

Nos. 20-1016, 20-1017

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

ENVIRONMENTAL DEFENSE FUND,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

PETITION FOR REHEARING OR REHEARING EN BANC

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GLOSSARY

APA	Administrative Procedure Act
Certificate Order	Federal Energy Regulatory Commission's August 3, 2018 Order Issuing Certificates, 164 FERC ¶ 61,085 (2018), JA932
Dth	Dekatherm
FERC	Federal Energy Regulatory Commission
Intervenors	Spire Missouri Inc. and Spire STL Pipeline LLC
MRT	Enable Mississippi River Transmission LLC
Petitioners	Petitioners Environmental Defense Fund and Juli Steck
Project	Spire STL Pipeline
Spire Missouri	Spire Missouri Inc.
Spire STL	Spire STL Pipeline LLC

RULE 35(B) STATEMENT AND INTRODUCTION

This Petition addresses the critically important question whether the Panel contravened Circuit precedent when, instead of remanding without vacatur under *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), it vacated a Federal Energy Regulatory Commission (“FERC”) certificate order outright. *See* Ex. 1. In so doing, the Panel mandated the shutdown of a vital natural gas pipeline and potentially left as many as 400,000 homes and businesses in the St. Louis area without gas service this winter. Because that ruling could have profoundly disruptive—and even deadly—consequences, and because FERC can correct any errors in its reasoning on remand, the appropriate remedy under *Allied-Signal* is remand *without* vacatur. The Panel should therefore grant rehearing and eliminate the vacatur portion of its remedy. Alternatively, the Court should grant rehearing en banc to maintain the uniformity of its decisions as to when vacatur of a readily correctable agency decision is inappropriate.

In 2018, FERC authorized Spire STL Pipeline LLC (“Spire STL”) to construct the Spire STL Pipeline (the “Project”), a 65-mile pipeline connecting the St. Louis area to new sources of natural gas. Spire Missouri Inc. (“Spire Missouri”)—the area’s gas utility—had determined that it needed to increase the reliability and diversity of its natural gas supply by accessing gas from the

Appalachian Basin and by decommissioning its obsolete propane-peaking facilities, which enabled Spire Missouri to satisfy periods of peak demand. After unsuccessful discussions between Spire Missouri and other pipeline developers, Spire STL was formed to construct and operate the Project. FERC concluded that the Project would meet existing needs and have a net public benefit. It thus issued a Certificate Order authorizing construction and operation of the Project and requiring that it be in service by August 3, 2020.

In reliance on that approval, Spire STL invested nearly \$300 million to construct the Project, which has been operating since 2019. Since then, the St. Louis natural gas market has undergone profound operational and contractual changes. If the Project is shut down, Spire Missouri may be unable to obtain the gas necessary to heat St. Louis-area homes and businesses during the upcoming winter. In particular, after the Project became operational, Spire Missouri relinquished other “firm” (contractually locked-in) pipeline capacity and decommissioned the propane-peaking facilities it previously relied on to meet demand during peak periods—as FERC was informed would occur. That capacity is now unavailable, as are other, alternative sources of natural gas the Project rendered unnecessary. Thus, a return to the pre-Project peak day capacity mix is impossible: if the Project is shut down, Spire Missouri will be unable to secure even half the capacity it would need to meet extreme cold-weather demand, and

gas service to hundreds of thousands of homes and businesses in the St. Louis area could be lost this winter for weeks.

Intervening events have only underscored the Project's need. Earlier this year, during Winter Storm Uri, the St. Louis area's reduced reliance on natural gas from Oklahoma, Texas, and Louisiana protected it from shortages, skyrocketing prices, and humanitarian emergencies that plagued other parts of the country. Only the Project shielded Spire Missouri's customers from service disruptions and hundreds of millions of dollars in increased costs, just as Spire STL had told FERC it would do if a disaster like that occurred.

In nevertheless vacating, the Panel departed from this Court's precedent holding that remand without vacatur is appropriate where "the disruptive consequences of vacating' are substantial," *Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010) (quoting *Allied-Signal*, 988 F.2d at 151), and it is "plausible" the agency "will be able to supply the explanations required" to rehabilitate its reasoning, *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019). Indeed, the Panel gave *no* weight to the potentially catastrophic consequences of vacatur because it was not sufficiently "certain" or "clear" to the Panel that FERC could remedy its reasoning on remand. Op. 36-37. And the Panel so held even though it found only a gap in FERC's reasoning, *not* that the record was insufficient to support FERC's conclusion. *Id.* at 35. That approach

not only nullifies an essential prong of *Allied-Signal*, but also requires a heightened showing that conflicts with this Court’s case law.

Accordingly, Spire STL and Spire Missouri (collectively, “intervenors”) respectfully submit that rehearing—or rehearing en banc—is warranted to amend the Panel’s remedy. Remanding without vacatur would align the Panel’s remedy with this Court’s precedent and afford FERC an opportunity to address the perceived shortcomings in its order before St. Louis natural gas customers are subjected to serious and potentially life-threatening consequences this winter.

**REASONS FOR GRANTING REHEARING OR REHEARING EN BANC
THE PANEL’S VACATUR DECISION CONFLICTS WITH THIS COURT’S
AND OTHER COURTS’ PRECEDENTS.**

“It is well settled that ‘[a]n inadequately supported’” agency action “‘need not necessarily be vacated.’” *Shands Jacksonville Med. Ctr., Inc. v. Azar*, 959 F.3d 1113, 1118 (D.C. Cir. 2020) (quoting *Allied-Signal*, 988 F.2d at 150). Where an agency “may be able to rehabilitate” its decision on remand and “the consequences of vacatur ‘may be quite disruptive,’” vacatur is improper. *Id.* (quoting *Allied-Signal*, 988 F.2d at 151). This Court has repeatedly granted rehearing to amend orders vacating agency decisions, particularly where recent developments demonstrated that the *Allied-Signal* factors favored remand without vacatur. *See, e.g., Nat’l Parks Conservation Ass’n v. Semonite*, 925 F.3d 500, 502 (D.C. Cir.

2019); *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

Rehearing is warranted here because vacating FERC's Certificate Order would conflict with this binding precedent. As the attached declaration demonstrates, if the Project is shut down, Spire Missouri cannot replace the lost gas supply, particularly during peak periods, leading to serious service disruptions for its customers. *See* Ex. 2. The massively disruptive consequences of vacatur—and the ability of FERC to correct any defects in its Certificate Order—require modifying the remedy. *See Wisconsin v. EPA*, 938 F.3d 303, 336-37 (D.C. Cir. 2019) (“As a general rule, we do not vacate regulations when doing so would risk significant harm to the public health”). If the Court does not amend its remedy, intervenors understand that this would be the first case in which this Court entered a vacatur that would require the shutdown of an operational pipeline.¹

Modifying the remedy is especially appropriate because the full scope of the consequences of shutting down the Project became clear only after the administrative record closed. Under those circumstances, the most prudent course is to allow FERC to decide in the first instance whether the Project's continued operation is warranted. *Cf. Nat'l Parks Conservation Ass'n*, 925 F.3d at 501-02

¹ In *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), the Court vacated a certificate order but ultimately stayed its mandate, preventing a shutdown.

(amending opinion on rehearing to eliminate vacatur of construction permit so district court could consider “recent factual developments regarding completion of construction and the disruption that vacating the permit could cause”).²

A. Vacatur Could Cause Significant Service Disruptions.

This Court generally remands *without* vacatur where vacatur could have substantial adverse consequences, such as shutting down an operational gas pipeline. *See City of Oberlin*, 937 F.3d at 611 (“vacatur of the Commission’s orders would be quite disruptive, as the ... pipeline is currently operational”); *see also Vecinos Para El Bienestar De La Comunidad Costera v. FERC*, ___ F.4th ___, 2021 WL 3354747, at *6 (D.C. Cir. Aug. 3, 2021) (vacatur would have “disrupt[ed] completion of [construction] projects”). That is true even when agency errors are egregious. *See Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (no vacatur although agency “clearly violate[d] the APA” because “there [wa]s no apparent way to restore the status quo ante”).

“Under [this Court’s] precedents, a quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction.” *Am. Great Lakes*

² Given the extreme exigencies, Spire STL also recently sought temporary operating authority from FERC under 15 U.S.C. § 717f(c)(1)(B), but that request is no substitute for a remand without vacatur. The outcome of that proceeding, and the timing of FERC’s decision, are far from certain, and temporary authority is not identical to a permanent certificate.

Ports Ass'n v. Schultz, 962 F.3d 510, 519 (D.C. Cir. 2020). Thus, where “vacatur would disrupt settled transactions,” *id.*, or would otherwise be “an invitation to chaos,” *Sugar Cane Growers*, 289 F.3d at 97, remand without vacatur is warranted.

In conflict with these precedents, vacating the Project’s certificate would be profoundly disruptive. Since the Project began operation in 2019, the St. Louis-area natural gas market has undergone a dramatic reconfiguration as Spire Missouri and other market participants have restructured their contractual arrangements in light of the new supply the Project provides. If the Project is shut down, its capacity and connectivity cannot be replaced before this winter, if at all. A shutdown thus has the potential to cause widespread—and possibly fatal—disruptions of service to Spire Missouri’s customers this winter.

1. The Project’s Capacity Cannot Be Replaced.

Spire Missouri subscribed to the Project for additional capacity and to increase supply reliability for its customers. JA295-300. Nearly half that capacity was intended to replace operationally problematic propane-peaking facilities. JA295-96. The remainder would provide an alternative to St. Louis’s then-existing gas source, natural gas produced in the Midcontinent and surrounding regions and delivered through MRT, an older pipeline.

Intervenors predicted to FERC that as Spire Missouri tapped into new natural gas supplies through the Project, MRT would likely remarket Spire

Missouri's capacity to other shippers. JA829; JA834; JA593-94; JA976. These predictions were realized. When the Project began operating, Spire Missouri turned back about 180,000 Dekatherm ("Dth")/day of firm MRT capacity and cancelled 170,000 Dth/day in upstream contracts that fed that capacity. *See* JA971-77; Ex. 2, ¶ 9. MRT, in turn, remarketed its firm Main Line capacity to other firm shippers. MRT's Main Line has virtually no firm capacity available for Spire Missouri to replace what it now receives through the Project, *see* JA593-94; JA976; Ex. 2, ¶ 38, and capacity available elsewhere also cannot replace what Spire Missouri previously received from MRT. Nor can Spire Missouri replace the additional 160,000 Dth/day needed for peak-day requirements, previously provided through the now-retired propane-peaking facilities. Ex. 2, ¶ 42.

The only significant available capacity to St. Louis is on MRT's East Line. But even if the supply available on that line were sufficient—and it is not, *id.* ¶ 40—that supply can now only be delivered through the Project to serve this area of Spire Missouri's system. As contemplated in the FERC proceeding, MRT abandoned and removed its Chain of Rocks interconnection, and now MRT's East Line physically connects to Spire Missouri through the Project at a new Chain of Rocks interconnection. *See* JA933-35 & n.9; Ex. 2, ¶ 39. Thus, even if the East Line could replace the Project's capacity, Spire Missouri would still need the access provided by the Project to serve this area of its system. Additionally,

upstream suppliers delivering through the East Line had difficulties maintaining sufficient pressure even before the Project. JA829; JA834. And, Spire Missouri no longer has firm contracts for transportation upstream of the East Line and will likely be unable to re-secure that firm capacity. Ex 2, ¶ 36. Shuttering the Project therefore will not restore the status quo ante, *Sugar Cane Growers*, 289 F.3d at 97, but instead would put Spire Missouri and its customers in a worse position than before.

The Project also produced other changes that were not fully appreciated until after it became operational. In particular, the Project's interconnection with a pipeline operated by an unaffiliated company has allowed Spire Missouri to supply high-pressure gas to suburban areas west of St. Louis experiencing increasing natural gas demand. Ex. 2, ¶ 12. Shutting down the Project would severely impair the reliability of natural gas service in those areas. To provide the pressure needed to supply those western areas without the Project, Spire Missouri would, at a minimum, need to make extraordinarily expensive improvements over many years. *Id.*

Spire Missouri also maintains storage capacity at its "Lange" facility that is a necessary resource to meet winter and peak demand. *Id.* ¶ 11. But operations at Lange were modified to utilize the Project's high-pressure line and cannot be efficiently replenished through lower-pressure systems, even if they were

available. *See* JA934-35 & n.9; Ex. 2, ¶ 11. Thus, without the Project, Lange may not be reliably replenished during the winter season to provide gas when needed, potentially eliminating an additional 357,000 Dth/day of winter supply. Ex. 2, ¶ 11.

Accordingly, if the Project is shut down, Spire Missouri projects that it could secure less than 1,000 Dth/day of firm replacement capacity this winter—nowhere near the 350,000 Dth/day the Project currently provides to meet extreme cold weather demand. *Id.* ¶ 38. This means that approximately 175,000-400,000 homes and businesses served by Spire Missouri (from approximately 27% to 62% of all eastern Missouri customers) could lose gas service this winter. *Id.* ¶¶ 16, 18-19. Spire Missouri estimates it needs about 1,300,000 Dth/day to meet peak gas demand during extreme cold weather. *Id.* ¶ 17. Without the Project, and if the Lange capacity is unavailable, Spire Missouri could meet less than half that demand. *Id.* Table 1. Even with Lange operating with adequate replenishment capability, Spire Missouri could not meet demand at average daily temperatures of 9° F, which St. Louis has experienced during four of the past five winters. *Id.* ¶ 20. If Lange storage is depleted, Spire Missouri could not even meet demand at temperatures as high as 38° F. *Id.* And there is no question that Spire Missouri could not meet demand at the -10.6° F “peak” demand temperature it presently uses for planning purposes. *Id.*

Despite best efforts, such weather would likely produce severe service losses, which could cause fatalities as customers—including elderly homeowners, nursing homes, and hospitals—lose heat. *Id.* ¶ 15. Moreover, disrupted gas service cannot simply be switched back on. *Id.* ¶¶ 23-25. Restoring service carries potentially fatal explosion risks and requires laborious site-by-site inspections and re-lighting procedures. *Id.* ¶¶ 23-24. Thus, homes and businesses could remain without heat, hot water, and cooking ability for a prolonged time as technicians work to restore service safely. *Id.* ¶ 25.

2. Spire Missouri's Propane-Peaking Facilities Have Been Decommissioned.

As mentioned, Spire Missouri's need for the Project stemmed in part from its business decision to decommission its propane-peaking facilities, which supplied 160,000 Dth/day for peak-day requirements. JA89; JA134; JA295-96. Spire Missouri had multiple reasons for decommissioning those obsolete facilities, including environmental and operational concerns. JA110; JA830-32. Before FERC, it was undisputed that no existing pipeline, including MRT's, could replace the propane facilities' capacity, thus requiring new infrastructure. JA769-72; JA1019.

Accordingly, following Project approval, Spire Missouri decommissioned its propane facilities and repurposed their primary vaporization systems. Ex. 2, ¶ 42. Those facilities can no longer supply peak capacity to Spire Missouri. Bringing

them back online would require rebuilding the primary vaporization systems, which cannot be done by this winter. *Id.*

3. As Last Winter Showed, The Project Protects Against Disruptions In Other Gas-Producing Regions.

Before FERC, intervenors identified problems with then-existing supply pipelines, which overwhelmingly came from the Midcontinent and surrounding areas. Those included reliability concerns from “regional events such as supply freeze offs ... or extreme cold ... weather [that could] create significant regional price spikes,” which the Project’s alternative supply would avoid. JA833.

Those exact events occurred last winter, confirming the wisdom of Spire Missouri’s decision to diversify its gas supplies. Freezing weather in Texas disrupted gas supplies and hugely increased their cost; in response, Texas banned the out-of-state shipment of gas that could be used for Texas power generation. *See* Cayla Harris, *Gov. Greg Abbott Mandates Natural Gas Producers Keep Supply in Texas Until Sunday*, *Houston Chronicle* (Feb. 17, 2021), <https://tinyurl.com/3brwnanr>. As a result, Kansas City, only 200 miles away from St. Louis but without access to the Project and the diversified gas sources it supplied, experienced skyrocketing prices. *See* Travis Meier et al., *Kansas, Missouri Officials Urge Energy Conservation Following Round of Rolling Blackouts*, *Fox 4 Kansas City* (Feb. 15, 2021), <https://tinyurl.com/8zxsnr76>.

St. Louis customers experienced no such scarcity, due to the Project's sourcing of natural gas from other regions. Spire Missouri estimates that, without the Project, up to 133,000 homes and businesses would have lost service in February 2021, or, alternatively, total gas costs for St. Louis-area customers would have increased by up to \$300 million (assuming Spire Missouri would even have been able to serve all of its customers). Ex. 2, ¶ 29.

Experience therefore shows that the Project served the exact need that Spire Missouri originally identified: it provided alternative gas supplies that enabled St. Louis to avoid disruptions from southern sources and largely justified its construction costs in February 2021 alone. JA91. But if the Project is shut down, St. Louis would be vulnerable again to those same disruptions.

B. FERC Could Plausibly Remedy The Identified Deficiencies.

The massively disruptive consequences of vacatur are reason enough for the Court to modify the remedy to remand without vacatur. *See Sugar Cane Growers*, 289 F.3d at 97. But that modification is especially appropriate here because it is at least plausible that FERC can remedy the deficiencies the Panel identified and reissue the certificate. Indeed, although it concluded that there were gaps in FERC's reasoning, the Panel expressly declined to conclude that the record evidence was insufficient to support FERC's ultimate decision. Op. 35.

Remand without vacatur is warranted when “an agency may be able readily to cure a defect in its explanation of a decision.” *Heartland Reg’l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). Under this Court’s cases, the likelihood that the agency will be able to fill the gaps in its reasoning on remand need not be high. It need only be “*plausible*” that the agency would “be able to supply the explanations required.” *City of Oberlin*, 937 F.3d at 611 (emphasis added); *see also, e.g., Sugar Cane Growers*, 289 F.3d at 98 (“at least possible”); *Allied-Signal*, 988 F.2d at 151 (“conceivable”).

The Panel’s opinion strays from these decisions. Because the deficiencies the Panel identified were mere gaps in reasoning—the kind of error the Court has held insufficient for vacatur in nearly identical circumstances—remand was the appropriate remedy. *Compare* Op. 35-36 (failure to make findings), *with City of Oberlin*, 937 F.3d at 611 (failure to explain).

In fact, the record already contains the evidence FERC would need to justify its decision, and nothing in the Panel opinion suggests otherwise. *See* Op. 35. Substantial record evidence supported the Project’s need, which was uncontested or only weakly contested. *See* Intervenors’ Br. 15-23. Given the copious evidence already in the record—and the recent winter events confirming that the Project is needed to ensure a reliable source of natural gas to St. Louis-area customers—it is

far more than “plausible” or “conceivable” that FERC would find a need for the Project after considering that evidence and more on remand.

The Panel nevertheless decided to vacate the Certificate Order because, according to the Panel, it was “not at all clear”—and “far from certain”—that FERC could rehabilitate its reasoning. Op. 36-37. And the Panel did so without meaningfully considering the disruptive consequences of shutting down an operational pipeline because, according to the Panel, it had “identified serious deficiencies in the Certificate Order.” *Id.* at 36. But even the existence of “fatal flaws” or “clear[] violat[i]ons of] the APA” cannot justify ignoring the disruptive consequences of vacatur, which is one of the two fundamental elements of the *Allied-Signal* standard. *North Carolina*, 550 F.3d at 1177; *Sugar Cane Growers*, 289 F.3d at 97. The Panel should have fully considered the disruptive effects of shutting down the Project, rather than discounting those consequences based on FERC’s failure to prove it was “certain” to correct its perceived errors on remand.

By not doing so, the Panel transformed the *Allied-Signal* test into one that effectively compels vacatur without meaningful consideration of vacatur’s disruptive effects even where an agency decision could be readily sustained on remand. Under the Panel’s new “clear” or “certain” test, even the presence of record evidence that could remedy perceived gaps in an agency’s reasoning will

not satisfy *Allied-Signal*'s first prong. *See* Op. 35. The test therefore plainly conflicts with the decisions of this Court and other circuits.³

The Panel also expressed concern that remanding without vacatur would incentivize FERC to allow “build[ing] first and conduct[ing] comprehensive reviews later.” Op. 37 (citation omitted). That reasoning—which is not part of the *Allied-Signal* analysis—would *always* justify vacatur of completed projects whenever the Court finds an agency's review was less than comprehensive, contrary to this Court's practice of carefully weighing vacatur's disruptive impact.

In addition, the Panel's concern is likely eliminated by recent developments. Last year, in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), the Court overruled prior cases and held that parties may now seek judicial review of a FERC order 30 days after a rehearing petition is filed, even if the petition remains pending before FERC. Although *Allegheny* was not decided in time to allow Petitioners here to quickly obtain judicial review, the combination of prompt judicial review under *Allegheny*, and a 2020 FERC order that no longer allows pipeline construction until the time for rehearing has passed or FERC has

³ *See, e.g., Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021) (vacatur inappropriate if “there is at least a serious possibility that the agency will be able to substantiate its decision”); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016) (vacatur typically inappropriate where it is “conceivable” that agency can create supportable rule); *NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (similar).

acted on that petition, 171 FERC ¶ 61,201 (June 9, 2020), will prevent FERC from intentionally deferring meaningful consideration of a project until after it is completed.

Furthermore, Spire STL's decision to move forward with the Project despite pending judicial review was prudent and amply justified. Waiting for the lengthy resolution of agency rehearing proceedings and judicial review was impractical under the certificate's terms because FERC's authorization to build was time-limited, giving Spire STL only two years to construct the Project and bring it into operation. JA1039-40.

In addition, there was an urgent need for the Project based on numerous risks plaguing the St. Louis natural gas market. JA277-78 (market changes); JA833 (weather-related supply freeze-offs); JA830-32 (obsolete propane system). These concerns did not disappear while agency and court proceedings continued. In fact, they began to materialize even before FERC issued the Certificate Order. JA829. And subsequent events last winter dramatically validated Spire STL's decision to begin immediate work in reliance on (and compliance with) FERC's orders. Without the Project, Spire Missouri's customers would have continued to face the serious risks that were the impetus for the Project and that would have materialized last winter in the form of significant service disruptions and astronomical gas costs.

CONCLUSION

The Court should grant rehearing, or rehearing en banc, to eliminate the vacatur aspect of the Panel's remedy.

Respectfully submitted,

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STATEMENT OF CONSENT

Pursuant to D.C. Circuit Rule 32(a)(2), I certify that Christopher J. Barr, counsel for Spire Missouri Inc., has consented to my filing this brief on behalf of his client.

/s/ Theodore B. Olson
Theodore B. Olson

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Counsel for Spire STL Pipeline LLC

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of D.C. Cir. R. 35(b)(2)(A) because this petition contains 3,894 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f). This petition complies with the typeface requirements of Fed. R. App. P. 32(f) and the type style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

/s/ Theodore B. Olson
Theodore B. Olson

August 5, 2021

Counsel for Spire STL Pipeline LLC

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on August 5, 2021. Service upon participants in the case who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

/s/ Theodore B. Olson
Theodore B. Olson

August 5, 2021

Counsel for Spire STL Pipeline LLC

Exhibit 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 8, 2021

Decided June 22, 2021

No. 20-1016

ENVIRONMENTAL DEFENSE FUND,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

SPIRE MISSOURI INC. AND SPIRE STL PIPELINE LLC,
INTERVENORS

Consolidated with 20-1017

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

Natalie M. Karas argued the cause for petitioner Environmental Defense Fund. With her on the briefs were *Erin Murphy*, *Jason T. Gray*, *Kathleen L. Mazure*, *Matthew L. Bly*, and *Sean H. Donahue*.

Henry B. Robertson argued the cause and filed the briefs for petitioner Juli Steck.

Jennifer Danis and *Edward Lloyd* were on the brief for *amicus curiae* Dr. Susan Tierney in support of petitioners.

Randy M. Stutz was on the brief for *amicus curiae* the American Antitrust Institute in support of petitioners.

Anand R. Viswanathan, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *David L. Morenoff*, Acting General Counsel, and *Robert H. Solomon*, Solicitor.

Jonathan S. Franklin argued the cause for intervenors Spire STL Pipeline LLC and Spire Missouri Inc. in support of respondent. With him on the brief were *Christopher J. Barr*, *Jessica R. Rogers*, *Matthew J. Aplington*, *Thomas E. Hirsch III*, *David T. Kearns*, *Daniel Archuleta*, and *Sean P. Jamieson*.

Paul Korman, *Michael R. Pincus*, and *Michael Diamond* were on the brief for *amicus curiae* Interstate Natural Gas Association of America in support of respondent.

Before: TATEL and MILLETT, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In the action leading to this petition for review, the Federal Energy Regulatory Commission (the “Commission” or “FERC”) issued a certificate of public convenience and necessity (“Certificate”) under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A), to Intervenor-Respondent Spire STL Pipeline LLC (“Spire STL”) to construct a new natural gas pipeline in the St. Louis area. The Commission may issue such a

Certificate only if it finds that construction of the new pipeline “is or will be required by the present or future public convenience and necessity.” *Id.* § 717f(e).

Pursuant to the Commission’s “Certificate Policy Statement,” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000), FERC first considers whether there is a market need for the proposed project. If there is a need for the pipeline, FERC then determines whether there will be adverse impacts on “existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.” *Id.* at 61,745. If adverse impacts on these stakeholders will result, the Commission “balanc[es] the evidence of public benefits to be achieved against the residual adverse effects.” *Id.* In analyzing the need for a particular project, the Certificate Policy Statement makes it clear that the Commission will “consider *all* relevant factors.” *See id.* at 61,747 (emphasis added).

The issue in this case arose in 2016, when Spire STL announced its intent to build a pipeline in the St. Louis metropolitan area. In August of that year, Spire STL held an “open season” during which it invited natural gas “shippers” to enter into preconstruction contracts, also known as “precedent agreements,” for the natural gas the pipeline would transport. But no shippers committed to the project during the open season. Instead, after the open season finished without any takers, Spire STL privately entered into a precedent agreement with one of its affiliates, Laclede Gas Company – now known as Intervenor-Respondent Spire Missouri Inc. (“Spire

Missouri”) – for just 87.5 percent of the pipeline’s projected capacity.

In January 2017, Spire STL applied to the Commission for a Certificate. It conceded that the proposed pipeline was not being built to serve new load, as natural gas demand in the St. Louis area is projected to stay relatively flat for the foreseeable future. Rather, Spire STL claimed that the pipeline would result in other benefits, such as enhancing reliability and supply security, providing access to new sources of natural gas supply, and eliminating reliance on propane “peak-shaving” during periods of high demand. As evidence of need, Spire STL principally relied on its precedent agreement with Spire Missouri. In September 2017, the Commission – pursuant to its obligations under the National Environmental Policy Act (“NEPA”) – released an Environmental Assessment (“EA”) for construction and operation of the proposed pipeline, finding that they would have no significant environmental impact.

Petitioner Environmental Defense Fund (“EDF”), along with several other parties, challenged Spire STL’s Certificate application. EDF contended, *inter alia*, that the precedent agreement between Spire STL and Spire Missouri should have only limited probative value in FERC’s assessment of Spire STL’s application because the two companies were corporate affiliates. In addition, Petitioner Juli Steck, then known as Juli Viel, contested the efficacy of the EA.

On August 3, 2018, in an Order Issuing Certificates (“Certificate Order”), FERC granted the authorizations for the new pipeline. *See* Joint Appendix (“J.A.”) 932. FERC’s decision acknowledged that the pipeline was not meant to serve new load demand. Nevertheless, FERC rejected arguments that a market study should be undertaken to establish the need for the project. Rather, the Commission’s decision principally

focused on the precedent agreement between Spire STL and Spire Missouri in finding that there was market need for the project. And the Commission stated that it would not “second guess” Spire Missouri’s purported “business decision” in entering into the precedent agreement with Spire STL, even though the shipper and the pipeline were affiliates. J.A. 968. In November 2019, by a 2-1 vote, FERC denied requests for rehearing filed by EDF and Steck. These two parties now seek review in this court.

EDF asserts that the Commission’s decision to award a Certificate to Spire STL was arbitrary and capricious because the Commission uncritically and exclusively relied on the affiliated precedent agreement to find need and because the Commission failed to sufficiently justify its conclusion that the new pipeline’s benefits would outweigh its adverse effects. Steck, in turn, renews many of her challenges to the Commission’s environmental analysis, including its EA.

For the reasons explained below, we find that Petitioner Steck lacks standing to pursue her claims. However, we find no jurisdictional infirmities in EDF’s petition for review. On the merits, we agree with EDF that the Commission’s refusal to seriously engage with nonfrivolous arguments challenging the probative weight of the affiliated precedent agreement under the circumstances of this case did not evince reasoned and principled decisionmaking. In addition, we find that the Commission ignored record evidence of self-dealing and failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement. Therefore, FERC’s Certificate Order and Order on Rehearing do not survive scrutiny under the applicable arbitrary and capricious standard of review. *See Minisink Residents for Env’t Pres. & Safety v. FERC* (“*Minisink*”), 762 F.3d 97, 105-06 (D.C. Cir. 2014). Because “vacatur is the normal remedy” in

circumstances such as we find in this case, we vacate FERC's Orders and remand the case to the Commission for appropriate action. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

I. BACKGROUND

A. Statutory and Regulatory Background

The Natural Gas Act provides the Commission with authority “to regulate the transportation and sale of natural gas in interstate commerce.” *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019). To safeguard the public, “Section 7 of the Act requires an entity seeking to construct or extend an interstate pipeline for the transportation of natural gas to obtain [a Certificate] from the Commission.” *Id.* (citing 15 U.S.C. § 717f(c)(1)(A)). The Commission may issue Certificates only if, among other things, it finds that the proposed construction or extension “is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.” 15 U.S.C. § 717f(e). In deciding whether to issue Certificates under this standard, the Commission must “evaluate *all* factors bearing on the public interest.” *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (emphasis added). And there is good reason for the thoroughness and caution mandated by this approach: A Certificate-holder may exercise eminent domain against any holdouts in acquiring property rights necessary to complete the pipeline. 15 U.S.C. § 717f(h).

In its Certificate Policy Statement, the Commission has set forth the “analytical steps” that guide its dispositions of Certificate applications. *See* 88 FERC at 61,745. The first question the Commission considers is “whether the project can proceed without subsidies from [the applicant's] existing customers.” *Id.* “To ensure that a project will not be subsidized

by existing customers, the applicant must show that there is market need for the project.” *Myersville Citizens for a Rural Cmty., Inc. v. FERC* (“*Myersville*”), 783 F.3d 1301, 1309 (D.C. Cir. 2015).

If there is market need, the Commission then determines whether there are likely to be adverse impacts on “existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.” 88 FERC at 61,745. If adverse impacts on these stakeholders will result, “the Commission balances the adverse effects with the public benefits of the project, as measured by an ‘economic test.’” *Myersville*, 783 F.3d at 1309 (quoting 88 FERC at 61,745). “Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners’ property.” *Id.* (citing 88 FERC at 61,747-48). Public benefits generally include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Id.* (quoting 88 FERC at 61,748).

As to market need and interest-balancing, the Certificate Policy Statement further provides:

Rather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving

the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects

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. Thus, *projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study. . . . Vague assertions of public benefits will not be sufficient.*

88 FERC at 61,747-48 (emphases added).

The Certificate Policy Statement also specifically addresses the significance of precedent agreements in demonstrating need:

Although the Commission traditionally has required an applicant to present [preconstruction] contracts to demonstrate need, that policy . . . no longer reflects the reality of the natural gas industry's structure, nor does it appear to minimize the adverse impacts on any of the relevant interests. Therefore, although contracts or precedent agreements always will be important evidence of demand for a project, *the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity.* Of course, if an applicant has entered into contracts or precedent agreements for the capacity, . . . they would constitute significant evidence of demand for the project.

Eliminating a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers, which was the subject of a number of comments. A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from the existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers.

Id. at 61,748-49 (emphases added).

B. The Instant Case

For the last two decades, natural gas consumption in the St. Louis area has been roughly flat. And when the Commission issued the Certificate Order in this case, all parties agreed that future demand projections were not expected to increase. *See* Certificate Order, J.A. 979 (noting that “[a]ll parties” agreed that natural gas demand forecasts “for the region are flat for the foreseeable future”); *see also, e.g.*, J.A. 583 (July 2017 report prepared by Concentric Energy Advisors on behalf of Spire Missouri and submitted to the Commission stating that Spire Missouri “does not expect any significant growth or decline in . . . forecasted demand over time”); Spire STL Pipeline LLC Docket Nos. CP17-40-000 and 001 Response to Data Request at 9, Accession No. 20180313-5193 (Mar. 13, 2018) (Spire STL submission to the Commission stating that its “gas supply annual demand requirement” was projected to “remain

relatively constant” at “average historical usage” levels for the next 20 years).

As of 2016, five natural gas pipelines served the St. Louis region. At that time, a majority of Spire Missouri’s natural gas supply was provided via pipelines owned and operated by Enable Mississippi River Transmission, LLC (“Enable MRT”). It is undisputed that, prior to Spire STL’s application in this case, Spire Missouri had declined to subscribe to proposals for new natural gas pipelines in the region, stating that the proposed new pipelines did not make operational and economic sense for its customers.

In 2016, Spire STL announced its intent to construct a new natural gas pipeline to serve homes and businesses in the St. Louis area. Following an amendment to its Certificate application, the final length of the proposed pipeline was approximately 65 miles. The initial estimated cost of the project was approximately \$220 million, with a proposed overall rate of return of 10.5 percent – a return on equity of 14 percent and a cost of debt of seven percent.

Between August 1, 2016 and August 19, 2016, Spire STL held an “open season,” during which it sought to enter into precedent agreements with natural gas shippers. After an unsuccessful open season, Spire STL then entered into a single precedent agreement with its affiliate, Spire Missouri, for 87.5 percent of the pipeline’s 400,000 dekatherm-per-day transport capacity. Spire STL indicated that other shippers expressed interest, but it did not enter precedent agreements with any of them.

On January 26, 2017, Spire STL applied to the Commission for a Certificate to begin construction of the proposed pipeline. The stated purpose of the pipeline was to “enhance reliability and supply security; reduce reliance upon

older natural gas pipelines; reduce reliance upon mature natural gas basins . . . ; and eliminate reliance on propane peak-shaving infrastructure.” J.A. 89. In particular, the new pipeline would provide gas from newly accessed sources in the Rocky Mountains and Appalachian Basin; avoid transecting the New Madrid Seismic Zone, unlike other pipelines in the area; and reduce use of propane for “peaking” during periods of high demand, which purportedly has negative environmental, operational, and cost-related impacts.

Spire STL made it clear that its new pipeline “was not [being] developed to serve new demand.” J.A. 265. It further stated that “conjecture” as to whether Spire Missouri might “reduce its contract entitlements on other pipelines” as a result of contracting for capacity on the proposed pipeline “would be inappropriate.” J.A. 104. The application also asserted that the proposed project was “the result of a fair process undertaken by [Spire Missouri] to examine competitive alternatives and select the one that would best meet its needs.” J.A. 105. In materials it later submitted to the Commission, Spire Missouri acknowledged that it used propane peaking on only three days between 2013 and 2018 – a consecutive three-day period in January 2014.

Several parties either protested or conditionally protested Spire STL’s application, including the Missouri Public Service Commission (the “Missouri Commission”) – a state body that regulates natural gas shippers – and Enable MRT. In its conditional protest, the Missouri Commission expressed skepticism as to the “need for the project,” J.A. 143, while also urging FERC to undertake a particularly thorough review of the impact the project might have on customers of existing pipelines given that “the St. Louis market is static and there is no demonstrated need . . . for . . . new capacity,” *see* J.A. 152. In its protest, Enable MRT claimed that the project “ha[d] been

shielded from a truly competitive market,” J.A. 155, and that “where a proposed project does not have precedent agreements for all of the capacity of the project and the project’s only precedent agreement is with a single affiliated shipper with predominantly captive retail customers, the mere existence of such a precedent agreement is insufficient to show adequate market demand,” J.A. 161. *See also* J.A. 181 (“As a[] [shipper] with captive retail customers, [Spire Missouri] can pass through to those customers the costs associated with its contract with Spire [STL]. Rather than pay lower rates to receive gas from an unaffiliated pipeline, Spire [STL] and [Spire Missouri] can maximize the revenue and return earned by their corporate parent by having [Spire Missouri] pay to receive service from Spire’s Project.”). Enable MRT also highlighted certain public-facing comments by Spire Missouri and Spire STL’s corporate parent indicating that construction of the pipeline would increase shareholder earnings. And in later submissions to the Commission, Enable MRT asserted “that the affiliate relationship between [Spire Missouri] and Spire STL [had] thwarted fair competition,” J.A. 812, and that economic risks of the pipeline would be shifted onto Spire Missouri’s “captive ratepayers [for natural gas] and the ratepayers of pipelines that would experience decontracting due to” the new pipeline, J.A. 813.

In May 2017, EDF sought to intervene and filed a protest. It raised several arguments regarding the probative weight of the precedent agreement between Spire STL and Spire Missouri in demonstrating market need for the proposed pipeline, given their affiliated relationship. In particular, EDF expressed concerns regarding the growing trend for

utility holding companies [to] enter[] into affiliate transactions whereby the retail utility affiliate commits to new long term capacity with its pipeline

developer affiliate. The essence of this financing structure is to take a cost pass-through for a retail gas or electric distribution utility – a contract for natural gas transportation services – and pay those transportation fees to an affiliated pipeline developer entitled to accrue return on its investment from that same revenue. Thus ratepayer costs which may not be justified by ratepayer demand are being converted into shareholder return.

J.A. 550 (footnote omitted). EDF also requested that the Commission “apply heightened scrutiny” to the Certificate application given the affiliated relationship between Spire STL and Spire Missouri. *See* J.A. 556-58; *see also* J.A. 856 (asserting that “there is a gap . . . between state and federal regulatory oversight of affiliate precedent agreements, such as the one Spire STL has submitted in this proceeding to demonstrate market need”). And it asserted that “[w]here, as here, there is evidence of self-dealing calling into question the need for a project, th[e] Commission should take steps to ensure that customers are protected.” J.A. 558; *see also* J.A. 559 (explaining why “record evidence” should have resulted in “enhanced regulatory scrutiny” in this case); J.A. 855 (reiterating “that the pursuit of earnings growth must be balanced against the inherent risk to customers embedded in [this] affiliate transaction”).

In September 2017, Commission staff published an Environmental Assessment for the proposed pipeline, including their finding of no significant impact from constructing and operating the pipeline. In reaching that conclusion, the EA noted that the pipeline “was not developed to serve new demand.” J.A. 765, 768.

On October 30, 2017, Petitioner Steck moved to intervene. In comments to the Commission, she alleged that there were several deficiencies in the EA, “particularly in its treatment of the purpose and need for the project and of climate change.” J.A. 791. She therefore requested preparation of either a full Environmental Impact Statement or a revised EA.

On August 3, 2018, by a 3-2 vote, the Commission issued the Certificate Order, granting a Certificate to Spire STL. Therein, the Commission referenced the concerns of the protestors and intervenors regarding the affiliated precedent agreement, *see, e.g.*, J.A. 938-40, 944-47, 950-51, and noted that “[a]ll parties, including Spire, agree that the new capacity is not meant to serve new demand, as load forecasts for the region are flat for the foreseeable future,” J.A. 979. The Commission also found that data provided by Spire STL and Enable MRT “show[ed] that the difference in the cost of gas delivered to Spire Missouri via the proposed [pipeline] as compared with gas accessed via” current pipelines “was not materially significant.” J.A. 980.

The Commission purported to apply the Certificate Policy Statement in reaching its decision. *See* J.A. 940-41; *see also* J.A. 941 n.31 (“[T]he current Certificate Policy Statement remains in effect and will be applied to natural gas certificate proceedings pending before the Commission as appropriate.” (citation omitted)). However, the Commission’s decision appeared to rely entirely on the precedent agreement between Spire STL and Spire Missouri in finding that there was market need for the project. *See* J.A. 963 (“The fact that Spire Missouri is affiliated with the project’s sponsor does not require the Commission to look behind the precedent agreements to evaluate project need. . . . [T]he Commission may reasonably accept the market need reflected by the applicant’s existing contracts with shippers and not look behind those contracts to

establish need.” (footnotes omitted)); J.A. 967 (“We disagree with [Enable] MRT’s stance that the mere existence of a precedent agreement is insufficient to show adequate market demand when a project is subscribed by affiliates for less than the full project capacity.” (footnote and internal quotation marks omitted)). FERC also explicitly rejected calls for a market study to assess the need for a new pipeline. *See* J.A. 966-67. And it dismissed arguments that Spire STL had engaged in anticompetitive behavior, while finding that whether Spire Missouri or its corporate parent had engaged in anticompetitive behavior was irrelevant to its determination. Rather, according to the Commission, any concerns regarding anticompetitive behavior could only be addressed by the Missouri Commission, as “Spire Missouri is not regulated by this Commission and thus we have no authority to dictate its practices for procuring services.” J.A. 964.

The Commission explained that it was generally unwilling to consider arguments raising “issues fall[ing] within the scope of the business decision of a shipper,” even if the shipper and the pipeline were affiliates. J.A. 968; *see also* J.A. 943 (“The Commission is not in the position to evaluate Spire Missouri’s business decision to enter a contract with Spire [STL] for natural gas transportation, which . . . will be evaluated by the [Missouri Commission].”). In particular, FERC was unwilling to assess the challenges that protestors had raised questioning the purported justifications that Spire STL had offered in support of the proposed new pipeline. As the Commission phrased it:

The lengthy arguments the protestors make regarding whether Spire Missouri should have chosen to utilize existing infrastructure to meet the project purposes or committed to capacity on previously proposed projects, whether retiring Spire Missouri’s propane

peaking facilities and replacing them with capacity from the [proposed pipeline] is a cost effective approach, whether choosing a transportation path that avoids the New Madrid fault is unnecessarily cautious, and even, in the first instance, the extent to which the [proposed pipeline] will provide economic and rate benefits to Spire Missouri's customers, all go to the reasonableness and prudence of Spire Missouri's decision to switch transportation providers.

J.A. 968. As to why Spire Missouri had declined to subscribe to, or otherwise endorse, "prior failed [pipeline] projects" in the area, the Commission found that such questions were "not necessarily relevant to [its] decision" and explicitly declined to resolve any related factual questions. *See* J.A. 968-69.

Regarding its balancing of the benefits and adverse impacts of the project, the Commission, without deeper analysis, simply concluded

that the benefits that the [proposed pipeline] will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and [Natural Gas Act] section 7(e), . . . we find that the public convenience and necessity requires approval of Spire [STL]'s proposal.

J.A. 986.

Finally, the Commission rejected the vast majority of challenges to its Environmental Assessment, including those of Petitioner Steck.

Commissioners LaFleur and Glick dissented. Both believed that the Commission should have looked behind and beyond the precedent agreement in evaluating market need, given the facts of the case and the affiliated nature of the two Spire entities. Commissioner Glick noted that “[t]here are several potential business reasons why [Spire STL]’s corporate parent might prefer to own a pipeline rather than simply take service on it, such as the prospect of earning a 14 percent return on equity rather than paying rates to [Enable] MRT or another pipeline company.” J.A. 1058. In addition, both dissenting Commissioners would have found that adverse impacts of the proposed pipeline outweighed benefits.

Several parties filed rehearing requests, including Steck on August 31, 2018 and EDF on September 4, 2018. In her request, Steck renewed several of her challenges to the EA and also objected to the Commission’s environmental analysis in the Certificate Order. EDF argued that the precedent agreement was not dispositive evidence of market need. It also challenged Spire STL’s contentions as to the benefits of the new pipeline, including possible cost savings to Spire Missouri and whether the new pipeline was needed to allow Spire Missouri to cease using propane peaking facilities. And more generally, EDF argued that the Commission had failed to adequately balance costs and benefits in the Certificate Order.

On October 1, 2018, the Secretary of the Commission issued a tolling order solely “to afford additional time for consideration of the matters raised.” J.A. 1107. It appears that during the period between the issuance of the Certificate Order and September 2019, Spire STL completed virtually all

construction of the pipeline. *See* J.A. 1135 (notice of Enable MRT withdrawing its petition for rehearing and asserting that “[i]n the year in which the [rehearing requests] ha[d] been pending, Spire STL . . . ha[d] nearly completed construction of the proposed pipeline”). During that period, Spire STL also submitted a revised cost estimate to the Commission of almost \$287 million, or approximately \$67 million more than it had originally estimated.

On November 21, 2019, the Commission issued an Order on Rehearing (the “Rehearing Order”), denying the requests for rehearing on the merits. The Commission reaffirmed its belief that it “is not required to look behind precedent agreements to evaluate project need, regardless of the affiliate status of the . . . shipper.” J.A. 1149 (footnote omitted). It also asserted that it had “evaluated the record and did not find evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse.” J.A. 1152 (footnote omitted). And it reiterated that, in its view, it was “not in the position to evaluate Spire Missouri’s business decision to enter a contract with Spire STL for natural gas transportation.” J.A. 1152 (footnote omitted).

The Commission also stated that several of the benefits Spire STL touted in its application and subsequent submissions to the Commission were “sufficient to overcome any concerns of overbuilding.” J.A. 1155. As to cost, the Commission clarified that the Certificate Order had “evaluated cost differences of gas delivered to Spire Missouri from both the” proposed new pipeline and Enable MRT’s existing system and found that they “were not materially significant.” J.A. 1159 (citing J.A. 980). Finally, the Rehearing Order found that the EA, and the Commission’s resulting environmental analysis, were sound.

Commissioner Glick again dissented. He argued that the Commission had acted arbitrarily and capriciously by refusing to engage with counterevidence or seriously consider countervailing arguments as to market need and benefits of the pipeline. *See, e.g.*, J.A. 1183 (“Whatever probative weight that [precedent] agreement has, the Commission cannot simply point to the agreement’s existence and then ignore the evidence that undermines the agreement’s probative value.”); J.A. 1185 (“The Spire companies’ obvious financial motive coupled with the abundant record evidence casting doubt on the need for the project ought to have caused the Commission to carefully scrutinize the record to determine whether the [proposed pipeline] is actually needed or just financially advantageous to the Spire companies.”). In his view, the issuing of the Certificate to Spire STL had also represented “an unreasonable application of the . . . Certificate Policy Statement.” J.A. 1188.

Steck and EDF filed their petitions for review in this court on January 21, 2020.

II. ANALYSIS

A. Standard of Review

The Commission’s award of a Certificate is reviewed under the Administrative Procedure Act’s arbitrary and capricious standard. *See Minisink*, 762 F.3d at 105-06 (citations omitted); 5 U.S.C. § 706(2)(A). Under this standard, an action by the Commission may be set aside “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, the

overarching question in this case is whether “the Commission’s ‘decisionmaking [wa]s reasoned, principled, and based upon the record.’” *Myersville*, 783 F.3d at 1308 (quoting *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). “A passing reference to relevant factors . . . is not sufficient to satisfy the Commission’s obligation to carry out ‘reasoned’ and ‘principled’ decisionmaking”; this means that “[t]he Commission must ‘fully articulate the basis for its decision.’” *Am. Gas Ass’n*, 593 F.3d at 19 (quoting *Mo. Pub. Serv. Comm’n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000)). When the Commission’s explanation for a contested action is lacking or inadequate, it will not survive judicial review and the matter will be returned to FERC for appropriate action. *See, e.g., Mo. Pub. Serv. Comm’n*, 234 F.3d at 42.

B. Standing

The “irreducible constitutional minimum” of standing requires three elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.* (citation omitted). The party invoking federal jurisdiction bears the burden of demonstrating standing. *Id.* (citation omitted). Generally, “[t]o establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent.” *Id.* at 1548 (citation and internal quotation marks omitted). However, where a party alleges procedural injury, “courts relax the normal standards of redressability and imminence.” *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009)).

In a NEPA procedural injury case, the causation requirement is met when a “causal chain” contains “at least two links: one connecting the omitted [NEPA analysis] to some substantive government decision that may have been wrongly decided because of the lack of [proper NEPA analysis] and one connecting that substantive decision to the plaintiff’s particularized injury.” *Id.* (alterations in original) (citation omitted). In other words, “[i]t must be substantially probable that the substantive agency action that disregarded a procedural requirement created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff.” *Id.* (citation and internal quotation marks omitted).

1. Steck’s Standing

Steck does not have standing to pursue her claims against FERC in this court. She does not own land transected by Spire STL’s pipeline and has not had property rights taken via eminent domain. Instead, Steck asserts in a declaration that she lives “half a mile from” the new Chain of Rocks meter and regulation station (the “Chain of Rocks Station”) at “the southern end of the pipeline,” Final Br. of Pet’r Juli Steck Addendum 1 (hereinafter “Steck Decl.”) ¶ 4; that the metering station “sits between . . . blind curves,” *id.* ¶ 5; that the station “is a looming eyesore and a traffic hazard” which “is not in keeping with the character of [her] neighborhood,” and which she passes approximately three times per week, *id.* ¶ 7; and that the now-completed construction of the pipeline “interfered with [her] use and enjoyment of” a local park through which part of the pipeline was built, *id.* ¶¶ 9-10, and that she “experienced the noise, dust, diesel fumes, and traffic stops from construction both at home and in” the park, *id.* ¶ 8.

Steck claims that the “blind curves” near the metering station are a “traffic hazard” to which she objects. Even if this is sufficient to show a cognizable injury-in-fact, Steck has not met her burden on causation as to this alleged injury. This is so because she does not claim that the blind curves resulted from the construction of the Chain of Rocks Station. Therefore, she has not shown that issuance of a Certificate to Spire STL caused any “traffic hazard” that now exists.

In addition, any alleged injuries that Steck suffered during the now-completed construction of the pipeline and metering station cannot support standing for want of redressability. Those alleged injuries, including that Spire’s “drill[ing] under [a] lake” to construct the pipeline interfered with her “use and enjoyment of the [nearby] park,” *id.* ¶ 9, ended when the construction was completed. Nor does Steck assert that there is any lasting impact from these prior injuries. Therefore, a favorable judicial decision will not redress her alleged injuries.

Steck also alleges that the metering station “is a looming eyesore,” *id.* ¶ 7, as if to suggest that this constitutes a cognizable injury-in-fact. It is true that some intangible injuries may be concrete enough to support standing. *See Spokeo*, 136 S.Ct. at 1549. And “[t]he Supreme Court has recognized that harm to ‘the mere esthetic interests of [a] plaintiff . . . will suffice’ to establish a concrete and particularized injury” sufficient to support standing. *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (third alteration in original) (quoting *Summers*, 555 U.S. at 494). However, Steck’s claims that allude to aesthetic injuries do not correspond with the types of aesthetic interests that the Supreme Court has said will suffice to establish concrete and particularized injuries.

At no point in her declaration does Steck indicate any ways in which the new metering station injures her specific aesthetic

interests, beyond labeling it a “looming eyesore” that “is not in keeping with the character of [her] neighborhood.” *See* Steck Decl. ¶ 7. She never alleges that she used and enjoyed the land on which the station now exists; that she intended to use the land in the future; or that her planned future uses of the land have been foreclosed by the construction. In other words, she never indicates how she derived aesthetic value from the land as it had existed before the construction. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that environmental group lacked standing because “[n]owhere in the pleadings or affidavits did the [group] state that its members use [the affected area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents” (emphases added)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992) (explaining that “a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity” (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (explaining that organizations’ members would have had standing as a result of the detailed ways in which the challenged actions had led them to modify their prospective behavior, reduced their property values, or otherwise diminished their enjoyment of the affected areas); *Jewell*, 764 F.3d at 5-6 (recounting detailed declarations explaining the ways in which the challenged action would diminish declarants’ ability to “use, enjoy, and appreciate,” or “ability to visit and enjoy,” affected areas (citations omitted)).

Steck does not even allege that she can see the new station from her property. Rather, the only aesthetic injury that might be implied from her declaration is that she must look at an “eyesore” several times per week while driving past. Viewed in full frame, Steck’s alleged aesthetic injuries reflect nothing more than generalized grievances, which cannot support

standing. *See Lujan*, 504 U.S. at 573-74 (explaining that generalized grievances do not raise Article III cases or controversies for standing purposes).

At oral argument, Steck's counsel was unable to identify any authority that would allow mere incidental viewership of something unappealing to qualify as an injury-in-fact for standing purposes. *See Oral Arg. Tr.* at 27:21-28:23. This is not surprising, for we can find nothing in the existing case law to suggest that a person who incidentally views something unpleasant has suffered an injury-in-fact for purposes of standing. In her brief, Steck cites *Sierra Club v. FERC* for the proposition that “[a]esthetic and recreational harm [may] bestow[] standing.” Final Br. of Pet’r Juli Steck 10 (citing 827 F.3d 59, 66 (D.C. Cir. 2016)). However, the declaration in support of standing in *Sierra Club* is strikingly different from Steck's declaration in this case. The declarant in *Sierra Club* “fishe[d], boat[ed], and seasonal duck hunt[ed] frequently around” the affected areas. 827 F.3d at 66 (citation and alterations omitted). The declarant further averred that the resulting “‘increase in liquefied natural gas vessel traffic’ . . . w[ould]: (1) harm his aesthetic interests in the [nearby] waterways . . . ; (2) inconvenience him, given the ‘large exclusion zone the Coast Guard maintains around tankers’; and (3) ‘diminish his use and enjoyment of the waterways.’” *Id.* (citation and alterations omitted). He also noted that, because of the “existing levels of operation” in the affected areas, he had “moved his ‘primary boat’” away from them. *Id.* (citation omitted). These concrete injuries, including those to his aesthetic interests, are a far cry from those asserted by Steck, who has neither altered her behavior nor explained why she has any particularized connection to the land on which the metering station now sits.

Finally, Steck claims that she has suffered a procedural injury as a result of the Commission's alleged failure to comply with its NEPA obligations. *See* Final Br. of Pet'r Juli Steck 10; Steck Decl. ¶ 10; *see also* Oral Arg. Tr. at 27:18-20, 33:19-25. Steck argues that this procedural injury is "an independent source of standing." Oral Arg. Tr. at 33:24-25. "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496; *see also Spokeo*, 136 S. Ct. at 1550 (explaining that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation"). Because Steck has failed to allege a concrete injury that is "tethered to" the Commission's issuance of the Certificate, she has not shown a viable Article III injury. *Sierra Club v. FERC*, 827 F.3d 36, 43 (D.C. Cir. 2016) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013)).

In sum, on the record before us, we hold that Steck has failed to satisfy her burden of demonstrating standing. We therefore dismiss her petition for review.

2. EDF's Standing

EDF clearly has standing to pursue its claims. "An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507-08 (D.C. Cir. 2020) (citation and internal quotation marks omitted). EDF's members include at least four individuals who own land transected by Spire STL's pipeline, each of whom have had

property rights taken via eminent domain. These EDF members also allege various ways in which the presence of the pipeline has harmed, and continues to harm, their property, economic, aesthetic, and emotional interests.

“[A] landowner made subject to eminent domain by a decision of the Commission has been injured in fact because the landowner will be forced either to sell its property to the pipeline company or to suffer the property to be taken through eminent domain. . . . [I]t is enough that [eminent domain proceedings] have been deemed authorized and will proceed absent a sale by the owner.” *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271-72 (D.C. Cir. 2015) (citing *B&J Oil & Gas v. FERC*, 353 F.3d 71, 74-75 (D.C. Cir. 2004)). Moreover, “credible claims of exposure to increased noise and . . . disruption of daily activities . . . are sufficient to satisfy Article III’s injury-in-fact requirement.” *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017) (quoting *Sierra Club*, 827 F.3d at 44). Those injuries were caused by the Commission’s orders, which allowed for the exercise of eminent domain against the EDF members’ land, and vacatur of those orders likely will allow those injuries to be redressed. *See City of Oberlin*, 937 F.3d at 604-05. “And nobody disputes that the prevention of this sort of injury is germane to [EDF]’s conservation-oriented purposes, or cites any reason why these individual members would need to join the petition in their own names.” *Sierra Club*, 867 F.3d at 1366. Thus, EDF has associational standing.

C. EDF’s Petition Was Timely

The Natural Gas Act requires that, prior to obtaining judicial review, an aggrieved party must have sought rehearing before the Commission “unless there [wa]s reasonable ground for failure so to do.” 15 U.S.C. § 717r(b). The Act also states

that “[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application *may be deemed to have been denied.*” *Id.* § 717r(a) (emphasis added). As to the timing of judicial review, the act provides that an aggrieved party “may obtain a review” of a Commission order “by filing” a petition for review “within sixty days after the order of the Commission upon the application for rehearing.” *Id.* § 717r(b).

In *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), we confronted the Commission’s then-consistent practice of issuing “tolling orders” following rehearing requests. *See id.* at 9-11. The tolling orders were fashioned so that they “d[id] nothing more than prevent [rehearing requests] from being deemed denied by agency inaction and preclude . . . applicant[s] from seeking judicial review until the Commission act[ed]” on the merits. *Id.* at 9. This court found that such tolling orders were insufficient for FERC to avoid a “deemed denial” per 15 U.S.C. § 717r(a). *Id.* at 18-19.

In this case, EDF filed a request for rehearing with the Commission on September 4, 2018. On October 1, 2018, the Secretary issued a tolling order that did nothing more than “afford additional time for consideration of the matters raised” in rehearing requests. J.A. 1107; *see Allegheny Def. Project*, 964 F.3d at 6-7 (same language in tolling order at issue). The Commission did not dispose of the merits of the rehearing requests in this case until November 21, 2019, when it issued the Rehearing Order. *See* J.A. 1144. EDF then filed its petition for review in this court on January 21, 2020. According to the Spire Intervenor-Respondents (but not the Commission), EDF’s petition for review was untimely because, under *Allegheny Defense Project*, the requests for rehearing were “deemed denied” as of October 4, 2018. And, since the petition

for review was submitted more than 60 days thereafter, the court lacks jurisdiction. *See* Br. for Intervenors-Resp'ts Spire STL Pipeline LLC and Spire Missouri Inc. 1-2. We reject this argument.

In *Texas-Ohio Gas Co. v. Federal Power Commission*, 207 F.2d 615 (D.C. Cir. 1953), we held that the 60-day requirement of Section 717r(b) did not preclude our consideration of a petition for review from a final denial of relief, even if there had been a deemed denial in the interim and the petition for review was filed more than 60 days following that deemed denial. *See id.* at 616-17. *Allegheny Defense Project* did not disturb this binding precedent, which is squarely controlling in this case.

Moreover, in *Allegheny Defense Project*, the petitioners filed two sets of petitions for review. *See* 964 F.3d at 6-9. The first set was filed in March and May 2017, within 60 days of the March 2017 tolling order, *see id.* at 6-7, while the second was filed in December 2017 and January 2018, after the Commission rejected the merits of the rehearing requests, *see id.* at 8-9. Though this court found that the tolling order failed to prevent a deemed denial as of March 2017, the court proceeded to evaluate the merits of *both* sets of petitions for review, including the later set of petitions filed more than 60 days following the date of “deemed denial.” *See id.* at 19.

EDF filed its petition for review on January 21, 2020, within the period allowed by statute “after the order of the Commission upon the application for rehearing.” 15 U.S.C. § 717r(b). The petition for review was therefore timely and we may consider the merits of EDF’s contentions.

D. FERC's Grant of a Certificate of Public Convenience and Necessity Was Arbitrary and Capricious

Under established law, precedent agreements are “always . . . important evidence of demand for a project.” *Minisink*, 762 F.3d at 111 n.10 (quoting 88 FERC at 61,748). And, in some cases, such agreements may demonstrate both market need and benefits that outweigh adverse effects of a new pipeline. *See City of Oberlin*, 937 F.3d at 605-06; *Myersville*, 783 F.3d at 1311. But there is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient* to show that construction of a proposed new pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e).

According to the Commission's Certificate Policy Statement, “the evidence necessary to establish the need for [a] project will usually include a market study. . . . Vague assertions of public benefits will not be sufficient.” 88 FERC at 61,748. In addition, the Certificate Policy Statement indicates that pipelines built for reasons other than demand growth might require greater showings of need and public benefits. *See id.* (“[P]rojects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline.”). The Policy Statement also explicitly states that “[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.” *Id.* In addressing why it is unnecessary for the Commission to categorically discount the value of affiliated precedent agreements when assessing applications to construct new pipelines, the Policy Statement explains that, in all cases, the Commission invariably focuses

on “the impact of the project on the relevant interests balanced against the benefits to be gained from the project.” *Id.* Finally, it is noteworthy that nothing in the Certificate Policy Statement suggests that a precedent agreement is conclusive proof of need in a situation in which there is no new load demand, no Commission finding that a new pipeline would reduce costs, only a single precedent agreement in which the pipeline and shipper are corporate affiliates, the affiliate precedent agreement was entered into privately after no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.

In this case, the Commission was presented with strong arguments as to why the precedent agreement between Spire STL and Spire Missouri was insufficiently probative of market need and benefits of the proposed pipeline. Indeed, those arguments drew on the Commission’s own Certificate Policy Statement for support. But rather than engaging with these arguments, the Commission seemed to count the single precedent agreement between corporate affiliates as conclusive proof of need. Nothing in the Certificate Policy Statement endorses this approach.

Furthermore, we can find no judicial authority endorsing a Commission Certificate in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline. This is hardly surprising because evidence of “market need” is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement. *See Chinook Power Transmission, LLC,*

126 FERC ¶ 61,134, 61,767 (2009) (explaining that, in a different context, the Commission “will apply a higher level of scrutiny” to certain affiliate transactions “due to the absence of arms’ length negotiations as a basis for the commitment, concerns that the affiliate would receive unduly preferential treatment, further concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate and subsidize the . . . project inappropriately, and the lack of transparency that would surround the arrangement”).

Moreover, in this case the Commission failed to adequately balance public benefits and adverse impacts. This is a serious problem in a case in which there is no new load demand and only one affiliated shipper. In the Certificate Order, the Commission’s balancing of costs and benefits consisted largely of its *ipse dixit* “that the benefits that the [proposed pipeline] will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities.” J.A. 986. The Commission pointed to no concrete evidence to support these assertions.

In the Rehearing Order, the Commission made a superficial effort to remedy the obvious deficits of the Certificate Order by noting that Spire Missouri had articulated several public benefits for the proposed pipeline. *See* J.A. 1155-56. However, the Commission never addressed the claims raised by EDF and others challenging whether these purported benefits were likely to occur. Instead of evaluating the legitimate claims that had been raised, the Commission simply stated that it had “no reason to second guess the business decision of” Spire Missouri as reflected in the precedent agreement. Rehearing Order, J.A. 1155; *see also*

Rehearing Order, J.A. 1159 (declining to evaluate extent to which Spire Missouri's customers would experience economic benefit from pipeline construction because doing so would "second guess the business decisions of an end user"). Before this court, EDF has continued to challenge the Commission's failure to appropriately scrutinize the costs and alleged benefits of the project. *See* Final Opening Br. of Pet'r EDF 39-40; *see also* Final Reply Br. of Pet'r EDF 15-18 (asserting that purported benefits of proposed pipeline were invoked post hoc by the Commission, unlikely to be realized, or pretextual). Under the circumstances presented in this case – with flat demand as conceded by all parties, no Commission finding that a new pipeline would reduce costs, and a single precedent agreement between affiliates – we agree with EDF that the Commission's approach did not reflect reasoned and principled decisionmaking.

The Commission and the Spire Intervenor-Respondents advance several arguments in response, but none carry the day. First, they rely on isolated statements this court has made while reviewing previous Commission grants of Certificates. In *Minisink*, we echoed the Certificate Policy Statement in explaining that precedent "agreements 'always will be important evidence of demand for a project.'" 762 F.3d at 111 n.10 (quoting 88 FERC at 61,748). Similarly, in *Myersville*, we noted that the petitioners had "identif[ied] nothing in the 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.'" 783 F.3d at 1311 (quoting *Minisink*, 762 F.3d at 111 n.10). In *City of Oberlin*, we upheld the Commission's decision to treat both affiliated and unaffiliated precedent agreements as evidence of market need, as "it is Commission policy to not look behind precedent or service agreements to make

judgments about the needs of individual shippers.” 937 F.3d at 606 (quoting *Myersville*, 783 F.3d at 1311). And in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished), the court upheld the Commission’s decision not to distinguish between affiliated and unaffiliated precedent agreements under the facts of that case. *See id.* at *1. According to the Commission and the Spire Intervenor-Respondents, these cases stand for two broad propositions: (1) that the Commission generally need not look behind precedent agreements in determining whether there is market demand; and (2) that affiliated precedent agreements should almost always be treated the same as unaffiliated precedent agreements. We disagree, because it is quite clear that our case law does not go so far as Respondents claim.

In both *Minisink* and *Myersville*, the precedent agreements at issue were not alleged to be between affiliated entities. *See Minisink*, 762 F.3d at 111 n.10; *Myersville*, 783 F.3d at 1307, 1309-10. Thus, those cases presented significantly different facts than the instant Certificate application. *Appalachian Voices* was an unpublished opinion, meaning that the panel found its opinion to be of “no precedential value” when disposing of the case. *See* D.C. CIR. R. 36(e)(2). Moreover, unlike in this case, the Certificate applicant in that case had submitted a market study to the Commission to show the need for, and benefits of, the proposed project. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, 61,297 (2017).

In *City of Oberlin*, the pipeline applicant had entered into four precedent agreements with affiliate shippers but had entered eight precedent agreements in total. *See* 937 F.3d at 603. The facts of that case are therefore easily distinguishable, and the evidence of market demand was much stronger than in the instant case, where there is but a single precedent

agreement and it is with an affiliated shipper. It is true that *City of Oberlin* says that FERC can put precedent agreements with affiliates on the same footing as non-affiliate precedent agreements (*i.e.*, it may “fully credit[]” them), but only so long as FERC finds “no evidence of self-dealing” or affiliate abuse and the pipeline operator “bears the risk for any unsubscribed capacity.” *Id.* at 605. And tellingly, the Commission made an uncontested finding that there was “no evidence of self-dealing” or affiliate abuse in *City of Oberlin*. *See id.*

Here, by contrast, EDF and others have identified plausible evidence of self-dealing. This evidence includes that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings. FERC’s failure to engage with this evidence did not satisfy the requirements of reasoned decisionmaking. Indeed, as noted above, FERC’s ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement. The challenges raised by EDF and others were more than enough to require the Commission to “look behind” the precedent agreement in determining whether there was market need. If it was not necessary for the Commission to do so under these circumstances, it is hard to imagine a set of facts for which it would ever be required. Because the Commission declined to engage with EDF’s arguments and the underlying evidence regarding self-dealing, its decisionmaking was arbitrary and capricious.

Next, the Commission contends that its balancing of benefits and adverse impacts was sufficient because the Natural Gas Act “vests the Commission with ‘broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.’” Br. for Resp’t FERC 42 (quoting *Minisink*, 762 F.3d at 111). The Commission’s discretion in this sphere is, indeed, broad, but it may not go

entirely unchecked. The Commission must provide a cogent explanation for how it reached its conclusions. As discussed, FERC failed to balance the benefits and costs in both the Certificate Order and Rehearing Order.

Finally, Respondents claim that there is evidence in the record supporting their assertions as to the benefits of the pipeline, even in the absence of increasing demand or potential cost savings. However, it is not enough that such evidence may exist within the record; the question is whether the Commission's decisionmaking, as reflected in its orders, will allow us to conclude that the Commission has sufficiently evaluated that evidence in reaching a reasoned and principled decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88, 93-95 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Based on the Certificate Order and Rehearing Order, we cannot say that the Commission has done so. It is not surprising that the Commission failed to seriously engage with the question of whether these benefits were real or illusory given that it took the position that it would "not second guess the business decisions" of the pipeline shipper in this case. Certificate Order, J.A. 968.

In sum, it was arbitrary and capricious for the Commission to rely solely on a precedent agreement to establish market need for a proposed pipeline when (1) there was a single precedent agreement for the pipeline; (2) that precedent agreement was with an affiliated shipper; (3) all parties agreed that projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future; and (4) the Commission neglected to make a finding as to whether the construction of the proposed pipeline would result in cost savings or otherwise represented a more economical alternative to existing pipelines. In addition, the Commission's cursory

balancing of public benefits and adverse impacts was arbitrary and capricious.

III. REMEDY

The final question that we must address concerns remedy. The Spire Intervenor-Respondents urge that, if we set aside FERC's certification, we should remand without vacatur. EDF, in turn, contends that vacatur is appropriate. "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation and internal quotation marks omitted). However, "[v]acatur 'is the normal remedy' when we are faced with unsustainable agency action." *Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)).

Based on these considerations, we believe that vacatur is appropriate. Given the identified deficiencies in the Commission's orders, it is far from certain that FERC "chose correctly," *see Allied-Signal*, 988 F.2d at 150 (citation omitted), in issuing a Certificate to Spire STL. We understand that the pipeline is operational, and thus there may be some disruption as a result of the "interim change," *see id.* at 150-51 (citation omitted), *i.e.*, de-issuance of the Certificate, caused by vacatur. However, we have identified serious deficiencies in the Certificate Order and Rehearing Order. And "the second *Allied-Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (citation omitted).

The Commission's ability to do so is not at all clear to us at this juncture.

Furthermore, remanding without vacatur under these circumstances would give the Commission incentive to allow “build[ing] first and conduct[ing] comprehensive reviews later.” *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). We certainly do not wish to encourage such an approach given the significant powers that accompany a certificate of public convenience and necessity. *See* 15 U.S.C. § 717f(h) (allowing holder of Certificate to exercise eminent domain); *see also* Rehearing Order, J.A. 1195-96 (Glick, Comm'r, dissenting) (noting that “Spire STL prosecuted eminent domain actions against over 100 distinct entities . . . involving well over 200 acres of privately owned land”). *See generally* Rehearing Order, J.A. 1202 (Glick, Comm'r, dissenting) (“A regulatory construct that allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court ensures that irreparable harm will occur before any party has access to judicial relief.”).

IV. CONCLUSION

For the foregoing reasons, we dismiss Juli Steck's petition for review and grant EDF's petition for review. We vacate the Certificate Order and Rehearing Order and remand to the Commission for further proceedings.

Exhibit 2

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

Environmental Defense Fund, et al.)	
)	
Petitioners,)	
)	
v.)	Nos. 20-1016 and 20-1017
)	(consolidated)
Federal Energy Regulatory)	
Commission,)	
)	
Respondent.)	

DECLARATION OF SCOTT CARTER

1. My name is Scott Carter, and I am President of Spire Missouri Inc. (“Spire Missouri”). Spire Missouri is the natural gas utility serving the St. Louis, Missouri metropolitan area and is a local distribution company (“LDC”) regulated by the Missouri Public Service Commission. My business address is 700 Market St., Saint Louis, MO 63101. I have decades of experience in the natural gas utility industry, both at Spire Missouri and other utilities throughout the United States. I am very familiar with Spire Missouri’s natural gas supply portfolio, distribution system and natural gas supply requirements.

Purpose of Declaration and Summary of Conclusions

2. The purpose of this Declaration is to inform the U.S. Court of Appeals for the District of Columbia Circuit of the potential disruptive impacts on the retail customers and communities served by Spire Missouri in the event Spire STL

Pipeline LLC (“STL Pipeline”) were to cease operations due to a loss of certificate authority.

3. As I will explain in detail below, loss of service from STL Pipeline would severely jeopardize Spire Missouri’s ability to provide needed energy to a large portion of the 650,000 households and businesses that Spire Missouri serves in eastern Missouri,¹ in addition to other potentially severe disruptive consequences. This energy is needed to fuel the economy, and to enable residents to heat their homes and cook food.

4. Spire Missouri cannot replace its current “firm” (contractually locked-in) supply from STL Pipeline with any other alternatives to ensure reliable gas service to the St. Louis region. Without supply from STL Pipeline, Spire Missouri would very likely be forced to intentionally curtail natural gas service to many of its customers during the upcoming 2021-2022 winter heating season. In addition, Spire Missouri faces the very real threat that despite such mandated curtailments, its reduced gas supply would lead to low pressure on its distribution system during cold periods, causing uncontrolled loss of service to households and other high priority consumers, such as hospitals, nursing homes, and schools. Loss of natural gas service during cold periods would create the potential for loss of life and

¹ References to Spire Missouri’s customers throughout refer only to Spire Missouri’s customers in eastern Missouri.

severe disruptive impacts to essential services relied on by many individuals and communities served by Spire Missouri.

5. Therefore, it is essential that STL Pipeline be permitted to maintain service to its customer Spire Missouri during the upcoming winter season and beyond.

Pertinent Background

6. In order to provide the context for these projections, I will first address the background that led to the current supply situation and constraints.

7. Spire Missouri serves approximately 650,000 households and businesses in eastern Missouri. Historically, Spire Missouri was heavily dependent on a single interstate natural gas pipeline—the Enable Mississippi River Transmission (“MRT”) system—to supply eastern Missouri. However, in the normal course of the utility’s prudent system planning efforts, the MRT system was identified as presenting a heightened reliability risk for Spire Missouri customers because (1) MRT derived its supplies from the traditional Midcontinent and Gulf Coast natural gas basins, whereas, by the mid-2010s, alternative supplies from the developing Appalachian Basins were providing better access to more diverse, reliable, and abundant natural gas, and (2) MRT’s system runs through the seismically unstable New Madrid fault zone. Additionally, during these planning efforts, operational problems were identified with Spire Missouri’s liquid propane

“peaking” facilities, as outlined in this declaration. (Peaking facilities are facilities that are called into service to meet periods of peak demand.)

8. Consequently, to mitigate the identified risks from prudent system planning analyses, Spire Missouri initiated discussions with pipeline developers to improve critical infrastructure for gas supply into the St. Louis region that could optimize opportunities to access new prolific supplies from the Appalachian Basins and allow Spire Missouri to remove its liquid propane peaking facilities from its supply stack. But those discussions did not lead to any definitive agreements to construct new capacity. Accordingly, STL Pipeline developed and proposed a project that satisfied all of Spire Missouri’s critical infrastructure needs. STL Pipeline proposed to build and operate a new 65-mile long pipeline to bring gas from the Rockies Express Pipeline (“REX”), which would provide Spire Missouri with improved access to natural gas supplies from the Rockies and Appalachian Basins, bringing new supply diversity, reliability and cost competitiveness to the region.

Changes to Spire Missouri’s Facilities and Operations Post-STL

9. Once STL Pipeline was placed into service in 2019, it provided Spire Missouri with 350,000 Dth/day of new firm pipeline capacity. Because of this new firm capacity, and to preserve affordability to its customers consistent with its obligations, Spire Missouri undertook several steps to diversify and optimize its

natural gas supply portfolio, which resulted in replacing preexisting sources.

Specifically, Spire Missouri took the following steps: (1) allowed approximately 180,000 Dth/day of firm capacity contracts on MRT, as well as 170,000 Dth/day of firm capacity on upstream pipelines that fed into MRT's East Line, to expire; and (2) retired its obsolete propane peaking facilities, which previously had the ability to supply 160,000 Dth/day of peak demand. Had Spire Missouri held onto this capacity from MRT or maintained the propane facilities, the associated costs would have posed an additional and unwarranted financial burden on its customers, especially because the additional capacity would not have resolved the previously identified operational risks.

10. Spire Missouri was later able to take advantage of the high-pressure deliveries available from the STL Pipeline system in other ways, providing additional benefits beyond those presented by Spire Missouri in the STL Pipeline certificate proceeding before FERC.

11. First, Spire Missouri was able to use the higher pressure STL Pipeline supply to improve the injections of natural gas into its on-system Lange storage field. The high-pressure supply available from STL Pipeline allows for direct injection into the field without having to rely on compressor facilities to do so. That is a more efficient and reliable process. Given the ability to direct-inject into the Lange storage field from STL Pipeline, Spire Missouri retired and removed

three compressors that had been used for injection into Lange storage prior to STL Pipeline. These compressors were approximately 70 years old, and were at or beyond their useful life. The changes to the operations at Spire Missouri's Lange storage facility resulted in more than an 80% reduction in greenhouse gas emissions (GHG) from the Lange storage facility. However, it is important to recognize that even aside from the reduced pressure without STL Pipeline and the problems this would cause, there is insufficient supply available to replenish the Lange storage field without STL Pipeline. The Lange storage field has a high yield deliverability of up to 357,000 Dth/day, and Spire Missouri typically replenishes the Lange facility throughout the winter heating season to maintain Spire Missouri's inventory level for late season cold weather events. Spire Missouri relies heavily on the Lange natural gas storage facility to meet its customer's needs, and now relies solely on the high-pressure supply of STL Pipeline to replenish that storage inventory. Without the high-pressure supply from STL Pipeline, Spire Missouri risks being unable to operate the Lange storage once it is depleted. In this scenario, Spire Missouri could face a lack of inventory availability, as it will not be able to replenish inventory from time to time as needed throughout the winter months. (While this risk cannot be quantified precisely, it exceeds the risk that Spire Missouri would take when planning for the necessary winter natural gas supply, as illustrated by the February 2021 experience

described later in this paragraph.) Accordingly, if the Lange storage facility is depleted, there is a potential for significant disruptions to service and the potential loss of up to an additional 357,000 Dth/d of deliverability into our distribution system. This deliverability shortfall, combined with the loss of 350,000 Dth/d from STL Pipeline, would create an overall deficit of over half of our planned peak day supply, as illustrated below in Table 1. Without the high pressure supply available from STL Pipeline, Spire Missouri would likely not be able to maintain ongoing replenishment of the Lange facility over the winter, thus jeopardizing the availability of that facility to serve Spire Missouri's customers at temperatures as high as approximately 38 degrees Fahrenheit. As an example, this past February following Winter Storm Uri,² Spire Missouri reinjected natural gas into its Lange storage facility for nine days, February 20-28, 2021, in order to replenish inventory in the event of another late cold spell during that winter season. If the high pressure supply from STL Pipeline had not been available for this purpose, Spire Missouri would not have been able to replenish that level of inventory and would have been at risk for customer outages throughout the rest of the winter season if there had been another cold snap. The high-pressure supply from STL Pipeline is

² References to Winter Storm Uri refer to the major winter and ice storm from February 13-17, 2021 that impacted the United States (in particular, Texas), Northern Mexico, and parts of Canada.

absolutely critical to the operation of Spire Missouri's on-system storage and cannot be replaced with anything other than high pressure flowing supply, which is not available without STL Pipeline.

12. Second, and not contemplated during the certificate application process, MoGas Pipeline, a 263-mile interstate natural gas pipeline system in and around St. Louis that extends into Central Missouri, interconnected with STL Pipeline. STL Pipeline's high-pressure deliveries into MoGas increased MoGas's operating pressure,³ allowed Spire Missouri to contract for additional capacity on MoGas, and allowed Spire Missouri to forego making certain costly reinforcements to its own distribution system, which would have been absorbed by customers. This additional capacity, which is more than double what Spire Missouri was able to secure before STL Pipeline was placed into operations, benefited the west and southwest portions of our distribution system that are served by MoGas, areas that are seeing increased demand for natural gas. This permitted Spire Missouri to avoid making certain costly reinforcements of its facilities to ensure adequate supply into these areas of its distribution system. Without the additional deliveries from MoGas, reinforcements would have been required and

³ See MoGas Pipeline LLC's Motion to Intervene Out-Of-Time and Comments in Support, at 9, *Spire STL Pipeline LLC*, Dkt. No. CP17-40-007 (FERC July 28, 2021).

would have involved building additional high-pressure pipelines in very populated areas. Based on our engineering estimates, it would take years to install such reinforcements, putting the company at risk of not being able to serve its customers during the construction period.

13. The net result of all of Spire Missouri's actions to improve reliability and reduce costs to customers is an enormous change to its distribution operations and supply situation. Consequently, if STL Pipeline were to cease functioning, Spire Missouri would no longer have the firm capacity that it needs to meet winter season demand for household, industrial, commercial, and other uses. The following chart shows the current supply capabilities of Spire Missouri, both with and without STL Pipeline.

Table 1

Pipeline	<u>Current Portfolio w/ STL Pipeline</u> (Dth/day)	<u>Winter 21/22 w/out STL Pipeline</u> (Dth/day)	<u>Winter 21/22 w/out STL Pipeline and Lange</u> (Dth/day)
Enable MRT	550,779	473,547 ¹	473,547 ¹
Mogas Pipeline	145,600	62,800 ²	62,800 ²
Southern Star Central	30,300	30,300	30,300
Spire STL Pipeline	190,000	0	0
Spire MO Underground Storage	357,000	357,000 ³	0 ³
Total	1,273,679	923,647	566,647

¹ Assumes the following: (1) 7,800 Dth/day of the 550,779 Dth/day now becomes upstream capacity utilized to feed MoGas (2) 70,000 Dth/d of capacity from STL Pipeline is no longer available to feed a southbound contract on MRT in the market area, and (3) Spire Missouri is able to contract for the 568 Dth/day of MRT Main Line capacity currently available, see *infra* ¶ 38.

² Assumes the historical contract capacity Spire Missouri held pre-STL Pipeline given the STL Pipeline interconnect will no longer be available.

³ Spire Missouri's on-system underground storage is a finite resource. As Spire Missouri's underground storage is depleted, our ability to withdraw at max rates—357,000 Dth/d—and support peak loads will also decline. STL is currently the sole source of supply for winter re-injections and annual summer storage refill. Without access to STL Pipeline, the Company may not be able to sustain the max withdrawal rate long term, eliminating the city gate capacity represented by underground storage.

14. Table 1 shows a shortfall of 350,032 Dth/day in the absence of STL Pipeline's deliveries, and a shortfall of up to 707,032 Dth/day once Spire Missouri's Lange storage field is depleted.

Loss of STL Pipeline Would Cause Severe Harm, and Potentially Loss of Life

15. Without STL Pipeline's firm, high pressure deliveries into its distribution system, Spire Missouri would face significant shortfalls of the natural gas needed to serve its customers during the winter season. Winter weather increases demand, and it does so during a period when natural gas is critically needed by households, businesses, hospitals, nursing homes, schools, and other consumers to provide space and water heat.

16. If STL Pipeline is not in service during the upcoming winter heating season, depending on availability of Lange storage, approximately 175,000-400,000 homes and businesses may be without gas service for periods of time, based on Spire Missouri's extreme cold weather planning scenarios.

17. Spire Missouri undertakes a planning process, consistent with industry standards and audited by the Missouri Public Service Commission, to estimate its planned peak day (*i.e.*, peak customer demand) during the winter heating season, so it may determine how that demand will be met. For these planning purposes, Spire Missouri uses hydraulic modeling software to simulate its natural gas distribution system; this software is widely used in the industry, and this modeling process is used by Spire Missouri in the regular course of business to model customer demand and thereby determine the natural gas supply necessary to serve its customers. Spire Missouri has used this same software and modeling process to

arrive at the projections set forth in this section and preceding sections of this Declaration. Based on its planning estimates, Spire Missouri would require nearly 1,300,000 Dth of capacity for a planned peak day.

18. Without STL Pipeline's 350,000 Dth/d of supply, Spire Missouri estimates that as many as 175,000 households and businesses, or 27% of Spire Missouri's customers, could be without gas service on a planned peak day assuming Lange storage is still available.

19. A large portion of Spire Missouri's peak day is served by its on-system Lange natural gas storage, which as discussed above Spire Missouri must replenish following withdrawals during the winter months (*i.e.*, Spire Missouri may withdraw large volumes to meet winter cold spells, but must refill the storage field to maintain sufficient inventory). Without supply from STL Pipeline, the Lange storage field will be depleted much earlier in the winter than normal, and therefore the inability to replenish Lange during the winter months will be even more impactful. Once the Lange inventory is fully depleted, and without the ability to replenish it through the STL Pipeline, as many as 400,000 households and businesses, or close to 62% of Spire Missouri's customers, could be without gas service on a planned peak day.

20. After Spire Missouri maximizes its available supplies and issues curtailment orders to minimize use of natural gas by non-essential end users, our

modeling indicates that customers could begin to lose service due to uncontrolled pressure loss at an average daily temperature of approximately 9 degrees Fahrenheit without natural gas supply from STL Pipeline, as explained further below. These temperatures are not atypical for St. Louis. Spire Missouri has experienced days with average daily temperatures at or below 9 degrees Fahrenheit during four of the last five winters, according to data from NOAA's National Climatic Data Center converted to a "gas day average" (9 a.m. to 9 a.m.). This temperature threshold for potential loss of service to customers increases to approximately 38 degrees Fahrenheit once Spire Missouri's natural gas storage resource is depleted. Finally, it is important to note that these temperatures are well above the temperature of -10.6 degrees Fahrenheit, which is the "peak day temperature" Spire Missouri currently uses for planning purposes consistent with industry standards and the oversight exercised by the Missouri Public Service Commission.⁴

⁴ The -10.6 degrees Fahrenheit peak day average temperature is based on the coldest historical gas day average temperature experienced in the St. Louis area in recent decades, which was December 24th, 1983. A gas day is measured between 9 a.m. and 9 a.m. the next calendar day. This figure differs from the prior peak day temperature that Spire Missouri previously referenced in the FERC certificate proceeding of -8 degrees Fahrenheit because the prior -8 degrees Fahrenheit level resulted from the use of a coldest past average calendar day temperature (12:00 a.m. to midnight).

21. The geographical impact of such gas supply outages is illustrated broadly in the map attached as Appendix A, which is entitled “Missouri East Projected Outages” (“Outage Map”). The Outage Map is based on two scenarios.

Scenario 1:

Estimated outages on a peak day without STL Pipeline (yellow polygon region). This is the area that Spire Missouri expects to have insufficient pressure to provide natural gas service should the following occur (the total expected outages in this scenario is as many as 175,000 homes and businesses):

- a. STL Pipeline is no longer in service.
- b. St. Louis experiences its peak planning scenario, with an average daily gas day temperature of -10.6 degrees Fahrenheit.

Scenario 2:

Estimated outages on a peak day without STL Pipeline and also without Lange underground storage (yellow and red polygon regions). This is the area that Spire Missouri expects to have insufficient pressure to provide natural gas service should the following occur (the total expected outages in this scenario is as many as 400,000 homes and businesses):

- a. STL Pipeline is no longer in service.
- b. Spire Missouri depletes its Lange underground storage facility.

- c. St. Louis experiences its peak planning scenario, with an average daily gas day temperature of -10.6 degrees Fahrenheit.

These projections have both been generated using the modeling system that is used by Spire's system planning department in the regular course of business, as described above, and both scenarios assume peak conditions. It is important to note, however, that customer outages can occur at temperatures well above our peak planning temperature of -10.6 degrees Fahrenheit, as I referenced earlier in this Declaration.

22. The practical disruptive impacts of a loss of natural gas service would be dire. In the event of a mass outage, customers will remain without heat, hot water, and the ability to cook for a prolonged period of time due to the time and complexity required to reestablish service. Loss of heat during extreme cold weather sometimes results in death.

23. Loss of natural gas service is considerably more difficult to restore, and is more hazardous, than the more familiar loss of electric service. Missouri state pipeline safety regulations,⁵ company operating standards, and sound safety practices require that, to restore natural gas service, a utility technician must visit each impacted home or business to physically shut-off the meter prior to re-

⁵ See Mo. Code Regs. tit. 20 § 4240-40.030(12)(S)1.A.

establishment of gas into the system. When gas flow is re-established to the company's facilities, a utility technician must then return later to physically turn-on the meter for the customer, purge the customer's fuel lines of any air, complete a shut-in pressure test, and re-light all gas appliances.

24. Moreover, natural gas outages caused by uncontrolled pressure loss present an even more dangerous scenario. When pressure is lost to a customer's premise, the lack of flowing gas can extinguish gas appliance pilot lights. If pressure is restored prior to the customer's meter being physically shut-off, there is a risk of explosion created by uncontrolled gas escaping into customer homes through the unlit gas appliance pilot orifice.

25. Even under a controlled curtailment scenario, mass restoration of natural gas service is a formidable challenge. Spire Missouri estimates that it would take up to 100 days before all customers would have service re-established, depending on how many customers lose service and how many technicians are available. It is important to note that gas flow typically cannot be re-established until after the cold weather subsides and overall demand on the system decreases, potentially leaving customers without service for an even longer period of time during extreme and sustained cold weather.

26. As discussed in more detail below, the widespread impact of a mass outage during the winter could therefore result in loss of life and property similar

to, or even worse than, that seen in Texas during Winter Storm Uri in February 2021.

27. In addition to loss of service to households, in the above scenarios, gas service could be lost to more than 320 schools and nearly 20 hospitals, as well as nursing homes, churches and government facilities. The brunt of the loss of service will be felt by the communities who can least afford it.

Winter Storm Uri, in January 2021, Demonstrates Both the Need for STL Pipeline and the Potential Disruptive Impacts of Losing Its Supplies

28. Confirmation of STL Pipeline's value in meeting St. Louis's energy needs is provided by the experience of Spire Missouri during Winter Storm Uri in February 2021. Without STL Pipeline, Spire Missouri's customers would have likely experienced gas service outages and far higher costs.

29. Spire Missouri estimates that without STL Pipeline, up to 133,000 homes and business would have been without gas service as a result of Winter Storm Uri. (This estimate is derived by comparing the demand actually experienced during that period with the supply that would have been available without STL Pipeline.) Alternatively, Spire Missouri estimates that its customers overall would have experienced a combined increased gas cost of up to \$300 million (assuming Spire Missouri would have been able to serve all of its customers), as discussed further below.

30. Spire Missouri's ability to avoid that disastrous outcome was a direct result of STL Pipeline's access to alternative supplies other than Spire Missouri's traditional supply basins. During Winter Storm Uri, natural gas production in the U.S. declined by roughly 25%,⁶ mostly driven by declines in Oklahoma, Texas, and Louisiana, but production in the Rockies and Appalachian Basins that STL Pipeline accessed saw little to no impact. As a result, Spire Missouri was able to provide reliable service to its customers during this weather event with minimal cost impact to customers.

31. Without STL Pipeline, Spire Missouri expects that customers would have lost gas service on eight of the nine days from February 11, 2021 to February 19, 2021, with a peak of roughly 133,000 homes and businesses without service on February 15, 2021. The average daily temperature on this day was 2 degrees Fahrenheit, which is approximately 13 degrees Fahrenheit warmer than Spire Missouri's planned peak day of -10.6 degrees Fahrenheit.

32. Spire Missouri customers realized up to an estimated \$300 million in gas cost savings over the course of nine days during Winter Storm Uri because

⁶ *Natural Gas Weekly Update*, U.S. Energy Info. Admin. (Feb. 18, 2021), https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2021/02_18/ ("In the wake of record-low temperatures affecting most of the country, dry natural gas production in the United States fell by 21.0 billion cubic feet per day (Bcf/d), declining from 90.7 Bcf/d on February 8 to about 69.7 Bcf/d on February 17, according to data from IHS Markit.").

STL Pipeline delivered gas supply sourced from the Rockies and Appalachian Basins, instead of gas from the significantly higher-priced Midcontinent producing basins, around Texas and Oklahoma, that suffered from major operational impediments due to the Winter Storm Uri extreme weather. These price differentials are illustrated in Appendix B, which reflects daily published index prices from Platts Gas Daily during the period of February 16-18, 2021. The map shows the extremely high prices that were experienced in the Midcontinent region around Texas and Oklahoma (red circle) relative to those experienced from trading points that had access to the Appalachian Basins (green circle).

33. Winter Storm Uri provides concrete historical evidence of the supply security and cost benefits that STL Pipeline provides by allowing Spire Missouri to maintain a portfolio consisting of diverse supplies of natural gas. Those benefits would be lost if STL Pipeline were forced to cease operations.

Spire Missouri Cannot Re-Establish the Supply Sources that STL Pipeline Replaced This Winter

34. As discussed above, Spire Missouri faces a high risk of significant loss of natural gas service to large areas of its service territory if STL Pipeline ceases operation, because of changes to its supply portfolio, system, and operations leading up to, and since, STL Pipeline commenced service. Specifically, those changes were: (1) allowing contracts on MRT and upstream pipelines to expire;

(2) retiring the obsolete propane peaking facilities; (3) making changes to the operations at the Lange storage facility to allow reliance on high pressure supply from STL Pipeline; and (4) foregoing system reinforcements for service to the western and southwestern areas because of the new supplies by STL Pipeline.

35. None of those steps can be reversed, and none of these sources of gas can be accessed before the upcoming winter season or beyond, as is explained in more detail below.

36. **MRT is not available to replace the STL Pipeline supply.** As noted above, Spire Missouri allowed 180,000 Dth/day of firm transportation contract rights on MRT to expire, as well as the nearly 170,000 Dth/day of firm upstream contracts that fed its MRT East Line capacity via NGPL and Trunkline. These quantities of firm entitlements are no longer available, for several reasons.

37. Other shippers have subsequently contracted for the pipeline capacity that Spire Missouri allowed to expire on those pipelines. For example, MRT has capacity available on two distinct segments, its Main Line and its East Line, but neither can adequately replace STL Pipeline for the 2021-2022 heating season, as explained in the next two paragraphs.

38. MRT has told Spire Missouri that it now only has 568 Dth/day of capacity available on MRT's Main Line, a negligible quantity compared to the 350,000 Dth/day contracted on STL Pipeline.

39. According to MRT's electronic bulletin board (the generic name for MRT's FERC-mandated posting of pipeline and electric transmission information), MRT has some capacity available on the MRT East Line for this winter. But MRT's delivery point facilities at Chain of Rocks have been removed by MRT, as contemplated in the FERC certificate proceeding, so this capacity is not a viable option for Spire Missouri to use in place of STL Pipeline. In addition to the delivery point being out of service, due to the changing flow dynamics associated with the Appalachian Basins gas flowing south to the Gulf Coast area, upstream flows have not been reliable into the MRT East Line at the pressures MRT would need to deliver gas to the Spire Missouri service territory.

40. At present, any MRT East Line deliveries must be made through STL Pipeline to get into this area of Spire Missouri's distribution system. The facilities needed to connect MRT with Spire Missouri's distribution system cannot be constructed in time for the upcoming 2021-2022 winter season, and would lack the higher pressures that STL Pipeline provides, which would be crippling for Spire Missouri's operations. Moreover, even if the MRT East Line were to be re-connected to Spire Missouri's system at some point in the future, upstream pipeline deliveries into the MRT East Line have had significant pressure reliability problems for years, making them an unreliable and consequently unacceptable supply source to serve customers when they need it the most. Spire Missouri

knows that firm shippers experienced interruptions of service on their MRT East Line volumes during Winter Storm Uri. While MRT was able to deliver quantities actually received from upstream pipelines on its MRT East Line, interruptions occurred due to the inability of MRT to receive all scheduled gas from the upstream pipelines, thus leaving shippers with deliveries less than their nominated quantities. Spire Missouri is exploring availability on upstream pipelines, NGPL and Trunkline, to feed into the MRT East Line. However, Spire Missouri has not received a firm delivery pressure commitment from either of those upstream pipelines, further compromising the company's ability to rely on the MRT East Line as a substitute for STL Pipeline. Finally, even if—contrary to fact—Spire Missouri could access the MRT East Line capacity, it would be far from adequate to meet the overall shortfall that Spire Missouri faces, as shown by Table 1 above.

41. Overall, Spire Missouri may only be able to secure an incremental 568 Dth/day (MRT Main Line) of available pipeline capacity, resulting in a deficit of more than 350,032 Dth/day of contracted supply to meet customer demand during extreme cold weather, as outlined in Table 1 above.

42. **The propane peaking facilities are no longer available.** Spire Missouri's propane injection facilities, which historically were utilized to meet 160,000 Dth/d of customer demand on a planned peak day, were decommissioned as planned after the STL Pipeline went into service. The injection facilities have

been disconnected from the propane pipeline and the vaporizers have been repurposed. Physically reassembling these facilities cannot be done before the 2021-2022 winter season, or for some time beyond. Additionally, Spire Missouri made a strategic decision to remove propane from its supply stack; does not intend to rely on propane in the future to meet customer demand; and does not believe it would be prudent to do so. There are many reasons for this, but in particular, vaporizing propane is more complicated and introduces more risk than flowing natural gas supply; it requires Spire Missouri to notify large industrial customers prior to propane injection as higher percentages of propane can damage equipment due to the higher Btu content it introduces to the system; and to the best of Spire Missouri's knowledge, the Spire Missouri system was the only system of its kind in the U.S., and therefore the specialized knowledge and expertise needed to maintain and operate the equipment presented a long-term risk. Finally, Spire Missouri no longer has priority access to propane supply even if, contrary to fact, Spire Missouri could rebuild and reconnect its facilities, because it terminated its priority propane service contract following the commencement of STL Pipeline service.

43. **The high-pressure supply from STL Pipeline cannot be replaced for Lange storage injection.** As noted above, the operations of the Lange storage field changed with the advent of STL Pipeline, to capture the benefits of receiving

direct injections from the STL Pipeline's higher-pressure supply. Given the ability to direct inject into the Lange storage field from STL Pipeline, Spire Missouri retired three compressors that had been used prior to STL Pipeline, as needed, for injection into storage prior to STL Pipeline. Any resumption of service from MRT (which is purely hypothetical because there is no longer an MRT delivery location other than STL Pipeline at Chain of Rocks) would still leave Spire Missouri without a high pressure supply for direct injection into the field, resulting in inadequate supply and pressure to operate the Lange storage field during the winter heating season to meet customer demand.

44. Reinforcements to the Spire Missouri distribution system cannot be completed in time to allow continued adequate service to the western and southwestern service areas that have relied on the new supplies from STL Pipeline. As noted above, STL Pipeline's service allowed Spire Missouri to forego certain reinforcements on its own system in order to serve demand in the west and southwest areas of its eastern Missouri service territory. Instead, the greatly improved pressure on MoGas due to its interconnection with STL Pipeline⁷ has rendered these reinforcements unnecessary. As I mentioned before, to

⁷ See *supra* n.3.

construct these reinforcements would take years, making that option unavailable for the 2021-2022 heating season, and beyond.

45. In sum, even if Spire Missouri were to attempt to replace STL Pipeline with the pre-existing alternatives, which would involve numerous risks and costs even if completed, it cannot do so in time for the upcoming 2021-2022 heating season.

Conclusion: Continued Operation of STL Pipeline Remains Essential to Continued Service by Spire Missouri to its Customers

46. Spire Missouri is attempting to make contingency plans to ensure customers have continued access to affordable, reliable gas supply in the event STL Pipeline is taken out of service, including discussions with Enable MRT, MoGas and Southern Star Central regarding available capacity. But there currently is no viable alternative to replace the energy supply delivered by STL Pipeline to ensure reliable service to customers, and no such alternative is expected to be available by the 2021-2022 winter, making it imperative to avoid a shutdown.

47. For the reasons discussed above in detail, if STL Pipeline ceases service, Spire Missouri does not have sufficient natural gas supply to meet the demands of the St. Louis region during the upcoming winter season, and faces the prospect of major losses in natural gas service during cold weather events, with

attendant hardships to the residents of Missouri including a significant potential for loss of life.

48. For all of the foregoing reasons, it is critically important that STL Pipeline continue its current operations for the upcoming 2021-22 winter heating season.

49. I declare under penalty of perjury that the foregoing is true and correct. Executed on August 5, 2021.

A handwritten signature in black ink, appearing to read 'S. Carter', written in a cursive style.

Scott Carter

Exhibit 3

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C.

Circuit Rule 26.1, intervenors state as follows:

Spire Missouri Inc.

a) Spire Missouri is a corporation organized and existing under the laws of the State of Missouri, having its principal place of business at 700 Market Street, St. Louis, Missouri 63101. Spire Missouri is a wholly-owned subsidiary of Spire Inc., which has its headquarters in Missouri and is organized under the laws of the State of Missouri.

Spire Inc. (NYSE MKT: SR) is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 12.0% of Spire Inc.'s common stock, and The Vanguard Group, Inc. owns 10.56% of Spire Inc.'s common stock.

b) Spire Missouri is a public utility engaged in the purchase, retail distribution, and sale of natural gas and is the largest natural gas distribution utility system in Missouri, serving more than 1.17 million residential, commercial, and industrial customers.

Spire Inc.'s gas utility subsidiaries provide service to approximately 1.7 million customers in Alabama, Mississippi, and Missouri.

Spire STL Pipeline LLC

a) Spire STL Pipeline LLC (“Spire STL”) is a limited liability company organized and existing under the laws of the State of Missouri. Spire STL’s sole member is Spire Midstream LLC, a Missouri limited liability company, which in turn is wholly owned by Spire Resources LLC. Spire Resources LLC’s sole member is Spire Inc., which has its headquarters in Missouri and is organized under the laws of the State of Missouri.

Spire Inc. (NYSE MKT: SR) is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 12.0% of Spire Inc.’s common stock, and The Vanguard Group, Inc. owns 10.56% of Spire Inc.’s common stock.

b) Spire STL is engaged in interstate natural gas transportation operations and is a natural gas company, as defined by section 2(6) of the Natural Gas Act, 15 U.S.C. § 717a(6) (2018).

Spire Inc.’s gas utility subsidiaries provide service to approximately 1.7 million customers in Alabama, Mississippi, and Missouri.

Exhibit 4

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenors state as follows:

A. Parties and Amici.

The Environmental Defense Fund is petitioner in Case No. 20-1016 and Juli Steck is petitioner in Case No. 20-1017. The Federal Energy Regulatory Commission (“FERC”) is respondent in these consolidated proceedings, and Spire STL Pipeline LLC and Spire Missouri Inc. are intervenors.

Dr. Susan Tierney and the American Antitrust Institute filed *amici curiae* briefs in support of the Environmental Defense Fund; the Interstate Natural Gas Association of America filed an *amicus curiae* brief in support of FERC.

B. Rulings Under Review.

Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018), R.164, JA932.

Spire STL Pipeline LLC, 169 FERC ¶ 61,134 (2019), R.424, JA1144.

C. Related Cases.

This case has not previously been before this Court or any other court. To counsel’s knowledge, there are no related cases pending elsewhere.