

No. 21A56

IN THE
Supreme Court of the United States

SPIRE MISSOURI INC.; SPIRE STL PIPELINE LLC,
Applicants,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,
Respondents.

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING
THE FILING AND DISPOSITION OF A PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL ARCHULETA
TROUTMAN PEPPER HAMILTON
SANDERS LLP
401 9th Street N.W., Suite 1000
Washington, D.C. 20004

SEAN P. JAMIESON
SPIRE STL PIPELINE LLC
3773 Richmond Avenue, Suite 300
Houston, TX 77046

THEODORE B. OLSON
Counsel of Record
EUGENE SCALIA
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

JONATHAN S. FRANKLIN
DAVID T. KEARNS
NORTON ROSE FULBRIGHT US LLP
799 9th Street N.W., Suite 1000
Washington, D.C. 20001

Counsel for Spire STL Pipeline LLC
[Additional Counsel Listed On Inside Cover]

CHRISTOPHER J. BARR
POST & SCHELL, PC
601 14th Street N.W., Suite 600
Washington, D.C. 20005

MATTHEW J. APLINGTON
SPIRE MISSOURI INC.
700 Market Street, 6th Floor
St. Louis, MO 63101

Counsel for Spire Missouri Inc.

RULE 29.6 STATEMENT

The corporate-disclosure statement included in the Application for a Stay remains accurate.

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REPLY IN SUPPORT OF APPLICATION FOR A STAY

The Environmental Defense Fund (“EDF”) does not dispute that, if the Spire STL Pipeline (the “Project”) is shut down, hundreds of thousands of St. Louis-area residents could be left without natural-gas service for prolonged periods of time this winter. *See* Appl. 5. Nor does EDF “dispute the harm that a breakdown in gas service to Spire Missouri’s customers would entail.” Opp. 4. Indeed, EDF acknowledges “the near-term necessity of continued operation of the” Project and the “emergency” created by the D.C. Circuit’s decision vacating the Project’s Permanent Certificate Order. *Id.* at 9, 10 (internal quotation marks omitted).

EDF nevertheless opposes the request of Spire Missouri Inc. (“Spire Missouri”) and Spire STL Pipeline LLC (“Spire STL,” collectively “Applicants”) that this Court recall and stay the D.C. Circuit’s mandate because, in EDF’s view, “there is a *distinct possibility* that FERC . . . will issue Spire a new temporary certificate that allows its pipeline to operate through the coming winter.” Opp. 20 (emphasis added). But when it comes to the potentially life-threatening consequences of depriving a major metropolitan area of natural gas at the outset of winter, a “distinct possibility” that an agency will act before disaster strikes is far from sufficient and cannot justify judicial inaction in the face of a looming catastrophe created by a court’s order. A stay of the D.C. Circuit’s mandate—which would leave the Project’s Permanent Certificate Order in place during the pendency of proceedings in this Court—is the *only* way to ensure that the hundreds of thousands of homes and businesses that rely on natural gas from Spire Missouri have access to a steady and reliable heating source this winter.

The importance of the question to be presented in Applicants’ forthcoming petition for a writ of certiorari confirms that a stay is warranted. EDF’s response does nothing to detract from the urgent need for this Court to reconcile the D.C. Circuit’s recent insistence on granting vacatur based on agencies’ remediable errors in reasoning and without regard to potentially devastating consequences—which is already the subject of one pending petition for a writ of certiorari, *see Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-____ (filed Sept. 20, 2021)—with the approaches of other circuits that have stated that vacatur is appropriate only rarely and that remand without vacatur is the presumptive remedy in agency proceedings. *See, e.g., Tex. Ass’n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021). EDF’s methodical recitation of the circuits’ divergent standards for assessing whether to remand without vacatur only underscores the need for this Court to resolve this long unsettled, and frequently recurring, question of administrative law. *See Opp.* 17-19.

For all of these reasons, the Court should recall and stay the D.C. Circuit’s mandate.¹

I. A Stay Is Required To Guarantee That The Impending Irreparable Harm To St. Louis-Area Homes And Businesses Will Not Occur.

EDF contends that a stay is unnecessary because Spire STL currently possesses a time-limited emergency Temporary Certificate Order—which is scheduled to expire on

¹ Because the mandate issued before the opposition was due, the Court will need to recall the mandate before staying it. But the governing standard remains the same. *See, e.g., Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers).

December 13, 2021—and FERC is considering whether to grant another temporary certificate that would extend the Project’s operating authority beyond the current certificate’s fast-approaching expiration date. Opp. 12-13. But, for multiple reasons, the “possibility” of action by FERC, *id.* at 20, is no substitute for the *guarantee* of continued operating authority that a stay would provide while this Court considers Applicants’ forthcoming petition for a writ of certiorari.

First, FERC currently has only four Commissioners, and it is entirely unknown whether a majority of the Commission will be able to reach consensus about granting Spire STL a temporary certificate that extends beyond December 13. *See* Appl. 25. These proceedings have already been the subject of numerous disagreements among the Commissioners, with the current Chairman dissenting from the decision to issue the Permanent Certificate Order, Ex. A to Appl. at 17; Ex. E to Appl. at 110, 126, Commissioner Danly dissenting from the decision to issue the emergency Temporary Certificate Order, Ex. H to Appl. at 6, 7, and a majority of the Commissioners supporting seeking rehearing on the remand-without-vacatur issue in the D.C. Circuit but the Chairman declining to do so, Ex. H to Appl. at 11 ¶ 9.

In light of that fraught history, there is no guarantee that the Commission will be able to act promptly and decisively to extend the Project’s operating authority and ensure that St. Louis-area residents are able to heat their homes and businesses this winter. And as Applicants explained, if FERC fails to act by December 13 and Spire STL is forced to shut down the Project, it will be too late for Applicants to return to this Court to seek emergency relief at that point without the threat of at least some service disruptions

because, once the Project has been shut down and decommissioned, Spire STL would need up to 10-12 weeks to take the necessary steps to reactivate the Project. Ex. J to App. ¶¶ 8, 24, 26. More broadly, the mere possibility that FERC might continue to employ its emergency powers to ameliorate the significant potential harms caused by the D.C. Circuit's vacatur is no substitute for an order from this Court preserving the status quo while it considers the important, and unsettled, question whether the D.C. Circuit erred in the first place by vacating FERC's Permanent Certificate Order and thereby relegating Spire STL to that uncertain agency remedy to redress the potential for serious harm the D.C. Circuit itself improperly created.

Second, even if FERC does grant a temporary certificate that extends the Project's operating authority beyond December 13, FERC may impose conditions on the certificate that could impair the Project's operations and its ability to deliver natural gas to St. Louis-area homes and businesses. EDF itself has requested that FERC impose "strict" and "sufficiently stringent conditions" on any temporary certificate, including restrictions on the volume of natural gas that the Project can transport. *See* EDF Mot. to Reject in Part and Protest at 1, 29-36, Spire STL Pipeline LLC, FERC Dkt. No. CP17-40-007 (filed Aug. 2, 2021). The Missouri Public Service Commission has opposed EDF's proposed conditions because, among other reasons, they "could constrain Spire Missouri's provision of natural gas to all of its local Missouri customers" and "could make natural gas service to retail customers more expensive than necessary," Reply Comments of the Pub. Serv. Comm'n of the State of Mo., at 5, Spire STL Pipeline LLC, FERC Dkt. No. CP17-40-007 (filed Oct. 5, 2021), but there is no way to know whether FERC will side

with EDF or the Missouri Public Service Commission on this issue if it grants a new temporary certificate at all.

Finally, it remains possible that FERC will not only decline to grant a new temporary certificate but will also shorten or revoke the emergency Temporary Certificate Order that is currently in place, leaving the Project without operating authority even earlier than December 13. According to EDF, FERC's language stating that the Temporary Certificate Order will only remain in place "absent further order from the Commission" is a mere "truism" that "could only have been meant to further assure the public that FERC would take steps necessary" to avert catastrophe. Opp. 13. But EDF does not, and cannot, dispute that FERC retains the authority to shorten or immediately revoke the Project's emergency operating authority, leaving the residents of St. Louis without a source of natural gas this winter.

Ultimately, EDF contends that "[h]arm contingent on future agency action is inherently speculative and incapable of supporting a request for extraordinary relief." Opp. 13. But it is EDF that is relying on speculation—speculation about FERC's ability to reach consensus to grant Spire STL's pending temporary-certificate application, speculation that FERC will deny EDF's own request for constraining conditions on that new certificate, and speculation about FERC's willingness to leave the emergency Temporary Certificate Order in place until it is replaced by a new certificate. EDF's multiple layers of speculation are inadequate protection for the hundreds of thousands of St. Louis-area residents who depend on natural gas supplied by the Project to heat their homes and businesses. It is the responsibility of the courts—not a short-staffed agency—

to avert the disastrous consequences of an improvident vacatur order. Only a stay from this Court—which would leave the Project’s Permanent Certificate Order in place during proceedings in connection with Applicants’ forthcoming petition for a writ of certiorari—can guarantee an uninterrupted supply of vital natural gas to Spire Missouri’s customers this winter and throughout the pendency of this case.

II. The Question Presented Warrants Review And Is Likely To Lead To Reversal.

EDF essentially admits that the D.C. Circuit deployed a vacatur analysis that resulted in an order with catastrophic consequences that require multiple “emergency” interventions by a federal agency. But according to EDF, this Court is nevertheless unlikely to grant review of the Applicants’ forthcoming petition for a writ of certiorari because the conflict identified by Applicants is supposedly nothing more than the “application of a uniform standard in a wide array of factual settings.” Opp. 17. That assessment is impossible to square with EDF’s own survey of the circuits’ remand-without-vacatur case law, which highlights the divergent standards that the circuits have adopted in determining the appropriate remedy for agency error. *See id.* at 17-19.

The Fifth Circuit, for example, has stated that “[o]nly in rare circumstances is remand for agency reconsideration not the appropriate solution,” *Tex. Ass’n of Mfrs.*, 989 F.3d at 389 (alteration in original)—a standard that is squarely at odds with the D.C. Circuit’s holding in this case that remand without vacatur is appropriate only where it is “clear” or “certain” that an agency will be able to rehabilitate its reasoning on remand, Ex. A to App. at 36-37, and that conflicts with EDF’s own claim that it is remand without

vacatur that is “exceedingly rare[],” Opp. 14. And while EDF attempts to dismiss the Fifth Circuit’s statement as one-off “dictum,” the same language is also found in an earlier opinion, *see O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 239 (5th Cir. 2007), and is consistent with the approach applied by the Fifth Circuit in other cases that articulate the test somewhat differently but apply the same presumption in favor of remand without vacatur, *see also Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur because the agency “may well be able to justify its decision” on remand and vacatur “would be disruptive”).

EDF also suggests that every circuit that has considered the issue invokes some version of the D.C. Circuit’s *Allied-Signal* test in determining whether to remand without vacatur. Opp. 15-16. But merely citing *Allied-Signal*’s two guideposts—“the seriousness of the order’s deficiencies” and “the disruptive consequences” of vacatur, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)—does not mean that courts are giving those factors the same weight, applying them in the same manner, or limiting their analysis to those two considerations. One need look no further than the D.C. Circuit’s decision vacating the Project’s Permanent Certificate Order—which gave no weight to the potentially dire consequences of shutting down an operational natural-gas pipeline and thus ignored one of the two *Allied-Signal* factors—and the First Circuit’s decision in *Town of Weymouth v. Massachusetts Department of Environmental Protection*, 973 F.3d 143, 146 (1st Cir. 2020) (per curiam), allowing a pipeline to continue operating—despite errors in its permitting—to perceive the flaws in

EDF’s attempt to manufacture uniformity on this confounding question of administrative law.²

Finally, EDF argues that, if this Court grants review, it is likely to affirm because the administrative record supposedly does not include evidence of “market need” for the Project, which means that FERC’s “permanent certificate will be difficult to rehabilitate on this record.” Opp. 21. But “market need” includes considerations beyond increased demand. As FERC recognized in the Policy Statement that governs this case, a pipeline certificate can validly be supported by numerous needs other than meeting new demand, including “eliminating bottlenecks,” providing “access to new supplies,” “lower[ing] costs to consumers, providing new interconnects that improve the interstate grid,” and “increasing [system] reliability.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

In support of the permanent-certificate order application, Spire STL presented extensive, and largely undisputed, evidence of just such needs for the Project—wholly independent of the precedent agreement upon which the D.C. Circuit held that FERC

² EDF faults Applicants for failing to cite additional facts regarding the disruptive consequences of vacatur before the D.C. Circuit issued its ruling on the merits, but those facts were not part of the administrative record—which closed before the Project became operational—and therefore were not within the scope of the D.C. Circuit’s review of the Permanent Certificate Order. EDF’s complaints (at 7, 8) about Applicants’ submission of declarations in this Court—which are entirely un rebutted by EDF—are equally off-base because a stay must be supported by evidence of the potential for *current* harm, which is documented in detail in Applicants’ declarations.

placed undue weight—including that the Project would increase the reliability of natural-gas service in the St. Louis area by diversifying Spire Missouri’s natural-gas supply and reducing its reliance on a single, vulnerable source of gas from Texas and the Gulf Coast region, and would enable Spire Missouri to retire obsolete, environmentally problematic propane-peaking facilities that Spire Missouri previously used to satisfy periods of peak demand. *See* Appl. 7; D.C. Cir. Intervenor’s Br. 15-23. After reviewing that record evidence, FERC identified those same benefits, JA968-69; JA1155-56, and specifically rejected arguments claiming that the Project was the result of unfair competition, affiliate abuse, or self-dealing, and issued a Permanent Certificate Order that gave Spire STL two years to put the Project into service, Ex. E to Appl. at 33 ¶¶ 76-77, 108-09.

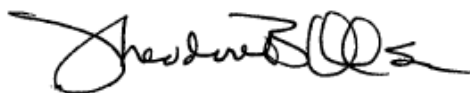
Because Spire STL complied with the terms of that order, the Project was already operational when Winter Storm Uri struck in February 2021; the Project’s provision of uninterrupted natural-gas service during that severe winter weather event—without any of the disruptions, shortages, and price spikes experienced elsewhere in the country—belies EDF’s inaccurate characterizations of the Project’s utility and Spire STL’s conduct and motives (which will be rebutted more fully in Spire STL’s application for a new permanent certificate), and confirms that FERC could readily find market need and re-issue the Project’s Permanent Certificate Order on remand, *see* Appl. 26-27.

CONCLUSION

The hundreds of thousands of households and businesses in the St. Louis area should not be left to depend on the mere possibility of action by FERC to protect them from the impact of the D.C. Circuit’s vacatur order and to preserve their ability to heat

their homes, schools, hospitals, and workplaces this winter. To guarantee that the Project's Permanent Certificate Order remains in place while this Court considers Applicants' petition for a writ of certiorari—and that natural gas remains available to St. Louis residents this winter—this Court should recall and stay the D.C. Circuit's mandate.

Respectfully submitted.



CHRISTOPHER J. BARR
POST & SCHELL, PC
601 14th Street NW, Suite 600
Washington, D.C. 20005

MATTHEW J. APLINGTON
SPIRE MISSOURI INC.
700 Market Street, 6th Floor
St. Louis, MO 63101

Counsel for Spire Missouri Inc.

THEODORE B. OLSON
Counsel of Record
EUGENE SCALIA
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

JONATHAN S. FRANKLIN
DAVID T. KEARNS
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW, Suite 1000
Washington, D.C. 20001

DANIEL ARCHULETA
TROUTMAN PEPPER HAMILTON
SANDERS LLP
401 9th Street N.W., Suite 1000
Washington, D.C. 20004

SEAN P. JAMIESON
SPIRE STL PIPELINE LLC
3773 Richmond Avenue, Suite 300
Houston, TX 77046

Counsel for Spire STL Pipeline LLC

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