

[ORAL ARGUMENT HELD MARCH 8, 2021]

Nos. 20-1016, 20-1017

IN THE

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

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

**Brief for *Amicus Curiae* the Interstate Natural Gas Association
of America in Support of Intervenors-Respondents' Petition
for Rehearing or Rehearing En Banc**

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Parties, Rulings, and Related Cases

A. Parties and *amici*.

All parties, intervenors, and *amici* appearing before this Court are listed in the Brief of Intervenors-Respondents.

B. Rulings under review.

References to the rulings at issue appear in the Brief for Intervenors-Respondents.

C. Related cases.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Interstate Natural Gas Association of America (“INGAA”) respectfully submits this Disclosure Statement. INGAA is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

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Glossary

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|-----------------------|---|
| FERC | Federal Energy Regulatory Commission |
| INGAA | Interstate Natural Gas Association of America |
| NGA | Natural Gas Act |
| Spire Missouri | Spire Missouri Inc. |
| Spire STL | Spire STL Pipeline LLC |

INTEREST OF *AMICUS CURIAE*

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

As the leading trade organization for the industry, INGAA has a significant interest in, and can offer a unique perspective on, the issues presented in intervenors-respondents’ petition, including the deeply disruptive impacts of vacating the certificate of an operational pipeline.¹

¹ This brief takes no position regarding the Court’s remand ruling, or the issues the Federal Energy Regulatory Commission (“FERC”) will evaluate on remand. Rather, this brief explains that rehearing regarding the remedy is warranted due to the disruptive impact of vacatur.

This broad industry perspective is not provided by any other party or amici. See [Fed. R. App. P. 29\(a\)\(3\)](#).²

INTRODUCTION AND SUMMARY OF ARGUMENT

People and businesses depend upon pipelines to deliver reliably the energy that powers their lives and livelihoods—and critically, as winter approaches, to heat homes, hospitals, schools, and businesses. But pipeline capacity simply cannot be replaced easily or quickly. When a certificate is vacated and a pipeline is forced to cease operations, the pipeline’s customers must try to replace the lost supply. There generally is no glut of capacity available on the interstate pipeline network, however, particularly during winter, when demand is at its peak. Shippers and the people and businesses who rely on them therefore are at significant risk of paying substantially higher costs for natural gas or, worse, losing access to natural gas. Gas pipelines are also highly interconnected, meaning that the sudden unavailability of one pipeline can have operational impacts on either other pipelines or the entire network.

² Pursuant to [Fed. R. App. P. 29\(a\)\(4\)\(E\)](#), INGAA affirms that no counsel for a party authored this brief in whole or in part, and no party or entity other than INGAA and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Vacatur's harm cannot be easily undone. The process of ceasing service on an operational pipeline, and of later re-starting service if a certificate is re-issued, is complex and costly. It is likely shippers, and eventually consumers, will ultimately bear much of the cost. Vacatur will also threaten reliable service in the future by undermining regulatory certainty, raising costs of development, and, ultimately, discouraging investment in critical infrastructure. Consumers will face supply constraints or increased rates as a result of declining investment, depriving them of the same benefits that the Natural Gas Act ("NGA") was intended to protect.

Far from merely creating "some disruption as a result of [an] 'interim change,'" Op.36, the negative consequences of vacatur demonstrates that the remedy is unwarranted. *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, [988 F.2d 146](#) (D.C. Cir. 1993). Due to these potentially severe consequences, FERC should have the opportunity to determine whether the STL Pipeline should continue operating during remand so the agency can minimize any disruption to consumers relying on the pipeline. This Court has never before entered an order mandating a gas pipeline cease operations pending a remand to FERC, and has granted

rehearing regarding the remedy in analogous cases.³ The Court should not depart from that precedent here.

ARGUMENT

I. Vacatur of an Operational Pipeline’s Certificate Is Highly Disruptive.

This Court’s precedent does not support vacatur here, because vacating the certificate of a natural gas pipeline that is in operation would have immense “disruptive consequences.” *Allied-Signal*, 988 F.2d at 150; *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019).

A. Vacatur Threatens Reliable Gas Supply Heading into the Winter Season.

A secure, continuous supply of natural gas is vitally important, because people and businesses rely on natural gas for critical energy needs. Pipeline service is particularly crucial during the winter, because many consumers depend on natural gas for heat. Once a pipeline enters operation, it has “an obligation, deeply embedded in the law, to continue service” to these consumers. *Mich. Consol. Gas Co. v. Fed. Power Comm’n*,

³ See, e.g., *Nat’l Parks Conservation Ass’n v. Semonite* (“NCPA”), 925 F.3d 500, 502 (D.C. Cir. 2019) (per curiam); *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (per curiam); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

283 F.2d 204, 214 (D.C. Cir. 1960). The NGA prohibits ceasing pipeline service unless FERC finds there are reasonable or comparable alternatives. 15 U.S.C. § 717f(b); *N. Nat. Gas Co.*, 135 FERC ¶61,048, ¶35 (2011). Respondent-intervenor Spire Missouri is also mandated by state law to provide continuous utility service. *Nat'l Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 383 (Mo. Ct. App. 1973); Section 393.130.1, Mo. Rev. Stat. The STL Pipeline supplies gas that powers homes, medical facilities, schools, wastewater treatment plants, grocery stores, manufacturing plants, and businesses in the St. Louis area.⁴

Vacatur of an operational pipeline's certificate disrupts secure, continuous supply in at least two respects.

First, there is no guarantee that a pipeline's customers will be able to meet their service obligations if the pipeline ceases operation, even if the customers previously had adequate capacity on other pipelines. When

⁴ See, e.g., Response of the Pub. Serv. Comm'n of the State of Missouri, Application of Spire STL Pipeline LLC for a Temporary Emergency Certificate (July 30, 2021), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210730-5055&optimized=false; Metro. St. Louis Sewer Dist., Comment Letter on STL Pipeline LLC Temporary Emergency Certificate Application (July 30, 2021), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210730-5176&optimized=false.

a new pipeline begins operations, existing pipelines must attempt to re-market any terminated capacity from former customers. Remand without vacatur would allow FERC to determine, based on its expertise, how best to meet the needs of customers served by the subject pipeline and avoids the potentially disruptive results of immediate vacatur and cessation of operations.

FERC also does not require pipelines “to build additional capacity” to serve customers. *Process Gas Consumers Grp. v. FERC*, [292 F.3d 831, 836](#) (D.C. Cir. 2002). Even if there is a willing developer, any new capacity requires an NGA section 7 certificate, a lengthy process unsuited to meeting customers’ immediate needs. [15 U.S.C. § 717f\(c\)](#).

Customers currently using the STL Pipeline may therefore bear substantial costs when the pipeline ceases operation—if they are able to find alternatives at all. For instance, the MoGas Pipeline is interconnected with the STL Pipeline. MoGas has stated that if the STL Pipeline ceases operations, it will need to build new infrastructure to continue transporting critical natural gas supplies, which could take years to complete and cost up to \$100 million. Motion to Intervene Out of Time at 6, 10, *MoGas Pipeline LLC*, Docket CP17-40-007 (FERC July 28, 2021).

Second, the interconnected nature of the gas pipeline network means that a pipeline ceasing operations can diminish the entire network's resiliency and reliability. FERC encourages interconnections between pipelines, to promote competition and lower prices for consumers. *Panhandle E. Pipe Line Co.*, 91 FERC ¶61,037, 61,140-41 (2000). A pipeline generally must allow other systems, including its competitors', to interconnect. *Id.* Because of interconnections, the addition of a new pipeline typically decreases consumer prices by removing supply bottlenecks and opening up access to new markets.⁵

The benefits of access to diverse markets were apparent during Winter Storm Uri in February 2021, which severely disrupted the supply of natural gas from Texas. Areas reliant on this supply saw rationing or outages of natural gas, leading to deaths from hypothermia and carbon monoxide poisoning, as well as spiking consumer costs.⁶

⁵ U.S. Dep't of Energy, *Appendix B, Natural Gas Infrastructure*, at 28-32 (2015), https://www.energy.gov/sites/prod/files/2015/06/f22/Appendix%20B-%20Natural%20Gas_1.pdf.

⁶ See Perla Trevizo et al., Texas Tribune, *Texas Enabled the Worst Carbon Monoxide Poisoning Catastrophe in Recent U.S. History* (Apr. 29, 2021), <https://www.texastribune.org/2021/04/29/texas-carbon-monoxide-poisoning/> (noting deaths from carbon monoxide poisoning as residents attempted to use cars for heat); Tex. Dep't of State Health Servs., *Winter*

There is no guarantee that the damage vacatur could cause would be averted, and the cost of failure is high. Demand for natural gas peaks in the winter months because many people and businesses use gas for heat. *See Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 626 n.3 (1972); *PennEast Pipeline Co.*, 170 FERC ¶61,064, 61,482 n.5 (2020). Contracts for natural gas supplies are often in place months in advance of the winter heating season as a result. If the Court vacates the STL Pipeline's certificate, Spire Missouri and its customers will be scrambling to reconfigure gas supply arrangements and find alternative transportation at a time when many alternatives are already under contract.

It is therefore imperative that the Court reconsider its remedy ruling. The Court should not “vacate regulations when doing so would risk significant harm to the public health.” *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (per curiam). Vacatur here could threaten reliable gas supply in St. Louis less than 90 days before the winter heating season. Petn. Ex. 2. If the Court's order goes into effect unmodified, there is

Storm-Related Deaths (July 13, 2021), <https://dshs.texas.gov/news/updates.shtm#wm> (noting 210 deaths).

a risk that severe weather this upcoming winter could have devastating consequences for St. Louis.

B. The Remedy is Disruptive due to the High Cost of Abandoning and Reinstating Pipelines.

Temporarily shutting down an operational natural gas pipeline is not a simple matter of flicking a switch. It is a complex and highly expensive process that includes disconnecting all supplies of gas, venting gas from the pipeline into the atmosphere, “run[ning] cleaning pigs through . . . to remove residual fluids,” and “purg[ing] with air or nitrogen to create an inert atmosphere.” FERC, *Line 1-N Abandonment Project, Environmental Assessment* at 6, Docket CP18-533-00 (Jan. 2019); see [49 C.F.R. § 192.727](#). Costs from this process easily run into millions of dollars, with the cleaning alone costing roughly \$35,000 per mile. See Callie Mitchell, RBN Energy, LLC, ‘Wooo – Pig – Sooie!’, *The Business of Pipeline Integrity II* (Oct. 31, 2013).

The process of reinstating service is likewise complex and costly. Among other things, “each disconnected service line must be tested in the same manner as a new service line, before being reinstated.” [49 C.F.R. § 192.725](#). This testing costs, on average, more than \$100 *per foot* of pipeline, and costs can run to more than \$400 per foot. INGAA, *Safety of Gas*

Transmission Pipeline Rule, Cost Analysis, at 5 (July 7, 2016). If the certificate were re-issued, “large sums of money would have been wasted” “only for the project to be [reinstated] shortly thereafter,” *Nat’l Parks Conservation Ass’n v. Semonite*, [422 F. Supp. 3d 92, 103](#) (D.D.C. 2019), which would likely ultimately harm consumers as well as the pipeline.

C. The Remedy Will Raise the Cost of Capital for Pipelines, Harming Consumers.

The remedy also threatens to harm consumers by significantly raising the cost of capital for future pipeline projects. “Pipelines are capital-intensive.” *Nat’l Fuel Gas Supply Corp.*, 158 FERC ¶61,145 (2017) (Bay, Commissioner, Separate Statement). Between 2010 and 2020, in reliance upon FERC certificate orders, the industry added new gas pipeline capacity of over 100 billion cubic feet per day, at a cost of over \$61 billion.⁷ “[T]ransportation service” over these pipelines “provid[ed] public benefits” by “contributing to the development of the gas market, in particular the supply of reasonably-priced gas; adding new transportation options for producers, shippers, and consumers; strengthening the domestic economy and the international trade balance; and supporting domestic jobs

⁷ U.S. Energy Information Administration, <https://www.eia.gov/natural-gas/data.php#pipelines>.

in gas production, transportation, and distribution, and jobs in industrial sectors that rely on gas.” *NEXUS Gas Transmission, LLC*, 172 FERC ¶61,199, ¶17 (2020).

Congress chose a framework that relies upon private investment to fund this critical energy infrastructure. The NGA affords a pipeline the opportunity to earn a just and reasonable return on investment, “to maintain its credit and to attract capital.” *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U. S. 591, 603 (1944).

Regulatory certainty “leads to lower risk and lower cost of capital.”⁸ Conversely, in the absence of such certainty, the costs of capital can rise dramatically—if investors are willing to fund projects at all. It is axiomatic that “[c]ompanies need to have some level of regulatory certainty if they are going to continue to make multi-million and multi-billion

⁸ Kevin Chavers et al., BlackRock, at 4, *Infrastructure Investment: Bridging the Gap Between Public and Investor Needs* (Nov. 2015), <https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-infrastructure-investment-november-2015/pdf>.

dollar investment decisions.”⁹ Investors have relied on FERC certificates in funding costly infrastructure.

Vacatur of the certificate pending remand will therefore make investments in future pipeline projects far more costly, if not untenable, ultimately harming shippers and consumers through higher rates and longer timelines between system improvements.

II. Vacatur Is Unwarranted Given the Potential that FERC Could Reach the Same Result on Remand.

The remaining *Allied Signal* factor—“the likelihood that ‘deficiencies’ in an order can be redressed on remand, even if the agency reaches the same result,” *Black Oak Energy, LLC v. FERC*, [725 F.3d 230, 244](#) (D.C. Cir. 2013)—also does not support vacatur here. The Court found “it is far from certain that FERC ‘chose correctly,’” and that the disruptive impact of vacatur “is weighty only insofar as the agency may be able to rehabilitate its rationale.” Op.36. But where, as here, vacatur would be extremely disruptive, remand without vacatur is appropriate if it is “at least possible” that the agency could properly reach the same result on

⁹ FERC, *Opening Statement of Chairman Richard Glick* (May 20, 2021), <https://www.ferc.gov/news-events/news/opening-statement-chairman-richard-glick-may-20-2021>.

remand. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (remanding without vacatur even though the “agency so clearly violate[d] the APA”); *see also, e.g., North Carolina*, 550 F.3d at 1177 (remanding without vacatur despite “more than several fatal flaws in the rule” due to potential for disruption); *Clean Wis. v. EPA*, 964 F.3d 1145, 1177 (D.C. Cir. 2020) (per curiam) (similar).

Remand without vacatur is particularly appropriate “when a court declares a rule ‘invalid’ because the agency’s explanation is inadequate,” since “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). The Court’s merits ruling here is based on gaps in the agency’s explanation, particularly FERC’s decision not “to ‘look behind’ the precedent agreement in determining whether there was market need” for the pipeline. Op.34. Remand without vacatur is appropriate because it is “plausible” that FERC may “be able to supply the explanations required.” *City of Oberlin*, 937 F.3d at 611.

Spire STL “claim[s] that there is evidence in the record supporting their assertions as to the benefits of the pipeline.” Op.35. Due to its ruling that FERC’s reasoning was flawed, the Court did not analyze this

evidence itself, instead remanding for the agency to do so in the first instance. Op.35. Given FERC's "broad discretion" in this area, *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014), the Court should not predict the outcome of FERC's analysis by holding FERC cannot "plausibl[y]" rehabilitate its decision on remand, *City of Oberlin*, 937 F.3d at 611. Vacatur is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for rehearing or rehearing en banc should be granted.

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Certificate of Compliance

1. This brief complies with Federal Rule of Appellate Procedure 29(b)(4)'s type-volume limitation because it contains 2,598 words, excluding the material exempted by Rule 32(f).

2. This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

August 12, 2021

/s/ Emily P. Mallen
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Certificate of Service

Today, August 12, 2021, I caused this brief to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of this filing to all registered CM/ECF users.

/s/ Emily P. Mallen
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