ORAL ARGUMENT NOT YET SCHEDULED

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

JULI STECK,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent;

Spire STL Pipeline LLC *et al.*,
Intervenors

No. 20-1017, consolidated with 20-1016 (lead case)

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 164 FERC ¶ 61,085 (August 3, 2018) and 169 FERC ¶ 61,134 (November 21, 2019)

REPLY BRIEF OF PETITIONER JULI STECK

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GLOSSARY

BLM	Bureau of Land Management
Certificate Order	Order Issuing Certificates, 164 FERC ¶ 61,085
CPCN	Certificate of Public Convenience and Necessity
EA	Environmental Assessment
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse gas(es)
MRT	Enable Mississippi River Transmission, LLC
NEPA	National Environmental Policy Act
P	denotes a numbered paragraph in a FERC order.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in Addendum 2 to the opening brief.

SUMMARY OF ARGUMENT

I. Spire's effort to deny jurisdiction would work a manifest injustice if applied retroactively. Aside from that, the Court has jurisdiction under 15 U.S.C.A. § 717r(b) because Ms. Steck filed her petition for review within 60 days of FERC's denial of her request for rehearing, and that date is unaffected by the decision in *Allegheny Defense Project v. FERC,* 964 F.3d 1 (D.C. Cir. 2020), which interprets § 717r(a).

II. FERC and Spire pay only lip service to the principle that FERC may not adopt the applicant's purpose and need for the project. The record shows that in the last analysis this is what FERC did.

III. FERC now admits that its role in granting certificates of public convenience and necessity (CPCNs) to pipelines was a causal factor in the greenhouse gas effects, but FERC and Spire continue to deny that there will be indirect greenhouse gas effects by insisting that there will be "no new demand." This ignores record evidence of additional GHG emissions from displaced pipeline capacity seeking a new outlet and Spire STL's longer lifetime than the pipelines it replaces.

IV. The Commission and Spire exclude greenhouse gases from consideration as cumulative impacts by giving an extremely narrow geographic scope to the project, ignoring the regional, national and global effects on the climate.

V. Spire's argument against vacatur fails. Vacatur is the accepted remedy for NEPA violations in a CPCN. Disruptive consequences for the pipeline are the result of FERC's use of a tolling order to prevent judicial review until the pipeline was completed. FERC should not be able to use its illegal act to evade review.

ARGUMENT

I. Reply to Intervenor Spire's jurisdictional argument: This Court's invalidation of FERC's tolling orders leaves the petition for review properly before the Court.

Intervenor Spire makes a perfunctory argument that the Court lacks jurisdiction because the petition for review was retrospectively untimely since the Court en banc invalidated FERC's tolling order procedure in *Allegheny Defense Project v. FERC,* 964 F.3d 1 (D.C. Cir. 2020). Spire maintains that in light of that case, all rehearing motions in this case were denied by operation of law on Oct. 4, 2018 (Spire Br. 1–2).

Of course, any petition for review Ms. Steck might have filed then would have been denied or ignored for lack of final agency action. That obstacle to

review was removed by *Allegheny Defense,* which struck down FERC's longstanding interpretation of 15 U.S.C. § 717r(a) (Addendum 2, p. 2) as allowing FERC to indefinitely delay acting on requests for rehearing. *Allegheny* does not affect 15 U.S.C. § 717r(b) (Add. 2, p. 3), under which Ms. Steck's petition for review was timely filed within 60 days of FERC's eventual denial of her rehearing request.

The petitioners in *Allegheny* filed petitions for review both upon the expiration of 30 days after filing their rehearing applications and after FERC finally denied the applications. 964 F.3d at 7–8. The latter petitions would have been jurisdictionally untimely under Spire's argument, yet the Court reviewed both sets of petitions for review. *Id.* at 19. Ms. Steck necessarily relied on the law as it existed before *Allegheny Defense*.

II. FERC improperly adopted the applicant's statement of purpose and need and thus inevitably rejected the no-action alternative.

FERC admits that the EA adopted Spire's statement of purpose and need (FERC Br. 55–6) while Spire makes a distinction that is a tautology: "an agency…may define its purpose as determining whether to approve a proposed project" (Spire Br. 29).

The agency should take into account the needs and goals of the parties to the application, but also the views of Congress as expressed in the agency's statutory

authorization to act and other directives (which includes NEPA). *Citizens Against Burlington v. Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991). Even the cases relied on by FERC and Spire distinguish between the applicant's private need and the public need for the project. *City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986)("But the Corps' regulations recognize that 'every application has both an applicant's purpose and need and a public purpose and need.'"); *Theodore Roosevelt Conservation Partnership v. Salazar,* 661 F.3d 66, 73 (D.C. Cir. 2011)(following *Burlington*).

National Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1070 (9th Cir. 2010), follows *Burlington* and *Angoon* to reach a result more consistent with the facts of this case. BLM's statement of purposed and need set out four goals, one of which was properly BLM's but the other three of which were those of the applicant. *Id.* at 1071. The court found that this "unreasonably constrain[ed] the possible range of alternatives…The BLM did not, however, consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that Kaiser's private needs be met." *Id.* at 1072.

Looking to the record here, FERC went well beyond according "substantial weight to the preferences of the applicant" (FERC Br. 55, quoting *Burlington,* 938 F.2d at 197–8). Whenever one hand offers a token acknowledgment of public need, the other hand pulls it back with a concession to private interest. Spire does the

same: "Nor did FERC fail to consider the no-action alternative. An agency need not consider alternatives that do not meet a project's purpose" (Spire Br. 31); in other words, the agency failed to consider the no-action alternative.

The Commission's Certificate Order undermines FERC's and Spire's claims that FERC considered anything other than Spire's own interest in a project that aimed to build profitable new infrastructure without serving any new demand. "Courts have upheld federal agencies' use of applicants' identified project purpose and need as the basis for evaluating alternatives"… But, an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is shaped by the application at issue and by the function that the agency plays in the decisional process" (P 209, JA ____). That last nod in the direction of a public purpose is negated further on in the Certificate Order: "The Commission is not required to consider alternatives that are not consistent with the purpose and need of a proposed project" (P 211, JA ____). FERC acknowledges the NEPA requirement to consider a reasonable range of alternatives but immediately adds, "The Commission does not need to consider alternatives that are not consistent with the purpose and need of a proposed project" (P 212, JA ____). FERC was then able to reject alternatives using existing pipeline systems despite the lack of need. (*Id.*)

It followed inevitably that the no-action alternative was rejected: "Here, we agree with Commission staff, that under the no-action alternative impacts on the environment would not occur and the current conditions described in the EA would persist. However, selection of the no-action alternative would not meet the needs of the project; i.e., to provide direct access to additional, alternative sources of supply" (P 217, JA ____). That was the Certificate Order's last word on the subject.

FERC's Order on Rehearing says the same. "When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal, adopting the proposal, or adopting the proposal with some modification." But then comes the fatal qualifier: "The agency may eliminate those alternatives that will not achieve a project's goals…" (P 55, JA ____).

The EA's adoption of Spire's purpose and need, as ratified by FERC, resulted in "a purpose and need statement so narrowly drawn as to foreordain approval." *National Parks & Conservation Ass'n v. BLM,* 606 F.3d at 1072.

III. FERC failed to consider the indirect effects, both "upstream" and "downstream," of its approval of the Spire STL pipeline.

A. FERC now admits its causative role in creating indirect effects.

FERC now admits that its "authority to deny pipeline certificates makes the agency a legally relevant cause of the direct and indirect environmental effects of

pipelines it approves." (FERC Br. 48). FERC and Spire continue to deny that greenhouse gas (GHG) emissions will be an indirect effect of the Spire STL.

B. FERC arbitrarily and capriciously denied that the production and combustion of the gas flowing through the pipeline even were indirect effects.

NEPA defines the indirect effects of an action as those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR 1508.8(b).

The insistence that the pipeline will have no effect because it will serve no new demand (FERC Br. 47, 52; Spire Br. 35–6, 38–9) ignores the fact that the Spire STL, as new infrastructure, will transport new gas for decades into the future. It is not a mere slip of the tongue when FERC refers to the pipeline as "additional" capacity (Cert. Order P 217, JA ____). As such it will result in additional GHG emissions.

The all-purpose answer of "no new demand" led FERC to ignore statements by the gas industry itself, cited in Ms. Steck's comments (JA ____–_) that companies expect induced growth and, as a result, proliferation of pipelines. New wells will need to be drilled constantly because production from fracking wells declines rapidly after the first year (Request for Rehearing 5, JA ____).

FERC misrepresents Ms. Steck's brief as arguing "that the Commission must find that the Project will drive existing pipelines out of business before it may conclude that the Project will not lead to an increase in downstream emissions" (FERC Br. 51). Spire advances an argument about turned-back capacity on MRT, the pipeline that previously provided 87% of the capacity being replaced by the Spire STL (Spire Br. 39). But all the "no new demand" is Spire's alone. FERC noted that Spire pressed MRT to develop new business opportunities and remarket the capacity displaced by the Spire STL (Cert. Order PP 97, 99; JA 43-4___). Displaced capacity seeks an outlet. The fate of MRT's capacity is not a matter of record in this case, but Spire's reliance on *Birckhead v. FERC,* 925 F.3d 510 (D.C. Cir. 2019) is misplaced; that case rejected the argument "that downstream emissions are not reasonably foreseeable simply because the gas transported by the Project may displace existing natural gas supplies," 925 F.3d at 518.

Schematically, the same gas that goes into a pipeline emerges downstream where it is fed to end users and burned; upstream gas = downstream gas, barring leaks. But leaks — fugitive methane emissions — are significant. Ms. Steck cited evidence in her comments that hydraulic fracturing leads to much higher fugitive emissions than conventional gas and that the natural gas system overall is as serious a greenhouse gas emitter as coal (JA 4___, 7–8__).

FERC (Br. 50) relies on the EA's estimate of downstream GHG emissions, but that estimate played no part in the Commission's decision, which was that the pipeline would spur no new consumption. The CO_2 estimate was, in FERC's view, a superfluous demonstration that the EA went above and beyond the call of NEPA (Rehearing Order P 63, JA ____). The denial of new consumption contradicts FERC's own finding that the Spire STL will access new gas supplies (Cert. Order 4 P 11; JA ____).

The estimate of 7.7 million tons of CO_2 per year for the "downstream," end-use combustion of all the gas to be delivered by the pipeline (EA 144–5 (JA ____–__), though it omits fugitive methane emissions, could still have been used as a measure of environmental effect were it not for the absurd condition imposed by FERC that all effects must be local (FERC Br. 53, Spire Br. 35–7, 40). This betrays a complete misunderstanding of the greenhouse effect that imperils our previously benign climate.

IV. FERC and Spire erroneously insist that all effects must be local, thus ignoring the cumulative effects on the climate.

FERC (Br. 53) argues that impacts must be limited to the geographic area of the project, tracing this test back to *Grand Canyon Trust v. FAA,* 290 F.3d 339 (D.C. Cir. 2002), but no such limitation appears in the statute or rule. *Id.* at 341–2. The Court cited to a list of requirements the petitioner's reply brief in that case

"gleans from case law," a list that focuses on other projects and impacts in the project area. *Id.* at 345. But when it comes to greenhouse gases, the relevant area is the atmosphere. Every greenhouse gas-emitting project contributes incrementally to what has been accurately described as global warming. *WildEarth Guardians v. Zinke,* 368 F.Supp.3d 41, 76–7 (D.D.C. 2019) ("climate change occurs at the 'global,' 'regional,' and 'local' scales," so BLM must consider regional and national emissions).

"*Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR § 1508.7 (Addendum 2 to Opening Brief, p. 10). This definition sets no arbitrary limit on the area of impact.

Massachusetts v. EPA, 549 U.S. 497, 521, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), holds that carbon-dioxide is a pollutant subject to regulation under the Clean Air Act. The Court rejected EPA's argument that the Act is concerned only with local pollutants, 549 U.S. at 528–9; "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Id.* at 531. NEPA too contemplates global impacts: 42 U.S.C.

§ 4332(2)(F) "recognize[s] the worldwide and long-range character of environmental problems…" (Addendum 2 to Opening Brief, p. 7).

V. Spire's argument against vacatur fails. Vacatur is the correct remedy for NEPA violations in a CPCN case.

Spire argues that vacatur is inappropriate if there is (1) a likelihood that the deficiencies can be remedied on remand and (2) where vacatur would cause disruptive consequences for the operational pipeline (Spire Br. 42).

Vacatur is the remedy for NEPA violations in a CPCN case. *City of Boston Delegation v. FERC,* 897 F.3d 241, 250 (D.C. Cir. 2018), citing *Sierra Club v. FERC,* 867 F.3d 1357, 1366 (D.C. Cir. 2017), which holds that members aesthetic and recreational interests injured by an unlawfully issued certificate order "would be redressed by vacatur of that order on the basis of *any* defect in the environmental impact statement."

As for the disruption to the pipeline, FERC should not be allowed to benefit from its own wrongdoing. The pipeline was completed before review could take place only because of FERC's illegal use of tolling orders condemned in *Allegheny Defense,* 964 F.3d 1. FERC cannot "hide behind" such a procedural bar. *Cantrell v. City of Long Beach,* 241 F.3d 674, 678 (9th Cir. 2001). "The 'gotcha' argument is of no avail here," and an existing pipeline can be removed or shut down. *Montana Wilderness Ass'n v. Fry,* 310 F.Supp.2d 1127, 1141–2 (D. Mont. 2004).

CONCLUSION

Ms. Steck asks the Court to remand the case to the Commission for compliance with NEPA, and to vacate the CPCN as being fatally infected by the NEPA deficiencies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's Briefing Schedule because this brief contains 2,570 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Office 2016 computed the word count.

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/s/ Henry B. Robertson
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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically filed the foregoing Petitioner's Opening Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

/s/ Henry B. Robertson
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