

ORAL ARGUMENT NOT YET SCHEDULED

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

Case Nos. 20-1016 and 20-1017 (Consolidated)

ENVIRONMENTAL DEFENSE FUND

Petitioner,

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

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

**INITIAL OPENING BRIEF OF PETITIONER
ENVIRONMENTAL DEFENSE FUND**

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Dated: June 26, 2020

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES**

Per Circuit Rule 28(a)(1), Petitioner Environmental Defense Fund (“EDF”) files this certificate as to parties, rulings under review, and related cases.

A. Parties and Amici

EDF is the petitioner in Case No. 20-1016 and Juli Steck¹ is petitioner in Case No. 20-1017. The Federal Energy Regulatory Commission (“FERC”) is the respondent in these consolidated proceedings. The following parties have served motions for leave to intervene upon EDF or are shown on the docket sheet of this Court as having moved to intervene in the instant consolidated proceedings:

Spire STL Pipeline, LLC

Spire Missouri Inc.

EDF understands that one or more entities may seek to participate as *amici curiae*. However, as of the time of this brief, no entity has filed a notice of intent or motion for leave to file.

B. Rulings under Review

EDF seeks review of the following orders issued by FERC:

¹ On June 23, 2020, Juli Viel filed a Notice to reflect a name change to Julie Steck.

1. *Spire STL Pipeline LLC*, Order Issuing Certificates, Docket No. CP17-40-000, 164 FERC ¶ 61,085 (August 3, 2018); and
2. *Spire STL Pipeline LLC*, Order On Rehearing, Docket No. CP17-40-002, 169 FERC ¶ 61,134 (November 21, 2019).

C. Certificate as to Related Cases

EDF is not aware of any related cases that raise the issues EDF is pursuing on appeal, i.e., (i) FERC's exclusive reliance on a precedent agreement between affiliates to support a finding of need under Natural Gas Act Section 7, despite substantial evidence demonstrating that the proposal was not needed, and (ii) FERC's fact-specific findings concerning public benefits and adverse impacts.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, the Environmental Defense Fund is a non-profit organization and therefore does not issue stock to the public.

Respectfully submitted,

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GLOSSARY OF ABBREVIATED TERMS AND TERMS OF ART

Term	Description
Certificate Order	<i>Spire STL Pipeline LLC</i> , 164 FERC ¶ 61,085 (August 3, 2018)
Certificate Policy Statement	<i>Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy</i> , 88 FERC ¶ 61,227, <i>modified by</i> , 89 FERC ¶ 61,040 (1999), <i>Order Clarifying Statement of Policy</i> , 90 FERC ¶ 61,128, <i>Order Further Clarifying Statement of Policy</i> , 92 FERC ¶ 61,094 (2000)
Decl.	Declarations contained in the Environmental Defense Fund's Addendum on Standing
EDF	Environmental Defense Fund, Petitioner in Case No. 20-1016
Enable	Enable Mississippi River Transmission LLC
FERC	Federal Energy Regulatory Commission, Respondent in Case Nos. 20-1016 and 20-1017 (consolidated)
JA	Joint Appendix
Missouri Commission	Missouri Public Service Commission
P	Paragraph numbers in Federal Energy Regulatory Commission orders
Project	Spire STL Pipeline LLC's 65-mile-long pipeline in Illinois and Missouri
R	Citation to the Index of the Record filed in these proceedings on March 12, 2020
Rehearing Order	<i>Spire STL Pipeline LLC</i> , 169 FERC ¶ 61,134 (November 21, 2019)
Spire Missouri	Spire Missouri Inc., affiliate of Spire STL Pipeline LLC
Spire STL	Spire STL Pipeline LLC

INTRODUCTION

In the Natural Gas Act, Congress assigned the Federal Energy Regulatory Commission (“FERC”) the responsibility for permitting new interstate gas pipeline facilities. 15 U.S.C. § 717f. Before approving an application to construct and operate a new interstate pipeline, FERC must determine that the pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). FERC must evaluate “all factors bearing on the public interest.” *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391 (1959); *see also Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy*, 88 FERC ¶ 61,227, 61,747, *modified by*, 89 FERC ¶ 61,040 (1999), *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128, *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000) (“Certificate Policy Statement”). Before issuing a certificate, FERC must also find that a project’s public benefits outweigh any adverse effects. Certificate Policy Statement, 61,749-50.

FERC’s practice has been to accept precedent agreements—binding contracts between the pipeline developer and expected customers that commit to pay for capacity on the pipeline—as evidence of need for a project. FERC’s rationale is that customers willing to invest in a project can be a reliable indicator of need. That rationale makes sense where unrelated parties rigorously negotiate the terms of a transaction and bear the risks of their investment decisions. However, that rationale does not hold where a utility with captive end-use customers enters into a precedent

agreement with an affiliate developer (i.e., where two affiliates “negotiate” with themselves). In that scenario, the affiliate developer stands to earn revenues, including a generous return on equity, from captive end-use customers who foot the bill for transportation capacity on the pipeline for several decades, regardless of actual use. These types of transactions stifle competition, threaten market integrity, and harm consumers. Indeed, FERC has recognized the threat of this type of affiliate abuse in numerous other contexts.

By narrow majorities, FERC impermissibly failed to address those threats when it relied *exclusively* on Spire STL Pipeline LLC’s (“Spire STL”) precedent agreement with its affiliate gas utility, Spire Missouri, Inc. (“Spire Missouri”) to find “need” for a 65-mile-long pipeline project in Illinois and Missouri (“Project”). R164, *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, 73 (2018) (“Certificate Order”), R424, *order on reh’g*, 169 FERC ¶ 61,134, P 14 (2019) (“Rehearing Order”); [JA ____; ____]. Skirting its obligations to engage in reasoned decisionmaking and base its decisions on substantial evidence, FERC disclaimed the ability and jurisdiction to “look behind” the Spire STL/Spire Missouri precedent agreement and determine whether the affiliate relationship diminished the extent to which the precedent agreement was evidence of any genuine public need. R164, P 33; R424, P 15; [JA ____; ____].

FERC found that the affiliate-precedent agreement was dispositive of legitimate need despite a factual record showing the opposite. Demand for additional

pipeline capacity to transport gas in St. Louis is flat. R164, P 107; [JA ____]. As such, “Spire Missouri is merely shifting its capacity subscription from an existing pipeline to a new one owned by its affiliate.” R424, Commissioner Glick’s Dissent, P 4; [JA ____]. Given these circumstances, the Missouri Public Service Commission (“Missouri Commission”) asked for heightened review from FERC, demonstrating that “the St. Louis market cannot support” the Project’s additional capacity. R21, 13; [JA ____]. A neighboring pipeline called the Project “fundamentally uneconomic,” noting that costs to Spire Missouri could be “more than half a billion dollars.” R139, 5; [JA ____]. Record evidence showed that, without Spire Missouri’s ability to shift costs and risks to its captive customers, Spire STL would have no support for its Project. R123, 1-2; [JA ____-____]. In disregarding this evidence and blindly accepting the affiliate agreement as dispositive of genuine need, FERC failed to recognize that the interests of the Spire corporate family are not synonymous with the public interest.

FERC’s deference to the “business judgment” of affiliates constitutes an abdication of its independent obligation to assess the need for new pipelines and to protect end-use customers—an obligation this Court has admonished FERC for ignoring in the past and a foundational legal error given the facts of the case. *See Tejas Power Corp. v. FERC*, 908 F.2d 998, 1000-01, 1003-05 (D.C. Cir. 1990). The unnecessary environmental and economic harm from this Project—which runs across a significant amount of private property that had to be taken with eminent domain—

graphically illustrate the costs of FERC's abdication. As put by one Commissioner, FERC's uncritical reliance on the mere existence of an affiliate-precedent agreement to find need for Spire STL's Project turns the Natural Gas Act's public-interest standard into a "meaningless check-the-box exercise." R424, Commissioner Glick's Dissent, PP 1, 7; [JA ___, ___]. Another Commissioner detailed the long-lasting consequences flowing from the Majority's approval, including "a significant risk of overbuilding into a region that cannot support additional pipeline infrastructure." R164, Commissioner LaFleur's Dissent, 6-7; [JA ___-___].

FERC's errors were compounded by its failure to comply with the Certificate Policy Statement's requirement to balance a project's public benefits against its adverse effects. That balancing analysis mandates that a project may not be deemed to be in the public interest unless FERC first finds that public benefits outweigh any adverse effects. Here, FERC engaged in no comparison or quantification whatsoever. Instead, it ignored or minimized the Project's harm, which includes significant environmental impacts, massive use of eminent domain to condemn private land for this unnecessary Project, and very substantial adverse economic and operational impacts on existing pipelines and end users. It also cited no record evidence to support its findings of purported but illusory benefits. R164, P 123; [JA ___]. FERC then summarily concluded that the Project's vague public benefits outweighed its

tangible adverse effects. *Id.* Such an arbitrary, subjective approach epitomizes unreasoned decisionmaking.

In relying exclusively on the Spire STL/Spire Missouri precedent agreement to find need, and disregarding evidence showing a lack of need, FERC approved an unnecessary project. Such approval contravenes section 7 of the Natural Gas Act, Supreme Court precedent, FERC's own Certificate Policy Statement, and the substantial record in this proceeding. As such, the Court should vacate FERC's clearly deficient orders as patently arbitrary and capricious.

JURISDICTIONAL STATEMENT

On January 26, 2017, as amended on April 21, 2017, Spire STL applied for a FERC certificate for the Project. R1; R49; [JA ____-____; ____-____]. On May 23, 2017, as amended on May 24, 2017, EDF filed a motion to intervene and protest, challenging Spire STL's reliance on the Spire Missouri precedent agreement to demonstrate need. R57; R58 [JA ____-____; ____-____]. FERC granted EDF's motion to intervene. R164, P 16; [JA ____]. FERC's August 3, 2018 Certificate Order approved Spire STL's application. *Id.*, P 2; [JA ____]. On September 4, 2018, EDF timely sought rehearing per Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), and FERC Rules 207 and 713, 18 C.F.R. §§ 385.207, 385.713, challenging FERC's reliance on the Spire STL/Spire Missouri precedent agreement as evidence of need and failure to balance benefits and adverse effects. R179, 2-22; [JA ____-____]. FERC's

November 21, 2019 Rehearing Order rejected EDF's arguments. R424, PP 11-38; [JA ____-____].

EDF timely petitioned this Court for review on January 21, 2020. Jurisdiction is proper under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which authorizes any party "aggrieved" by FERC's orders to seek review by filing a petition in this Court within 60 days of FERC's rehearing order.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory authorities are contained in the attached addendum.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether it was arbitrary and capricious and contrary to law for FERC to:

(1) rely solely on a precedent agreement between affiliated companies to find need for the Project, particularly given challenges to whether the affiliate relationship diminished the agreement's probative value, as well as substantial record evidence demonstrating lack of genuine need; and

(2) find, based on this record, that the Project's public benefits outweigh its adverse effects.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Section 7(c) of the Natural Gas Act permits construction and operation of interstate gas pipelines only if FERC first

grants a “certificate of public convenience and necessity.” 15 U.S.C. § 717f(c).

Section 7(e) provides that a certificate application “shall be denied” unless FERC finds a project “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). Section 7(e) “requires [FERC] to evaluate all factors bearing on the public interest.” *Atl. Ref.*, 360 U.S. at 391. This evaluation is critical because pipelines are substantial infrastructure investments that have the potential to negatively impact customers, landowners, and the environment.

FERC’s Certificate Policy Statement establishes the criteria by which FERC determines whether a proposed project is needed and whether the proposed project will serve the public interest. R164, P 26 (citing Certificate Policy Statement); [JA ____]. FERC first determines whether the project can proceed without a subsidy from the applicant’s existing customers. Certificate Policy Statement, 61,745-46. Next, FERC assesses potential adverse effects on the applicant’s existing customers, neighboring pipelines and their captive customers, landowners and communities, and the environment. *Id.*, 61,747-50; *see City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019). If FERC identifies adverse effects, it may only approve the project upon an affirmative finding that public benefits outweigh adverse effects. Certificate Policy Statement, 61,750.

The amount of evidence required to demonstrate need for any particular project depends on the extent of that project’s adverse effects. *Id.*, 61,748. Relatively

less evidence may be required where a project has few or no adverse impacts. In contrast, “more may be required” if a proposed pipeline has significant environmental consequences or relies on eminent domain to acquire rights-of-way. *See Indep. Pipeline Co.*, 89 FERC ¶ 61,283, 61,845 (1999).

Factual History. For nearly two decades, natural gas consumption in Missouri has been flat. R24, 4; [JA ____]. Numerous pipelines serve the St. Louis region, with excess capacity available. R123, 6; [JA ____]. The region has a failed track record of proposals to build new pipelines. R24, 32-38; [JA ____-____]. In response to one prior proposal, Spire Missouri explained that it “did not make operational or economic sense for either the Company or its customers.” R24, 34; [JA ____].

Despite these circumstances, Spire STL announced on August 1, 2016 its intent to build a new pipeline to serve St. Louis. R1, 4; [JA ____]. The only customer willing to execute a precedent agreement was Spire STL’s affiliate, Spire Missouri. *Id.*, 3; [JA ____]. But Spire Missouri did not need new capacity. R164, P 107; [JA ____]. It simply proposed to transfer its existing load from a competitor to Spire STL under the pretense of replacing propane facilities and accessing diverse gas supplies. R20, 2-4; [JA ____-____].

FERC Proceeding. Spire STL filed its certificate application on January 26, 2017. R1; [JA ____-____]. The precedent agreement with Spire Missouri was the only evidence of need Spire STL produced. *Id.*, 8-10; [JA ____-____].

Numerous parties protested the application, including EDF; the Missouri Commission; Enable Mississippi River Transmission LLC (“Enable”), an existing pipeline serving Spire Missouri; and Ameren Service Company, Enable’s second-largest customer. R57; R21; R24; R25; [JA ____-____; ____-____; ____-____; ____-____]. Protestors cast material doubt on whether the Spire STL/Spire Missouri precedent agreement constituted evidence of genuine market need. *See, e.g.*, R57, 2-12; R24, 31-32; [JA ____-____; ____-____]. Protestors also demonstrated that: (1) there is no demand for new pipeline capacity; (2) the Project would have adverse impacts on Spire Missouri’s captive customers, remaining customers of Enable, landowners, and communities within the proposed route; and (3) the adverse impacts outweighed public benefits. *See, e.g.*, R57, 6-8; R24, 32-37; [JA ____-____; ____-____].

FERC Staff issued an Environmental Assessment on September 29, 2017, documenting the Project’s extensive impact on the environment, landowners, and communities. R94; [JA ____]. Specifically, the Environmental Assessment acknowledged that the Project would cross over 100 water bodies, including two major rivers that support state and federally listed threatened and endangered species; require a 50-foot right-of-way over 65 miles, with additional land used and occupied during construction; and use drilling methods that could expose nearby waterbodies to lost-drilling fluid. *Id.*, 9, 34, 47, 49; [JA ____, ____, ____, ____].

On August 3, 2018, FERC approved Spire STL's application by a 3-2 vote. R164; [JA ____]. The majority relied exclusively on the existence of the Spire STL/Spire Missouri precedent agreement to establish need. *Id.*, P 73; [JA ____]. Rather than consider whether the affiliate relationship diminished the probative value of the Spire STL/Spire Missouri precedent agreement regarding the question of need, FERC declared it was "not in the position to evaluate Spire Missouri's business decision." *Id.*, P 33; [JA ____]. Accordingly, FERC disregarded: (1) undisputed evidence of flat demand in St. Louis; (2) adverse impacts that Enable and its captive customers would face if Spire Missouri transferred its load from Enable to Spire STL; (3) the absence of market studies by Spire STL to support its assertion of need; (4) prior unsuccessful projects proposed by non-affiliates (and Spire Missouri's lack of interest in those projects); and (5) the lack of "materially significant" cost savings to Spire Missouri's captive customers. *Id.*, PP 81, 84, 107-08; [JA ____, ____, ____-____].

Concerning the Certificate Policy Statement, FERC recognized the adverse impacts on captive customers of existing pipelines. *Id.*, PP 107, 115; [JA ____, ____]. It also found that Spire STL had not finalized easement agreements with affected landowners for "most of the land required for the [P]roject." *Id.*, P 119; [JA ____]. Without these agreements, Spire STL would need to exercise its FERC-enabled authority to seize private property through disruptive condemnation proceedings. Despite this evidence of substantial harm, which FERC never quantified, the majority

summarily concluded “that the benefits that the Spire STL Project will provide to the market, enhanced access to diverse supply of resources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities.” *Id.*, P 123; [JA ____].

Several parties, including EDF and Missouri resident Juli Steck,¹ sought rehearing of the Certificate Order. R179; R177; [JA ____-____; ____-____]. With rehearing requests still pending, FERC authorized Spire STL to begin construction and, ultimately, commence service. R195; R198; [JA ____]. Thus, Spire STL seized land through condemnation proceedings before landowners and affected parties could seek judicial review of FERC’s actions. On November 21, 2019, more than one year after parties sought rehearing and one week after Spire STL commenced service, FERC denied all rehearing requests, again by divided vote. The two-commissioner majority affirmed the exclusive reliance on the Spire STL/Spire Missouri precedent agreement as evidence of need without questioning whether the affiliate relationship undermined such uncritical reliance. *See* R424, PP 15, 22-24; [JA ____, ____-____]. It also affirmed the prior ruling that FERC appropriately balanced adverse impacts and

¹ On June 23, 2020, Juli Viel filed a Notice to reflect a name change to Julie Steck.

public benefits. *Id.*, PP 29-37; [JA ____-____]. Commissioner Glick dissented, noting that “there is nothing in the record to suggest” that the Project is needed. R424, Commissioner Glick’s Dissent, P 1; [JA ____].

SUMMARY OF THE ARGUMENT

The Natural Gas Act’s “primary aim” is “to protect consumers against exploitation at the hands of natural gas companies.” *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). “The [Natural Gas Act’s] certificate provisions ‘form the heart of the Act,’ and are the means by which [FERC] effectuates” that primary aim. *Great Lakes Gas Transmission Ltd. P’ship v. FERC*, 984 F.2d 426, 431-32 (D.C. Cir. 1993) (quoting *Atl. Ref.*, 360 U.S. at 388). Specifically, sections 7(c) and (e) prohibit FERC from authorizing construction and operation of unnecessary pipelines. 15 U.S.C. §§ 717f(c), (e).

Before FERC, EDF argued that Spire STL failed to meet its burden of demonstrating a need for its proposed Project. EDF’s submissions cast substantial doubt on the probative value of the only evidence Spire STL produced to demonstrate need—i.e., the Spire STL/Spire Missouri precedent agreement. EDF also demonstrated that Spire STL’s Project was not needed, and that its adverse effects outweighed any public benefits. R57, 6-12; R179, 2-17; [JA ____-____; ____-____].

In the challenged orders, FERC relied on two internally inconsistent rationales to reject EDF's challenge. First, FERC refused to consider whether the Spire STL/Spire Missouri affiliate relationship tainted the evidentiary value of the precedent agreement, claiming that it "is not in the position to evaluate Spire Missouri's business decision." R164, P 33; R424, P 15; [JA ____; ____]. To support that decision, FERC cited its policy not to "look behind" precedent agreements. R164, P 75; R424, P 14; [JA ____; ____]. FERC also asserted that looking behind the Spire STL/Spire Missouri precedent agreement would "interfere" with, or "infringe" upon, the Missouri Commission's jurisdiction. R164, P 87; R424, P 27; [JA ____; ____].

Second, despite claiming not to be in a "position" to evaluate Spire Missouri's "business decision" for self-dealing, and not to have jurisdiction over that issue, FERC also took the opposite position, stating it "evaluated the record and did not find evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse." R424, P 15; [JA ____].

The Court should not let FERC have it both ways—both declining to consider evidence of self-dealing and then claiming that it considered the effect of the affiliate relationship on the determination of need. Nonetheless, neither of these rationales has merit. As this Court has explained, FERC's obligations under the Natural Gas Act do not permit uncritical reliance on customer acquiescence because the customer's interests may not be aligned with the interests of end users. *See Tejas*, 908

F.2d at 1000; *see also Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003). It was critical that FERC satisfy its independent obligation here because protestors raised legitimate challenges to whether the Spire STL/Spire Missouri precedent agreement was probative of genuine need. FERC disregarded those challenges in contravention of its obligations to respond meaningfully, engage in reasoned decisionmaking, and base its decisions on substantial evidence. *PPL Wallingford, LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); 15 U.S.C. 717r(b).

FERC also violated its Certificate Policy Statement by failing to perform any meaningful evaluation of the Project’s public benefits and its adverse impacts. Attempting to minimize the Project’s adverse effects, FERC claimed that adverse effects on existing customers are the result of Spire Missouri’s business decision and that it is not required to protect customers from such decisions. R424, P 31; [JA ____]. FERC is obligated to consider all adverse effects—there is no exception for adverse effects caused by business decisions. R424, Commissioner Glick’s Dissent, P 27; [JA ____]. FERC’s “analysis” of adverse effects on landowners, communities, and the environment was inadequate, including a failure to address the impacts of eminent domain. *Id.*, Commissioner Glick’s Dissent P 25; [JA ____-____].

Concerning benefits, FERC claimed, without any citation to the record, that that the Project’s benefits included “enhanced access to diverse supply of resources

and the fostering of competitive alternatives.” R164, P 123; [JA ____]. The record does not support that finding.

Compounding these deficiencies, FERC never quantified adverse effects and benefits or meaningfully compared the two. Rather, it summarily concluded that public benefits outweigh adverse effects. *Id.*; [JA ____]. FERC’s “fail[ure] to seriously weigh the meager evidence of the need for the pipeline against harms caused by its construction,” including harms to “landowners, communities[,] and the environment,” was arbitrary and capricious. R424, Commissioner Glick’s Dissent, P 28; [JA ____].

These errors demonstrate that FERC had no lawful basis for issuing a certificate to Spire STL. Consequently, the Court should vacate the challenged orders.

STANDING

EDF members and their families own, live, and recreate on land that is transected by Spire STL’s pipeline. FERC’s certificate orders confer on Spire STL the right to exercise eminent domain to acquire “any land necessary to the project’s completion” and permit Spire STL to construct and operate the pipeline. *City of Oberlin*, 937 F.3d at 602; 15 U.S.C. § 717f(h). Construction of the pipeline and its continued presence and operation causes concrete injury to EDF members. *See* Addendum on Standing, Declaration of Jacob Gettings, Jr. (“Gettings Decl.”); *id.*,

Declaration of Greg Stout (“Stout Decl.”); *id.*, Declaration of Kenneth Davis (“Davis Decl.”); *id.*, Declaration of Patrick Parker (“Parker Decl.”).

EDF members own property along the route of the pipeline and have been subject to condemnation actions brought by Spire STL, using its FERC-conferred eminent domain authority. *Id.*, Gettings Decl. ¶¶ 4-5, 11-12; *id.*, Stout Decl. ¶¶ 3, 12-13; *id.*, Davis Decl. ¶¶ 4-5, 10-11; *id.*, Parker Decl. ¶¶ 4, 11-12. These members suffer a cognizable injury. *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271-72 (D.C. Cir. 2015) (citing *B&J Oil & Gas v. FERC*, 353 F.3d 71, 74-75 (D.C. Cir. 2004)) (“[A] landowner made subject to eminent domain by a decision of the Commission has been injured in fact because the landowner will be forced either to sell its property to the pipeline company or to suffer the property to be taken through eminent domain.”).

EDF members have experienced diminished enjoyment of recreational activities and decreased aesthetic benefit of natural spaces due to degradation caused by the pipeline. Addendum on Standing, Davis Decl. ¶¶ 13-15 (describing decreased use and enjoyment of land for hunting due to disruption of hunting grounds from pipeline construction, deforestation, and damage to soil by pipeline developer); *id.*, Parker Decl. ¶¶ 20-23 (describing decreased enjoyment of land for outdoor recreation due to disruption of pipeline); *id.*, Stout Decl. ¶¶ 15, 18, 25 (explaining that his conservation prairie is partially destroyed by construction and presence of pipeline,

resulting in loss of prairie plant species and butterflies and other pollinators that he enjoyed on the property; and tree removal has caused aesthetic harm to his enjoyment of the land). *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)) (stating that individuals show injury in fact when they “aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity”).

EDF members are coping with damage to soil and other land features, caused by the Project, that negatively affects their use of the land for agriculture and cattle grazing. Addendum on Standing, Parker Decl. ¶¶ 14-19; *id.*, Gettings Decl. ¶¶ 16-21. *See Sierra Club v. FERC*, 827 F.3d 36, 44 (D.C. Cir. 2016) (stating that an individual experiencing “disruption of daily activities” suffers concrete, particularized injury). The soil damage caused by the construction process is enduring and requires significant investment to rectify. *Id.*, Stout Decl. ¶¶ 19-20, 23; *id.*, Gettings Decl. ¶¶ 22, 24. EDF members are concerned that this harm will be ongoing and that additional damage could recur in the future while the pipeline is present on their land. *Id.*, Parker Decl. ¶ 18; *id.*, Stout Decl. ¶¶ 15, 25.

EDF members are concerned about living or spending time in close proximity to an operational pipeline, out of fear that a rupture or other pipeline failure could result in a dangerous explosion on their land. *Id.*, Gettings Decl. ¶¶ 14-15, 22; *id.*,

Parker Decl. ¶¶ 21, 24. Some members have modified their plans for future use of the land, or are reassessing whether to pursue such plans, due to concerns about the presence of an operational pipeline crossing their property. *Id.*, Davis Decl. ¶¶ 20-21; *id.*, Gettings Decl. ¶ 15.

The injuries-in-fact to EDF members are traceable to the challenged orders because those orders issued the certificate of public convenience and necessity that allowed Spire STL to proceed with eminent domain proceedings, preconstruction and construction activities, and operation of the unnecessary pipeline. Harm to EDF's members is redressable by a ruling from this Court vacating the challenged orders. *See Gunpowder Riverkeeper*, 807 F.3d at 272. EDF therefore has standing.

ARGUMENT

FERC's orders represent an abdication of its statutory obligation to protect the public by ensuring that new interstate pipelines will serve a genuine need. Instead of rigorously analyzing whether the public interest will be served, FERC performed an illusory "analysis" that rubber-stamped an unnecessary pipeline based solely on the existence of an affiliate precedent agreement that required captive ratepayers to support a project that benefits the affiliates' owner. The aligned interests of the affiliates, and the ability to pass costs through to captive customers, would put any reasonably vigilant regulator on high alert. At a minimum, it would warrant FERC's performing *some* analysis of whether the affiliate relationship diminished the

evidentiary value of the precedent agreement when evaluating need. But a majority ignored the potential for affiliate abuse entirely. Rather than fulfill FERC's obligation to protect the public interest, the majority facilitated harm to the public interest by allowing an unnecessary pipeline to negatively impact customers, landowners, and the environment. The certificate should have been denied, and FERC's orders should be vacated.

A. Standard of Review.

The Court must set aside FERC's orders if they are arbitrary and capricious or otherwise contrary to law. *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 358 (D.C. Cir. 2017); 5 U.S.C. § 706(2)(A). To survive review under that standard, FERC must engage in "reasoned decisionmaking, which requires it to "examine the relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Court only accepts FERC's factual findings as conclusive if they are supported by substantial evidence. 15 U.S.C. § 717r(b).

B. It Is Patently Arbitrary and Capricious and Contrary to Law to Authorize Construction and Operation of Unnecessary Pipelines.

The Natural Gas Act's "primary aim" is "to protect consumers against exploitation at the hands of natural gas companies." *Hope*, 320 U.S. at 610. The

Natural Gas Act's certificate provisions—sections 7(c) and 7(e), 15 U.S.C. §§ 717f(c), (e)—“form the ‘heart of the Act,’ and are the means by which [FERC] effectuates” that primary aim. *Great Lakes Gas*, 984 F.2d at 431-32 (quoting *Atl. Ref.*, 360 U.S. at 388). Those two provisions work in tandem to define the showing applicants must make to obtain a certificate and the evidentiary findings necessary for FERC to conclude that a proposed pipeline is needed. The determination of need is critical given the drastic consequences these projects can have on customers, landowners, and the environment. Consequently, robust analysis is required to assure the public that sufficient benefits exist to outweigh those negative impacts. Without that assurance, FERC runs the risk of certifying unnecessary pipelines, which would be a violation of sections 7(c) and 7(e) and, therefore, arbitrary and capricious.

C. FERC's Uncritical, Exclusive Reliance on the Spire STL/Spire Missouri Precedent Agreement to Find Need is Arbitrary and Capricious.

To fulfill its duty as the “guardian of the public interest,” *FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961), FERC must “evaluate all factors bearing on the public interest” in assessing certificate applications. *Atl. Ref.*, 360 U.S. at 391; Certificate Policy Statement, 61,747. Despite the requirement to consider all relevant factors reflecting on the prospective need for a project, FERC's actual practice is to rely heavily, if not exclusively, on only one factor—i.e., the existence of precedent agreements. *See Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042,

P 35 (2018). This Court has affirmed FERC’s reliance on precedent agreements to support a finding of need because, “[i]f there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity.” *See Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 262-63 (D.C. Cir. 2018). But that logic does not apply where, as here, there is only one precedent agreement and it is between affiliates, with costs borne by captive customers.

Rather than negotiate “rigorously” and “selfishly” in their own best interest, affiliates have incentives to pursue transactions that benefit the corporate enterprise. *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048, P 96 (2014). For these reasons, affiliate transactions—as FERC itself has previously found—require greater scrutiny. *See Am. L.A. Pipe Line Co.*, Opinion No. 387, 29 F.P.C. 932, 935-36 (1963); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, P 49 (2009); *TECO Power Servs. Corp. and Tampa Elec. Co.*, 52 FERC ¶ 61,191, 61,697 (1990).

Here, Spire Missouri has little incentive to avoid costs from Spire STL—in fact, it has a strong incentive to incur them. Utilities such as Spire Missouri pass the costs of interstate transportation service on to their retail customers. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 967-68 (1986). Under the agreement, Spire Missouri will pay Spire STL for transportation capacity every hour of every day for the next 20 years regardless of whether Spire Missouri in fact uses that capacity. While FERC’s reliance on “business judgment” may warrant some deference when the

transaction is between unaffiliated parties, the mere invocation of a “business decision” without more “is simply a talismanic phrase that does not advance reasoned decision making” when the business judgement is tainted by affiliated interests.²

R424, Commissioner Glick’s Dissent, P 23 (citation omitted); [JA ____].

Protestors demonstrated the skewed incentives underpinning the Spire STL/Spire Missouri precedent agreement. As evidence of the lack of arm’s-length negotiations, they showed there was no meaningful distinction between Spire STL and Spire Missouri—but rather that they acted together to advance a shared corporate goal. *See* R38, 8 (where Spire STL speaks for Spire Missouri’s business decision); *id.*, 12-13 (where Spire STL purports to address Spire Missouri’s “operational considerations” and its “goal of enhancing supply path diversity”); [JA ____]. Because no reasonable company would subscribe to capacity on a new pipeline when demand is flat, existing capacity is sufficient, and the new pipeline does not offer cost savings, protestors explained that advancing the corporate enterprise’s interests is the only

² Contradicting its prior statement that it was not in the position to evaluate Spire Missouri’s “business decision,” FERC accepted Spire Missouri’s claim that it must replace its propane peaking facilities with Spire STL capacity. *See* R164, P 108; [JA ____]. Record evidence made clear that Spire Missouri used the propane peaking facilities on only three days out of the past five years, severely undercutting this justification. R137, 26; [JA ____].

rational explanation for Spire Missouri's decision. *See, e.g.*, R164, P 18 (summarizing protests); R424, Commissioner Glick's Dissent, P 14; (noting doubts about whether unaffiliated parties would have entered the same agreement); [JA ____; ____]. Namely, revenue that Spire Missouri collects from its captive ratepayers for service on Spire STL would go to Spire-family shareholders, not shareholders of the unaffiliated neighboring pipeline. R146, 11 n.47; [JA ____]. As Commissioner Glick explained, "[t]he record is replete with evidence suggesting that the [Project] is a two-hundred-million-dollar effort to enrich Spire's corporate parent rather than a needed piece of energy infrastructure." R424, Commissioner Glick's Dissent, P 3; [JA ____].

FERC disregarded this evidence, claiming that it was "not in the position to evaluate Spire Missouri's business decision to enter into a contract with Spire [STL]." R424, P 15; [JA ____]. FERC provided two reasons for its refusal to engage that critical issue, neither of which has merit.

1. The Court Should Reject FERC's Blind Adherence to Its Policy Not to Look Behind Any Precedent Agreement.

FERC claimed that the sole, dispositive question is whether a precedent agreement is long-term and binding. R164, P 75 n.136 (citing *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,244, P 57(2002)); R424, P 14 n.39 (same); [JA ____; ____]. If those conditions are present, FERC disclaimed the ability to "look behind" precedent agreements and consider whether they are demonstrative of legitimate need, even when between affiliates. R164, P 75; R424, P 14; [JA ____; ____]. FERC claimed this

Court affirmed that approach in four cases: (1) *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); (2) *Myersville Citizens for a Rural Community v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015); (3) *City of Oberlin*; and (4) *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished). See R164, PP 72, 75; R424, PP 14-15; [JA ___, ___, ___-___].

None of the Court's prior decisions support findings that (i) a single precedent agreement with an affiliate is dispositive of need, (ii) FERC need not consider evidence that calls into question the probative value of the affiliate-precedent agreement, or (iii) the existence of the affiliate-precedent agreement permits FERC to disregard record evidence of lack of need.

First, none of the four cases on which FERC relied addressed the situation here—i.e., FERC's exclusive reliance on a developer's precedent agreement with an affiliate with captive customers to find need. Indeed, rather than provide a basis for sustaining FERC's actions, the prior decisions demonstrate that FERC's uncritical reliance on the Spire STL/Spire Missouri precedent agreement as the sole evidence of need is arbitrary and capricious. In *Minisink*, FERC did not rely exclusively on the existence of a precedent agreement to find need. Rather, the Court noted FERC's analysis of benefits like "increased capacity to customers in the high-demand northeast market." *Minisink*, 762 F.3d at 104. Similarly, in *Myersville*, the Court noted FERC's analysis, and rejection, of studies that purportedly showed declining demand

in the area. *Myersville*, 783 F.3d at 1311. There are no similar findings or benefits here. It is undisputed that load is flat and existing capacity is sufficient to serve Spire Missouri's demand. R164, P 107; R424, P 24; [JA ____; ____].

Likewise, *City of Oberlin* cited FERC's finding that existing pipelines could not meet demand to be served by the new project. *City of Oberlin*, 937 F.3d at 605. Here, an existing pipeline could meet, and in fact was meeting, Spire Missouri's demand. *City of Oberlin* also noted FERC's affirmative finding, which no petitioner challenged, that there was no self-dealing. *Id.* Here, FERC declined to engage in a similar analysis, citing its policy of not looking behind precedent agreements. In addition, multiple parties challenged the probative value of the Spire STL/Spire Missouri precedent agreement.

FERC's reliance on the unpublished opinion in *Appalachian Voices* is similarly misplaced. There, "neither any existing or proposed pipeline nor any pipeline customers have suggested that the...[p]roject would have negative impacts on them, as one would expect them to do if they anticipated being burdened with the cost of unused capacity." *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 42 (2017). Further, the applicant provided a market study to support its assertion that the project was needed. Those facts are absent here.

None of these cases supports a finding that precedent agreements "always represent accurate, impartial, and complete evidence of need." R164, Commissioner

Glick’s Dissent, 2; [JA ____]. Rather, they demonstrate the type of analysis that is required of FERC—analysis that FERC did not engage in here despite unrebutted evidence of the absence of genuine need. Absent that analysis, the Natural Gas Act’s public interest requirement and the Certificate Policy Statement’s analytical framework would be meaningless. The Court should avoid this result by vacating the orders.

2. State Commission Reviews Do Not Relieve FERC of Its Independent Statutory Obligation to Protect the Public Interest.

FERC also claimed that it lacked jurisdiction to analyze whether the affiliate relationship diminished the probative value of the Spire STL/Spire Missouri precedent agreement. *See* R164, P 33 (“Spire Missouri’s business decision to enter into a contract with Spire [STL] . . . will be evaluated by the state commission.”); R424, P 16 (“[L]ooking behind the precedent agreements . . . would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate.”); [JA ____; ____]. FERC’s claims ignore the Natural Gas Act’s consumer-protection aim and FERC’s independent obligation to protect the public interest. This Court has chastised FERC for blindly accepting agreements entered into by retail gas utilities, noting the ability of those utilities to pass costs on to captive customers. In *Tejas*, the Court found that FERC did not satisfy the substantial evidence standard where it “failed to justify its heavy reliance upon the [customers’] having agreed to its terms.” *Tejas*, 908 F.2d at 1000-01. Articulating a rationale that

applies equally here, the Court explained that FERC’s “rel[iance] upon the [customers’] agreement” calls into question the evidentiary value of that agreement, “a question made salient by the possibility that, as utilities subject to cost-based price regulation, the [customers] might with reason assume that they can recover from end users any costs they incur under this settlement.” *Id.*, 1005. Moreover, “before relying on contracts between a pipeline and its wholesale customers, FERC must ‘address the question of whether’ the interests of those customers ‘are sufficiently likely to be congruent with those of ultimate consumers’ that ‘will bear the cost’ of the agreed-upon rates in their monthly energy bills.” *Mo. Pub. Serv. Comm’n*, 337 F.3d at 1076 (quoting *Tejas*, 908 F.2d at 1003-04). Orders that “do not consider these relevant factors [are] arbitrary and capricious.” *Id.* (citing *N. Mun. Distribs. Group v. FERC*, 165 F.3d 935, 941 (D.C. Cir. 1999)).

Critically, *Spire Missouri’s captive ratepayers*, not Spire Missouri, are the end-users responsible for the costs of the Project over the 20-year term of the affiliate agreement. Given the shifting of risk to captive ratepayers, Spire Missouri’s business decision to enter into an affiliate agreement should not be dispositive of need.

Even a cursory review of the evidence below should have prompted FERC to conclude that the affiliate relationship and the ability to pass costs to Spire Missouri’s captive customers diminish the evidentiary value of the Spire STL/Spire Missouri precedent agreement in the need determination. Spire Missouri *conceded* that the

Project would not be financially viable without the ability to recover costs from its captive customers. R123, 1-2; [JA ____-____]. Record evidence showed that the ability to pass costs through to retail customers, including the 14% rate-of-return for new-entrant pipelines, is a powerful incentive for utilities to contract with their affiliates and generate revenues for the parent corporation. *See, e.g.*, R24, 31-32; [JA ____-____]. This evidence should have triggered heightened scrutiny of the merits (and demerits) of the Spire STL/Spire Missouri precedent agreement, just as similar concerns trigger heightened scrutiny in other contexts. *See Boston Edison Co.*, 55 FERC ¶ 61,382, 62,168 (1991); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, P 4 (2008). But FERC took a different approach and ignored whether the affiliate relationship diminishes the Spire STL/Spire Missouri agreement's probative value.

Moreover, the state regulator in this case, the Missouri Commission, specifically requested a "much more rigorous review" given the affiliate relationship and the ability to pass costs on to retail customers. R21, 9-10; [JA ____-____]. In making that request, the Missouri Commission "dispute[d] that competition between pipelines is or can be 'fair' when the pipelines are competing for the business of a single dominant customer and that customer is an affiliate of one of the pipelines." *Id.*, 9 n.18; [JA ____]. Rather, the Missouri Commission's express position in this case demonstrates the insufficiency of FERC's deferral to the Missouri Commission's processes to

address concerns that the Spire STL/Spire Missouri precedent agreement is not evidence of genuine need.

Finally, FERC's purported concern about "infring[ing] upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate" (R424, P 16; [JA ____]) is undermined by FERC's practice in other cases. For example, *Cove Point LNG* involved a state-regulated entity's purchase of liquefied natural gas peaking services from an affiliate. The applicant claimed that state-commission regulation mitigated any risk of self-dealing. FERC rejected that claim because state commission prudency hearings provided limited relief and could be "lengthy, resource-consuming and uncertain in their outcome." *Cove Point LNG Ltd. P'ship*, 68 FERC ¶ 61,128, 61,619 (1994); *see also Boston Edison*, 55 FERC ¶ 61,382, 62,169-70 (disagreeing that FERC "need not worry about self-dealing because the [state regulator] ultimately will have to approve the...project," and recognizing FERC's "independent responsibility to protect against affiliate abuse."). The same rationale applies here and undermines FERC's strained reliance on state regulation to avoid its obligations under the Natural Gas Act.

If affirmed, the "practical effect" of FERC's orders "is that no regulatory body would ever be able to conduct a holistic assessment of the need for a proposed pipeline simply by virtue of the fact that Congress divided jurisdiction over the natural gas sector between the federal and state governments." R424, Commissioner Glick's

Dissent, P 20; [JA ____]. The Court should vacate the orders because the Natural Gas Act does not permit that result.

3. FERC Erred by Disregarding Overwhelming Record Evidence Demonstrating Lack of Need.

As explained above, FERC justified its refusal to analyze the Spire STL/Spire Missouri precedent agreement by claiming that it was “not in the position to evaluate Spire Missouri’s business decision.” R164, P 33; R424, P 15 [JA ____; ____].

Remarkably, FERC also took the opposite position, claiming that it had performed the very evaluation it was in no position to perform. According to FERC, it “evaluated the record and did not find evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse.” R424, P 15; [JA ____]. The record does not show that FERC performed any such analysis. The cites that FERC provided at footnote 45 of the Rehearing Order to support its claim—i.e., “*Id.*, PP 77, 83, & 86.”—appear to be erroneous and there is no other evidence of such a review. What the orders do contain is FERC’s refusal to “look behind” the affiliate-precedent agreement. The arbitrary and capricious standard does not permit FERC to affirmatively deny the existence of evidence it declined to look for.

Had FERC performed such an analysis, it would have been compelled to either reject the application as unsupported or, at a minimum, determine that the Spire STL/Spire Missouri precedent agreement is not, in itself, dispositive of need. FERC’s majority acknowledged the Project is not needed to serve new load. R164, P 107; [JA

___]. Thus, “the record does not contain any evidence—let alone substantial evidence—suggesting a need for additional interstate natural gas pipeline capacity in the St. Louis region.” R424, Commissioner Glick’s Dissent, P 4; [JA ___]. Treating it as dispositive that Spire STL entered into an affiliate-precedent agreement with Spire Missouri was plainly insufficient.

FERC’s Certificate Policy Statement acknowledges this very situation: “A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.” Certificate Policy Statement, 61,748. Consistent with Supreme Court precedent, FERC’s Certificate Policy Statement addresses this situation by requiring FERC to “consider all relevant factors reflecting...need” instead of “relying on only one test.” *Id.*, 61,747; *Atl. Ref.*, 360 U.S. at 391. The proper evaluation would have required consideration of evidence such as “demand projections, potential cost savings to consumers, or comparison of projected demand with the amount of capacity currently serving the market.” R164, Commissioner LaFleur’s Dissent, 2 (citing *id.*, P 72); R424, Commissioner Glick’s Dissent, P 14; [JA ___; ___].

Had FERC considered such evidence, it would have been compelled to conclude that the Project is not needed. It is an undisputed (and indisputable) fact that load growth in St. Louis is flat. R164, P 107; [JA ___]. As such, “Spire Missouri is merely shifting its capacity subscription from an existing pipeline to a new one

owned by its affiliate.” R424, Commissioner Glick’s Dissent, P 4; [JA ____-____].

FERC conceded that any cost savings to consumers are negligible at best. *See* R164, P 108; [JA ____]. These two considerations—alone—call into question need for the pipeline. *See Empire Pipeline, Inc.*, 166 FERC ¶ 61,172 (2018) (Glick, Comm’r, dissenting, P 6) (“[I]f a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be ‘needed’ in the first place.”).

But FERC then ignored additional record evidence submitted by Enable’s expert finding—across 12 scenarios—that the Project is “fundamentally uneconomic” and “would result in increased costs to [Spire Missouri].” R139, 5; [JA ____]. Record evidence detailed the failed track record of prior, unsuccessful projects. R24, 32-38; [JA ____-____]. Remarkably, when presented with these facts, FERC found no need to consider anything other than whether Spire STL and Spire Missouri entered into a precedent agreement.

FERC ignored substantial record evidence demonstrating an abject lack of need for the Project and challenging the probative value of the affiliate agreement in FERC’s evaluation of need. Those actions constitute reversible error.

D. There is No Support for FERC’s Conclusion that the Project’s Public Benefits Outweigh Its Adverse Effects.

FERC arbitrarily and capriciously concluded that Spire STL’s Project is in the public interest despite record evidence of significant adverse effects and illusory

public benefits. FERC must evaluate all factors bearing on the public interest in its review of a certificate application, and it may only approve a project if the public benefits outweigh the adverse effects. *Atl. Ref.*, 360 U.S. at 391; *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017); Certificate Policy Statement, 61,750. Adverse effects may include “a deleterious environmental impact on the surrounding community,” *City of Oberlin*, 937 F.3d at 599, “increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners’ property,” *Myersville*, 783 F.3d at 1309. Public benefits extend beyond just the benefits to the pipeline developer and can include access to new supplies and lower costs to consumers. *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128, 61,396 (2000).

Here, FERC disregarded record evidence and summarily concluded that the Spire STL Project provided benefits that “outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities.” R164, P 123; [JA ____]. FERC failed to “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs.*, 463 U.S. at 43. FERC’s finding is arbitrary and capricious because it is not supported by substantial evidence nor any meaningful comparative analysis of public benefits and adverse effects.

Furthermore, FERC embraces a proportional approach in its Certificate Policy Statement, where the amount of evidence required to establish need will depend on the potential adverse effects of the proposed project. *Id.* 61,748; *see, e.g., Arlington Storage Co., LLC*, 128 FERC ¶ 61,261, PP 11-13 (2009) (demanding heightened demonstration of need where evidence shows adverse effects to landowners). Because the record here indicates that the Project will have significant adverse effects, FERC should have demanded a heightened demonstration of need for the project.

1. FERC's Assessment of Adverse Effects Disregards Substantial Record Evidence.

The record establishes that the Project's adverse effects on existing pipelines and their customers, landowners, and the environment are sweeping and severe. *See, e.g.,* R24, 11-19, 48-51; R179, 19-21; R172, 1-2; [JA ____-____, ____-____; ____-____; ____-____]. FERC either minimized or disregarded those adverse effects, and failed to engage in any meaningful comparison of adverse effects and benefits, as required by the Certificate Policy Statement. R424; Commissioner Glick's Dissent, PP 24-28; [JA ____-____]. FERC's failure to meaningfully address the Project's adverse impacts requires vacatur.

Harm to Landowners, Communities, and the Environment. In assessing pipeline certificate applications, FERC's objectives include avoiding "unnecessary environmental and community impacts" and "the unneeded exercise of eminent domain." Certificate Policy Statement, 61,737, 61,743. FERC must consider those

adverse effects in determining whether a project is in the public interest and may “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.” *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019).

FERC’s finding that Spire STL had taken adequate steps to minimize adverse impacts on landowners and surrounding communities is simply untethered from the record evidence. R424, P 34; [JA ____]. When FERC issued the Certificate Order, Spire STL had not reached agreements with affected landowners for “most of the land required for the project,” R164, P 119; [JA ____], indicating opposition to the pipeline and that Spire STL would have to seize private property against the will of landowners. When FERC issued its Rehearing Order, Spire STL had prosecuted eminent domain actions against over 100 people and entities involving hundreds of acres of privately-owned land.³ Rather than minimize adverse impacts, record

³ Spire STL has brought condemnation actions against roughly 405 acres of land in three federal district courts in Missouri and Illinois. *See* Docket, *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN) (E.D. Mo.) (listing consolidated condemnation actions against roughly 150 acres of land); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN), 2018 WL 6528667, *8 (E.D. Mo. Dec. 12, 2018) (granting Spire STL’s motion to condemn the land in the consolidated actions); Memorandum Supporting Second Motion for a Preliminary Injunction, No. 4:2018-CV-1327 (Feb. 8, 2019), Exh. A (describing an additional roughly 30 acres of land that Spire STL sought to condemn); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN), 2019 WL 1232026, *2 (E.D. Mo. Mar. 15, 2019) (granting Spire STL’s second motion); Verified Complaint for Condemnation of Pipeline Easements, No. 3:18-CV-1502 (NJR) (SCW) (S.D. Ill. Aug. 15, 2018) (listing consolidated condemnation actions against roughly 80 acres); *Spire STL Pipeline LLC v. Turman*, No. 3:18-CV-1502 (NJR) (SCW),

evidence shows that Spire STL exacerbated them by an “unethical” lack of communication with the impacted communities. R172, 2; [JA ____].

The severe impact of this Project on local communities is distinct from other instances where FERC has approved certificates. FERC has found that benefits outweighed adverse effects where record evidence established that a pipeline developer did not need to exercise eminent domain to acquire any of the property. *Millennium Pipeline Co. LLC*, 145 FERC ¶ 61,007, P 28 (2013) (finding that the developer had taken appropriate steps to minimize impacts to landowners and communities where the developer “purchased all of the property rights necessary for its project from willing sellers and will not need to exercise eminent domain to acquire any of the property rights it will need for the project”). And FERC has found a project to be in the public interest where the proposed facilities would be constructed on existing rights-of-way or on land owned by the pipeline. *Transcon. Gas Pipe Line Co., LLC*, 145 FERC ¶ 61,152, P 18 (2013). The circumstances involving Spire STL are not comparable. Spire STL’s heavy reliance on the momentous, disruptive power

2018 WL 6523087, *13 (S.D. Ill. Dec. 12, 2018) (granting Spire STL’s motion); Verified Complaint for Condemnation of Pipeline Easements, No. 3:18-CV-03204 (SEM) (TSH) (C.D. Ill. Aug. 15, 2018) (listing consolidated condemnation actions against roughly 145 acres); Order, *Spire STL Pipeline LLC v. Betty Ann Jefferson*, No. 3:18-CV-03204 (SEM) (TSH), 2018 WL 8244004, *11 (C.D. Ill. Dec. 14, 2018) (granting Spire STL’s motion for a preliminary injunction for immediate possession of land).

of eminent domain highlights FERC's failure to ensure that the Project satisfies the public interest standard of the Natural Gas Act.

FERC's consideration of the Project's environmental impacts was likewise insufficient. In the single sentence in the Certificate Order finding that the benefits of the project outweigh the harms, FERC fails to even mention environmental impacts. R164, P 123; [JA ____]. And its subsequent "Environmental Analysis" is dedicated only to an assertion that it fulfilled its obligations under the National Environmental Policy Act. *Id.*, PP 202, 242; [JA ____, ____]. FERC's Environmental Assessment details a broad range of environmental harms that are ignored in FERC's balancing "analysis." R94, 9, 22, 34, 47, 49; [JA ____, ____, ____, ____, ____].

FERC provided no rationale for its disregard of environmental impacts beyond a non-sequitur: "Spire STL filed a written statement affirming that it executed contracts for service at the levels provided for in the precedent agreements as required by the Certificate Order, thus ensuring avoidance of unnecessary environmental impacts." R424, P 37; [JA ____]. That conclusory statement does not constitute reasoned decisionmaking. As then-Commissioner LaFleur opined, "[g]iven the lack of demonstrated need for the project, this environmental harm can be avoided altogether." R164, Commissioner LaFleur's Dissent, 7; [JA ____].

Harm to Existing Pipelines and their Customers. FERC considers whether a proposed project is intended to replace service on other pipelines and

whether affected pipelines have protested the application. *See* Certificate Policy Statement, 61,748; *PennEast Pipeline Co. LLC*, 162 FERC ¶ 61,053, P 37 (2018) (“PennEast’s project is not intended to replace service on other pipelines, and no pipelines or their customers have filed adverse comments regarding PennEast’s proposal.”); *Mountain Valley Pipeline*, 161 FERC ¶ 61,043, P 56 (because “[n]o transportation service provider or captive customer...protested this project,” FERC found the “no adverse impact on existing pipelines or their captive customers”). Both factors were present here but FERC arbitrarily disregarded them based on the existence of the Spire STL/Spire Missouri precedent agreement.

Enable, the neighboring pipeline, demonstrated that the Project would have adverse effects on it, its customers, Spire Missouri’s customers, and all consumers of natural gas around St. Louis. R24, 11-19; [JA ____-____]. FERC acknowledged these impacts, but dismissed them to avoid second-guessing Spire Missouri’s business decision. R164, P 115; [JA ____]. According to FERC, review of adverse impacts “is not synonymous with protecting incumbent pipelines from the risk of loss of market share to a new entrant.” R424, P 31; R164, P 122; [JA ____; ____]. Regardless of whether an adverse impact is the result of a business decision, FERC must still consider it to ensure that only projects in the public interest are approved. FERC is obligated to protect captive shippers on existing pipelines from adverse impacts of certifying new pipelines for which no incremental demand has been demonstrated.

Certificate Policy Statement, 61,747-50. The existence of an affiliate agreement does not allow FERC to disregard that obligation.

Moreover, FERC suggested that it would only review adverse impacts of Spire Missouri's business decision if there was "evidence of anticompetitive behavior."

R164, P 122; [JA ____]. But the record contains substantial evidence of anticompetitive behavior and self-dealing, and FERC found it was "not in the position to evaluate Spire Missouri's business decision." R424, P 33; [JA ____].

Enable detailed the operational impacts that would occur on its system if FERC approved the Spire STL pipeline. R24, 11-19, 48-50; [JA ____-____, ____-____]. After issuing a request for additional information from Enable, FERC stated it could not verify the claims and then ultimately concluded that the extent of any impacts are speculative. R164, PP 110, 115; [JA ____, ____]. When FERC fails to consider the very evidence that would trigger a more meaningful review, its protection is illusory and its certificate orders are arbitrary and capricious.

2. The Record Does Not Support FERC's Finding of "Benefits," or Demonstrate a Meaningful Comparison of Benefits and Adverse Effects.

The record of this proceeding shows that FERC abdicated its duty to make a determination of public benefit grounded in facts. All FERC could conjure to show benefits was the affiliate precedent agreement and a vague reference to "enhanced access to diverse supply sources and the fostering of competitive alternatives." *Id.*, P

123; [JA ____]. In a region already served by numerous pipelines, with flat or decreasing demand, this perfunctory assertion of benefits cannot balance out the significant adverse impacts of the pipeline. FERC simply made conclusory statements unsupported by record evidence. *See* R424, Commissioner Glick’s Dissent, P 25 (“The Certificate Order included a single conclusory sentence stating that the benefits outweigh the potential impacts and [the Rehearing Order] reaches the same conclusion in a similarly terse fashion.”) (footnotes omitted); [JA ____].

Assuming, *arguendo*, that there were record support for FERC’s conclusory statements, FERC still failed to engage in reasoned decisionmaking because it provided no meaningful comparison of benefits and adverse impacts. Rather, FERC skipped that critical step and summarily concluded that the vague benefits outweigh the distinctly identified adverse impacts. R164, P 123; R424, P 24; [JA ____; ____]. The public convenience and necessity and the arbitrary and capricious standard require a more fulsome analysis before a project may be deemed necessary. *See* Certificate Policy Statement, 61,748. (“Vague assertions of public benefits are not sufficient”). Absent a transparent weighing of costs and benefits, FERC has no basis for concluding that the Project’s benefits outweighed its adverse effects. This deficiency further demonstrates that the certificate orders lack merit and should be vacated.

CONCLUSION

The Court should vacate the Federal Energy Regulatory Commission’s orders.

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Dated: June 26, 2020

CERTIFICATE OF COMPLIANCE

Per Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 29(a)(5), and the Court's March 19, 2020 order, I certify that this Initial Brief complies with the type-volume limitations because its textual portions, including headings, footnotes, and quotations contain 9,486 words of the 16,000 total words allocated to Petitioners, as counted by the "Word Count" feature of Microsoft Word 2010, the program with which this brief was prepared. This word count excludes: (1) the cover page; (2) the table of contents; (3) the Rule 26.1 corporate disclosure statement; (4) certificates; (5) the glossary of abbreviated terms and terms of art; and (6) the signature block.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this 26th day of June 2020, I served the foregoing Initial Opening Brief of Petitioner Environmental Defense Fund, by first class mail, postage prepaid or electronic mail through the Court's CM/ECF system upon the parties to the proceeding below as listed in the Service Preference Report.

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ORAL ARGUMENT NOT YET SCHEDULED

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

Case Nos. 20-1016 and 20-1017 (Consolidated)

ENVIRONMENTAL DEFENSE FUND

Petitioner,

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

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

**PETITIONER ENVIRONMENTAL DEFENSE FUND'S
STATUTORY ADDENDUM**

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5 USCS § 706, Part 1 of 3

Current through Public Law 116-145, approved June 17, 2020.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1)compel agency action unlawfully withheld or unreasonably delayed; and
- (2)hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B)contrary to constitutional right, power, privilege, or immunity;
 - (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D)without observance of procedure required by law;
 - (E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [[5 USCS §§ 556](#) and [557](#)] or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

15 USCS § 717f

Current through Public Law 116-145, approved June 17, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing. Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity.

(1)

(A)No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B)In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission

may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2)The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A)natural gas sold by the producer to such person; and

(B)natural gas produced by such person.

(d) Application for certificate of public convenience and necessity. Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity. Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act [[15 USCS §§ 717](#) et seq.] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate customers.

(1)The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2)If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served. Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc. When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding

in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

15 USCS § 717r

Current through Public Law 116-145, approved June 17, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717r. Rehearing and review

(a) Application for rehearing; time. Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [[15 USCS §§ 717](#) et seq.] to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act [[15 USCS §§ 717](#) et seq.].

(b) Review of Commission order. Any party to a proceeding under this Act [[15 USCS §§ 717](#) et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [circuit] court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in [section 2112 of title 28, United States Code](#) [[28 USCS § 2112](#)]. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [[28 USCS § 1254](#)].

(c) Stay of Commission order. The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of

18 CFR 385.207

This document is current through the June 19, 2020 issue of the Federal Register with the exception of the amendment appearing at 85 FR 37250. Title 3 is current through June 5, 2020.

Code of Federal Regulations > TITLE 18 -- CONSERVATION OF POWER AND WATER RESOURCES > CHAPTER I -- FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY > PART 385--RULES OF PRACTICE AND PROCEDURE PART 385 -- > SUBPART B -- PLEADINGS, TARIFF AND RATE FILINGS, NOTICES OF TARIFF OR RATE EXAMINATION, ORDERS TO SHOW CAUSE, INTERVENTION, AND SUMMARY DISPOSITION

§ 385.207 Petitions (Rule 207).

(a)General rule. A person must file a petition when seeking:

- (1)**Relief under subpart I, J, or K of this part;
- (2)**A declaratory order or rule to terminate a controversy or remove uncertainty;
- (3)**Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;
- (4)**A rule of general applicability; or
- (5)**Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b)Declarations of intent under the Federal Power Act. For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c)Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

18 CFR 385.713

This document is current through the June 19, 2020 issue of the Federal Register with the exception of the amendment appearing at 85 FR 37250. Title 3 is current through June 5, 2020.

Code of Federal Regulations > TITLE 18 -- CONSERVATION OF POWER AND WATER RESOURCES > CHAPTER I -- FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY > PART 385--RULES OF PRACTICE AND PROCEDURE PART 385 -- > SUBPART G -- DECISIONS

§ 385.713 Request for rehearing (Rule 713).

(a) Applicability.

(1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) Time for filing; who may file. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) Content of request. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled "Statement of Issues," listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) Answers.

(1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) Request is not a stay. Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) Commission action on rehearing. Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.