companies").

[31] Initial Opening Brief of Petitioner Environmental Defense Fund at 2, EDF v. FERC, No. 20-1016 (D.C. Cir. filed June 26, 2020).

[32] *See e.g.*, Andrea J. Ercolano & Peter C. Lesch, *Narragansett Update: From Washington Gas Light to Nantahala*, 7 Energy L.J. 333, 333 (1986) ("the so-called 'Narragansett doctrine' ... provides that state regulatory commissions, in setting retail rates, must allow recovery of the interstate wholesale utility rates that have been made effective by [FERC] in the exercise of its exclusive jurisdiction over the regulation of such rates.").

[33] "In practice, the Commission does not look 'behind' or 'beyond' precedent agreements when making a determination about the need for new projects or the

contracts bear no hallmarks of abuse, FERC's practice of relying on such agreements alone nonetheless violates the Gas Act, imposing public harm.

III. The Commission's Reliance on Regulated Affiliate Precedent Agreements Contravenes the Gas Act's Public Convenience and Necessity Standard.

To understand how Regulated Affiliate-backed projects can yield authorizations for unnecessary pipelines, this Part explains the harm the Commission misses by refusing to look beyond contracts. Part III.A. describes why Regulated Affiliate-backed projects evade the public convenience and necessity threshold screening test. Part III.B. describes how relying on contracts alone limits the Commission's ability to adequately weigh these project's benefits against their adverse impacts. Part III.C. reviews FERC's failure to weigh landowner's adverse impacts when determining public interest.

A. Projects that require subsidization by existing customers do not meet the Gas Act standard.

The public convenience and necessity standard first demands that existing customers not subsidize newly proposed projects.[34] Recent pipeline applicants --

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needs of the individual shippers." *Certification of New Interstate Nat. Gas Facilities*, *supra,* at 46. "To date, the Commission has not distinguished between affiliate and non-affiliate precedent agreements in considering the need for a proposed project." *Id.*, at 47.

[34] 1999 Policy Statement, at ¶ 61,745.

like Spire STL Pipeline LLC -- are often newly-created entities, owned by the same corporate parent as the Regulated Affiliates that are their only committed customers.[35] As such, the applicants by definition do not have existing customers. But the Commission's reasoning that there can be no subsidization because there are no existing customers[36] ignores the economic reality of such affiliate arrangements. The Commission created the no-subsidization requirement to prevent pipeline companies from passing project costs onto customers that would not benefit therefrom, because doing so runs counter to the public interest.[37] Yet creating a new company does not eliminate the possibility that consumers subsidize pipelines from which they derive no benefit. Indeed, the captive customers of pipelines' Regulated Affiliate shippers are quite likely to end up subsidizing the project.

Here's how. The Commission sets the initial rate that a new pipeline company may charge shippers. When those shippers are Regulated Affiliates, they will subsequently appear before PUCs (public utility commissions) to include the new pipeline's costs in retail rates to customers. For reasons explained below,[38] PUCs feel compelled to approve recovery of such costs in retail rates. The result is

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[35] *See, e.g.*, *Jordan Cove Energy Project, LP*, 171 FERC ¶ 61,136, Order on Rehearing and Stay (May 22, 2020) (Glick, Comm'r, dissenting at P 13).
[36] *Spire STL Pipeline LLC,* 164 FERC ¶ 61,085, P 28-34 (August 3, 2018).
[37] 1999 Policy Statement, at ¶ 61,745.
[38] *See* Part V, *supra*.

assured cost-recovery throughout the affiliated supply chain, leading to ordinary gas consumers subsidizing projects.

Furthermore, because the pipeline company may go back to the Commission for a rate increase over time, the original economic impacts on captive customers may not reflect the whole harm; the pipeline may increase its rates after project construction, costing consumers even more. Such an exercise of vertical market power is a technical evasion of a requirement supposed to protect against just such a result. Projects like *Spire* do not pass even the first step of the Commission's own articulation of the Gas Act's requirements. The Commission's current implementation leaves customers deeply vulnerable to shouldering post-approval cost-subsidization, violating the Gas Act's requirement to protect the public interest.

B. The Commission must apply heightened scrutiny to Regulated Affiliate contracts when determining public benefit, and require alternative evidence on the existence, or lack thereof, of public benefits.

After essentially discarding the no-subsidization requirement, the Commission treats Regulated Affiliate contracts as conclusive evidence that a project has public benefit.[39] Regulated Affiliate-backed projects must receive

[39] The Certificate Policy stipulates that no single factor be determinative. *See, e.g., National Fuel Gas Supply Corporation, Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (Feb. 3, 2017) (Bay, Comm'r, Separate Statement at P 3) ("The certificate policy statement, which was issued in 1999, lists a litany of factors for the Commission to consider in evaluating need. Yet, in practice, the Commission has largely relied on

greater scrutiny, with the Commission considering alternative evidence of a project's *actual public* benefit. The Commission admits that there have been significant changes in the twenty years since the Policy Statement, such as applicants using "precedent agreements as applicants' principal evidence of the need for their projects."[40]

The Commission acknowledges that it fails to weigh other critical data demonstrating that the public may not benefit from the project, and in fact be *harmed* by the proposed project. Neither the Commission nor this court have to "look behind precedent or service agreements to make judgments about the needs of individual shippers,"[41] and no one disputes that contracts signed between two arm's-length parties can provide some evidence of market demand. The Commission appropriately considers such contracts to be "important evidence of demand for a project."[42] And serving unmet demand is one public benefit that can be credited to applications.[43] But the public convenience and necessity standard does not support giving one factor -- and certainly not Regulated Affiliate contracts

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the extent to which potential shippers have signed precedent agreements for capacity on the proposed pipeline." (internal citation omitted)).

[40] *See Certification of New Interstate Nat. Gas Facilities*, *supra*, at 2.

[41] *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019).

[42] 1999 Policy Statement, at ¶ 61,748.

[43] *Id*.

-- dispositive weight when determining a project's public benefit.[44] The standard requires that the Commission conduct a *holistic* application review to determine public benefit.[45]

The Commission's Certificate Policy recognizes the insufficiency of contracts alone, and dictates that market studies, which show whether there is in fact unmet demand, be considered.[46] Nor does the Gas Act contemplate reliance on contracts; it uses the fulsome public convenience and necessity standard, and not a ministerial requirement that the Commission ensure the project has contracts. Given the Commission's monolithic reliance on Regulated Affiliate contracts as a proxy for public benefit, public commenters have assumed the burden of introducing evidence demonstrating that proposed projects will not serve unmet demand.[47] The Commission does not require applicants to submit market studies,[48]

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[44] Nor does the Commission's own policy statement support this abdication of a fulsome public convenience and necessity analysis. *Id.* at ¶ 61,747.

[45] *Id.*

[46] *Id.*, at ¶ 61,748. *Accord Allegheny Defense Project v. FERC*, No. 17-1098, 2020 WL 3525547, at *15 (D.C. Cir. June 30, 2020) (affirming FERC's reliance on precedent agreements because its market need determination was also grounded on a study reinforcing domestic demand for gas shipments).

[47] Out of 29 projects approved since 2019, only five had an application or order *mentioning* evidence other than contracts. For those, the Commission did not seriously consider countervailing evidence of need. *See, e.g.*, *Adelphia Gateway, LLC*, Order Issuing Certificates, 169 FERC ¶ 61,220, p. 15, ¶ 36 (Dec. 20, 2019) (dismissing market study negating applicant's vague and unsubstantiated assertions of need).

[48] The Certificate Policy finds that market studies are valuable for establishing public benefit. 1999 Policy Statement, at ¶ 61,748. It noted that the Commission's

demand forecasts, data regarding existing pipeline capacity, or monetized landowner and local community impacts. Three Commissioners have recognized that the Commission's practices are inappropriate, stating that near-exclusive reliance on precedent agreements improperly undervalues myriad factors relevant to determining a pipeline's potential public benefit.[49] But as it did in *Spire*, the Commission routinely ignores countervailing data.[50]

Spire is perhaps the most egregious example of this behavior. Here, the Commission relied on Regulated Affiliate agreements exclusively to support public need, ignoring significant evidence of overbuilding, unprecedented opposition from a competitor pipeline, and a market with existing excess capacity.[51] Even

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prior review process relied too heavily on contracts to demonstrate market demand. *Id.* at ¶ 61,744.

[49] *See Jordan Cove Energy Project, LP*, Order on Rehearing and Stay, 171 FERC ¶ 61,136 (May 20, 2020) (Glick, Comm'r, dissenting at P 13); Hearing on "Modernizing the Natural Gas Act to Ensure it Works for Everyone," Before H. Comm. on Energy & Commerce, Subcomm. on Energy, 116th Cong. (Feb. 5, 2020) (written testimony of Cheryl A. LaFleur, former Federal Energy Regulatory Commission Comm'r); *National Fuel Gas Supply Corporation, Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (Feb. 3, 2017) (Bay, Comm'r, Separate Statement).

[50] *See, e.g.*, *Jordan Cove Energy Project, LP*, 171 FERC ¶ 61,136, Order on Rehearing and Stay (May 20, 2020) (finding single affiliate contract sufficient to establish public need and ignoring studies showing project's cost disadvantages compared to competitors').

[51] Request for Rehearing of the Environmental Defense Fund, FERC Docket Nos. CP17-40-000 and CP17-40-001, at 4.

worse, the *Spire* record contained evidence that Spire Missouri turned back lower-cost legacy capacity in favor of its affiliate.[52]

The Commission's approach to Regulated Affiliate contracts is also problematic because it ignores an important element of a typical arms-length relationship absent between affiliates: the discipline of the market on rates.[53] The Commission dismisses concerns that affiliated-shipper contracts are not true indicators of market demand because the contracts reflect no improper business dealings.[54] This ignores the fact that the rate impacts of non-arms-length business dealings between affiliated shippers and a project operator may only appear *after* project construction. Typically, the rates gas pipeline operators can charge are determined initially during the Certificate process.[55] Thereafter, the pipeline must file with the Commission if it wishes to increase its rates (Section 4 rate cases).[56]

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[52] *Id.*

[53] Although *Spire* involves a Regulated Affiliate contract, the problem highlighted here also affects unregulated affiliate contracts.

[54] *See, e.g.*, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), Certificate Order, at P 33.

[55] Cost-of-Service Rate Filings, Federal Energy Regulatory Commission, https://www.the Commission.gov/industries/gas/gen-info/rate-filings.asp (last updated Apr. 24, 2019). *See e.g.*, Sean Sullivan, *Spire STL Pipeline can adjust rates to account for construction challenges*, S&P Global Market Intelligence, October 29, 2019, https://www.spglobal.com/marketintelligence/en/news-insights/trending/yct6xtkz4-b7s_lngc_1-a2.

[56] Cost-of-Service Rate Filings, FERC, https://www.the Commission.gov/industries/gas/gen-info/rate-filings.asp (last updated Apr. 24, 2019).

Additionally, the Commission may initiate a proceeding to determine if the operator's rates are "just and reasonable," or a third party may submit a complaint alleging that the rates are not "just and reasonable" (Section 5 rate cases).[57] The Commission's current practice is to determine that rates are just and reasonable if they reflect the actual cost of providing service.[58] A pipeline's customers are thus a key participant in both kinds of rate cases, where they can challenge the operator's proposed rates if inappropriately high. But if the operator's shipper-customer is in fact part of *the same corporate family*, there is no incentive for the customer to challenge the proposed rates. The logic of the market -- that customers can refuse to transact when they think prices are inefficient or uncompetitive -- is absent when pipelines rely on Regulated Affiliates as their shipper-customers. Operators can file for rate increases without fear they will be challenged, and the increased rates will be passed along as additional costs for the customers of Regulated Affiliate shippers. The potential for this abuse is particularly present in *Spire*; the *only customer* for the proposed pipeline is a Regulated Affiliate. There is no third-party entity that will ensure that Spire STL is building and operating its project in an economically efficient manner. This indicates that Regulated Affiliate contracts cannot be given substantial weight in determining public benefit.

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[57] *Id.*
[58] *Id.*

Fundamentally, affiliate agreements are inadequate evidence of public need because they reflect only the private interests of two parties and therefore cannot *alone* demonstrate that a pipeline project is needed by the public. The Commission has previously recognized this, stating that using "contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates,"[59] and yet now seems to ignore such concerns. The court must step in to remedy this situation, requiring the Commission to give greater weight to state regulators' opinions, substantiated demand forecasts, and evidence of shippers turning back capacity from another pipeline.

C. After relying on Regulated Affiliate contracts to establish public benefit, the Commission uses them to create an insurmountable weight when "balancing" public benefit against adverse impacts.

If the Commission determines that a project has public benefit, it must weigh that benefit against residual harms.[60] Accordingly, the "amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests."[61] This should be a crucial analytical step, with public benefit data increasing as adverse impacts

[59] 1999 Policy Statement, at ¶ 61,744.
[60] *Id.* at ¶ 61,749.
[61] *Id.* at ¶ 61,748.

increase.[62] But the Commission exclusively relies on regulated affiliate contracts rather than requiring more evidence of need.

While the Commission does not quantify the weight it assigns such contracts, they eliminate public interest balancing. Since 1999, the Commission has **never** rejected an application supported by contracts.[63] "Benefit" is a binary finding (i.e., is there a contract or not), and contracts outweigh all adverse impacts, regardless of character or magnitude. For *Spire*, a single regulated affiliate contract outweighed a project impacting over 1,000 acres, causing significant damage, massive land condemnation, significant evidence of overbuilding, unprecedented opposition from a competitor pipeline, and a market with existing excess capacity (including lower cost legacy capacity Spire Missouri turned back in favor of its

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[62] *Id.*

[63] FERC reports that there have been 493 pipeline approvals since 1999 (based on raw listings of pipeline approvals). Approved Major Pipeline Projects (2015-Present), https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-2015-present (last visited June 27, 2020). Two applications were rejected since the Certificate Policy's adoption (Jordan Cove and Turtle Bay). *See* Tierney Testimony, at 2, n. 6 (updated with additional pipeline approvals as of May 12, 2020). Neither was supported by any precedent agreements. *See Jordan Cove Energy Project, L.P.,* Order Denying Applications for Certificate and Section 3 Authorization, 154 FERC ¶ 61,190, at P 13-18 (Mar. 11, 2016) (describing the lack of signed precedent agreements to support the proposed project); *Turtle Bayou Gas Storage Company, LLC*, Order Denying Application for Certificate Authorizations, 135 FERC ¶ 61,233, 62,297 (June 16, 2011) (same). Since Dr. Tierney testified on the Commission's pipeline project review record, it has approved six additional pipeline projects. Approved Major Pipeline Projects (2015-Present), FERC (June 17, 2020), https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-2015-present.

affiliate).[64] The Commission assigns precedent agreements unquantified public benefit outweighing these significant and quantifiable impacts. The Certificate Policy, the Gas Act, and the Constitution all demand that the Commission give actual weight to the disparate burden of infrastructure development placed on landowners and communities. The Commission recognizes the significant public harm from condemnation, finding that "the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits."[65] But it accepts a single Regulated Affiliate contract as enough evidence of need to outweigh harm from massive exercises of eminent domain. This strains credulity.

IV. The Commission's Treatment of Other Adverse Impacts Is Not the Product of Reasoned Decision Making, and Fails to Protect the Public Interest.

Pipelines supported by Regulated Affiliates -- when there is no capacity construction or forecasted load growth -- create government-sanctioned profit

[64] Request for Rehearing of the Environmental Defense Fund, the Commission Docket Nos. CP17-40-000 and CP17-40-001, at 4.
[65] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 90 FERC ¶ 61128, 61398 (Feb. 9, 2000).

generation for projects providing no public benefit, but significant public costs.[66] Beyond ignoring substantial market, industry, ratepayer, consumer and landowner harms from regulated affiliate-supported projects, the Commission also subverts the Gas Act's public interest standard by discounting adverse environmental and health impacts. This exponentially compounds the harms from Regulated Affiliate-supported projects. It also infects the Commission's Gas Act implementation for all projects, because it fails to put environmental and health impacts on the public interest scale. For example, when certifying LNG facilities, after reciting significant environmental impacts to environmental justice communities, "the Commission basically shrugs its shoulders, concludes that the impacts on environmental justice communities are inevitable, and moves on."[67] Naming is not weighing, and the Gas Act requires more than disclosure. Worse, the Commission has determined that Regulated Affiliate projects serve the public interest when

[66] *See PennEast Pipeline Co., LLC*, Order on Rehearing, 164 FERC ¶ 61,098, at 13 (Aug. 10, 2018) (Glick, Comm'r, dissenting) (the Commission did not account for environmental impacts when approving the affiliate-supported project and "cannot legitimately suggest it is fulfilling its obligations under the NGA to 'evaluate all factors bearing on the public interest' while simultaneously relying solely on economic factors in its determination.").

[67] *Texas LNG Brownsville LLC*, 170 FERC ¶ 61,139 (Feb. 21, 2020), at P. 15 (Glick, Comm'r, dissenting). That same decision similarly disposed of "significant adverse impact on endangered species" concerns by "simply recit[ing] the potential harm and then proceed[ing], post haste, to make a public interest determination without further discussion." *Id.*, at 16.

significant environmental harms have yet to be identified, much less weighed, completely negating any pretense of balancing them against benefit.[68]

V. The Commission, Not State Regulators, Is the Entity Best Positioned to Prevent These Abuses.

Even though Congress established that the Commission should be responsible for determining whether new gas pipelines are needed, the Commission believes that these problems should be addressed, if they must be addressed at all, by state regulators. This belief stems from a fundamental misunderstanding of state regulators' role in regulating LDCs (local distribution companies). The Commission's rationale for declining to require data in addition to Regulated Affiliate contracts partially relies on the idea that state regulators will conduct a pipeline prudency and/or cost recovery review.[69] This is wrong. State prudency reviews -- in which a PUC reviews whether it was prudent for an LDC to take service from a new or existing pipeline -- do not necessarily occur prior to the construction of a pipeline and, once that pipeline is built, take Commission-approved rates as a given and cannot undo a Commission approval for such construction.[70] In fact, the Missouri Commission specifically requested the

[68] *See PennEast Pipeline Co., LLC, supra* note 66.
[69] *Spire STL Pipeline*, 169 FERC ¶ 61,134, at P 19, Order on Rehearing (Nov. 21, 2019) (Glick, Comm'r, dissenting).
[70] *Id. See e.g.*, Missouri State Regulations 4 CSR 240-20.045(2)(C).

Commission conduct a need determination review, belying the Commission's assertion that doing so would step on state regulators' toes.[71] The Missouri Commission itself lacks authority to pre-approve contracts.[72] This limitation is not unique to Missouri; most PUCs lack such authority.[73] Nor could any of the few states authorized to do so satisfy the *Commission's* Gas Act mandate. Instead, most PUCs may only review pipeline activity through safety monitoring and rate cases,

[71] Missouri PSC February 27, 2017 Protest, at 4-5 ("request[ing] the Commission thoroughly examine all of the circumstances and impacts of the proposed pipeline as the Commission determines whether Spire has shown that construction of the pipeline is in the public interest" and stating that "it is not clear that there is need for the project").

[72] "Missouri utilities are subject to an Affiliate Transactions Rule, but this rule is applied only on a retroactive basis and as such is insufficient to protect the interests of utility gas customers. The state's prudency review, which will take place in a future . . . process, is similarly after-the-fact, whereby the [Missouri Commission] will be limited to reviewing whether Laclede was prudent in contracting with Spire when compared to other alternatives." Motion to Lodge of the Environmental Defense Fund, before the Federal Energy Regulatory Commission, Spire STL Pipeline, LLC, Nos. CP17-40-000 and CP17-40-001, January 9, 2018, at 7-8 (internal citations omitted).

[73] For those few with authority, review is permissive, at LDC request. *See, e.g.*, Order No. PSC-13-0505-PAA-EI (October 28, 2013), http://www.floridapsc.com/library/filings/2013/06488-2013/06488-2013.pdf ("FPL is not obligated by law to obtain our approval to enter into a long-term gas transportation contracts for the projects, as both contracts are governed by [FERC]). Some states may require Regulated Affiliates to file contracts for approval, but the PUC's review does not comprise a need analysis. *See, e.g.*, *In the Matter of Application of Piedmont Nat. Gas Co., Inc., for Authorization to Enter into Affiliate Agreements & Related Redelivery Agreement Amendments*, No. G-9, 2014 WL 5500869, at *6 (N.C.U.C. Oct. 28, 2014) (unpublished).

but these all occur after land has been condemned and the pipeline built, and cannot substitute for a prior-approval determination.

Moreover, during post hoc cost recovery proceedings, state regulators' hands are tied by two factors. First, states cannot undo a Commission-approved rate when the states incorporate the costs, like gas transportation service, as part of retail rates.[74] Second, any attempt to deny cost recovery results in lowering the LDCs' credit rating,[75] which raises their costs of equity capital or debt for all capital investments and will result in higher charges to consumers to cover this cost. Thus, the Commission's attempt to duck a fulsome Gas Act review -- which it portrays as necessary to avoid trammeling PUCs' jurisdiction -- is backwards.[76] In fact, PUCs' reliance on the Commission to conduct its statutorily mandated need determination is another compelling reason for the Court to ensure that the Commission begins doing just that. *Spire* lays bare this truth; the state regulators apprised the Commission of their limited regulatory reach, and the Commission again abdicated its Gas Act mandate to protect the public interest.

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[74] This is the "Narragansett Doctrine." *See* Ercolano & Lesch, *supra* note 33.
[75] Regulated Electric and Gas Utilities 6, 15, Moody's Investor Service, https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Rate%20Cases/Attachment-MPS-4.pdf (describing that ability to recover costs through regulatory processes is a key metric in credit ratings for regulated utilities).
[76] *Spire STL Pipeline*, 169 FERC ¶ 61,134, at P 16, Order on Rehearing (Nov. 21, 2019).

The Commission is also better resourced and positioned than most PUCs to conduct comprehensive public need analyses for new gas pipelines. As in Missouri, many PUCs lack capacity to engage in a fulsome need review. The Commission, however, unquestionably is capable of doing the requisite comprehensive public benefit analysis;[77] it has a history of exercising vigilance in addressing the risk that affiliates will exercise horizontal[78] or vertical[79] market power. The Commission staff conducts detailed market assessments,[80] state-of-the-market reports,[81] and, as part of the agency's enforcement responsibilities, complex analyses of market manipulation.[82] It also conducts technical analyses to monitor physical and cybersecurity risks to energy infrastructure.[83] If the Commission

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[77] Comments of Susan F. Tierney, Ph.D. (July 25, 2018), *Certification of New Natural Gas Facilities,* No. PL18-1-000, at 34.
[78] Horizontal Market Power, FERC (June 15, 2020), https://www.ferc.gov/horizontal-market-power.
[79] Vertical Market Power, FERC (June 15, 2020), https://www.ferc.gov/vertical-market-power.
[80] Office of Electric Reliability, FERC, Summer Energy Market and Reliability Report 2020 (May 21, 2020), https://www.ferc.gov/sites/default/files/2020-06/2020-summer-assessment.pdf; FERC, Energy Primer: A Handbook for Energy Basics (Apr. 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf; Office of Enforcement, FERC, OE Energy Market Snapshot (Apr. 2019), https://www.ferc.gov/sites/default/files/2020-05/May2019NationalVersion.pdf.
[81] Office of Energy Policy and Innovation, FERC, State of the Markets (2019), https://www.ferc.gov/sites/default/files/2020-05/2019-som.pdf.
[82] *See, e.g.*, Office of Enforcement, FERC, 2019 Report on Enforcement (2019), https://www.ferc.gov/sites/default/files/2020-05/11-21-19-enforcement.pdf.
[83] *See e.g.*, Office of Energy Infrastructure Security, FERC (June 20, 2020), https://ferc.gov/about/offices/office-energy-infrastructure-security-oeis; Office of

presently lacks capability to conduct fulsome analyses of whether proposed pipeline projects are needed, it is by choice. Regardless, the Gas Act requires the Commission to do this review; it cannot fulfil its own statutory duties by passively delegating them to state regulators or to the sole metric of the existence of contracts.

Electric Reliability (OER), FERC (June 25, 2020), https://ferc.gov/about/offices/office-electric-reliability-oer.

VI. Conclusion

For all the foregoing reasons, the Court should vacate FERC's *Spire* orders.

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CERTIFICATE OF COMPLIANCE

Per Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 29(a)(5), I certify that this brief complies with the type-volume limitations because its textual portions, including headings, footnotes, and quotations contain 6,497 words, as counted by the "Word Count" feature of Microsoft Word for Mac license 2019, version 16.36, the program with which this brief was prepared, and because it has been prepared in Microsoft Word, using 14-point Times New Roman font, a proportionally spaced typeface. This word count excludes: (1) the cover page; (2) the table of contents; (3) the Rule 26.1 corporate disclosure statement; (4) certificates; (5) the glossary of abbreviated terms and terms of art; and (6) the signature block.

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STATUTORY ADDENDUM

15 USCS § 717a-b

Current through Public Law 116-145, approved June 17, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS § § 717 et seq. applicable. The provisions of this Act [15 USCS §§ 717 et seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures, I hereby certify that I have this 2nd day of July, 2020, served the foregoing Amicus Brief of Dr. Tierney, by first class mail, postage prepaid or electronic mail through the Court's CM/ECF system upon the parties to the proceeding below as listed in the Service Preference Report.

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