ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20-1016 and 20-1017 (consolidated)

ENVIRONMENTAL DEFENSE FUND, *ET AL.*,

***Petitioners*,**

v.

FEDERAL ENERGY REGULATORY COMMISSION,

***Respondent*.**

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

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE FEDERAL ENERGY REGULATORY COMMISSION AND AFFIRMANCE

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September 16, 2020

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Interstate Natural Gas Association of America ("INGAA") respectfully submits this Disclosure Statement.

INGAA is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*.

All parties, intervenors, and *amici* appearing before this Court are as stated in the Petitioners' Joint Opening Brief and the Brief of Respondent Federal Energy Regulatory Commission ("FERC"), with the exception of the Interstate Natural Gas Association of America which is seeking leave to participate as *amicus curiae*.

B. Rulings Under Review.

The following final agency actions by Respondent are under review:

1. *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (R.164, J.A. ___-___), and
2. *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (R.424, J.A. ___-___).

C. Related Cases.

All related cases are as stated in the Brief of Respondent FERC.

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Certificate Order	*Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) ("Certificate Order") (R.164, J.A. ___-___), *order on reh'g*, 169 FERC ¶ 61,134 (2019) ("Rehearing Order") (R.424, J.A. ___-___).
Certificate Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 ("Certificate Policy Statement"), *modified by*, 89 FERC ¶ 61,040 (1999), *order on clarification*, 90 FERC ¶ 61,128, *further order on clarification*, 92 FERC ¶ 61,094 (2000).
EDF Br.	Initial Opening Brief of Petitioner Environmental Defense Fund, Nos. 20-1016 and 20-1017 (consolidated) (June 26, 2020).
FERC or Commission	Respondent Federal Energy Regulatory Commission
Environmental Fund	Petitioner Environmental Defense Fund
INGAA	Interstate Natural Gas Association of America
J.A.	Citations to the Joint Appendix
P	Paragraph numbers in Federal Energy Regulatory Commission orders
Project	Spire STL Pipeline ILC's 65-mile-long pipeline in Illinois and Missouri
R	Citation to the Index of the Record (March 12, 2020)
Rehearing Order	*Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) ("Certificate Order") (R.164, J.A. ___-___), *order on reh'g*, 169 FERC ¶ 61,134 (2019) ("Rehearing Order") (R.424, J.A. ___-___).
Spire STL	Intervenor Spire STL Pipeline, LLC

Spire Missouri	Intervenor Spire Missouri Inc.
Tierney Br.	Brief of Dr. Susan Tierney as *Amicus Curiae* in Support of Petitioners the Environmental Defense Fund in Support of Reversal of the Challenged Orders, Nos. 20-2016 and 20-2017 (consolidated) (July 2, 2020).

INTEREST OF THE *AMICUS CURIAE*

Amicus Interstate Natural Gas Association of America ("INGAA") represents the majority of interstate natural gas transmission pipeline companies in the United States. Its 26 members operate approximately 200,000 miles of interstate natural gas pipelines, serving as an indispensable link between natural gas producers and consumers. INGAA and its members have a substantial interest in pipeline development, continued investment in energy infrastructure, maintenance of an efficient and timely process for approval and construction of new interstate natural gas pipeline infrastructure, and ensuring predictable, consistent, and rational law and policy affecting natural gas transportation. To advance those interests, INGAA regularly files briefs in cases concerning the industry.

As the leading trade organization for the interstate natural gas pipeline industry, INGAA has a significant interest in, and can offer a unique perspective on, the issues presented in this case. This perspective is not provided by any other party or *amici*. *See* Fed. R. App. P. 29(a)(3).

INGAA affirms that no counsel for a party authored this brief in whole or in part and that no person other than INGAA or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 29(b), Counsel for Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") consented to the filing of INGAA's participation as *amicus curiae*, as have intervenors Spire Missouri Inc. ("Spire Missouri") and Spire STL Pipeline, LLC ("Spire STL"). Counsel for Petitioners Environmental Defense Fund ("Environmental Fund") (No. 20-1016) and Juli Steck (No. 20-1017) also consented to INGAA's participation as amicus curiae.

SUMMARY OF ARGUMENT

The Commission's longstanding practice is to determine whether there is need for new pipeline projects on the basis of "precedent agreements," which are long-term contracts in which gas shippers agree to buy the proposed pipeline's transportation services. *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020). As opposed to market demand forecasts, which are projections of future events, precedent agreements are an objective and reliable indicator of demand for a new pipeline project because they represent market participants' commitments of millions of dollars to a new pipeline's services. Precedent agreements and the investment they represent are no less objective when the pipeline's shipper is affiliated with the pipeline company, as is the case with Spire STL and its shipper, Spire Missouri. In several cases, this Court has approved of the Commission's practice of relying on a pipeline's contract with its affiliate to demonstrate need for a project.

Environmental Fund argues that this case is different, asserting that as a result of Spire STL's corporate affiliation with its Project shipper, the Commission should rely more heavily on market studies to determine whether the Project is needed. But Environmental Fund fails to raise any significant distinctions between this Project and the several others the Commission has authorized—with this Court's approval—in large part by relying on precedent agreements between pipelines and affiliated shippers. This case is simply another example of the Commission reasonably applying its longstanding policies to approve a pipeline project that is almost fully subscribed. The Court should affirm the Commission's order.

ARGUMENT

I. Precedent Agreements Are the Best Evidence of Need for a Pipeline Project.

The Commission appropriately determined that Spire Missouri's 20-year commitment to subscribe to 87.5 percent of the Project's capacity demonstrated need for the Project.[1] Environmental Fund argues that the Commission over-relied upon this agreement in assessing the Project's need, asserting that Spire STL's affiliation with its shipper and regional demand considerations distinguish this case from numerous others in which the Commission has relied on precedent agreements to support its findings of project need. EDF Br. 20-30. Environmental Fund argues

[1] *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, at P 73 (2018) ("Certificate Order") (R.164, J.A. ___), *order on reh'g*, 169 FERC ¶ 61,134 (2019) ("Rehearing Order") (R.424) (J.A. ___-___).

that the Commission should have placed greater weight upon the other indicators of Project need. *Id.* at 30-32.

The Commission has consistently looked to contracts as evidence of project need since shortly after passage of the Natural Gas Act in 1938. *See In re Kan. Pipe Line & Gas Co.*, 2 FPC 29, 40-41 (1939). The Court has repeatedly upheld this longstanding policy. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019); *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602-03 (D.C. Cir. 2019); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014). As the interstate natural gas pipeline industry evolved to become more competitive, so too did the Commission's regulations and policies; however, precedent agreements and contacts for service on pipelines continued to play a prominent role in the industry and in the Commission's test for need. *See* Robert Christin, *et al.*, *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 Energy L.J. 115, 121-25 (2017).

In its 1999 Certificate Policy Statement, the Commission expanded upon its traditional requirement that a project sponsor "present contracts to demonstrate need," and permitted sponsors to introduce additional means, such as market studies, to support the need for a project. *Certification of New Interstate Natural Gas*

Pipeline Facilities, 88 FERC ¶ 61,227, at p. 61,748 (1999) ("Certificate Policy Statement"), *modified by*, 89 FERC ¶ 61,040 (1999), *order on clarification*, 90 FERC ¶ 61,128, *further order on clarification*, 92 FERC ¶ 61,094 (2000). Still, when shippers have committed to pay for most of a project's capacity, the Commission is not required to look to other factors to find need for the project. 88 FERC ¶ 61,227 at p. 61,748. This Court has found that there is "nothing in the [Certificate Policy Statement] or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Myersville*, 783 F.3d at 1311 (citation omitted).

There is good reason for this policy. The Natural Gas Act is an economic regulation statute. *See Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,246, at PP 18-25 (2020) (Comm'r McNamee, concurring) (discussing the Natural Gas Act's purpose and legislative history). The Commission, therefore, relies on market forces to determine whether new natural gas transportation infrastructure is required. Because pipeline companies and their customers only enter into binding precedent agreements after thoroughly assessing market and economic fundamentals, an executed agreement between industry participants provides a strong objective indication of project need. *See, e.g.*, *Twp. of Bordentown , N.J. v. FERC*, 903 F.3d 234, 262-63 (3d Cir. 2018) (internal citation omitted) ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity."). The Commission has found that while projections of demand, assessments of potential cost savings to consumers, or other factors can provide additional support that a project is needed, contracts are the most reliable indicator. *See, e.g.*, *Tenn. Gas Pipeline Co.*, 170 FERC ¶ 61,142, at P 10 (2020). Indeed, the Commission has refused to issue a certificate when a project sponsor submitted a market study to support a project that did not have any contracts. In *Turtle Bayou Gas Storage Co.*, 135 FERC ¶ 61,233 (2011), *reh'g denied*, 139 FERC ¶ 61,033 (2012), the project sponsor attempted to demonstrate need for a natural gas storage facility by providing the Commission with regional and national assessments of gas storage inventory, but failed to show that customers had contracted for capacity on the project, and the Commission refused to approve the project. 135 FERC ¶ 61,233 at PP 8, 33-34. *See also Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at P 39, *reh'g denied*, 157 FERC ¶ 61,194 (2016) (denying authorization for pipeline project due to lack of precedent agreements).

Market studies may be submitted by proponents or opponents of a project, but in neither case do they override the objective and highly probative evidence of market need that contractual commitments provide. In *Sierra Club v. FERC*, this court rejected an argument that a pipeline was unnecessary because it "largely parallels existing pipelines." 867 F.3d 1357, 1379 (D.C. Cir. 2017) (citation omitted). Instead, the Court accepted the Commission's finding that the applicant had demonstrated a market need because over 93 percent of the project capacity had been subscribed. *Id*. The Court stated that the Commission was justified in finding a demand for the project solely on the basis of precedent agreements, without "looking beyond the market need reflected by the applicant's existing contracts with shippers." *Minisink Residents*, 762 F.3d at 111 n.10.

As discussed in Section III below, in this case the Commission considered all factors relevant to the need for the Project, including access to additional gas supplies, reliability, and the planned retirement of Spire Missouri's propane facilities. However, the Commission appropriately emphasized the Project's 87.5 percent subscription level. The Commission explained that "[g]iven [the] uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand." Rehearing Order at P 23 (J.A. ___). In relying on Spire STL's precedent agreement as evidence of demand, the Commission simply applied its longstanding policy, which has been affirmed by this Court. The Court should affirm the Commission's application of that policy.

II. Agreements With Affiliates Are Equally Strong Indicators of Project Need As Agreements With Non-Affiliates.

The Commission appropriately gave Spire STL's precedent agreement with its affiliate, Spire Missouri, the same weight it would have given to a similar precedent agreement with a non-affiliated shipper. The Commission explained that its policy is to not "look behind the precedent agreements to evaluate project need," because affiliated and non-affiliated shippers have the same obligation to pay for the project's capacity. Certificate Order at P 75 (J.A. ___); *see* Rehearing Order at PP 14-16 (J.A. ___-___). The Commission cited to a similar case in which this Court reasoned that "[t]he fact that [the pipeline's] precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; . . . an affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened *just because* it is affiliated with the project sponsor." Rehearing Order at P 14 n.32 (J.A. ___) (cited by *Appalachian Voices*, 2019 WL 847199 at *1). The Commission has consistently applied the same policy in prior orders. *See, e.g.*, *Greenbrier Pipeline Co.*, 103 FERC ¶ 61,024, at P 17 ("[t]he fact that the [customers] are affiliated with the project sponsor does not lessen the [customers'] need for the new capacity or their obligation to pay for it under the terms of their contracts"), *reh'g denied*, 104 FERC ¶ 61,145, *reh'g denied*, 105 FERC ¶ 61,188 (2003); *E. Shore Nat. Gas Co.*, 132 FERC ¶ 61,204, at P 31 (2010) ("the Commission gives equal weight to contracts with affiliates and non-affiliates and does not look behind contracts to determine whether the customer commitments represent genuine growth in market demand."). *See also* Certificate Order at P 42 n.65 (J.A. ___) (citing additional cases).

Environmental Fund asserts that this case is different, but raises no meaningful distinctions. Environmental Fund points out various contextual differences between past cases and this one, noting, for instance, that in *Appalachian Voices* the project sponsor had provided a market study while Spire STL did not, and that there was greater regional demand in *City of Oberlin* than there is in Spire STL's case. EDF Br. 23-26. These differences are immaterial. As the Commission explained in the Certificate Order, its policy statements and precedents serve as "guideposts" as it confronts new projects. Certificate Order at P 113 (J.A. ___). Applying these guideposts to Spire STL, the Commission reasonably determined that Spire Missouri's long-term contractual commitment to the Project demonstrated Spire Missouri's need for capacity on the Project.

There is no incentive to build pipeline capacity for an affiliate that does not need it, as to do so would create an unacceptable business risk. Environmental Fund asserts incorrectly that the affiliate relationship between Spire STL and Spire Missouri changes the financial incentives underpinning the Project, EDF Br. 20-23, and shifts Spire STL's risk to Spire Missouri's captive ratepayers. *Id.* at 27-28. For one, Spire STL must carry the risk of paying the costs of *unsubscribed* Project capacity regardless of whether its shipper was affiliated. *See* Certificate Policy Statement, 88 FERC at p. 61,746. This creates a "strong deterrent to constructing pipelines not supported by market demand." *See* Rehearing Order at P 21 (J.A. ___). No parent company would allow a subsidiary to construct pipeline capacity that it did not believe it would be able to sell.

With respect to the cost of the Project's *subscribed* capacity, it is up to the Missouri Public Service Commission to address the prudence of Spire Missouri's contract with Spire STL and its decision to phase out its existing propane peak shaving facility. *See* Rehearing Order at PP 25-28 (J.A. ___-___). Spire Missouri has every incentive to avoid entering into an imprudent contract for pipeline capacity, and risking its state regulator disallowing its recovery of the costs of the contract. Environmental Fund's emphasis on the corporate affiliation between the parties to a precedent agreement is overly simplistic given that one of the parties' decisions is subject to regulatory review by the state.

Moreover, Environmental Fund ignores the Commission's "cornerstone" policy that requires pipelines to offer open access service to all shippers on a non-discriminatory basis. *See Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 1982-1985 FERC Stats. & Regs., Regs. Preambles ¶ 30,665, at p. 31,494 (1985). Discrimination or "exclud[ing] certain consumers from transportation services is inconsistent with the fundamental goals of consumer protection and competition in the Natural Gas Act." *Id*. Environmental Fund's suggestion that the Commission should apply "heightened scrutiny" to this Project merely because of the affiliate relationship would contradict this non-discrimination requirement.

Environmental Fund also asserts incorrectly that the Commission failed to apply sufficient scrutiny to the relationship between Spire STL and Spire Missouri to guard against affiliate abuse. EDF Br. 1-4, 13, 18-30. But the record shows that the Commission carefully considered this issue and found no evidence of self-dealing or impropriety in the record. Rehearing Order at P 15 (J.A. ___-___). The Commission explained that it does not "second guess the business decisions of pipeline shippers, [local utilities], or end users (unless there is evidence of affiliate abuse)." Certificate Order at P 83 (J.A. ___). Given the absence of any such evidence, the Commission found that the precedent agreement demonstrated a need for the Project.

Amicus American Antitrust Institute takes the seemingly odd position of opposing a new entrant to the market. American Antitrust Institute's singular focus on antitrust principles is misplaced. Here, the Commission found that Spire STL, the entity regulated by the Commission, would provide Spire Missouri with additional access to supply and enhanced reliability, and found no evidence of anticompetitive behavior. Certificate Order at PP 79-87 (J.A. ___-___). Spire Missouri's decisions are subject to review by the Missouri Public Service Commission. That is the agency that can and should review Spire Missouri's decisions. *Id*. at P 86 (J.A. ___).

Developing new energy infrastructure is an increasingly costly proposition with attendant business risks. The value of the precedent agreement between Spire STL and Spire Missouri should not be discredited simply because the companies involved are affiliates.

III. The Commission Properly Considered Additional Evidence of Market Demand.

Environmental Fund argues that the Commission erred by relying "exclusively" on the precedent agreement to demonstrate need for the Project, and ignored "overwhelming" evidence of a lack of need. *See* EDF Br. 5, 10, 20, 24, 30-32. In fact, the Commission considered record evidence beyond the precedent agreement, and reasonably concluded that there was need for the Project.

The Commission considered several additional factors supporting Project need. The Commission explained that Spire Missouri would require additional transportation capacity due to the planned retirement of its propane facilities, and that this capacity was not available on existing pipelines. Rehearing Order at P 24

(J.A. ___-___).[2] The Commission also recognized that the Project would enhance the reliability of Spire Missouri's distribution system by providing it with access to additional gas supplies in closer proximity that, unlike the existing transportation provider, was not located near an earthquake zone. *Id*. The Project provides direct access to the Rockies Express Pipeline, which in turn provides access to gas supplies from both the Rocky Mountains and the Appalachian Basin. Certificate Order at P 84 (J.A. ___-___). The Commission's consideration of these additional factors supporting the Project is consistent with the Certificate Policy Statement, which provides for the Commission's consideration of, among other things, access to new supplies and enhanced reliability as indicators of a project's benefits. *See* Certificate Policy Statement, 88 FERC at p. 61,748.

Based on these factors, along with the precedent agreement, the Commission found no need to "second guess the business decision" of the shipper. Rehearing Order at P 12 (J.A. ___-___). Contrary to Environmental Fund's position that the Commission relied "exclusively" on the precedent agreement, the Commission provided reasonable support for its finding of Project need.

[2] Environmental Fund makes light of the limited use of Spire Missouri's existing propane peaking facilities, suggesting that more facilities are unnecessary. EDF Br. 22 n.2. Peaking facilities are designed to be used for limited times when demand is high, such as during unusual weather events. Local distribution companies typically are obligated to have facilities and natural gas supplies sufficiently available to serve core customers on peak days when customers need service the most.

Amicus Dr. Susan Tierney blames the Commission's "dereliction of its Gas Act duties" for what she refers to as a nationwide overbuild of natural gas pipeline infrastructure. Tierney Br. 10. Although not the issue in this case, this is incorrect, as the Commission fulfilled its responsibilities under Section 7 of the Natural Gas Act by authorizing the Project. The Supreme Court has explained that the purpose of the Natural Gas Act was "to *encourage* the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (emphasis added). Following the proliferation of production of natural gas from shale formations that commenced in 2007, the price per thousand cubic feet of delivered gas to local utilities like Spire Missouri has decreased from an average in 2008 of $9.18 to just $3.18 in 2019.[3] U.S. natural gas prices are generally less than half of those anywhere in the world, allowing U.S. consumers to pay on average $100 billion per year less than their European counterparts. Jeff D. Makholm, *Certification of US Gas Pipelines: Assault on a "Modern Miracle"?* J. of Nat. Gas & Electricity, at 25 (Feb. 2018).

Abundant gas supplies are useless if they are unable to move to market to provide these consumer benefits. The development of a robust interstate pipeline grid that connects natural gas from new production areas to new markets is critical

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[3] U.S. Energy Information Administration, U.S. Natural Gas Citygate Price, https://www.eia.gov/dnav/ng/hist/n3050us3A.htm (last visited Sept. 16, 2020).

and has enabled U.S. consumers to reap these benefits. *See generally Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, at PP 19-22 (2018) (discussing the build-out of pipeline infrastructure that was needed to transport gas from new supply sources). Even today, however, pipelines are not able to capture all of the Nation's bourgeoning natural gas production. Dr. Tierney states that there is more overall pipeline capacity than daily gas delivered, but this does not mean new pipeline infrastructure is unnecessary, as Dr. Tierney seems to suggest. Tierney Br. 5-10. While the average price of natural gas has decreased in recent years, significant volatility remains, particularly on days when demand is the highest. *See* Stephanie Yang and Ryan Dezember, "The U.S. Is Overflowing With Natural Gas. Not Everyone Can Get It.," Wall Street J., July 18, 2019. New gas infrastructure remains necessary to serve demand. *Id.* ("Pipelines aren't in the right places, and when they are, they're usually decades old and often too small."). Spire STL's Project is simply one example of a pipeline designed to provide a local utility access to supplies in the Appalachian and Rocky Mountain production areas at competitive rates. Certificate Order at P 84 (J.A. ___-___). If, as Dr. Tierney tries to represent, the Nation was awash in excess pipeline capacity, one would expect to see a proliferation of applications to abandon uneconomic facilities. Dr. Tierney's brief points to no such development.

CONCLUSION

The Commission's orders are consistent with longstanding Natural Gas Act precedent as affirmed by this Court. Environmental Fund's petition for review should be denied.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,509 words.

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Dated: September 16, 2020

CERTIFICATE OF SERVICE

Pursuant to Rules 15(c)(2) and 25(d) of the Federal Rules of Appellate Procedure and Circuit Rule 15, I hereby certify that the foregoing document was electronically filed through this Court's CM/ECF system, which will send a notice of filing to the counsel registered to receive service through the Court's CM/ECF system via electronic filing.

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