ORAL ARGUMENT NOT YET SCHEDULED

Nos. 20-1016, 20-1017

IN THE

United States Court of Appeals for the District of Columbia Circuit

ENVIRONMENTAL DEFENSE FUND, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR INTERVENORS-RESPONDENTS SPIRE STL PIPELINE LLC AND SPIRE MISSOURI INC.

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September 23, 2020 (Proof Brief)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Respondent Federal Energy Regulatory Commission ("FERC").

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Respondent FERC.

C. RELATED CASES

This case has not previously been before this Court or any other court. Counsel is aware of no other related cases involving substantially the same parties and the same or similar issues.

Respectfully submitted,

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September 23, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Spire STL Pipeline LLC ("Spire STL") states as follows:

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

Spire Inc. (NYSE MKT: SR), is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 10.9% of Spire Inc.'s common stock.

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

Spire Inc., through its gas utility subsidiaries, provides service to approximately 1.7 million customers in Alabama, Mississippi, and Missouri.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Spire Missouri Inc. ("Spire Missouri") states as follows:

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

Spire Inc. (NYSE MKT: SR), is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 10.9% of Spire Inc.'s common stock.

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

Spire Inc., through its gas utility subsidiaries, provides service to approximately 1.7 million customers in Alabama, Mississippi, and Missouri.

Respectfully submitted,

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TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENTS .... ii, iv

TABLE OF AUTHORITIES viii

GLOSSARY xi

JURISDICTION...1

STATUTES AND REGULATIONS 2

INTRODUCTION 2

STATEMENT OF THE CASE...5

A. Statutory And Regulatory Background 5

B. Factual Background..5

1. Project Background 5

2. FERC Proceedings 8

SUMMARY OF ARGUMENT 8

STANDARD OF REVIEW 10

ARGUMENT 11

I. FERC'S NGA ANALYSIS WAS REASONABLE...................................11

A. FERC Reasonably Found That The Project Was Needed.......................11

1. FERC Reasonably Relied On A Precedent Agreement To Determine Need...11

2. FERC Considered And Relied On Substantial Evidence Beyond The Precedent Agreement...15

B. FERC Properly Balanced Benefits Against Adverse Effects..................23

II. FERC'S NEPA ANALYSIS WAS REASONABLE 29

A. FERC's EA Considered And Reasonably Rejected Project Alternatives...29

B. FERC Reasonably Concluded New GHG Emissions Are Not Foreseeable 34

C. FERC Adequately Considered All The Cumulative Impacts NEPA Requires 40

III. VACATUR WOULD BE INAPPROPRIATE....................42

CONCLUSION....................42

STATEMENT OF CONSENT

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

* *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (*en banc*) 1

American Rivers v. FERC, 895 F.3d 32 (D.C. Cir. 2018) 41

Appalachian Voices v. FERC, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) 12, 13

Birckhead v. FERC, 925 F.3d 510 (D.C. Cir. 2019) 36, 37, 39

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008) 41

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) 31

City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999) 30, 31

* *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019) 12, 13, 16, 42

Del. Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014) 35, 41

Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004) 34

FERC v. Elec. Power Ass'n, 136 S. Ct. 760 (2016) 20

Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024 (9th Cir. 2008) 33

Grand Canyon Tr. v. FAA, 290 F.3d 339 (D.C. Cir. 2002) 40, 41

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 2

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 40

* Authorities upon which we chiefly rely are marked with asterisks.

Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983)....35

Minisink Residents for Envt'l Pres. v. FERC, 762 F.3d 97 (D.C. Cir. 2014)....23

Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301 (D.C. Cir. 2015)....32, 33

N.C. Wildlife Fed'n v. N.C. Dep't of Transp., 677 F.3d 596 (4th Cir. 2012)....33

Nat'l Parks Conservation Ass'n v. Jewell, 965 F. Supp. 2d 67 (D.D.C. 2013)....30

Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015)....37

Sierra Club v. FERC, 827 F.3d 36 (D.C. Cir. 2016)....40, 41

Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017)....38

Sierra Club v. U.S. Dep't of Energy, 867 F.3d 189 (D.C. Cir. 2017)....35, 37

Spire STL Pipeline LLC v. 3.31 Acres of Land, No. 4:18-cv-01327 (E.D. Mo.)....25

Spire STL Pipeline LLC v. Turman, No. 3:18-cv-01502 (S.D. Ill.)....25

Tejas Power Corp. v. FERC, 908 F.2d 998 (D.C. Cir. 1990)....14

* *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66 (D.C. Cir. 2011)....29, 30, 31

Williams Gas Processing–Gulf Coast Co., L.P. v. FERC, 373 F.3d 1335 (D.C. Cir. 2004)....16

Williston Basin Interstate Pipeline Co. v. FERC, 475 F.3d 330 (D.C. Cir. 2006)....2

STATUTES AND REGULATIONS:

* 15 U.S.C. § 717(b) 37

* 15 U.S.C. § 717r...1

40 C.F.R. § 1508.8 34

40 C.F.R. § 1508.9(b) 32

18 C.F.R. § 358.1 *et seq.*..29

ADMINISTRATIVE MATERIALS:

* *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).. 17, 19, 21, 23, 25, 26, 27, 28, 29

Chinook Power Transmission, LLC, 126 FERC ¶ 61,134 (2009)...14

Eastern Shore Nat'l Gas Co., 132 FERC ¶ 61,204 (2010)................................11

Enable Miss. River Transmission, LLC, 170 FERC ¶ 61,254 (2020)...27

MoGas Pipeline LLC, 168 FERC ¶ 61,099 (2019) 27

Notice of Inquiry, 163 FERC ¶ 61,042 (2018) 29

Shell Pipeline Co. LP, 164 FERC ¶ 61,175 (2018)...21

TECO Power Servs. Corp. & Tampa Elec. Co., 52 FERC ¶ 61,191 (1990)...14

GLOSSARY

Term	Definition
CEQ	Council on Environmental Quality
Dth	Dekatherm
EDF	Petitioner Environmental Defense Fund
EA	Environmental Assessment
FERC	Federal Energy Regulatory Commission
JA	Joint Appendix
MPSC	Missouri Public Service Commission
MRT	Enable Mississippi River Transmission, LLC
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Certificate Order	*Spire STL Pipeline LLC*, Order Issuing Certificates, 164 FERC ¶ 61,085 (Aug. 3, 2018)
Project	Spire Pipeline
Rehearing Order	*Spire STL Pipeline LLC*, Order On Rehearing, 169 FERC ¶ 61,134 (Nov. 21, 2019)
REX	Rockies Express pipeline
Spire STL	Intervenor Spire STL Pipeline LLC
Spire Missouri	Intervenor Spire Missouri Inc.
Steck	Petitioner Juli Steck

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ENVIRONMENTAL DEFENSE FUND,
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BRIEF FOR INTERVENORS-RESPONDENTS SPIRE STL PIPELINE LLC AND SPIRE MISSOURI INC.

JURISDICTION

This Court lacks jurisdiction under *Allegheny Defense Project v. FERC*, 964 F.3d 1, 15-16 (D.C. Cir. 2020) (*en banc*), which holds that FERC "cannot use tolling orders to change the statutorily prescribed jurisdictional consequences of its inaction" because a tolling order does not "act[] upon" a rehearing request, which is therefore "deemed to have been denied" thirty days after filing, 15 U.S.C. § 717r(a), and under 15 U.S.C. § 717r(b) a petition for review must be filed within 60 days after that deemed denial. Here, petitioners sought rehearing on August 31 and September 4, 2018. [R.177; R.179]. Although FERC issued a tolling order, [R.188], that order was ineffective under *Allegheny* and the rehearing requests were denied by operation of law no later than October 4, 2018. Petitioners then

had 60 days, until December 3, 2018, to seek review. But they did not do so until January 21, 2020, depriving this Court of jurisdiction. *See Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334 (D.C. Cir. 2006) ("The 60-day limitations provision is jurisdictional."); *see also Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993) ("[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law.").

STATUTES AND REGULATIONS

The petitioners' and respondent's briefs contain applicable statutes and regulations.

INTRODUCTION

If the Court finds jurisdiction, it should nevertheless deny the petitions. For decades, the St. Louis area has received almost 90% of its natural gas supply from the Gulf Coast and surrounding midcontinent regions through a series of pipelines that travel as far as 670 miles, passing through a major earthquake zone, to the facilities of intervenor Spire Missouri Inc. ("Spire Missouri"), a local distribution company ("LDC") that serves the St. Louis market. One pipeline passing through the earthquake zone—Enable Mississippi River Transmission, LLC ("MRT")—directly connected St. Louis with that gas supply. The natural gas market, however, changed dramatically since that virtually monopolistic system was

established. The shale gas revolution allowed the Midwest to receive new, less expensive gas from the Marcellus and Utica basins in Appalachia. Beginning in 2010, Spire Missouri internally began to assess a possible new lateral pipeline into its service territory, although then-uncertainty over supply costs undercut these efforts to diversify.

In 2015, however, a relatively new pipeline flowing from west to east—the Rockies Express ("REX")—changed its flow to be bidirectional. As a result, this new Appalachian gas supply, and REX's existing Western gas supply, became available only 65 miles from Spire Missouri's service territory. At the same time, Spire Missouri's 40-year-old "peaking" facilities—a propane injection system needed to ensure full gas service to St.-Louis-area customers during peak winter days—was nearing the end of its useful life and posing operational difficulties.

In 2016, Spire STL Pipeline LLC ("Spire STL") began developing a project to alleviate these problems. In 2017, Spire STL sought authorization from FERC to construct and operate a new, 65-mile natural gas pipeline (the "Project"). The Project would avoid the earthquake zone traversed by MRT, eliminate the need for the aged, expensive, and potentially unreliable propane peaking facilities, and diversify Spire Missouri's gas supply and increase competition by directly connecting the St. Louis area to the REX pipeline and its cheap, abundant gas. Following a publicly held open season for new capacity, Spire STL entered into a

20-year precedent agreement with Spire Missouri (then known as Laclede Gas Company) which promised to subscribe for almost 90% of the Project's capacity at a fixed negotiated rate. Based on the financial commitment of that agreement, and other record evidence, FERC exercised its considerable discretion to grant Spire STL the authorizations it sought, subject to numerous environmental and other conditions. The Project has now been in operation without incident since November 2019.

Although a handful of parties protested below, only two appealed. They now seek to shut down a completed, operational pipeline that is nearly fully subscribed and revert to the earlier, non-competitive era when St. Louis had to rely largely on limited sources of gas that may not satisfy peak demand by themselves. Petitioner Environmental Defense Fund ("EDF") primarily argues that FERC acted arbitrarily and capriciously by relying in part on the precedent agreement because it was between affiliates. Petitioner Juli Steck ("Steck") argues that FERC contravened the National Environmental Policy Act ("NEPA") by not taking a sufficiently "hard look" at certain environmental issues.

As FERC has explained, petitioners cannot surmount the high standard of deferential review on either issue. As this Court has repeatedly held in similar circumstances, Spire STL's binding, long-term precedent agreement with Spire Missouri is reliable evidence of need regardless of affiliation. In any event, EDF's

NGA challenge fails because FERC did not merely rely on the agreement but also looked to undisputed evidence showing many benefits the Project would provide. Steck's NEPA arguments fare no better. Because the Project was not intended to serve increased demand for natural gas in the St. Louis area, which all parties agree is flat, FERC properly found no adverse downstream effects. And this Court has already rejected Steck's arguments that FERC was required to divine and consider exactly where the Project's upstream gas supply would originate.

The petitions should be dismissed or denied.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background.

Intervenors agree with FERC's description of the controlling legal framework. FERC Br. 4-6.

B. Factual Background.

1. Project Background.

After other options had been explored, [R.40:7-8], Spire STL proposed the Project in early 2017 in response to recent changes in the natural gas market. *See* [R.1]. Before 2010, continental natural gas came mostly from mature Gulf Coast and midcontinent basins. [R.1:9]; [R.40:7-8]. Long pipeline networks transported that gas northward to other regions, resulting in stacked transportation rates for distant markets like St. Louis. [R.1:9, 23].

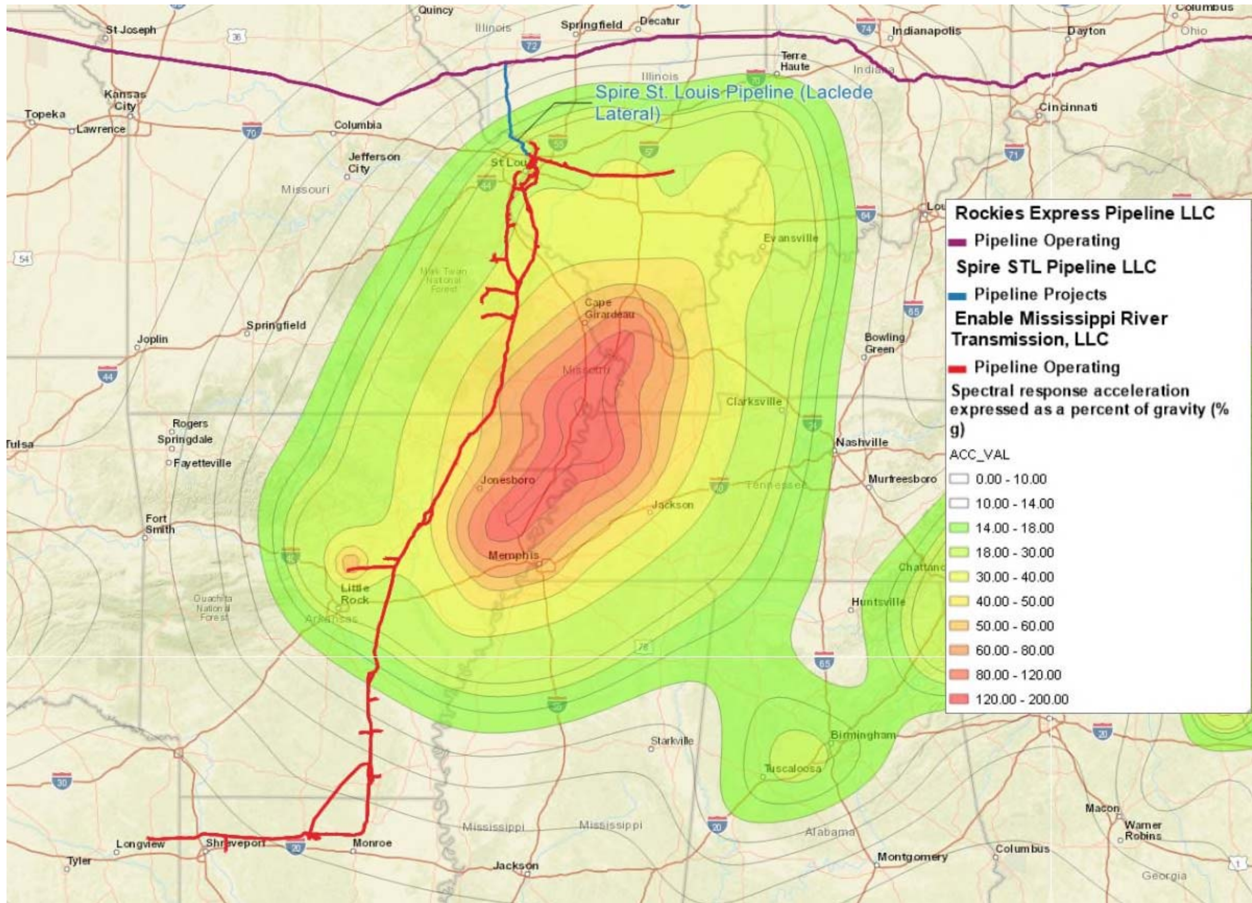
In the decade since hydraulic fracturing, or "fracking," became a widespread, viable method to extract natural gas from shale formations, gas production in the Appalachian area has reshaped the market. [R.40:8]. Northern markets that previously relied on southern and midcontinent gas became production centers. *See* [R.40:16-17]. Responding to this market reversal, in 2015 the formerly west-to-east Rocky Mountain Express ("REX") pipeline was modified to allow it to bring more than 2.0 million Dth per day of northeastern shale gas westward. [R.40:7-9, 30]. The Midwest was consequently offered an ample supply of cheap natural gas that did not exist only a few years before.

St. Louis is in the middle of these market shifts. Before the Project, MRT served nearly all of the St. Louis market through a northbound pipeline system. *See* [R.1:23].[1] But it no longer makes market sense for southern-sourced gas to be transported northward into markets that now receive cheap abundant gas from the Appalachian area. *See* [R.40:7-9, 16-17]. In addition, the changes to southward flow to liquefied natural gas terminals along the Gulf Coast caused by these new supplies have contributed to reduced pipeline pressure that, in the 2017-2018 winter, posed operational problems for Spire Missouri. [R.137:6, 38].

---

1 Less than 10% of Spire Missouri's gas was (and still is) supplied by another pipeline (MoGas Pipeline, LLC ("MoGas")) that also connects to the REX pipeline. But MoGas's current system cannot meet Spire Missouri's gas requirements or allow it to retire its propane-peaking facility. *See* [R.164:87]; [R.96:165]; [R.75:34].

Snaking hundreds of miles north from Louisiana, much of MRT's northbound pipeline also traverses the infamous New Madrid Fault:



[R.40:97] (shading indicates seismic hazard). That fault has caused extraordinary earthquakes before, and federal agencies have estimated it has a 30-40% potential to produce a strong earthquake within the coming decades. [R.40:18-19, 37-38]. Other experts agree that earthquake risk "in the near future is high." [R.40:18, 38].

The Project aimed to address these shortcomings, and others, by transporting gas to St. Louis through a much shorter 65-mile southbound pipeline that directly connects to the REX pipeline at a high-volume, liquid point. [R.40:6, 8-9]. The

Project provides St. Louis with ample gas supplies from a competitive, burgeoning market, and reduces its reliance on the long northbound system that runs through an earthquake zone, and was designed for a market that has since changed.

The Project also provides additional capacity, unavailable elsewhere, that allows Spire Missouri to eliminate propane-peaking facilities that are near the end of their useful life, and are both expensive to maintain and potentially unreliable. [R.40:12-14]. Propane's chemical properties also pose operational difficulties for some Spire Missouri customers, such as incompatibility with natural gas vehicles. [R.40:13].

The Project's many benefits prompted Spire Missouri to subscribe to 87.5% of the Project's capacity under a precedent agreement following Spire STL's public open season auction through which interested shippers could offer to subscribe to the Project. *See* [R.164:4]; [R.40:16-19].

2. FERC Proceedings.

Intervenors agree with FERC's description of the proceedings. *See* FERC Br. 6-12.

SUMMARY OF ARGUMENT

FERC's order (the "Certificate Order") properly applied established standards to substantial record evidence. FERC reasonably treated the precedent agreement as evidence of market need for the Project, since the agreement meant

that nearly all of the pipeline's available capacity would be utilized for at least 20 years, and no evidence showed that intervenors engaged in any anticompetitive behavior. Further, FERC considered evidence showing that the Project was developed in response to recent sea-changes in the natural gas supply markets that allowed Spire STL to offer competitive rates for gas transported through a pipeline that substantially increased reliability and supply diversity for, and increased gas pipeline competition into, the St. Louis market. Those benefits explained Spire Missouri's decision to subscribe and further justified FERC's conclusion that the Project was supported by a public need.

FERC then properly balanced these public benefits against potential adverse effects. In accord with well-established policy, FERC found that Spire STL had taken sufficient steps to minimize effects on landowners and protect their property values. Further, FERC rightly rejected claims of harm to competing pipelines—who raise no complaint to this Court—since a loss in market share from fair competition is not a relevant harm.

FERC's NEPA analysis was also more than adequate. The EA identified the Project's purpose in accord with Spire STL's application, and properly identified FERC's own purpose as determining whether to approve the Project. That approach comported with this Court's precedent and provided a proper baseline for FERC's discussion of alternatives.

FERC's treatment of greenhouse gas ("GHG") emissions was also proper. FERC explained that the Project would not foreseeably produce upstream emissions because it is simply a short link in a nationwide supply chain, such that predicting whether or where increased drilling might result was practically impossible. FERC reasonably concluded that the Project would not foreseeably produce any new downstream emissions because, as all parties agreed, it was not intended to serve increased demand. FERC thus had no reason to conduct a global climate-change analysis, which NEPA does not require anyway.

At bottom, petitioners' and their amici's arguments fail because they do not address the record. At every turn, they ignore or misstate that record and fail to identify any substantial evidence FERC ignored. Their objections are therefore just a disagreement with FERC's findings, which are owed dispositive deference, and they identify no errors of law.

STANDARD OF REVIEW

FERC accurately states the standard of review. FERC Br. 15-17.

ARGUMENT

I. FERC'S NGA ANALYSIS WAS REASONABLE.

A. FERC Reasonably Found That The Project Was Needed.

1. FERC Reasonably Relied On A Precedent Agreement To Determine Need.

As FERC explains, *id*. at 19, precedent agreements are the best evidence of need for proposed pipelines, regardless of whether they involve affiliates. While affiliate agreements conceivably raise the possibility—which FERC found did not occur here—that pipelines could engage in anticompetitive behavior by preferring affiliated shippers over others, parties' affiliation, taken alone, "does not call into question [affiliated shippers'] need for new capacity or their obligation to pay for it." *Eastern Shore Nat'l Gas Co.*, 132 FERC ¶ 61,204, P 31 (2010). That makes sense, since a long-term precedent agreement with ***any*** shipper guarantees that the pipeline will be used. Without any anticompetitive behavior, that guarantee is no less forceful merely because parties are affiliates. For a precedent agreement to lose its evidentiary value, therefore, FERC must have "evidence of … impropriety or abuse in connection with the agreements." *Id. See also* FERC Br. 28.

FERC properly applied that standard here. [R.164:32]; *see also* [R.164:17 n.67]. Spire STL did not engage in any anticompetitive behavior; it held a "binding open season for capacity on the project before filing its application" in which "all potential shippers had the opportunity to contract for service."

[R.164:33]. Accordingly, FERC justifiably treated the precedent agreement as evidence of market need. *Cf.* EDF Br. 25.

This Court has approved that approach. In *City of Oberlin v. FERC*, 937 F.3d 599, 605-06 (D.C. Cir. 2019), this Court affirmed FERC's decision to "fully credit[]" affiliate precedent agreements when FERC found "no evidence of self-dealing" and the pipeline bore the "risk for any unsubscribed capacity." In *Appalachian Voices v. FERC*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019), cited in *City of Oberlin*, this Court was crystal clear:

> The fact that [the pipeline company's] precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; the Certificate Order reasonably explained that "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor."

Here, FERC recognized Spire STL's risk for unsubscribed capacity, [R.164:12], and analyzed whether Spire STL engaged in anticompetitive behavior, [R.164:32-33]. Finding none, FERC reasonably treated the precedent agreement as evidence of market need.

EDF argues that *City of Oberlin*, *Appalachian Voices*, and similar precedents relied on distinct facts. *Cf.* EDF Br. 24-26. *City of Oberlin* is supposedly inapposite because existing pipelines there "could not meet demand to be served by the new project" whereas here, EDF claims, "an existing pipeline could." *Id.* at 25. But the Court in *City of Oberlin* cited no such distinction in approving FERC's

reliance on the affiliate agreement. 937 F.3d at 605-06.[2] In any event, as in *City of Oberlin*, Spire Missouri ***did*** contract for additional capacity, unmet by existing pipelines, that Spire Missouri needed to sunset its aging, costly, and problematic propane-peaking facility. [R.164:22-23, 29]. While EDF complains that that facility was only needed occasionally, EDF Br. 22 n.2, Spire Missouri's contingent need for additional gas on peak winter days to serve St. Louis gas customers existed regardless of how often the facilities were used. That is the very purpose of peaking facilities. *See*, *e.g.*, [R.152:9].

EDF similarly argues that facts in the *Appalachian Voices* record made it unlike FERC's decision here. EDF Br. 25. But this Court did not cite or rely on any facts EDF identifies. *See Appalachian Voices*, 2019 WL 847199, at *1. Nor did FERC hold here that precedent agreements "always represent accurate, impartial, and complete evidence of need." *Cf.* EDF Br. 25-26 (quoting Commissioner Glick's dissent, [R.164:126-27]). Rather, it held that a binding precedent agreement between affiliates can be sufficient evidence of need where, as here, the pipeline sponsor has not engaged in anticompetitive behavior.

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2 Amicus American Antitrust Institute ("AAI") echoes this claim. AAI Br. 21. But the identified facts related only to a challenge regarding the extent of the pipeline's subscription, not the parties' affiliation.

EDF's authority purportedly requiring "greater scrutiny," EDF Br. 21, does not itself withstand scrutiny. EDF cites only one proceeding involving construction, *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009), and there the "higher level of scrutiny" FERC applied was to ask whether the project developer had "afforded an affiliated anchor customer" an "undue preference." *Id.* at PP 49-50. FERC applied that standard here and found no preference. [R.164:32-33].

The old ratemaking cases EDF cites are also inapposite. *Cf.* EDF Br. 21, 26-27 (citing, *e.g.*, *TECO Power Servs. Corp. & Tampa Elec. Co.*, 52 FERC ¶ 61,191 (1990); *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990) (reviewing FERC approval of inventory charges settlements)). FERC's scrutiny of affiliate relationships when assessing ***rates*** shows that speculation regarding surreptitious cost-shifting are irrelevant when assessing ***need***, since FERC will apply greater scrutiny if the Project's rates become an issue in the future. FERC Br. 30-31. Notably, however, neither petitioner ever protested Spire STL's rates, which FERC approved without finding any affiliate abuse. *See* [R.164:108]. Nor did they protest the negotiated rates in Spire Missouri's agreement with Spire STL. *See* FERC Letter Order, *Spire STL Pipeline LLC*, No. RP20-70 (Nov. 14, 2019). In any event, as next shown, FERC did not "blindly accept[]" the precedent agreement at issue here, *cf.* EDF Br. 26-27, since FERC not only reviewed

substantial evidence establishing the operational benefits that Spire Missouri expected to receive but also requested and reviewed extensive price projections offered by Spire STL and MRT, the incumbent pipeline.

2. FERC Considered And Relied On Substantial Evidence Beyond The Precedent Agreement.

EDF's and amici's argument that FERC must "look behind" precedent agreements involving affiliates is irrelevant because FERC did just that here. *See* EDF Br. 20-32;[3] *see also* Susan Tierney Amicus Br. ("Tierney Br.") 11-20; AAI Br. 13-18. No party adduced evidence of anticompetitive conduct, and FERC reasonably found the Project would provide numerous benefits to St. Louis's customers.

FERC explicitly found no affiliate abuse. It found Spire STL held a proper public auction for Project capacity, [R.164:33], which rebuts EDF's claim that FERC entirely failed to address allegations of anticompetitive behavior. *Compare*

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[3] EDF's arguments on this point misread or ignore the record. EDF claims, for example, that FERC never evaluated allegations of anticompetitive behavior because its Rehearing Order citations "appear to be erroneous." *See* EDF Br. 30. But in the Rehearing Order, FERC referred to paragraphs in its Certificate Order where FERC did exactly what EDF claims FERC did not: find no evidence of anticompetitive behavior or affiliate abuse. [R.424:9 n.45]; [R.164:33, 37-38]. EDF also claims Spire Missouri "conceded" the Project would require subsidies "from its captive customers." EDF Br. 27-28. But EDF cites ***MRT's*** since-abandoned claim that Spire Missouri had done so, *see* [R.123:1-2], Spire Missouri having explained why that claim misrepresented its position, [R.127:2-4]. And MRT, notably, has not joined petitioners' challenge here.

EDF Br. 30. Nor does EDF cite any relevant evidence. EDF claims intervenors must have "acted together to advance a shared corporate goal" because Spire STL "sp[oke] for Spire Missouri's business decision" in filings. EDF Br. 22. If EDF implies that FERC should have pierced the corporate veil between the affiliates, EDF never asked for that on rehearing, and a few references to an aligned party's position would not be enough. *Cf. Williams Gas Processing–Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1343 (D.C. Cir. 2004). Further, the Spire STL filing that EDF cites discusses Spire Missouri's interests generally, *see*, *e.g.*, [R.38:10, 14-15], while Spire Missouri detailed its positions in its own filings, *see*, *e.g.*, [R.20]; [R.40]; [R.75]; [R.127]; [R.152]. Nor is there anything nefarious or unusual about affiliates having a shared goal, which is to be expected.

Without evidence of anticompetitive conduct, EDF is relegated to arguing only that "skewed incentives" meant that "advancing the corporate enterprise's interests [wa]s the only rational explanation for Spire Missouri's decision" to subscribe to the Project. EDF Br. 22-23. But that is merely a claim that affiliates ***always*** act anticompetitively, which conflicts with this Court's precedent and FERC's longstanding policy. *See*, *e.g.*, *City of Oberlin*, 937 F.3d at 605-06.

It also conflicts with substantial record evidence. FERC went beyond what was required by considering allegations of anticompetitive conduct by Spire Missouri, an LDC that FERC does not regulate. [R.164:37-38]. Contrary to

EDF's assertions, *cf.* EDF Br. 22, 30-32, Spire Missouri provided specific, compelling reasons for subscribing to the Project. Those reasons included (1) accessing diverse supplies from a new and competitive supply market; (2) shuttering an expensive, operationally-problematic propane-peaking facility that was needed to meet winter demand spikes that MRT and MoGas could not meet; (3) anticipating problems with reliable northbound service via MRT caused by significant market changes; (4) getting gas through a pipeline that does not cross a major seismic zone; and (5) enhancing gas pipeline competition in the St. Louis area. [R.40:7-19]; [R.137:5-6, 38]; [R.152:8]. Indeed, Spire Missouri supported the benefits of the project with a study prepared by outside experts. [R.75:3-4, 21-52]. FERC explicitly recognized these legitimate interests. [R.164:37-38]; [R.424:12-13].

In doing so, FERC applied the well-established principles of its *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) ("*Certificate Policy*"). Pipelines can provide public benefits even without serving new demand by "eliminating bottlenecks"; providing "access to new supplies, lower costs to consumers, [] new interconnects that improve the interstate grid, [and] competitive alternatives"; or "increasing [system] reliability." *Id.* at P 61,748. Here, FERC identified exactly these benefits based on substantial

evidence. [R.164:37-38]; [R.424:12-13]. FERC thus looked behind the precedent agreement and found multiple valid reasons for Spire Missouri's decision.

EDF cannot credibly challenge any of these benefits. It argues that eliminating the propane peaking facilities is not a real benefit because those facilities were only rarely used. EDF Br. 22 n.2. As explained above, *supra* at 12-13, that argument is nonsensical. Moreover, FERC specifically requested data that would "quantify operational benefits of Spire Missouri's replacement of the propane system," [R.164:22], and found, based on that data, that the Project's price advantages enabled Spire Missouri to replace that system. [R.164:49]; [R.137:26-28].

FERC likewise found the Project was needed "not just because it allows [Spire Missouri] to access supplies flowing on REX, but because it allows Spire Missouri to do so over a specific path, which Spire Missouri believes will provide certain benefits such as direct access to a liquid supply point in very close proximity to its distribution system, and the avoidance of transportation through a seismic zone," where "other pipelines could not provide the amount of capacity [Spire Missouri] desired." [R.164:37-38]. This "decision was driven by more than just cost or price considerations, such as the desire to enhance the reliability of [Spire Missouri's] system by diversifying its gas supply portfolio." *Id*. These are

well-established public benefits, *Certificate Policy*, 88 FERC at 61,748, and FERC reasonably relied on them.

FERC also addressed and rebutted all the "additional record evidence" submitted by MRT that EDF claims FERC ignored. EDF Br. 31-32. MRT—which has not appealed—argued that the Project would raise delivered gas costs to St. Louis, *see* [R.139:4-5, 10-20], and that Spire Missouri must have engaged in affiliate abuse because it had not accepted earlier pipeline projects proposed by non-affiliates, *see* [R.24:34-39].

FERC not only recognized both arguments, [R.164:21-26], and cited both documents, [R.164:25, nn.105-108] (citing MRT's protest, [R.24:34, 36-40, 43]); [R.164:24 & nn.96-102] (citing MRT's expert's opinion, [R.139:11-12]), but also explained why it found neither argument compelling. The proposed pipelines MRT identified predated the 2015 REX pipeline flow reversal that made directly connecting to that system beneficial to Spire Missouri and St. Louis area gas consumers. [R.164:37-38]. FERC analyzed MRT's price projections and found that gas delivered through the Project would be competitive with expansions to MRT's system that MRT advocated. [R.164:49]. And while EDF and its amici claim that FERC should have asked for evidence like market studies to further scrutinize cost effects, *e.g.*, EDF Br. 25; Tierney Br. 18-19; AAI Br. 23-25, none explains why the exhaustive predictions requested by FERC and provided by Spire

STL and its primary competitor were inadequate. *See* [R.164:22-24, 49]; *cf.* EDF Br. 32. EDF is simply upset that FERC did not ***agree*** with MRT's arguments, not that FERC failed to consider them. That does not support reversal. *See*, *e.g.*, *FERC v. Elec. Power Ass'n*, 136 S. Ct. 760, 784 (2016).

EDF and its amici (like the dissenting Commissioners below) are really arguing that FERC must disregard the precedent agreement because intervenors' relationship means they must have engaged in an elaborate, financially-risky plot to have St. Louis ratepayers pay an exorbitant rate of return for unneeded facilities. That argument not only contradicts this Court's precedent but is belied by the record, which shows that the Project provides real benefits that cost ratepayers no more (and likely less) than they would pay to MRT while giving them access to new, competitively-priced gas that can meet peak demand and does not travel through a major seismic zone and increases gas pipeline competition into the St. Louis area. *See* [R.164:37-38, 49].

As FERC expressly found and as petitioners do not contest, the projected costs of gas delivered to St. Louis via the Project is competitive with gas delivered via MRT. [R.164:49]; [R.424:15-16]. And far from milking captive ratepayers to fund an unneeded project, as EDF claims, Spire STL took on considerable risks to provide the real benefits FERC found. FERC found that Spire STL, not its customers or their ratepayers, is at significant risk if it cannot subscribe the

Project's remaining capacity. [R.164:12]. And Spire Missouri, reflecting its status as an "anchor" or "foundational" shipper, has a 20-year negotiated rate that is only 70% of Spire STL's current recourse rate and not subject to increase for additional Project cost overruns, such that St. Louis ratepayers will not cover even the rate of return FERC allowed.[4] Tellingly, petitioners and amici never protested Spire STL's rates or Spire Missouri's much lower contract rate, even while they now imply they must be too high.

Further, any such cost issues will be reviewable if they ever arise. Spire Missouri's decision to subscribe to the Project will be subject to prudency review by MPSC, as FERC found after thorough analysis. *See* [R.164:36-39]. MPSC can disallow imprudent costs that factor into rates, [R.164:38]; [R.424:10, 14-17], and rates on incumbent pipelines are subject to further review by FERC. *See Certificate Policy*, 88 FERC at 61,750 (FERC "will not permit all costs resulting from the loss of market share to be shifted to captive customers"). Accordingly, if—unlike here—a utility tried to saddle its ratepayers with the costs of unneeded facilities, further review avenues exist to ensure that that attempt would fail.

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4 *Compare* [R.412:2-3] (approving recourse rate of $0.3570 per Dth after early construction cost increases caused in part by delayed certificates) *with* Compliance Filing, App'x B, *Spire STL Pipeline LLC*, No. RP20-70 (Oct. 16, 2019) (negotiated rate of $0.25 per Dth, adjustable only for new taxes); *see Shell Pipeline Co. LP*, 164 FERC ¶ 61,175 at P 5 (2018) (noting that early "anchor" shippers often receive negotiated discounts).

Nor has MPSC disagreed with FERC's actions. *Cf.* EDF Br. 28-29. It filed a conditional protest that primarily challenged certain terms of the precedent agreement and asked FERC to clarify that any Project approval would not preempt MPSC's later prudency review. [R.21:4-6]; [R.158:2-3]. FERC did just that. [R.164:80]; *see also* [R.424:13-15]. MPSC sought rehearing on certain issues not raised here, *see* [R.176:1-2], but declined to appeal. And while a state commission cannot undo FERC's certificate decision, MPSC can prevent a Missouri utility's customers from funding unnecessary or imprudent costs. *See* [R.164:80]. Given those substantial risks of disallowance of unnecessary costs, affiliated companies have no incentive to engage in the nefarious plots surmised by petitioners and the dissents below.

EDF complains that FERC "[r]emarkably" claimed both that it could not evaluate Spire Missouri's business decision and that it had done so. EDF Br. 30. Not so. FERC responded to bald allegations of anticompetitive behavior by considering Spire Missouri's legitimate interest in the Project. [R.164:37-38]. Further scrutiny would have usurped MPSC's review regarding whether Spire Missouri's costs for those benefits were reasonable and prudent. *Id.*

EDF and its amici identify no evidence of anticompetitive conduct that FERC ignored. And they identify no feature of intervenors' affiliate relationship that makes the Project materially different from any other pipeline intended to

meet needs other than increased local demand. Instead, petitioners ask this Court to supplant FERC's reasoned conclusion with their own, based only on their baseless hunch that intervenors, merely because they are affiliates, must have done something untoward or may do so in the future. That is not the law.

B. FERC Properly Balanced Benefits Against Adverse Effects.

As noted above, FERC has long recognized many benefits a pipeline may offer other than meeting new demand. Before authorizing a pipeline, FERC applies "essentially an economic test" that balances public benefits against potential adverse effects to, *inter alia*, affected landowners and incumbent pipelines. *Certificate Policy*, 88 FERC at 61,745, 61,748.[5] FERC "enjoys broad discretion" when balancing interests. *Minisink Residents for Envt'l Pres. v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (quotation omitted).

Here, FERC balanced them reasonably. First, it considered the Project's potential economic effects on competing pipelines (MRT), and found that those effects resulted only from healthy competition. [R.164:48-52 & n.208]. FERC also found MRT had not substantiated claims of adverse operational effects to its

5 Environmental considerations also matter, but only if FERC concludes "that the public benefits outweigh the adverse effects." *Certificate Policy*, 88 FERC at 61,745-46; 90 FERC at 61,397-98. Accordingly, EDF's complaint that FERC did not address environmental factors as part of its ***economic*** balancing, EDF Br. 37, fails since FERC properly addressed them later. [R.164:82-105]; [R.424:19-20].

system. [R.164:49-50]. Second, FERC analyzed potential economic effects on landowners and communities and found that Spire STL had designed and amended the Project to limit these effects—including on Ms. Steck— and had taken other steps to reduce impact. [R.164:52-54]. FERC also noted that no affected landowners had intervened below to protest that the pipeline would reduce their property values. [R.164:53].

FERC then reasonably balanced these potential adverse effects against the Project's benefits. FERC found that the Project would provide substantial benefits—including increased reliability and competition in the St. Louis market—and that most of the purported adverse effects were merely effects of increased competition. [R.164:54-55]. Given the minimal economic effects to landowners, FERC's conclusion that the Project's public benefits outweighed its potential adverse impacts was reasonable. [R.164:55].

EDF argues that FERC should have focused on Spire STL's lack of agreements with all landowners when FERC issued the Certificate Order. *Cf.* EDF Br. 34-37. But EDF cites no authority requiring FERC to guess how many landowners would object and accordingly how much eminent domain power Spire STL would be forced to use if landowners refused to settle amicably. Moreover, EDF overstates the issue, since Spire STL did reach agreements with over half the landowners that EDF identifies. *Compare* EDF Br. 35 n.3 *with* Report and

Recommendation at 8, *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:18-cv-01327 (E.D. Mo. Nov. 26, 2018) (agreements with 60% of landowners) *and* Mem. & Order at 3, *Spire STL Pipeline LLC v. Turman*, No. 3:18-cv-01502 (S.D. Ill. Dec. 12, 2018) (agreements with 70%).

In any event, FERC acted well within established standards. FERC has long recognized that in "most cases it will not be possible to acquire all the necessary right[s]-of-way by negotiation." *Certificate Policy*, 88 FERC at 61,749. Accordingly, FERC applies a "sliding scale" in which a new pipeline may need a higher degree of public benefit if landowners refuse to negotiate agreements beforehand. *Id.* But FERC has made clear that "holdout landowners" should not be able to "veto a project" if, in FERC's view, a project's public benefits outweigh economic impacts to those landowners. *Id.* This is the design of the Natural Gas Act, which requires certificates of public convenience and necessity and grants certificate holders eminent domain rights.

Here, FERC found that the Project offered substantial benefits and had been designed and redesigned to minimize impacts to landowners, and no affected landowners raised economic objections. *See* [R.164:52]. FERC therefore applied the correct standard. And while FERC recognized that more landowners eventually objected than it might have anticipated, EDF does not explain how

FERC or Spire STL could have anticipated those objections beforehand. [R.424:19 & n.104].

Regarding adverse effects to incumbent pipelines, FERC again reasonably concluded that no relevant adverse interests outweighed the Project's benefits. *Cf.* EDF Br. 37-39. Crucially, FERC "need not protect competitors from the effects of competition" by shielding them "from the risk of loss of market share to a new entrant." *Certificate Policy*, 88 FERC at P 61,750. Nor, again, do EDF or its amici identify any evidence of anticompetitive conduct that FERC did not address. *Cf.* EDF Br. 38-39.[6] Accordingly, the "adverse effects" FERC purportedly "dismissed"—which relate to Spire Missouri's eventual decision to turn back some capacity on MRT's pipeline and negotiate a discount on MoGas—are simply effects of competition and not adverse effects of the kind FERC must balance. No competing pipelines or their shippers are participating in this appeal, and no shipper even sought rehearing before FERC; even MRT withdrew its rehearing request before FERC addressed it. [R.394].

6 EDF claims that MRT provided evidence of "operational impacts" that FERC "fail[ed] to consider." *Cf.* EDF Br. 39. FERC took the "unique step of requesting additional information" from MRT on this claim but found that MRT's evidence failed "to support [it]." [R.164:50]. Petitioners therefore mistake FERC's rejection of MRT's claim for a failure to consider it.

FERC's conclusion was therefore reasonable. Its role is not "to protect pipelines from new entrants when they offer a new opportunity for a shipper," and it therefore found that "the benefits that the Spire STL Project will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities." [R.164:55]. There is no basis for this Court to upset that reasoned conclusion.

Further, EDF ignores that the only adverse impact it identifies—potential increased rates to MRT's and MoGas's customers from capacity Spire Missouri turned back, EDF Br. 38-39—is subject to further review. *Certificate Policy*, 88 FERC at 61,750 (FERC "will not permit all costs resulting from the loss of market share to be shifted to captive customers"). Accordingly, FERC has authority, in a proper proceeding, to address any attempts by MRT to adjust its rates. But there is no issue there; both MRT and MoGas recently filed uncontested rate settlements with their customers and MPSC that FERC approved. *See Enable Miss. River Transmission, LLC*, 170 FERC ¶ 61,254 (2020); *MoGas Pipeline LLC*, 168 FERC ¶ 61,099 (2019).

EDF and its amici raise no other issues mandating reversal. EDF argues that FERC erred by making only a "vague reference" to the Project's benefits, and

again claims that FERC "simply made conclusory statements" that these benefits outweighed potential adverse effects. EDF Br. 39-40. This argument ignores not only FERC's substantial discussion of those benefits but also the *Certificate Policy*'s identification of them as valid. *Supra* 23-24.

Amici's arguments also fail. Tierney cites statistics to argue that FERC's approach has resulted in overbuilding. Tierney Br. 8-10 & n.28. But her simplistic offering assumes that pipeline capacity that is unnecessary for increased local consumption is unnecessary altogether. *Compare* [R.424:12-13]. That argument is contrary to FERC's longstanding policy as explained above. Nor is Tierney's argument internally consistent, since she admits that purported overbuilding has not eradicated "wintertime peak day gas-transportation constraints" in some areas. Tierney Br. 9.

Finally, AAI's argument is bizarre. AAI—which purportedly promotes competition—effectively argues that a short pipeline directly linking to a new, competitively-priced gas market should be dismantled so that St. Louis can remain captive to a single, rate-stacked pipeline for nearly 90% of its gas from sources hundreds of miles south across an earthquake zone. In any event, AAI neither addresses FERC's reasoning, including increased gas pipeline competition in the St. Louis area, nor identifies evidence that FERC purportedly ignored. *See* AAI Br. 13-26. AAI does not even acknowledge that FERC requested substantial cost

predictions from Spire STL and MRT and found the Project would offer competitive prices. *Compare* AAI Br. 19 *with* [R.164:49]. Its antitrust-based arguments are improperly brought before this Court, FERC Br. 31, but are in any event meritless. As explained above, FERC and MPSC have extensive authority to prevent companies from using affiliates to saddle captive ratepayers with unnecessary or imprudent costs or rates, or grant undue preferences. *See*, *e.g.*, 18 C.F.R. § 358.1 *et seq.* (FERC standards of pipeline conduct regarding affiliates).

At bottom, amici advocate not for a different result on this record but for a fundamental change to FERC's *Certificate Policy*. Whatever their merits, such arguments can be properly raised in a proceeding addressing that policy. *See generally Notice of Inquiry*, 163 FERC ¶ 61,042 (2018). Because FERC engaged in extensive further analysis here, amici's attempt to turn this case into a referendum on affiliate precedent agreements fails.

II. FERC'S NEPA ANALYSIS WAS REASONABLE.

A. FERC's EA Considered And Reasonably Rejected Project Alternatives.

In its NEPA analysis, FERC properly defined its purpose and considered alternatives. As FERC explains, FERC Br. 55-56, it may consider an applicant's purposes when assessing reasonable alternatives. While an agency cannot assign ***itself*** a purpose so narrowly that approval of a project is unavoidable, it may define its purpose as determining whether to approve a proposed project. *Theodore*

Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73 (D.C. Cir. 2011) (agency reasonably identified its purpose as "decid[ing] whether to adopt the proposal at all, and if so, to what degree"); *see also City of Alexandria v. Slater*, 198 F.3d 862, 867-68 (D.C. Cir. 1999) (agency could prioritize concerns other than "environmental goals"); *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 81 (D.D.C. 2013) (agency properly defined purpose as "deciding whether to issue" construction permit).

FERC followed that approach here. The EA responded to a specific proposal—Spire STL's application. *See* [R.96:16]. Accordingly, FERC did not err by recognizing ***the Project's*** purpose—to increase the diversity and reliability of St. Louis's gas supply and eliminate the need for propane-peaking facilities—as its reference for alternatives. [R.96:16].

But FERC separately identified ***its own*** purpose in conducting the EA: to determine "whether to issue Spire a Certificate to construct and operate the proposed facilities" based in part on the EA. [R.96:16]. Whether the Project met a public need turned on other factors, including "technical competence," "rates," "market demand," and "gas supply," in addition to environmental effects. [R.96:16-17]. Thus, if FERC found the Project was needed, the EA would address whether its environmental effects would be severe enough to warrant denying certification. [R.96:16-17]; *see also* [R.164:82-105]; [R.424:19-20]. That

approach comports with this Court's precedent. *Theodore Roosevelt*, 661 F.3d at 73; *Slater*, 198 F.3d at 867-68.

Steck cites no contrary authority. She argues only that the cases FERC cited when it rejected her objections "do not go [as] far" as Steck believes FERC read them. Steck Br. 13-14. But Steck herself cites *Theodore Roosevelt* in her brief, *id.* at 15, and that case refutes her argument.

Steck also ignores the record. She claims that "[e]nvironmental protection is missing" from the EA statement of purpose. Steck Br. 13. But Steck confuses FERC's identification of the ***Project's*** purpose from FERC's ***own*** purpose in conducting the EA: "The EA will be used by [FERC] in its decision-making process to determine whether to authorize Spire's proposal. Approval would be granted if, after consideration of … environmental … issues, [FERC] finds that the Project is in the public convenience and necessity." [R.96:16].

Nor did FERC fail to consider the no-action alternative. An agency need not consider alternatives that do not meet a project's purpose. In *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197-98 (D.C. Cir. 1991), this Court held that an agency properly evaluated "the environmental impacts of the only proposal that might reasonably accomplish [the project's] goal" after eliminating other alternatives that would not. And where, as here, an agency determines that a project's environmental impacts will be insignificant with required mitigation

measures, it need only "include a 'brief discussion[]' of reasonable alternatives." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (quoting 40 C.F.R. § 1508.9(b)).

Myersville applies here. There, petitioners argued that FERC failed to adequately consider whether a proposed pipeline's benefits could be achieved through existing pipelines, which would have avoided construction. *Id.* at 1323-24. FERC concluded that they could not, since other pipelines had insufficient capacity to meet the shipper's needs and modifying them would have had similar environmental effects. *Id.* This Court agreed that FERC's rejection of that alternative sufficed. *Id.* at 1324.

Here, FERC made the same assessment. It considered the no-action alternative relative to the Project's purposes—diversifying St. Louis's gas supply, retiring the propane-peaking system, and avoiding a major earthquake zone—and concluded that the no-action alternative would not achieve them. [R.96:16, 162-63]. FERC further concluded that any project that would achieve them would likely produce the same environmental effects. [R.96:163]; [R.164:87-89]. That result was reasonable at least because Spire Missouri could not retire its propane-peaking facility without an additional 160,000 Dth per day of capacity unavailable on existing pipelines, such that its needs could only be met either by constructing a

new pipeline or expanding existing ones. *See* [R.164:29-30, 37, 87]. FERC's consideration and rejection of the no-action alternative was thus reasonable.

Steck cites no relevant, contrary authority. *Cf.* Steck Br. 15. In *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596, 602 (4th Cir. 2012), the agency erred by assessing alternatives based on erroneous data that assumed the existence of the highway under consideration. That admitted mistake meant the no-action baseline was inaccurate and could not support any assessment of the project's environmental effects. *Id.* at 603-04. Similarly, in *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008), an agency used a prior land management plan as its baseline even though the court had already invalidated that plan. The consideration of the "no-action" alternative was therefore "logically untenable." *Id.* at 1038.[7]

FERC made no similar mistake here. Under the no-action alternative, "the Project would not be built and the environmental impacts identified in this EA would not occur." [R.96:162]. FERC therefore used the correct baseline to assess the Project and potential alternatives. But taking no action would also fail to realize any of the Project's goals. [R.96:162]. And because achieving those goals

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7 Further, both cases involved projects that, unlike here, warranted an EIS instead of an EA. Accordingly, they do not apply here. *See Myersville*, 783 F.3d at 1323.

would require similar pipeline construction, the Project's environmental impacts were similar to any alternative that would achieve the Project's purpose. [R.96:163]; [R.164:86-89]. Accordingly, FERC reasonably rejected the no-action alternative.

According to Steck, ***any*** adverse environmental effects should have required FERC to deny the pipeline certificate because, in her view, the Project serves no public purpose. Steck Br. 15-16. But that argument misunderstands FERC's certification process and ignores the record. FERC first balances economic factors to determine whether a pipeline serves a public need and, if so, considers whether the environmental impacts would outweigh that public need. *Supra* 23 & n.5; [R.424:27-28]. FERC followed that process here. *See* [R.164:48-55] (public need); [R.164:84-105] (environmental issues). Steck's arguments ignore the need FERC reasonably found. *See supra* at 15-23.

B. FERC Reasonably Concluded New GHG Emissions Are Not Foreseeable.

FERC also properly assessed the Project's environmental consequences. NEPA requires agencies to evaluate an action's "[d]irect" and "[i]ndirect effects." 40 C.F.R. § 1508.8(a), (b). But indirect effects must be "reasonably foreseeable," *id.*, since NEPA requires "a reasonably close causal relationship between the environmental effect and [an] alleged cause." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (citation omitted). This standard "is like the familiar

doctrine of proximate cause from tort law." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). It does not "demand forecasting that is not meaningfully possible." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014).

FERC applied this standard and reasonably concluded that the Project would not cause significant new GHG emissions. FERC found that induced upstream emissions were not foreseeable because (1) the Project likely would not spur new drilling because it will not serve new demand; and (2) predicting where any drilling might occur was infeasible. [R.164:98-104]. This Court has expressly upheld such an analysis as reasonable. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (because agency "could not estimate the locale of production, it was in no position to conduct an environmental analysis of corresponding local-level impacts, which inevitably would be 'more misleading than informative'") (citation omitted). Likewise here, the Project merely adds a small, but needed, pipeline to the middle of a nationwide "supply chain," such that any attempt to predict increased drilling would be "so generalized it would be meaningless." [R.164:100-03 & n.400].

FERC also reasonably concluded the Project would not produce new downstream emissions. FERC recognized that new pipelines may cause additional consumption when they deliver gas to customers that otherwise would not receive

it. [R.164:103 & nn.402-03]. Here, however, the Project was not intended to meet increased demand but to add reliability and supply diversity to the St. Louis market and allow Spire Missouri to sunset its propane-peaking facility. Accordingly, FERC reasonably accepted the EA's conclusion that the Project's downstream GHG emissions would not be ***new*** emissions. [R.164:103].

Steck first argues that FERC erroneously denied that new pipelines are the "legal cause" of any emissions. Steck Br. 18-20. But FERC did not deny that pipelines can sometimes result in emissions; it merely explained that where, as here, a pipeline project is merely a "component[] of the general supply chain," its market effects are often too nebulous to measure. *See* [R.164:100-04]; [R.424:30-33].

Further, Steck does not explain how FERC should have estimated the upstream GHG emissions she imagines the Project will cause. This Court held in *Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019), that FERC need not estimate upstream emissions when "no record evidence … would help [FERC] predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project." Steck cites no record evidence that even approaches that standard, *cf.* Steck Br. 22, and her objections before FERC were no clearer, *e.g.*, [R.105:5-6] (arguing that "FERC [wa]s in a position to know, from where the Spire STL will begin, at least approximately

where the gas will come from."); [R.177:5] (arguing that FERC need not identify wells at all).

Moreover, any increased upstream production is even more speculative here, since the NGA leaves regulation of production to the states. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 378-79 (2015); 15 U.S.C. § 717(b). Those overlapping schemes determine where, how, and how much gas is produced. Accordingly, even if FERC could model every conceivable alternative for induced production throughout North America, that analysis "would be so generalized [that] it would be meaningless," as FERC reasonably concluded here. [R.164:101-03]. *See Sierra Club*, 867 F.3d at 200 (upholding agency decision that environmental impacts could not be forecasted because "nearly all of the environmental issues presented by unconventional gas production are local in nature, affecting local water resources, local air quality, and local land use patterns, all under the auspices of state and local regulatory authority").

Steck also argues that FERC erred by estimating total GHG emissions from the Project's maximum capacity but then treating those emissions as an effective nullity. Steck Br. 21-22. That argument fails. FERC cannot ignore new downstream emissions from a pipeline based solely on the "mere possibility" of an "offset … elsewhere." *Birckhead,* 925 F.3d at 518-19 (alteration original) (citation omitted). But here, the Project was not intended to meet new demand, so FERC

had no reason to expect increased consumption at all. Steck's argument that FERC should have preferred a no-action alternative rests on that very premise, *see supra* 34, as do other arguments raised here, *e.g.*, EDF Br. 22-23, 25, 31-32. Accordingly, FERC merely accepted petitioners' own objections to the Project's need when it concluded that most or all of the downstream GHGs caused by the Project would substitute for other emissions from gas transported through another pipeline. [R.164:103] (Project was "not intended to meet an incremental demand," "[a]s emphasized by the protesters"); [R.96:159-60]. It is hardly arbitrary for an agency to reject a petitioner's argument that contradicts its own premise.

Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017), is also inapposite. *Cf.* Steck Br. 22. There, the pipeline would serve "growing demand for natural gas," other nearby pipelines were "almost at capacity," and two major utilities had "committed to buying nearly all the gas the project w[ould] be able to transport" to fuel specific power plants. 867 F.3d at 1363-64. Under those circumstances, this Court held that FERC should have more fully considered the downstream GHG emissions, since the "project's entire purpose" was to support new consumption by specific power plants. *Id.* at 1371-72. But here the Project's purpose—as Steck has repeatedly argued, *see* Steck Br. 3, 14, 16; [R.177:3]—is ***not*** to serve new demand. There is no indication that the Project will cause increased production or consumption anywhere.

The record also supports FERC's conclusion. Spire Missouri's subscription for 350,000 Dth per day on the Project stemmed in part from its need for an additional 160,000 Dth per day of capacity to retire its propane-peaking facility. [R.40:12-14]; [R.164:29]. But those facilities are only rarely used—as EDF notes, EDF Br. 22 n.2—such that this additional capacity cannot reasonably be treated as a constant source of new emissions. Further, Spire Missouri turned back additional capacity on MRT, such that the gas on the Project largely replaced capacity Spire Missouri had previously subscribed elsewhere. [R.164:40-41]. Those facts meant FERC had no need to look for an "offset" somewhere else. *Cf. Birckhead,* 925 F.3d at 518-19. Steck nevertheless claims that FERC ignored the EA's emissions estimate, Steck Br. 21, but the EA itself found that those emissions were not new. [R.96:159-60]. FERC therefore accepted the estimate ***and*** the EA's explanation that the estimated emissions have no significant environmental impact.

Further, in her rehearing request Steck argued only that FERC could have estimated the emissions of a "full burn" of all gas carried by the Project. [R.177:4-5]. But FERC did exactly that when it calculated that the Project could produce up to 7.7 million tons of carbon dioxide each year. [R.96:159]. Steck offers no way that FERC could have calculated what percentage of those emissions are new ones, and FERC reasonably concluded that essentially none of them would be. Accordingly, the "contradiction[]" that Steck identifies, Steck Br. 21, is illusory.

FERC engaged in the very analysis that Steck identifies; she simply disagrees with FERC's conclusion. That does not support reversal or vacatur.

C. FERC Adequately Considered All The Cumulative Impacts NEPA Requires.

For essentially the same reason, Steck's argument that FERC did not adequately address climate change in its cumulative-impacts analysis fails. As FERC explains, NEPA requires consideration only of regional cumulative effects, and FERC must use its special competency to identify the relevant region. FERC Br. 52-54. Accordingly, while some agency decisions may require a nationwide cumulative-impact analysis, interstate gas pipeline certifications do not. *See*, *e.g.*, *Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016). *Cf. Grand Canyon Tr. v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002); *Kleppe v. Sierra Club*, 427 U.S. 390, 410-14 (1976).

Nor has Steck even explained what her requested cumulative-impacts analysis would entail. She notes only that there "are sources available for assessing global effects such as the Assessment Reports of the Intergovernmental Panel on Climate Change." Steck Br. 27. But Steck never mentioned those sources in her cumulative-impacts objection on rehearing, nor did she identify any other standard that FERC failed to use. *See* [R.177:5-6]. Steck therefore asks this Court to require FERC to engage in a globe-spanning climate-change study using

an unidentified standard every time it approves a pipeline. That request is contrary to this Court's precedent. *See*, *e.g.*, *Sierra Club*, 827 F.3d at 49-50.

Steck cites no relevant authority to support this position. Cf. Steck Br. 26. *Grand Canyon Trust*, 290 F.3d at 347, involved regional noise pollution from changed airplane routes, and *American Rivers v. FERC*, 895 F.3d 32, 36 (D.C. Cir. 2018), involved environmental effects on a nearby river from a power plant. Similarly, the environmental impacts in *Delaware Riverkeeper Network*, 753 F.3d at 1311, 1319-20, involved local resources like groundwater, habitat, and soils. None of these cases required the wide-ranging analysis Steck seeks here.

Steck's reliance on *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008), is likewise inapposite. There, the Ninth Circuit required an agency to conduct a nationwide emissions analysis. *Id.* at 1216. But that was because the agency's action was itself nationwide: it established fuel-efficiency standards for all "light trucks" in the country, with estimated lifetime emissions ranging into the ***billions*** of tons, which the agency agreed would "have an effect on global warming." *Id.* at 1183-84, 1215-16. A 65-mile pipeline running through a handful of counties in Missouri and Illinois that would at most produce only 7.7 million tons of emissions annually, which FERC found would merely substitute for existing emissions, does not require the same treatment.

At bottom, Steck's position would require FERC to engage in a boundless to predict the environmental consequences of any marginal increase in GHG emissions that a pipeline might cause even when that pipeline is not intended to meet increased gas demand. FERC reasonably concluded that that approach would "be so generalized [that] it would be meaningless." [R.164:101-03].

III. VACATUR WOULD BE INAPPROPRIATE.

In the unlikely event the Court finds FERC's reasoning inadequate, it should remand without vacating the Certificate Order. That approach is proper if there is a "likelihood that 'deficiencies' in an order can be redressed on remand, even if the agency reaches the same result," and vacatur would cause "disruptive consequences." *City of Oberlin*, 937 F.3d at 611 (quotation omitted)). Remand without vacatur would be appropriate here because it would be "plausible that [FERC] w[ould] be able to supply the explanations required, and vacatur of [FERC's] orders would be quite disruptive, as the [Spire STL] pipeline is currently operational." *Id*.

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction or denied. Alternatively, if this Court concludes additional analysis is required, the Court should remand without vacatur.

Respectfully submitted,

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September 23, 2020 (Proof Brief)

STATEMENT OF CONSENT

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

/s/ Jonathan S. Franklin
Jonathan S. Franklin

September 23, 2020

Counsel for Spire STL Pipeline LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of D.C. Cir. R. 32(e)(2)(B)(1) because this brief contains 9,098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on September 23, 2020. Service upon participants in the case who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

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