ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1188

IN THE

United States Court of Appeals for the District of Columbia Circuit

OTSEGO 2000, INC., and JOHN AND MARY VALENTINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

DOMINION ENERGY TRANSMISSION, INC.,

Intervenor.

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

INITIAL BRIEF FOR INTERVENOR DOMINION ENERGY TRANSMISSION, INC.

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February 1, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. In addition to the parties listed in the Commission's brief, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers submitted an amici curiae brief. The Interstate Natural Gas Association of America has also filed an amicus curiae brief.

2. Dominion Energy Transmission, Inc. is a Delaware corporation engaged in the business of storing and transporting natural gas in interstate commerce for customers principally located in the Northeast and Mid-Atlantic markets. Dominion is a wholly owned subsidiary of Dominion Resources, Inc., a publicly traded company listed on the New York Stock Exchange.

B. RULINGS UNDER REVIEW

The rulings under review are listed in Otsego 2000's opening brief.

C. RELATED CASES

Aside from the case mentioned in the Commission's brief, there are no related cases of which counsel is aware within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Catherine E. Stetson
Catherine E. Stetson

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GLOSSARY

Certificate Order	*Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016)
Dominion	Dominion Energy Transmission, Inc.
FERC Br.	Federal Energy Regulatory Commission's Opening Brief
FERC or the Commission	Federal Energy Regulatory Commission
NEPA	National Environmental Policy Act
Otsego	Otsego 2000, Inc.
Pet. Br.	Petitioners' Opening Brief
Project	New Market Project
Rehearing Pet.	Otsego 2000, Mohawk Valley Keeper, and John and Maryann Valentine Petition for Rehearing of Order Issuing Certificate for the Dominion New Market Project and Request for Stay of Certificate
Rehearing Order	*Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018)
States Amicus Br.	Amici Brief of New York, Maryland, New Jersey, Oregon, and Washington, the Commonwealth of Massachusetts, and the District of Columbia

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JURISDICTIONAL STATEMENT

Otsego 2000, Inc. (Otsego) timely filed its petition for review following FERC's order denying rehearing. *See* 15 U.S.C. § 717r(b). But this Court lacks jurisdiction to resolve Otsego's contentions because Otsego did not raise them on rehearing before the Commission. *See Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107 (D.C. Cir. 1989).

INTRODUCTION

Otsego tries to make this case about the future of natural-gas policy in America. It is actually about something far more pedestrian: The Natural Gas Act's jurisdictional requirement that parties seeking judicial review first present their arguments to the Federal Energy Regulatory Commission (FERC) in a rehearing petition. In this Court, Otsego attacks both the substance of and the process behind the Commission's determination that Dominion Energy Transmission, Inc.'s (Dominion) New Market Project will not foreseeably cause additional natural-gas production or consumption as indirect effects of the Project's approval. But Otsego made none of those arguments to the Commission in its rehearing petition below. And the Natural Gas Act does not allow this Court to reverse the Commission based on arguments it never had a chance to consider on rehearing.

Otsego is wrong on the merits, anyway. The National Environmental Policy Act (NEPA) demands that FERC take a hard look at the potential environmental consequences of its choice to approve new natural-gas infrastructure. FERC spent more than a year and hundreds of pages examining the environmental consequences of approving the New Market Project and reasonably explained that FERC's approval is not likely to foreseeably cause additional natural-gas production or add net greenhouse gases to the atmosphere. NEPA does not require

FERC to consider far-flung possible consequences that will only minimally, if at all, influence its ultimate decision to approve a project.

The Court should reject Otsego's demand that FERC foresee the unforeseeable. Otsego wants FERC to consider the New Market Project's potential to set in motion events that would cause emissions by unidentified, two-steps-removed consumers and producers. It also wants FERC to ask for additional information about these consumers and producers, and it wants FERC to attempt to quantify the hypothetical effects those unidentified consumers and producers would cause by consuming and producing the gas transported by the Project. But neither NEPA nor the Natural Gas Act demands those crystal-ball inquiries or modes of policymaking.

Otsego's petition for review should be dismissed or otherwise denied.

STATEMENT OF THE CASE

The New Market Project. Dominion transports natural gas for customers in the Mid-Atlantic and Northeast. *See* JA __ [Certificate Order P 2]. In 2014, Dominion planned to upgrade and modify three existing compressor stations and one meter-and-regulating station, and to construct two new compressor stations in upstate New York. JA __ [*Id.* P 3].[1] This project, which Dominion calls the New

[1] "Compressor stations are facilities located along a natural gas pipeline that house and protect compressors. Compressors are used to compress (or pump) the gas to

Market Project, would allow Dominion to provide an estimated 112,000 dekatherms (Dth) per day of firm transportation[2] capacity from existing interconnections with other interstate pipelines in Clinton County, Pennsylvania to existing interconnections with local distribution systems near Schenectady and in Montgomery County. *See* JA __ [*Id.* P 4]. The incremental capacity to be provided by the New Market Project was contracted for by two New York local distribution companies, the Brooklyn Union Gas Company and Niagara Mohawk Power Corporation. *Id.* Local distribution companies like Brooklyn Union and Niagara Mohawk carry natural gas from interstate pipelines to retail customers, and are not generally regulated by FERC. *See* 15 U.S.C. § 717(b).

Before constructing the New Market Project, Dominion sought a certificate of public convenience and necessity from FERC. JA__ [Certificate Order P 1]. FERC undertook an environmental assessment considering the impacts—direct, indirect, and cumulative —of the Project on the geology, soil, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land

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move it through the system." FERC, An Interstate Natural Gas Facility On My Land? What Do I Need To Know? 28 (August 2015), *available at* https://tinyurl.com/y73qr6p3. Metering-and-regulating stations, meanwhile, "are installations containing equipment to measure the amount of gas entering or leaving a pipeline system and, sometimes, to regulate gas pressure." *Id.* at 29.

[2] In Commission parlance, "firm" service is guaranteed, while "interruptible" service is not. *Georgia Indus. Grp. v. FERC*, 137 F.3d 1358, 1360 n.6 (D.C. Cir. 1998).

use, recreation, visual resources, cultural resources, socioeconomics, air quality, noise, and safety, as well as potential alternatives. JA__ [*Id.* P 31]; JA __ - __ [Environmental Assessment]. After considering all of these impacts, FERC concluded that the New Market Project "would not constitute a major federal action significantly affecting the quality of the human environment." JA __ [Environmental Assessment 115].

FERC's Certificate Order and Otsego's Rehearing Petition. FERC issued a certificate for the New Market Project in April 2016. JA__ [Certificate Order P 1]. Drawing on the environmental assessment, FERC concluded that the Project's benefits outweighed any adverse effects, including environmental effects. JA __, __ [*Id.* PP 18, 142]. FERC determined, among other things, that approving the Project would not have the indirect effect of causing or inducing "the effect of additional or further shale gas production." JA __ [*Id.* P 77]. And FERC explained that even if it did, those effects would not be reasonably foreseeable, because FERC could only speculate as to when, where, and how many wells might be drilled as a result of the Project's approval. JA __ - __ [*Id.* PP 80-83].

Otsego, a conservation organization, sought rehearing. JA __, __ [Rehearing Order PP 4, 10]; *see also* FERC Br. 3 (explaining why petitioners John and Mary Valentine's petition is jurisdictionally barred). Otsego's 33-page petition devoted just three paragraphs to greenhouse gases. JA__-__ [Rehearing

Pet. 22-23]. It argued that FERC should have considered the environmental impacts of estimated methane leakage amounts from production, operation of the Project, and combustion of the transported gas. *Id.* Otsego mentioned production and consumption only once, contending "that a comprehensive analysis of lifecycle emissions, including emissions relating to the *production*, processing, distribution, and *consumption* of gas associated with Dominion's New Market Project, should be performed." JA__ [*Id.* at 23] (emphases added).

FERC denied Otsego's motion to stay the issuance of the certificate. *See* JA__ [Stay Order P 3]. The Project entered service in November 2017. *See* JA__ [Notification of In-Service].

While Otsego's rehearing petition was pending, this Court decided *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*). There, the Court considered FERC's approval of the construction and operation of the Sabal Trail pipeline, which transports gas from Alabama to identified power plants in Florida. *Id.* at 1363. The Court held that where the project's "entire purpose" was to transport gas to be burned in identified power plants and the Commission had technical and contractual information about the specific, identifiable end-users of transported gas, it should have provided a quantitative estimate of the downstream greenhouse-gas emissions that would result from burning the natural gas transported in the pipeline or explained why it could not do so. *Id.* at 1372, 1374.

FERC's Rehearing Order. FERC denied rehearing. JA __-__ [Rehearing Order]. FERC observed that "[n]o party in this proceeding has argued that either the upstream or downstream activities are sufficiently ca[us]ally connected to the New Market Project to be indirect impacts of the project." JA__ [*Id.* P 41]. And it concluded that there was no evidence that any potential increase in greenhouse-gas emissions associated with production or combustion of natural gas was causally related to FERC's approval of the New Market Project. *Id.*

FERC also acknowledged that "[f]or a short time," in other cases, it had gone beyond what NEPA required and provided generic information about the potential impacts of unconventional natural-gas production and downstream combustion of natural gas, even when that production and those downstream uses were neither reasonably foreseeable nor causally related to the proposals being considered. *Id.* Under that policy, when FERC lacked specific information about how the gas would actually be used or produced, the Commission made an "upper-bound estimate[ ]" of upstream and downstream emissions. *Id.*

To make an "upper-bound estimate" of consumption associated with a project, the Commission might assume that the total volume of the gas transported by the projected would be combusted and calculate the total amount of emissions that would result. *See* JA__ [Rehearing Order (LaFleur, Comm'r, dissenting)]. FERC explained that because such analyses are necessarily "based on generalized

assumptions" and "inherently speculative," they were not helpful to the public and only "muddle[d]" the analysis. JA __ - __ [*Id.* PP 41-42]. The Commission explained that because NEPA required FERC "to analyze upstream and downstream environmental effects when those effects are indirect or cumulative impacts as contemplated by [NEPA] regulations," it would "no longer prepare upper-bound estimates" untethered to any actual information about impacts. JA __ - __ [*Id.* PP 42-44].

FERC discussed the direct greenhouse-gas emissions from construction and operation of the Project but declined Otsego's request that it provide "a comprehensive analysis of lifecycle emissions" related to production, distribution, and consumption of the *transported* gas for the same reason: There was no evidence that the greenhouse gas emissions from upstream production activities or the downstream use of natural gas were foreseeable, indirect impacts of the New Market Project. JA __ - __ [*Id.* PP 58-59]. FERC reaffirmed that "the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by [NEPA] regulations." JA __ [*Id.* P 59]. Such a causal relationship, FERC explained, "would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in

the absence of the proposed pipeline (i.e., there will be no other way to move the gas)." *Id.* The source of the gas to be transported by the New Market Project was unknown and likely to change, and approval would not "spur additional identifiable gas consumption." JA __ - __ [*Id.* PP 61-62].

FERC also distinguished *Sabal Trail* in this respect, explaining that the natural gas there was to be delivered to specific power plants in Florida, which would burn the gas from the project, making the consumption of gas by the plants reasonably foreseeable. *Id.* In contrast, the New Market Project gas will be received by local distribution companies, who in turn will distribute the gas to their own customers for a variety of possible end-uses. *See* JA __ - __ [*Id.* PP 61-62]; *see also, e.g.*, *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 834 (D.C. Cir. 2006); FERC Br. 39. So, unlike in *Sabal Trail*, the end users and end uses of the gas transported by the New Market Project were unknown. *See* JA __ [Rehearing Order P 62]. Commissioners LaFleur and Glick both dissented in part. *See* JA__-__ [Rehearing Order].

Otsego 2000 did not seek further rehearing from the Commission. Instead, this petition followed.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are attached to the Commission's brief.

STANDARD OF REVIEW

This Court will "set aside a decision of the FERC only if it is arbitrary and capricious or otherwise contrary to law." *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007) (citation omitted). The Court upholds the Commission's conclusions if they are "based on a consideration of the relevant factors," and gives an "extreme degree of deference" to the Department's evaluation of "scientific data within its technical expertise." *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (citations omitted).

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to hear Otsego's arguments because it failed to raise them before the Commission. Before the Commission, Otsego devoted only three paragraphs of its 33-page petition to greenhouse gases, which now form the core of its argument. Otsego's rehearing arguments before FERC focused only on *cumulative* effects of upstream and downstream activities generally; Otsego's arguments before this Court specifically focusing on the *indirect* effects of greenhouse gases are brand-new. Likewise, Otsego argues that the Commission impermissibly changed its "upper-bound estimates" policy through adjudication rather than a rulemaking; but it never pressed those arguments about rulemaking to the Commission at all. The Natural Gas Act's jurisdictional rehearing-petition

requirement prevents Otsego from pressing in this Court arguments it never presented to the Commission in its rehearing petition.

II. On the merits, the Commission's thorough environmental analysis complied with NEPA. To challenge it, Otsego is constrained to stretch *Sabal Trail* far beyond its facts and reasoning. But *Sabal Trail* does not apply here, where the source of and uses for the natural gas transported by the New Market Project are not foreseeable and when the causal relationship between FERC's approval of the Project and additional emissions is not readily apparent. FERC thus correctly concluded that neither *Sabal Trail* nor NEPA generally required it to consider downstream impacts of the New Market Project's approval.

Nor does NEPA require FERC to ask for additional data to quantify potential effects when there is no indication that any available evidence would allow quantification to take place. Likewise, the Natural Gas Act's purposes make clear that the Commission did not have to consider end-use greenhouse-gas emissions in its public-interest analysis because those emissions were not one of Congress's focuses in passing the Natural Gas Act.

III. FERC permissibly announced in its Rehearing Order its new policy of no longer preparing speculative "upper-bound" estimates as part of its NEPA analysis. FERC had no statutory obligation to proceed by rulemaking. There was

nothing improper, or unfair, about the Commission altering its policies through adjudication—as it often does.

IV. Finally, even if (despite these jurisdictional and substantive hurdles) this Court were to find fault with some aspect of the Commission's order, the remedy would be to remand for further analysis or explanation. Vacating the certificate order—and thus shuttering the multi-million dollar, now-in-service New Market Project—would needlessly cause significant disruptions for Dominion's local-distribution customers and their end users.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER OTSEGO'S ARGUMENTS BECAUSE THEY WERE NOT RAISED BEFORE THE COMMISSION ON REHEARING.

Under the Natural Gas Act, "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in [an] application for rehearing unless there is reasonable ground for failure so to do." 15 U.S.C. § 717r(b). The Act thus requires that parties "rais[e] the very objection urged on appeal" before the Commission on rehearing in order for this Court to have jurisdiction to review the objection at all. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985); *see also Big Bend Conservation All. v. FERC*, 896 F.3d 418, 421 (D.C. Cir. 2018) ("[T]he party seeking judicial review must have raised in its rehearing request before the Commission each

objection it puts before the reviewing court.") (citation omitted). This jurisdictional threshold is exacting and highly specific: "Parties seeking review of FERC orders must petition for rehearing of those orders must . . . raise in that petition *all* of the objections urged on appeal," and "[n]either FERC nor this court has authority to waive th[is] statutory requirement[ ]." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989).

Here, Otsego did not raise its lifecycle-emission, public-interest, *or* rulemaking objections on rehearing before the Commission. The Court should therefore dismiss the entire petition for lack of jurisdiction.

A. Otsego Forfeited Its Lifecycle-Emissions Arguments By Not Raising Them Before The Commission On Rehearing.

Otsego forfeited its lifecycle-emission arguments (Pet. Br. 29-38) by not raising them on rehearing before the Commission in three distinct ways. *First*, the legal arguments Otsego makes now are not the policy arguments it made before the Commission. Otsego now contends that "FERC erred in issuing a Certificate for the Project without considering the indirect and cumulative impacts of GHG emissions." Pet. Br. 25. Yet Otsego's rehearing petition dedicated only three paragraphs to greenhouse gases. *See* JA__-__ [Rehearing Pet. 22-23]. Otsego gave such short shrift to the issue that it is constrained to cite the Commission's summary of the issues, not its own rehearing petition, to establish that the issue

was raised at all. Pet. Br. 5-6 (citing JA __ [Rehearing Order]).

On rehearing, Otsego's greenhouse-gas argument (if it can be called that) was a sub-point of its general contention that the Commission's "findings of no significant impacts are arbitrary and unsupported by substantial evidence." *See* JA__-__ [Rehearing Pet. 14-31] (capitalization removed). The greenhouse-gas argument rested on policy and factual disagreements, not law: The Commission had ignored "[t]he global climate imperative . . . that alternative sources of energy be pursued," and leakage from the pipeline and combustion of the gas that would flow through it would yield "tons of CO_2e." JA__-__ [*Id.* at 22-23]. For support, Otsego cited no law at all—no cases, no statutes, nothing. *See id.* Before this Court, by contrast, Otsego argues that NEPA required the Commission to consider upstream and downstream greenhouse-gas emissions. *See* Pet. Br. 25. Otsego's *policy* argument that the Commission ignored climate consequences in its analysis is therefore not the same as the *legal* argument it makes now. That is not "the very objection" it raised on rehearing. *ASARCO*, 777 F.2d at 774.

Second, the *cumulative* impacts argument Otsego made on rehearing about greenhouse gases is not sufficient to preserve its separate *indirect* impacts argument in this Court. Otsego argued on rehearing that FERC had erred by not considering the general upstream and downstream impacts of the New Market Project in its *cumulative* impacts analysis. *See* JA__-__ [Rehearing Pet. 12-14].

Nowhere in Otsego's challenge to the Commission's cumulative-impacts analysis did it mention indirect effects. *See id*. Otsego instead discussed the need for FERC to consider the direct, physical impacts of constructing the "power plants, storage facilities, and distribution networks" that will take shape downstream as a result of the New Market Project and the "air and water contamination, habit fragmentation" that will occur upstream as a result of efforts to increase gas production. *See id.* Indeed, the Commission's rehearing order noted that *no* party had made any arguments about indirect or downstream effects. *See* JA __ [Rehearing Order P 41].

Otsego now offers a new and different theory: The Commission erred by not considering upstream or downstream greenhouse gases in its *indirect* effects analysis. But indirect and cumulative effects are different, and an argument on one is not enough to preserve the other under this Court's cases. For example, in *Big Bend Conservation Alliance,* this Court concluded that it lacked jurisdiction to consider the petitioner's argument that a pipeline was an "export facility" under Section 3 of the Natural Gas Act, where the only statements the petitioners had made to FERC on rehearing about the pipeline being an "export facility" concerned *Section 7* of the Natural Gas Act. *Big Bend Conservation Alliance*, 896 F.3d at 421-422. Because the petitioners had failed to "alternatively assert" Section 3, this Court lacked jurisdiction to consider it. *Id.*; *see also Apache Corp.*

v. FERC, 627 F.3d 1222 (D.C. Cir. 2010) (court lacked jurisdiction to hear argument that FERC's lease discriminated against petitioner in favor of another company, where petition for rehearing had argued only that the lease discriminated against petitioner in favor of the company's *customers*). Because Otsego did not "alternatively assert" that the Commission also erred by not considering the indirect impacts of greenhouse gases caused by upstream production and downstream consumption, the Court lacks jurisdiction to consider that challenge now. *Big Bend Conservation Alliance*, 896 F.3d at 421-422.

Third, Otsego forfeited its argument that FERC had to consider the upstream and downstream climate effects of the New Market Project as part of its public-interest analysis. *See* JA__-__ [Rehearing Petition]. Otsego never mentioned the Section 7 public-interest analysis in its rehearing petition. *See id.* The Natural Gas Act therefore prevents the Court from considering that argument, too. *See ASARCO*, 777 F.2d at 774.

B. Otsego Forfeited Its Rulemaking Argument By Not Seeking Rehearing Of FERC's Rehearing Order.

Otsego also argues that FERC improperly announced a significant departure from its prior practice of considering "upper-bound estimates" without going through rulemaking. *See* Pet. Br. 38. This argument, too, is jurisdictionally barred.

The Natural Gas Act's jurisdictional rehearing-petition requirement also applies to objections to FERC's rehearing orders. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56 (D.C. Cir. 2015). If a rehearing order makes "merely a technical change" to the first order, no second rehearing petition is required. *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1110 (D.C. Cir. 1989). But if "the first rehearing order modified the results of the [certificate order] in a significant way" a second petition must be filed. *Smith Lake*, 809 F.3d at 56 (internal quotation marks and alteration omitted).

Otsego, of course, "did not and could not have raised" its argument about FERC's policy on upper-bound estimates in its rehearing petition because the policy appeared for the first time in the rehearing order. *Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990); *see* Pet. Br. 38 (FERC "announced" policy in its order denying rehearing); JA __ [Rehearing Order P 42]. The only question, then, is whether the policy announced in the order denying rehearing modified the first order "in a significant way." *Smith Lake*, 809 F.3d at 56 (citation omitted).

Otsego all but concedes that the answer is yes. It dubs the decision on upper-bound estimates "a major policy change on an issue of nationwide significance." Pet. Br. 38. Its *amici* agree. The state *amici* say that the order "announc[ed] its new NEPA interpretation" on "a broadly applicable policy

change" that constituted a "depart[ure] from its past practice." States Amicus Br. 23, 25-26. That Otsego and its *amici* make so much of how significant a change in policy this was only "makes it more important, rather than less, that the nature of petitioner's objection be presented to FERC before review is sought here." *Kelley ex rel. Mich. Dep't of Nat. Res. v. FERC*, 96 F.3d 1482, 1488-89 (D.C. Cir. 1996).

A petitioner is not excused from seeking rehearing of a rehearing order that modifies a certificate order in a significant way just because the modification occurred "sua sponte." *Id.* Because Otsego "could easily have sought rehearing by the Commission," but "failed to do so," this Court "lack[s] jurisdiction to consider the objection." *Id.*

II. FERC TOOK A "HARD LOOK" AT FORESEEABLE ENVIRONMENTAL EFFECTS AS NEPA REQUIRES AND CONSIDERED THE PUBLIC INTEREST AS THE NATURAL GAS ACT REQUIRES.

If the Court reaches the merits, it should deny the petition for review. NEPA requires all government agencies, including FERC, "to identify and assess in advance the likely environmental impact of its proposed actions." *Sierra Club v. United States Army Corps of Eng'rs*, 803 F.3d 31, 36 (D.C. Cir. 2015). This "hard look" requires FERC to consider not only the direct environmental effects of the project under consideration, but also "reasonably foreseeable" indirect and cumulative effects. 40 C.F.R. § 1508.7; *id.* § 1508.8(b); *see also Sierra Club v. United States Dep't of Energy*, 867 F.3d 189, 193 (D.C. Cir. 2017) ("*Freeport*").

But "NEPA does not require a crystal ball inquiry." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 534 (1978) (internal quotation marks omitted). "Baseless speculation is unhelpful, and agencies need not foresee the unforeseeable." *Friends of Capital Crescent Trail v. Federal Transit Admin.*, 877 F.3d 1051, 1064 (D.C. Cir. 2017) (internal quotation marks, citation, and alteration omitted). To separate helpful from unhelpful information, FERC employs a "rule of reason" and considers "the usefulness of any new potential information to the decisionmaking process." *Freeport*, 867 F.3d at 198 (internal quotation marks omitted). FERC's NEPA analysis here adequately covered those marks.

A. Downstream and Upstream Greenhouse-Gas Emissions Are Not Reasonably Foreseeable Consequences Of The New Market Project.

1. Otsego argues that FERC did not adequately analyze the downstream greenhouse-gas emissions associated with the consumption of the natural gas transported by the New Market Project, in contravention of NEPA and *Sabal Trail*. *See* Pet. Br. 29-33. But FERC reasonably concluded that downstream greenhouse-gas emissions are neither indirect nor cumulative effects of FERC's approval of the Project because they are neither caused by its approval nor reasonably foreseeable. *See* JA __ [Rehearing Order P 41].

Otsego contends that *Sabal Trail* means "downstream greenhouse gas emissions must be evaluated as an indirect effect" in *every* pipeline case. Pet. Br. 32. *Sabal Trail* says no such thing. In *Sabal Trail*, the Court reviewed FERC's approval of new pipelines across Alabama, Georgia, and Florida that connected existing pipelines to existing power plants in Florida. 867 F.3d at 1363. The Court concluded that the emissions caused by burning of gas in those power plants were, in those circumstances, foreseeable indirect effects of FERC's approval and that FERC therefore erred by not considering them. *Id.* at 1371-73.

But the *Sabal Trail* Court stopped well short of stating any general rule. It instead explained that, on the facts before it, a "reasonably foreseeable" effect of authorizing a new pipeline that will transport natural gas to specific, identified power plants is that the gas "will be burned in those power plants." *Id.* at 1372. Indeed, transporting the gas to those specific power plants was "the project's entire purpose." *Id.* The greenhouse-gas emissions from burning the natural gas were therefore foreseeable effects of the pipeline FERC had authorized.

The Court has confirmed this fact-specific interpretation of *Sabal Trail*. It has explained that *Sabal Trail* "invalidated an indirect effects analysis because the agency had technical and contractual information on 'how much gas the pipelines [would] transport' to specific power plants, and so could have estimated with some precision the level of greenhouse gas emissions produced by those power plants."

Friends of Capital Crescent Trail, 877 F.3d at 1065 (citation omitted and brackets in original). The Court further explained that *Sabal Trail* recognized that "in some cases quantification may not be feasible." *Id.* (citation omitted).

This is one such case. As FERC explained, "there is nothing in the record that identifies any specific end use or new incremental load downstream of the New Market Project." *See* JA __ [Rehearing Order P 39]. Instead, the record shows only that the gas transported by the New Market Project may be received by two upstate New York local-distribution companies. JA __ [*Id.* P 62]. From there, where the gas goes and how it will be used is anyone's guess. It could be combusted, substituted for higher-emitting fuels, used as an industrial feedstock, or sold to marketers. *Id.*; FERC Br. 39. And there is no basis to conclude that those unknown end-use consumers' would not consume gas but for the approval of the project.

Not only that, but *how much* gas will be burned is unknown. *Id.* The New Market Project "is designed for intermittent peak use" and does not run at full capacity at all times. JA__ [Rehearing Order P 62]. And, in any case, FERC is not tasked with regulating local distribution companies and their sale of gas to retail customers. *See Corning Glass Works v. FERC*, 675 F.2d 392, 394-395 (D.C. Cir. 1982) (Natural Gas Act does not give FERC power over "the local distribution of natural gas" and transactions with retail customers are "nonjurisdictional activities"

for FERC) (citation omitted). How the Project's gas will be used by Dominion's customers is not foreseeable (let alone reasonably so), and any emissions caused by those customers' customers or other activities are not indirect effects of FERC's decision to approve the New Market Project. FERC was therefore correct not to consider them.

2. Moreover, any attempt to model the potential downstream uses of the New Market Project's gas is hopelessly speculative. In *Freeport*, this Court concluded that the Department of Energy reasonably declined to consider the downstream combustion of exported natural gas. 867 F.3d at 202. The Department explained that calculating the greenhouse-gas effects of overseas combustion would require the Department to foresee the use of natural gas in every country, including what other fuel sources it might replace. *Id.* In some countries, it might replace coal, leading to a net reduction in greenhouse gases. *Id.* In others, it might replace renewable fuels and lead to a net increase in greenhouse gases. *Id.* Modeling those effects would require so many uncertain assumptions that it "would be 'too speculative to inform the public interest determination.' " *Id.* (citation omitted).

The same is true here. Figuring the greenhouse-gas impacts from the New Market Project will require modeling all potential uses of the natural gas delivered to Dominion's local-distribution customers because emissions vary depending on

how the gases are used, and FERC does not know what Dominion's customers will do with the gas. *See* JA __ [Rehearing Order P 62]. And the resulting guesses would be so speculative that it could not possibly inform FERC's decisionmaking. *Freeport*, 867 F.3d at 202. The Commission was right to reject it. *See* JA__ - __ [Rehearing Order PP 62-70].

Otsego contends that NEPA required the Commission to provide a "full-burn" or "upper-bound" estimate of greenhouse gases, where FERC assumes that *all* Project natural gas will be consumed and *all* of the resulting greenhouse-gas emissions will all be net additions to climate change. *See* Pet. Br. 35. But FERC reasonably explained why NEPA does not require such a measurement. JA__ [Rehearing Order P 41]. An upper-bound estimate of greenhouse gases is "generic in nature and inherently speculative," *id.*, because it does not consider that natural gas often *replaces* fuels that have a worse effect on climate change. *See* JA__ [Certificate Order P 73]. A worst-case scenario that assumes all project gas will add to climate change presents a potentially skewed picture of a project's environmental benefits and does not provide "useful[ ] . . . new potential information to the decisionmaking process." *Freeport*, 867 F.3d at 198 (citation omitted). At the very least, the Commission's determination that an upper-bound estimate would not assist its decisionmaking process is entitled to this Court's deference. *See id.* at 199 (agency's "determination that an economic model . . .

would be far too speculative to be useful is a product of its expertise . . . and is entitled to deference").

Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549 (8th Cir. 2003), is not to the contrary. *Cf.* Pet. Br. 35-36. There, the Eighth Circuit concluded that the Surface Transportation Board erred by not considering the downstream effects of burning the coal that was to be transported on rail lines it approved. *Mid States*, 345 F.3d at 532, 549-550. As FERC pointed out (JA__, __ [Certificate Order P 79, Rehearing Order P 65]), the agency in that case had "admit[ted]" that the approval of the project would increase the use of coal. *Mid States*, 345 F.3d at 548-549. Where the effect was foreseeable, even if its extent was not, the Eighth Circuit held that the Board had erred by not considering it. *Id.* at 549. Here, FERC has not similarly conceded that the New Market Project will increase overall natural-gas use, and Otsego has pointed to no record evidence suggesting it will.

This Court also has never relied on Otsego's cited portion of *Mid States*; and indeed, the Eighth Circuit itself has never read *Mid States* as broadly as Otsego does. The Eighth Circuit has explained instead that *Mid States* was a case where "computer 'programs could be used to forecast the effects of th[e] project on the consumption of coal,' " *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 555 (8th Cir. 2006) (citation omitted), and the agency "stated that a particular outcome

was reasonably foreseeable and that it would consider its impact, but then failed to do so." *Arkansas Wildlife Fed. v. United States Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005); *see also* FERC Br. 44-45. *Mid States* is inapposite.

Otsego's out-of-circuit district court cases are also distinguishable. *San Juan Citizens Alliance v. United States Bureau of Land Management* set aside a joint Bureau of Land Management and United States Forest Service decision to lease thirteen parcels of federal land for oil and gas mining. 326 F. Supp. 3d 1227, 1232, 1236 (D.N.M. 2018). The agency's entire indirect-effects analysis was a single sentence stating that "consumption [is not] an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption." *Id.* at 1240. The district court held that the analysis fell short because it was "circular and worded as though it is a legal conclusion," and because it appeared to diverge, without explanation, from cases like *Sabal Trail*. *Id.* at 1242.

FERC's analysis here has neither flaw. First, FERC gave detailed explanations of why it concluded downstream greenhouse-gas emissions were not reasonably foreseeable. *See* JA __ - __ [Certificate Order PP 77-83]; JA __ - __ [Rehearing Order PP 30-40]. Second, *San Juan* and the district court cases it cited—and that Otsego parrots here—all involve agency decisions approving mining or drilling on public lands. *Compare San Juan*, 326 F. Supp. 3d at 1243,

with Pet. Br. 33. Arguably, an agency's approval of mineral extraction has a fundamentally different causal relationship to downstream greenhouse gases than agency decisions greenlighting compressor-station modification and construction. If a resource is not extracted, it can never be consumed, and therefore it can never cause greenhouse-gas emissions.

Pipelines are different. FERC regulates only pipeline projects that transport already-extracted natural gas. States have jurisdiction over the production of natural gas and conduct environmental analyses in accordance with state law. *See* JA __, __ [Certificate Order PP 70, 72]. Thus, as the Commission observed, if FERC were to deny a certificate, the gas that might have been transported on the Project still will likely be extracted and burned—just somewhere else. *See* JA __ [Rehearing Order P 63]. Unlike a mining project, the denial of a certificate for a compressor station will not likely prevent any natural-gas consumption. And that makes the mining-approval cases distinguishable from FERC's approval of the New Market Project here—even assuming those out-of-circuit district court cases were correctly decided. *See* FERC Br. 45-46 & n.11.

3. Otsego also suggests that *Sabal Trail* requires FERC to estimate the greenhouse-gas impacts of the New Market Project even if those impacts are not an indirect effect under NEPA. *See* Pet. Br. 30-31. That is flat wrong. *Sabal Trail* explained that FERC had an obligation to quantify the greenhouse-gas emissions

from the power plants the pipeline connected to because the emissions were "an *indirect effect* of authorizing this project, which FERC could reasonably foresee." *Sabal Trail*, 867 F.3d at 1374 (emphasis added). The Court later confirmed that approach, explaining that *Sabal Trail* "invalidated an indirect effects analysis." *Friends of Capital Crescent Trail*, 877 F.3d at 1065. Because downstream emissions are not reasonably foreseeable indirect effects of the New Market Project (*supra* pp. 19-22), *Sabal Trail* did not require FERC to quantify them.

Otsego also accuses FERC of "mak[ing] the tacit assumption that the quantity of upstream and downstream GHG emissions is zero." Pet. Br. 36-37. Wrong again. The Commission was explicit that greenhouse gases from the New Market Project would, "in combination with past and future emissions from all other sources, . . . contribute incrementally to climate change." JA__ [Environmental Assessment at 108]. FERC explained that it had "not ignored the impacts of end use greenhouse gas emissions," but rather had "explained the lack of causation and reasonable foreseeability of effects related to the production and consumption of natural gas." JA__ [Rehearing Order P 66]. Given that lack of causation and foreseeability, NEPA did not require FERC to hypothesize the upstream and downstream greenhouse-gas impacts from the New Market Project. And, as the Commission explains (at 48-50), because these impacts are not legally relevant, they are also not cumulative impacts that must be considered under

NEPA. *See* 40 C.F.R. § 1508.7 (to be a cumulative impact an impact must be "reasonably foreseeable").

B. FERC Did Not Have To Seek Data On Upstream Natural-Gas Production Neither Dominion Nor Its Customers Would Have.

Otsego is also incorrect that FERC had to seek data about upstream greenhouse-gas emissions. Pet. Br. 33-34. FERC concluded that upstream impacts of increased production that could result from the approval of the New Market Project were not reasonably foreseeable. *See* JA __ [Rehearing Order P 38]. FERC explained that Dominion will use the Project to transport gas from existing interconnections with pipeline transmission systems extending from the Gulf of Mexico to New York City with numerous interconnections and potential supply sources in between. JA __ [*Id.* P 38 & n.85]. FERC therefore lacked "detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods." *Id.* Without this information, FERC concluded that "there [we]re no forecasts in the record that would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized." JA __ [*Id.* P 38].

Otsego argues that FERC should have asked Dominion to produce data necessary to understand the upstream impacts of the New Market Project and that the Commission's decision not to "contravene[d] NEPA's command that agencies must use [their] best efforts to find out all that [they] reasonably can." Pet. Br. 33-

34 (internal quotation marks omitted). But "NEPA grants substantial discretion to an agency to determine how best to gather and assess information." *Biodiversity Conservation v. U.S. Forest Serv.*, 765 F.3d 1264, 1270 (10th Cir. 2014). And FERC reasonably explained why "just ask[ing] for" information on upstream production from Dominion "would be an exercise in futility." JA__ [Rehearing Order P 61].

For starters, FERC "only has jurisdiction over the pipeline applicant, whose sole function is to transport gas from and to the contracted for delivery and receipt points." *Id.* Dominion plays no role in determining the supply of the gas its customer-shippers will transport. *Id.* Although the "shippers might contract with a specific producer for their gas supply, the shipper would not know the source of the producer's gas," and that source may change over time. *Id.* (footnote omitted). In fact, not even the *producer* may know the origin of gas transported on a given pipeline because "producers are not required to dedicate supplies to a particular shipper and thus likely will not know in advance the exact source of production." *Id.*

For the New Market Project in particular, it is even *less* likely that Dominion or its local-distribution-company customers will know from where production is coming because the local-distribution-company customers do not control production. *Id.* "The specific source of natural gas to be transported via the

Project is currently unknown and will likely change throughout the Project[ ]." *Id.*; *see also* JA__ [Certificate Order P 5] (Dominion's local-distribution customers have executed 15-year contracts for transportation). Moreover, because the New Market Project adds additional compression to Dominion's existing pipeline, gas transported by the Project is equally likely to come from anywhere on Dominion's large system or on the upstream pipeline systems with which it interconnects. *See* JA__ [Rehearing Order P 62]. Therefore, there was no way for the Commission to know—or for Dominion or even its customers to know—where and how much production the New Market Project could induce. *Id.*

In any event, Otsego's single citation (Br. 34)—*Barnes v. Department of Transportation*, 655 F.3d 1124, 1136 (9th Cir. 2011)—does not hold that agencies must seek from regulated parties information that they are unlikely to possess. In *Barnes*, the Ninth Circuit remanded for the Federal Aviation Administration to consider the environmental impact, if any, of increased demand that could result from an airport's proposal to expand from two runways to three. *Id.* at 1129-30, 1139. The agency had denied that the addition of a new runway would have any growth-inducing effects. *See id.* at 1136-37. The Ninth Circuit rejected this explanation, noting that the agency itself had previously remarked that building a new runway is "the most effective capacity-enhancing feature an airfield can

provide." *Id.* at 1138. The agency had therefore erred by "fail[ing] to conduct a demand forecast." *Id.*

Otsego argues that just as the agency in *Barnes* had to consider the possible demand induced by a new runway, FERC must consider the environmental impacts of the increased demand for natural gas production that could be induced by authorizing additional pipeline capacity. *See* Pet. Br. 33-34. But the Commission has never endorsed an if-you-build-it-they-will-come model of pipeline capacity. Quite the contrary: The Commission—the agency with "expertise in evaluating complex market conditions," *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 961 (D.C. Cir. 2013)—has concluded that expanding natural-gas production spurs additional pipeline capacity, not the other way around. *See* JA__ [Rehearing Order P 59 & n.141]; *see also* FERC Br. 27. Otsego offers no evidence to the contrary.

As this discussion shows, however, *Barnes* has nothing to do with gathering information from applicants. It instead is just another angle on Otsego's meritless foreseeability arguments. To that end, neither this Court nor any other has ever held that *Barnes* requires an agency to gather additional information. And Otsego has identified no other case where a court of appeals required an agency to gather information it does not have and cannot reasonably obtain in order to conduct a NEPA-compliant analysis. And as the Commission explains (at 29), Otsego raises

its information-gathering objections way too late, coming as they do four years after FERC sought comments on its environmental assessment.

Finally, Otsego makes much of the Commission's remark that States are more likely than the Commission "to have the information necessary to reasonably foresee production" because they "have jurisdiction over the production of natural gas,"[3] pointing out that there can be overlapping regulatory spheres in the natural-gas industry. Pet. Br. 34. But that misses the point. The Commission reasonably explained that if even States—who have immediate regulatory authority over natural-gas production—cannot tell where production will take place, then the Commission certainly cannot. *See* JA __ [Certificate Order P 72]; *see also* JA__ [Rehearing Order P 61 n.146]. Otsego never challenges that common-sense analysis.

C. The Commission Reasonably Declined to Consider Downstream Emissions as Part of Its Public Convenience and Necessity Analysis.

Otsego argues that even if FERC was not required to consider downstream greenhouse-gas emissions under NEPA, it was required to consider them under the Natural Gas Act as part of its public-interest determination. *See* Pet. Br. 36. Otsego did not make this argument below and, it, like the others, is jurisdictionally forfeit. *Supra* pp. 12-16. And even if it were not, the public-interest analysis

[3] *See* JA __ [Certificate Order P 72]; *see also* JA__ [Rehearing Order P 61 n.146].

simply does not encompass the sort of global climate concerns that motivate Otsego.

The Natural Gas Act directs that a certificate "shall be issued" if the Commission finds that the project is "required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). But the "public convenience and necessity" is not "a broad license to promote the general public welfare." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976). Instead, FERC's "authority to consider all factors bearing on the 'public interest' must take into account what the 'public interest' means in the context of the Natural Gas Act." *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980). That meaning is, in turn, determined by "the purposes that Congress had in mind when it" passed the Natural Gas Act. *Public Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (citation omitted).

The Natural Gas Act's purposes are to regulate the transportation and sale of natural gas, not to regulate end-use consumption. This Court has explained that the Act has "the principal aim of 'encouraging the orderly development of plentiful supplies of natural gas at reasonable prices.' " *City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (citation and alterations omitted). In passing the Act, Congress "declared that the business of *transporting* and *selling* natural gas for ultimate distribution to the public is affected with a public interest, and that

Federal regulation in matters relating to the *transportation* of natural gas and the *sale* thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a) (emphases added). This meaning is confirmed by the fact that the Act limits FERC's review to "the proposed service, sale, operation, construction, extension, or acquisition" of interstate natural-gas facilities. *Id.* § 717f(e). Because the Natural Gas Act does not give FERC the authority to regulate the distribution or consumption of natural gas, *see id.* § 717(b); *see also Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 647 (D.C. Cir. 2010), the "public interest" standard does not require FERC to consider end-use consumption and distribution. Put another way, because end-use consumption and distribution do not "reasonably relate to the purposes for which FERC was given certification authority," FERC was not required to consider them. *Office of Consumers' Counsel*, 655 F.2d at 1147.

To be sure, the Natural Gas Act has "subsidiary purposes including conservation." *City of Clarksville*, 888 F.3d at 479 (internal quotation marks, citation, and alteration omitted). But this Court has not read those conservation aims to include the broader climate-change impacts that Otsego argues for here; instead, this Court has conceived of conservation impacts as direct "natural resource impacts." *Public Utils. Comm'n*, 900 F.2d at 281. FERC's interpretation of its responsibilities under the Natural Gas Act was consistent with both the

statute and this Court's precedent. *See* JA __ [Rehearing Order P 43]; *see also City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (courts defer to an agency's interpretation of its own statutory jurisdiction).

III. FERC PERMISSIBLY ALTERED ITS UPPER-BOUND POLICY THROUGH ADJUDICATION.

Otsego briefly argues that FERC improperly announced a new policy regarding upper-bound estimates without going through rulemaking. *See* Pet. Br. 38. Otsego did not raise this argument in a rehearing petition below, so it is jurisdictionally barred. *Supra* pp. 12-13, 16-18. And in any event, it is "bedrock administrative law" that "the choice between proceeding by general rule or by individual, ad hoc litigation [lies] primarily in the informed discretion of the administrative agency." *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (internal quotation marks, citation, and alterations omitted); *see also Hatch v. FERC*, 654 F.2d 825, 837 (D.C. Cir. 1981) ("It is certainly within an agency's discretion to change rules and reinterpret statutory mandates in the course of adjudication as well as in rulemaking . . . ."). All the Commission did here was choose to proceed by adjudication, as it has done many times before. *See, e.g.*, *Panhandle E. Pipe Line Co.*, 91 FERC ¶ 61037, 61141 (2000) (announcing new interconnection policy); *Tenneco Oil Co.*, 34 FERC ¶ 61143, 61246 (1986) (announcing new policy for when successors-in-interest can collect periodic escalations and production-related costs); *Public Serv. Co. of Colo.*

12 FERC ¶ 61122, 61245 (1980) (announcing new policy that rates will be suspended for five months when rates have not been shown to be just and reasonable). And this Court regularly dismisses challenges to those decisions. *See, e.g.*, *"Complex" Consol. Edison Co. v. FERC*, 165 F.3d 992, 995-996 (D.C. Cir. 1999) (per curiam); *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980).

This Court will overturn an agency's choice to proceed by adjudication only if Congress has clearly specified that rulemaking is required. *See Michigan v. EPA*, 268 F.3d 1075, 1087-88 (D.C. Cir. 2001) (EPA required to proceed via rulemaking where "Congress ha[d] explicitly required" doing so); *see also Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) ("It is not surprising . . . that plaintiffs have been unable to cite any case where a court, absent a clear directive from Congress, required an agency to institute rulemaking in the place of adjudication."). Otsego has not even attempted to identify a Congressional directive requiring FERC to proceed by rulemaking. *See* Pet. Br. 38-40. It instead points out that by opting to proceed by adjudication, FERC made it so only the parties to that particular proceeding could challenge a policy with nationwide implications—an outcome Otsego finds unfair. *See id.* at 39-40.

But that is the case in every administrative adjudication: FERC adjudicates disputes between a limited set of parties that nonetheless has precedential effect for

subsequent parties and subsequent disputes. Indeed, that is a core feature of litigation. *Cf. Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001) ("[S]tare decisis . . . bars a different party from obtaining the overruling of a decision.").

In any event, third parties that disagree with policies that FERC adopts in individual proceedings and who are aggrieved by those policies have the option to seek late intervention to challenge the policy on rehearing. *See, e.g.*, *Swanson Min. Corp. v. FERC*, 790 F.2d 96, 105 (D.C. Cir. 1986); *see also* 18 C.F.R. § 385.214(d). And, if FERC denies intervention, parties may ask this Court to review that denial. *See City of Orrville v. FERC*, 147 F.3d 979, 988-990 & n.12 (D.C. Cir. 1998).

The state *amici*'s arguments fare no better. They concede that FERC can choose between adjudication and rulemaking, but argue that the Commission abused its discretion by announcing its upper-bound policy in an adjudication after FERC had solicited public comments on its NEPA obligations. *See* States Amicus Br. 22. But *amici* cannot raise arguments different from the party they support. *See Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) ("[O]rdinarily this court will not entertain an amicus's argument if not presented by a party.").

The States are wrong on the merits, anyhow. An agency is under no obligation to engage in rulemaking because it solicited public comment for a

potential future rule. *Cf. Center for Biological Diversity v. EPA*, 749 F.3d 1079, 1090 (D.C. Cir. 2014) (an agency's decision to not promulgate a rule, even when petitioned, is subject to "very limited review"). Even when rulemaking can and has offered the agency "a forum for soliciting the informed views of those affected," the agency retains "discretion to decide that the adjudicative procedures . . . may also produce the relevant information necessary to mature and fair consideration of the issues." *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 295 (1974); *see also Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). Likewise, nothing stops the Commission from continuing to consider revisions to its policy as part of its ongoing notice-of-inquiry process. *See Chisholm*, 538 F.2d at 365; *see also* JA__ [Rehearing Order P 44 n.99].

The States' position is all the more misguided because the Commission's previous policy of hypothesizing upper-bound greenhouse-gas emission was *itself* adopted by adjudication. *See* JA __ [Rehearing Order P 41 & n.88]. Because the original rule had been implemented through adjudication, "reversal by adjudication seem[ed] particularly appropriate." *Chisholm*, 538 F.2d at 365. FERC did not have to engage in rulemaking in order to announce a new policy on upper-bound estimates. JA __, __ - __ [Rehearing Order PP 41, 43-44].

IV. EVEN IF REMAND IS APPROPRIATE, VACATING THE CERTIFICATE IS NOT.

Even if the petition is not jurisdictionally barred (it is), and even if the Commission erred in its consideration of the Project's impacts (it did not), the Court should not vacate the New Market Project's certificate. "The decision to vacate depends on two factors: the likelihood that deficiencies in an order can be redressed on remand, even if the agency reaches the same result, and the disruptive consequences of vacatur." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (internal quotation marks omitted). Both factors counsel against vacatur.

First, it is not just possible, but "plausible that FERC can redress its failure of explanation on remand while reaching the same result." *Id.* The remand in *Sabal Trail* is illustrative. FERC prepared a supplemental analysis quantifying the emissions associated with downstream construction, as this Court instructed. *Florida Se. Connection, LLC*, 164 FERC ¶ 61099, at P 5 (2018). But FERC concluded that even then it could not determine whether those downstream greenhouse-gas emissions were significant because it lacked "a standard for determining whether a particular level of emissions is significant." *Id.* P 25. No party sought review of that determination.

There is no indication that the Commission has developed such a standard in the months since the *Sabal Trail* remand decision. It is therefore likely that on

remand here, all FERC could do is forecast a range of downstream emissions from the New Market Project, explain that it lacks meaningful criteria to determine whether those emissions are significant, and reissue the certificate. *See Black Oak Energy*, 725 F.3d at 244. Given that likelihood, the Court should not take the significant step of vacating the Project's certificate.

Vacatur would also prove deeply disruptive. Since FERC issued the certificate in April 2016, the project has commenced service. *See* JA __ [Certificate Order P 1]; JA __ [Notification of In-Service]; *see also* 15 U.S.C. § 717r(c) (explaining that a rehearing petition does not stay the effectiveness of a Commission certificate order). Vacating the order would require halting operation of the project indefinitely, which would disrupt Dominion's provision of gas to two local distribution companies whose customers require it to meet their residential, commercial, and industrial needs. *See* JA __ [Rehearing Order P 2].

This Court has declined to vacate a FERC approval in similar circumstances, where "the disruptive consequences of vacating [we]re substantial." *Apache Corp.*, 627 F.3d at 1221, 1223 (internal quotation marks omitted); *see also Black Oak Energy*, 725 F.3d at 244 (remanding without vacatur where vacating would impose "significant transaction costs"). Given the high likelihood that additional explanation from FERC will not change its decision to issue a certificate for the New Market Project, and the "significant transaction costs" associated with

vacating—shutting down an operating natural-gas project—the Court should remand without vacatur if it finds error. *Black Oak Energy*, 725 F.3d at 244.

CONCLUSION

For the foregoing reasons and those in the Commission's brief, the petition for review should be dismissed or denied.

Respectfully submitted,

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I certify that on February 1, 2019, the foregoing brief was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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