

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

No. 23-1064

NEW JERSEY CONSERVATION
FOUNDATION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the Federal Energy
Regulatory Commission, 182 FERC ¶
61,006 (Jan. 11, 2023) and 182 ¶ 61,148 (March 17, 2023)

PETITIONERS' EMERGENCY MOTION FOR STAY

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GLOSSARY

APA	Administrative Procedures Act
Certificate Order	Order Issuing Certificate and Approving Abandonment, <i>Transcontinental Gas Pipe Line Company, LLC</i> , 182 FERC ¶ 61,006 (Jan. 11, 2023)
1999 Certificate Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy, 88 FERC ¶ 61,227, at 61,747 (1999)
Commission	Federal Energy Regulatory Commission
EDF	<i>Env't Def. Fund v. FERC</i> , 2 F.4th 953, 975 (D.C. Cir. 2021)
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Gambell	<i>Amoco Prod. Co. v. Vill. of Gambell</i> , 480 U.S. 531, 545 (1987)
GHG	Green House Gases
NEPA	National Environmental Policy Act
New Jersey Agencies	New Jersey Division of the Rate Counsel and the New Jersey Board of Public Utilities
NGA	Natural Gas Act

NJCF Answer	NJCF, <i>et al.</i> , Answer to Transco’s Motion to Lift Stay, <i>Transcontinental Gas Pipe Line Company, LLC</i> , FERC Docket No. CP21-94, Accession No. 20230126-5063 (Jan. 26, 2023)
NJ Agencies Study	London Economics International LLC Study, prepared Nov. 5, 2021, In the Matter of the Exploration of Gas Capacity and Related Issues, NJBPU Docket No. GO19070846 (posted Dec. 16, 2021)
NJ Parties’ Motion to Lodge	Motion to Intervene Out of Time and to Lodge of the New Jersey Parties, <i>Transcontinental Gas Pipe Line Company, LLC</i> , FERC Docket No. CP21-94, Accession No. 20220711-5186 (Jul. 11, 2022)
NJCF, <i>et al.</i> ’s Request for Rehearing	New Jersey Conservation Foundation, et al., Request for Rehearing and Motion for Stay, <i>Transcontinental Gas Pipe Line Company</i> , FERC Docket Nos. CP21-94-000 and CP21-94-001, Accession No. 20230210-5215 (Feb. 10, 2023)
NTP	Notice to Proceed with Construction – Tree Felling, <i>Transcontinental Gas Pipe Line Company, LLC</i> , FERC Docket No. CP21-94, Accession No. 20230316-3044 (Mar. 16, 2023)
Project	Regional Energy Access Expansion Project
REAE	Regional Energy Access Expansion Project
Rehearing Order	Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, <i>Transcontinental Gas Pipe Line Company, LLC</i> , 182 FERC ¶ 61,148 (Mar. 17, 2023)

Skipping Stone Study	Comments on Behalf of NJCF, <i>et al.</i> Submitting Expert Report Regarding Capacity Sufficiency, <i>Transcontinental Gas Pipe Line Company, LLC</i> , FERC Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022)
Spire Order	Order Reissuing Certificates, <i>Spire STL Pipeline LLC</i> , 181 FERC ¶ 61,232 (2022)
Vogt Declaration	Declaration of Jim Vogt, President of APWC, <i>Transcontinental Gas Pipe Line Company, LLC</i> , FERC Docket No. CP21-94, Accession No. 20230210-5215, P 2 (Feb. 10, 2023)

INTRODUCTION AND TIME EXIGENCIES INVOLVED

Petitioners New Jersey Conservation Foundation (“NJCF”), New Jersey League of Conservation Voters, Aquashicola-Pohopoco Watershed Conservancy (“APWC”) and impacted landowner Catherine Folio (collectively, “Petitioners”) seek an immediate stay¹ of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Order Issuing Certificate and Approving Abandonment (“Certificate Order”)² and its Notice To Proceed with Tree Felling (“NTP”)³ for the Transcontinental Gas Pipe Line Company, LLC’s (“Transco”) proposed Regional Energy Access Expansion Project (“REAE” or the “Project”), pending this Court’s ruling on the merits.⁴ FERC authorized this project and issued

¹ As required by Fed. R. App. P. 18(a)(1), Petitioners moved for a stay of the Certificate Order in its Request for Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230210-5215, pp. 51-59 (Feb. 10, 2023) (“NJCF Request for Rehearing”), attached as Exhibit 1, which the Commission denied in its Rehearing Order, *Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,148 (Mar. 17, 2023) (“Rehearing Order”), attached as Exhibit 2.

² Order Issuing Certificate and Approving Abandonment, *Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,006 (Jan. 11, 2023) (“Certificate Order”), attached as Exhibit 3.

³ Notice to Proceed with Construction – Tree Felling, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230316-3044 (Mar. 16, 2023) (“NTP”), attached as Exhibit 4.

⁴ On March 20, NJCF *et al.* petitioned this Court for review of FERC’s Certificate Order, Deemed Denied Order, and Rehearing Order. NJCF, *et al.* Petition for Review. As of the time of this filing, a docket number has not been assigned for that challenge.

the NTP despite significant challenges to the lawfulness of its decision making, resulting in ongoing irreversible harm to landowners, communities, and the environment.

REAE⁵ gave a drop-dead date to FERC of March 3, 2023 of when it needed to begin tree felling “to safely comply with the construction window Transco has committed to in order to obtain approval from Fish & Wildlife” and to meet its alleged deadlines to commence service by the 2023-2024 winter heating season.⁶ However, the *very* earliest FERC could authorize Transco beginning construction under its regulations⁷ was over a week after this drop-dead date; consequently Transco’s pleas to begin tree-felling (and the alleged bases for it) were inapposite.⁸ Despite this, FERC issued the NTP—in violation of FERC’s own regulations, as it

⁵ REAE’s proposed Project includes constructing approximately 22.3 miles of 30-inch-diameter lateral pipeline in Luzerne, Pennsylvania and 13.8 miles of 42-inch-diameter loop pipeline in Monroe County, Pennsylvania, along with associated compressor stations and upgrades, and other appurtenant facilities.

⁶ See Motion of Transcontinental Gas Pipe Line Company, LLC to Lift Stay, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230117-5158, pp. 2-4 (Jan. 17, 2023), attached as Exhibit 5.

⁷ See 18 C.F.R. 157.23.

⁸ See NJCF, *et al.*, Answer to Transco’s Motion to Lift Stay, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230126-5063 (Jan. 26, 2023) (“NJCF Answer”), attached as Exhibit 6; NJCF, *et al.*, Answer to Transco’s Motion for Waiver of 18 C.F.R. 157.23(b), *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230217-5157 (Feb. 17, 2023), attached as Exhibit 7.

issued it prior to a substantive rehearing order⁹—on March 16, 2023.¹⁰ On issuance of the NTP, REAE *immediately* began cutting trees, including on landowner Petitioner Catherine Folio’s property.¹¹ That same day, Transco submitted a request to begin construction for “all components of the Project.”¹²

RELIEF REQUESTED

Petitioners ask this Court to stay the Certificate Order authorizing the Project; and enjoin the continuing construction activities, including tree-felling, of the Project. This relief is limited pending resolution of appeal of FERC’s authorization of this Project.¹³

STANDARD OF REVIEW

The factors considered when reviewing a motion to stay are:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the

⁹ FERC didn’t issue the Rehearing Order until around 8 pm the night of March 17, 2023; by that time, Transco had already cut trees for almost 2 full days.

¹⁰ 18 C.F.R. 157.23.

¹¹ Catherine Folio Declaration (March 21, 2023), attached as Exhibit 8.

¹² Request for Authorization to Proceed With Construction, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230316-5178, p. 1 (Mar. 16, 2023), attached as Exhibit 9.

¹³ Undersigned counsel has conferred with counsel for other parties. Respondent and Movant-Intervenors oppose the motion.

court grants the stay; and (4) the public interest in granting the stay.¹⁴

A moving party need not show a “mathematical probability” of success on the merits, and relief may be granted if the movant has made a “substantial case” on the merits.¹⁵

ARGUMENT

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

FERC’s Certificate Order’s finding project need is rife with reversible errors,¹⁶ including misstatements about data and analyses comprising the administrative record of this proceeding.¹⁷ FERC approved this Project despite significant evidence on the record from independent experts—including a state-commissioned independent gas capacity study—demonstrating that there is *no need for the Project’s proposed new gas capacity*, as well as probative evidence that the Project is driven by self-dealing; *i.e., the Commission once again buried its*

¹⁴ *Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (citation omitted); see also Cir. Rule 18(a)(1).

¹⁵ *Washington Metro. Area Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

¹⁶ Petitioners note that while their separately-filed challenge to FERC’s Rehearing Order does not have a docket number as of yet (*see supra* n. 4), the arguments made here are relevant to the Rehearing Order as FERC affirmed its Certificate Order findings.

¹⁷ While not addressed in this motion, FERC’s National Environmental Policy Act (“NEPA”) analysis underpinning its Certificate Order is also deficient.

head in the sand.¹⁸ Moreover, FERC’s authorization runs contrary to its alleged goal of taking into serious consideration state public utility commissions weighing in on FERC proceedings.¹⁹

A. Petitioners are likely to prevail on their claim that the Commission’s grant of a certificate to REAE was unlawful, as it was not supported by substantial evidence or the product of reasoned decision-making.

Petitioners are likely to succeed on the merits²⁰ in that the Commission “relie[d] on an incomplete record and the Commission’s own speculation about certain key facts underpinning the competing market studies filed in the docket.”²¹ More specifically, FERC (a) failed to properly consider evidence that there is no need for this Project from the New Jersey Agencies’²² independent

¹⁸ See *Env’t Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021) (“*EDF*”) (finding that “FERC’s ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement”).

¹⁹ See, e.g. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, PP 55-58, 70 (2022), amended from final to draft by Order on Draft Policy Statements, 178 FERC ¶ 61,197 (Mar. 24, 2022) (noting the importance of “regional projections for both gas supply and market growth, as well as pipeline-specific studies in these areas,” and finding that, “comments from state utility or public service commissions as to how a proposed project may impact existing pipelines will be particularly useful.”).

²⁰ Including because of other errors not elaborated upon here.

²¹ Rehearing Order, Clements, Comm’r, concurring in part, P 1.

²² The NJ Agencies include the New Jersey Board of Public Utilities (“NJBPU”) and the New Jersey Division of the Rate Counsel (together, “NJ Agencies”).

expert study,²³ (b) wrongfully discredited other studies, including by noting that they excluded design day and other demand (like electric generation) when this was patently untrue;²⁴ and (c) continually failed to test evidence veracity despite plausible evidence of self-dealing undermining the probative value of REAE's claims.

1. Petitioners are likely to prevail on their claim that FERC failed to properly consider and weigh the NJ Agencies Study.

Commissioner Clements' concern that "the most glaring omission in the Commission's need analysis is any discussion of the weight the Commission should accord to the finding of the [NJ BPU] that no additional pipeline capacity is needed in New Jersey"²⁵ is well-founded. FERC arbitrarily and capriciously discounted and misinterpreted the independent, state-sponsored NJ Agencies Study, from *where over 73% of the gas is set to flow*.²⁶ FERC

²³ See Motion to Intervene Out of Time and to Lodge of the New Jersey Parties, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (Jul. 11, 2022) ("NJ Parties' Motion to Lodge"), lodging London Economics International LLC Study, prepared Nov. 5, 2021, In the Matter of the Exploration of Gas Capacity and Related Issues, NJBPU Docket No. GO19070846 (posted Dec. 16, 2021) ("NJ Agencies Study") (determining LDCs had sufficient capacity and did not need additional infrastructure), attached as Exhibit 10.

²⁴ See Certificate Order, P 33.

²⁵ Certificate Order, Clements, Comm'r, concurring, P 4.

²⁶ See *EDF* at 972; 5 U.S.C. § 706(2)(A).

overrode the NJ Agencies' findings with little to no factual basis or analysis, supplanting its market-analysis and judgment for that of the NJ Agencies, finding without explanation or proper examination the self-serving Transco-sponsored study to be "more persuasive" for gas capacity needs in the area.²⁷ In doing so, FERC did not develop a record with sufficient evidence supporting its determination, much less substantial evidence as required by the Natural Gas Act ("NGA").²⁸ Commissioner Clements highlighted a notable example:

[T]he Commission criticizes the NJ Agencies [S]tudy based on its "key assumption" that off-system peaking resources will remain constant at 619 MDth/d. The Commission observes that the availability of these resources is "uncertain." However, the reasons the Commission gives for the uncertainty would have been true during past severe weather events, not just future ones; the Commission offers no explanation for why the identified uncertainties are relevant only to the future availability of off-system peaking resources. The only factual basis the Commission cites for its criticism relating to off-system peaking resources is that one NJ LDC projected its use of off-system peaking resources would decline to zero after 2022.²⁹

²⁷ See, e.g. Certificate Order, P 34; Rehearing Order, P 41 (FERC seems to justify its reliance on the Levitan Report by supplanting its judgment that non-LDC demands (e.g., electric generators' demand) justified LDCs' subscriptions).

²⁸ 15 U.S.C. 717r(b).

²⁹ Rehearing Order, Clements, Comm'r, concurring in part, P 3 (citations omitted).

I.e., FERC credited New Jersey Natural Gas' ("NJNG") unsupported and self-serving assertions that, despite historically contracting for an average of 200,000 Dth/d of off-system delivered gas peaking resources, NJNG now projects to use zero.³⁰ As the New Jersey Rate Counsel noted in its Request for Rehearing joining NJCF, *et al.*'s Request for Rehearing, "FERC misconstrued the [NJBPU's] findings that New Jersey does in fact have sufficient natural gas capacity without the REAE Project because it failed to accord the BPU-commissioned . . . study appropriate weight."³¹ FERC's decision to rest on bald shipper assertions that are both inconsistent with past practice and also controverted by data and analyses (including by the state most affected) is the very definition of arbitrary and capricious decision making.³²

2. Petitioners are likely to prevail on their claim that FERC compounded its initial error on the NJ Agencies Study by failing to properly consider and weigh the Skipping Stone Study and other data further demonstrating REAE is not needed.

³⁰ Certificate Order, P 29; *see also* Rehearing Order, P 38, n. 120; *id.* at Clements, Comm'r, concurring in part, P 3 ("It is entirely possible that the LDC did not believe it would *need* the off-system peaking resources, in which case its 'projection' could undercut the need case for the REAE Project.").

³¹ New Jersey Rate Counsel Request for Rehearing Letter Joining in NJCF, *et al.*'s Request for Rehearing, *Transcontinental Gas Pipe Line Company*, FERC Docket No. CP21-94, Accession No. 20230210-5206, p. 1 (Feb. 10, 2023), attached as Exhibit 11.

³² *See EDF* at 968, 972-976.

Five months after NJBPU's expert had determined that New Jersey LDCs did not need any additional gas capacity,³³ Transco submitted to FERC a report by Levitan & Associates, Inc. ("Levitan Report").³⁴ Petitioners moved for an evidentiary hearing in order to give the Commission and parties the opportunity to conduct discovery,³⁵ and to ask the right questions to test the veracity and premises of Transco's Levitan Report, as well as its conclusions.³⁶ Shortly thereafter, NJCF also filed a project-specific study on need for the REAE Project, prepared by Greg Lander of Skipping Stone ("Skipping Stone Study").³⁷

³³ *Supra* at n. 24 (NJ Agencies Study finding no additional gas capacity posted on NJBPU Docket No. GO1907084 (Dec. 16, 2021)).

³⁴ Transco's Apr. 22, 2022 Supplemental Filing, Attachment 1D, Resource Report 1 – Additional Information, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (April 22, 2022), attached as Exhibit 12.

³⁵ NJCF, *et al.*, Motion for an Evidentiary Hearing, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220906-5099 (Sept. 6, 2022), attached as Exhibit 13.

³⁶ FERC did not respond to this Motion for four months and denied it in the Certificate Order. Certificate Order, P 14.

³⁷ Comments on Behalf of NJCF, *et al.* Submitting Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022) ("Skipping Stone Study"), attached as Exhibit 14.

The Commission credited Transco's Levitan Report and, in turn, discounted the probative value of the Skipping Stone Study because of FERC's erroneous determination that Levitan "more accurately reflects overall future demand for natural gas in the study area than a study focused only on LDC demand."³⁸ This is demonstrably wrong, as the Skipping Stone Study did not focus only on LDC demand. For example, FERC incorrectly read the Skipping Stone Study as not taking into account demand from electric generators and industrials, and incorrectly found that the Study did not examine supply options during times of system constraint.³⁹ Contrary to FERC's findings, the Skipping Stone Study reflects *all* New Jersey demand in its analysis and data.⁴⁰ Moreover, the Commission found the Skipping Stone Study "unhelpful in determining project need," asserting that it "ignored 'design day' planning principles."⁴¹ Again, *this is patently false*. Skipping Stone not only used LDCs'

³⁸ Certificate Order, P 27.

³⁹ See Certificate Order, P 33.

⁴⁰ See, e.g. Skipping Stone Study, p. 16.

⁴¹ Certificate Order, P 33. FERC repeated a similar error in its Rehearing Order, stating that the Study failed "to account for design day criteria." Rehearing Order, P 50. This is also false. See Skipping Stone Study, p. 19, Chart 2 (showing sum of NJ LDC Design Day figures (using LDC-supplied figures)).

own design day figures but also conservatively escalated them by an annual growth rate that *exceeded* the one from Transco's Levitan Report *by 15%*.⁴²

Thus the bases on which FERC purportedly found that the independent expert reports (at least the ones it mentioned) were of less probative value than Transco's are controverted by the record. FERC's failure to properly consider or analyze studies that offer clear evidence of a lack of need constitutes reversible error, as there is insufficient evidence to demonstrate that this Project "is or will be required by the present or future public convenience and necessity."⁴³

3. Petitioners are likely to prevail on its claims that FERC's Order failed to probe record evidence indicating self-dealing.

As described in the record in the Skipping Stone Study, REAE's self-dealing arises out of LDCs subscribing to capacity in excess of firm market need, because they can use that excess capacity to make off-system sales and/or capacity releases benefiting those subscribers' shareholders, while the cost of such excess is paid for by the subscribers' ratepayers.⁴⁴ FERC's Orders do not meaningfully acknowledge this record allegation of LDCs profiteering on

⁴² Skipping Stone Study, p. 18, ns. 10, 11.

⁴³ See *EDF* at 972 (citing 15 U.S.C. § 717f(e)).

⁴⁴ See Skipping Stone Study, pp. 3-4.

ratepayers' backs or engage with it as a factor undermining the probative value of Transco's Levitan Report.⁴⁵

Indeed, not only has FERC failed its own mandate to protect against corporate abuse and protect the public interest, but in doing so, it also ignored New Jersey Rate Counsel's attempt to do just that, failing to appropriately weigh its submissions showing that REAE is not needed and would harm New Jersey ratepayers. Given that, FERC's REAE approval in the face of record evidence detailing the impetus for this Project that is not designed to meet unmet firm demand, serve firm load growth, or provide some other public benefit, is the very definition of arbitrary and capricious decision making.⁴⁶

B. Petitioners are likely to prevail on their claim that FERC's Order failed to adequately balance the adverse impacts and public benefits.

⁴⁵ See *EDF* at 975 (finding FERC's decision making arbitrary and capricious where it failed to engage with "plausible evidence of self-dealing. This evidence includes that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings."); see also *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) ("1999 Certificate Policy Statement") ("[T]he Commission will consider all relevant factors reflecting on the need for the project [including] precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.").

⁴⁶ *EDF* at 968, 972-976.

Just as in *EDF*, here the “Commission’s balancing of costs and benefits consisted largely of its *ipse dixit*”⁴⁷ finding that “the construction and operation of the project will provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.”⁴⁸ It did so without any data or analyses of supply diversity or system reliability failures, crediting the Transco’s bald assertions and its Levitan Report while misrepresenting and/or misunderstanding both NJ Agencies Study finding that such capacity was unnecessary and the Skipping Stone Study demonstrating that existing capacity easily meets winter peak demand. In short, FERC made this finding despite a lack of evidence that this Project provides any benefits to the public.

If anything, FERC’s approval of this Project would *actively harm* the public.⁴⁹ As the New Jersey Rate Counsel warned, REAE would “impose additional unnecessary costs onto New Jersey ratepayers.”⁵⁰ Moreover, FERC failed to properly take into account and weigh the adverse permanent impacts to landowners like Catherine Folio and their properties, including tree clearing,

⁴⁷ *EDF* at 973.

⁴⁸ Certificate Order, P 34.

⁴⁹ See NJCF, *et al.*’s Request for Rehearing pp. 21-32 (discussing how this Project will be saddled on ratepayers’ backs).

⁵⁰ Comments of New Jersey Division of Rate Counsel, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20221121-5157, p. 2 (Nov. 21, 2022), Exhibit 15.

ground disturbance, and the potential for an operational gas pipeline on their land—which inevitably would have an adverse impact on the value of their properties. The 1999 Certificate Policy Statement specifically contemplates some of the adverse impacts at play here: “[t]he interest of these groups is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way.”⁵¹ FERC failed to provide an explanation as to why the highly speculative benefits of the Project outweigh such adverse impacts,⁵² arbitrarily dismissing these concrete and irreversible harms without explanation.⁵³

II. PETITIONERS ARE LIKELY TO SUFFER IRREPARABLE HARM WITHOUT A STAY

A. Construction Activities Will Cause Irreparable Injury to Intervenor Landowner Catherine Folio.

⁵¹ Certificate Policy Statement at 61,748.

⁵² Under the Administrative Procedure Act (“APA”), an agency cannot ignore substantial evidence bearing on the agency decision. *See* 5 U.S.C. § 706; *see also*, *e.g.*, *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency decision is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem”).

⁵³ *See, e.g.*, Certificate Order, P 38 (“[T]he project will not have adverse economic impacts on existing shippers of other pipelines and their existing customers and will have minimal impacts on the interests of landowners and surrounding communities.”).

If this Court does not grant a stay, landowner Petitioner Catherine Folio's land will be absolutely and irreparably injured. REAE began to cut her trees⁵⁴ almost immediately after FERC granted the NTP—and will continue irreversibly damage Ms. Folio's property before she has had a judicial determination on the questions discussed *supra* on whether FERC failed to do its job in approving this Project. The risk Ms. Folio as well as other impacted landowners along the route face is something that affected landowners along the Spire⁵⁵ pipeline are all too familiar with—the irreversible, permanent destruction of their land for a project that never should have been approved by FERC. A stay is necessary to preserve the status quo and ensure such unnecessary destruction does not occur while judicial review is pending.

If no stay is in place and the Project continues construction, Ms. Folio's land will suffer from significant, irreversible damage on top of the trees already cut, including, but not limited to: increased, exacerbated flooding; contamination of her creek, shallow water table, and well; and adverse impacts to her storage

⁵⁴ Catherine Folio Declaration.

⁵⁵ *See, e.g.*, Order Reissuing Certificates, *Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022) (Glick, Chair, concurring, P 6) (“Spire Order”) (noting that three years after the pipeline entered service, “several landowners’ properties still ha[d] not been adequately restored, notwithstanding a Commission order and efforts by Commission staff to ensure that Spire fulfills its obligations to remediate the land affected by the pipeline.”), attached as Exhibit 16.

sheds.⁵⁶ Transco also has the authority to “grade, install temporary fencing, berms, and erosion and sedimentation controls, and use for any other construction activity necessary to construct the pipelines and facilities . . . and on exercise of the option a perpetual easement for ingress and egress over and across the Property by means of roads or other access areas utilized by Grantor.”⁵⁷ Construction would also adversely impact and interfere with Landowner Folio’s conservation efforts, general use, and enjoyment of the land.⁵⁸ Additionally, given that the relevant terms in the easement agreement are quite vague, Transco could potentially try to move the easement more onto Ms. Folio’s land at some point in the future, and it is unclear what remedies would be available to her.⁵⁹

B. Environmental Harm Will Cause Irreparable Injury to Intervenor.

A stay is also necessary to ensure REAE does not proceed with any activities that will cause or lead to irreparable environmental harm. The construction of this Project, as conditionally authorized by the Order, would

⁵⁶ Amended Declaration of Catherine Folio, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20221117-5094, P 14 (Nov. 17, 2022), attached as Exhibit 17.

⁵⁷ *Id.*, P 11 (internal citations and quotes omitted).

⁵⁸ *Id.*, P 15.

⁵⁹ *Id.*, P 12.

cause impacts to surface waters, wetlands, vegetation and forests, environmental justice communities, air quality and climate change, and noise, on 36.1 miles along the proposed pipeline route.⁶⁰ Any construction activities or permanent alteration of the land that Transco begins while challenges to the Certificate Order are pending will cause irreparable harm to the environment. For example, construction of the pipeline will cause impacts on 16.7 acres of wetlands, including “permanent conversion of previously forested and scrub-shrub wetland areas to emergent wetland areas. The conversion from one vegetation cover type to another could result in changes in wetland functions and values by altering the amount of sunlight or other environmental conditions in the wetland, affecting wildlife habitat.”⁶¹ “Clearing and grading would remove trees, shrubs, brush, roots, and large rocks from the construction work area and would level the right-of-way surface to allow operation of construction equipment. Vegetation would generally be cut or scraped flush with the surface of the ground, leaving rootstock in place where possible.”⁶² Construction of the

⁶⁰ Final Environmental Impact Statement, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220729-3005, ES-1, ES-3 to ES-10 (Jul. 29, 2022) (“FEIS”), relevant FEIS excerpts attached as Exhibit 18.

⁶¹ FEIS, 4-37 to 4-38; *see also id.* at 4-204.

⁶² *Id.*, 2-16.

Project would adversely impact 603.1 acres of upland vegetation, including trees and forests.⁶³ The construction of the pipeline will result in “thousands of acres of wildlife habitat including forested habitat...[some of which] would be converted to herbaceous or shrub-scrub habitat.”⁶⁴ The total area of wildlife that would be affected is 2,065 acres.⁶⁵

Petitioner APWC has worked tirelessly over the years to protect the watersheds in Monroe County, Pennsylvania.⁶⁶ REAE will run through Monroe County and significantly impact the areas that APWC exists to protect, including Poplar Creek (a tributary to Pohopoco Creek), Pohopoco Creek, Sugar Hollow Creek, and Princess Run (“the Watershed”).⁶⁷ REAE’s construction will *irreversibly* impact the Watershed.⁶⁸ REAE will create soil and general land disturbances that are an open invitation for invasive plants to move in.⁶⁹

⁶³ *Id.*, 4-44.

⁶⁴ *Id.*, 4-205.

⁶⁵ *Id.*

⁶⁶ Declaration of Jim Vogt, President of APWC, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20230210-5215, P 2 (Feb. 10, 2023) (“Vogt Declaration”), attached as Exhibit 19.

⁶⁷ The FEIS lists at least three waterbodies in that APWC protects. FEIS, Table C-4, p. C-52. *See also* Vogt Declaration, P 3.

⁶⁸ Vogt Declaration, P 4.

⁶⁹ *Id.*

To date, the Watershed is in extremely good condition and the streams are classed as High Quality Cold Water Fishery (HQ-CWF).⁷⁰ Native Brook Trout populate the Watershed; the pristine water quality can be attributed in large part to the lack of industrial activity in the area.⁷¹ REAE will cut across the Watershed's drainage patterns and create ground disturbances and runoffs that will adversely impact the Watershed's water quality and the wildlife that depend on it to thrive.⁷² And REAE's tree felling activities along the Watershed will result in significant habitat loss.⁷³

FERC has both failed to properly disclose and address these harms, and other environmental impacts under NEPA and the NGA. The Supreme Court has explained that injury to the environment is often irreparable because, "by its nature, [it] can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."⁷⁴

⁷⁰ *Id.*, P 5.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*, P 6.

⁷⁴ *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("*Gambell*").

III. LITTLE TO NO HARM WILL BE SUFFERED BY OTHER PARTIES IF RELIEF IS GRANTED

A stay will not significantly harm Transco. The current timeline is well outside of Transco's alleged drop-dead date to start cutting by March 3, 2023.⁷⁵ As indicated *supra*, public need does not exist for this Project.⁷⁶ New Jersey has met its gas capacity needs up until now without this Project, and data shows it will continue to do so for the foreseeable future.⁷⁷ Risk associated with this Project, including denial, has already long been internalized by Transco. Any harm associated with a stay would be minimal, redressable, and purely economic.⁷⁸ Meanwhile, as outlined above, harm to Petitioners, affected landowners, and the environment would be irreversible and extraordinary.⁷⁹ A balancing of hardships offers no serious comparison in this instance, where the environment and privately owned land will be permanently damaged and altered for a proposed pipeline for which there is no demonstrated need—and consequently, may never be built.

⁷⁵ See NJCF Answer, p. 2.

⁷⁶ *Supra* at I. A.

⁷⁷ *Id.*

⁷⁸ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“[M]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.”).

⁷⁹ *Supra* at II.

Moreover, as the Supreme Court has found, where injury to the environment is at stake, “the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁸⁰ For that reason, the Ninth Circuit has explained that issuing an injunction when balancing a defendant’s potential financial harm against potentially irreparable environmental harm is a “classic, and quite proper, examination of the relative hardships in an environmental case.”⁸¹ Consequently, given the potential long-term, permanent impacts to landowners’ properties and the environment—and the negligible impact to Transco—the singular conclusion is that the balance of harms tips towards granting the requested stay.

IV. GRANTING THE STAY IS IN THE PUBLIC INTEREST

There is a fundamental public interest in granting a stay in a proceeding of first impression wherein there are significant, substantiated, and state-sponsored challenges to project need.⁸² This case raises an important question of first impression, regarding the weight accorded to an independent, state-sponsored study before the Commission finding that there is no need for the capacity of a

⁸⁰ *Gambell* at 545.

⁸¹ *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005).

⁸² *See supra* at I.A.

proposed project.⁸³ As discussed *supra*, the Commission did not conduct the proper public need analysis before issuing the Order. Without a stay, the construction and operation of this Project would *actively harm the public*, as New Jersey ratepayers would be footing the cost for this unneeded infrastructure as FERC jurisdictional tariffs must be passed through to them, New Jersey LDC private shareholders would be reaping the profits from it, and society would be bearing the full \$46 billion in social costs as the climate destruction project price tag.⁸⁴

The Project will also cause or contribute to increased upstream gas production and locking in existing wells' usage through hydraulic-fracking and infrastructure development, including all adverse environmental impacts associated therewith, and result in major adverse downstream environmental impacts from combustion of the gas.⁸⁵ The pollutants that result from combusting gas are known to cause serious adverse health effects, and the GHGs are well-understood to contribute significantly to adverse climate change

⁸³ *See supra* at I.A.1.

⁸⁴ FEIS at 4-180. Any mention of this social cost was omitted from FERC's Orders.

⁸⁵ *See* Rehearing Order, Clements, Comm'r, concurring in part, PP 5-7 (discussing that FERC may consider greenhouse gases ("GHGs") under NEPA and NGA, including the fact that FERC may deny a certificate application on environmental grounds alone).

impacts. Thus, there is a strong interest in protecting the public from those effects, particularly when there is substantial record evidence showing FERC's authorization violated the NGA, NEPA and APA.

If a stay is not granted the nightmare scenario outlined by then-Chairman Glick in the Spire Order on remand could play out, as “[b]y the time the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) hear[s] argument on the Commission’s order[], the pipeline [will be] operating and . . . [REAE shippers will begin] taking actions that would have the effect of establishing a need for the pipeline that simply did not exist at the time the Commission issued its certificate.”⁸⁶

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their motion to stay.

⁸⁶ Glick, Chair, concurring, P 2. FERC arbitrarily authorized the Spire pipeline, and the D.C. Circuit vacated this authorization because its need determination was unsupported (*see EDF*), but significant destruction of property and environmental resources occurred while the case was pending. *See* Spire Order, Glick, Chair, concurring, P 6 (in the “over three years after [the pipeline] first entered service[,] several landowners’ properties still have not been adequately restored”).

Respectfully submitted,

Dated: March 21, 2023

/s/ Megan C. Gibson

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a) that the foregoing Emergency Motion to Stay is proportionally spaced, has a proportionally spaced typeface of 14-point font size and Times New Roman type style, and contains 5,198 words according to the word-count feature of Microsoft Word.

Dated: March 21, 2023

/s/ Megan C. Gibson
Megan C. Gibson

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

This case is a petition for review of an agency action, not an appeal from the ruling of a district court. The parties, amici, and entities that intervened and will participate in this proceeding are as follows:

1. Petitioners: The following parties appear in this case as petitioners: New Jersey Conservation Foundation, New Jersey League of Conservation Voters Education Fund, Aquashicola Pohopoco Watershed Conservancy, and Catherine Folio.

2. Respondent: Federal Energy Regulatory Commission.

3. Movant-Intervenors for Respondent Federal Energy Regulatory Commission: Transcontinental Gas Pipe Line Company, LLC.

4. Amici: At this time, to the knowledge of undersigned counsel there are no *amici curiae* in this case.

B. RULINGS UNDER REVIEW

Petitioners seek review of two Federal Energy Regulatory Commission orders:

- (1) Order Issuing Certificate and Approving Abandonment, *Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,006 (Jan. 11, 2023) (“Certificate Order”); and
- (2) Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 62,146 (March 13, 2023) (“Deemed Denied Order”).

C. RELATED CASES

The petition on review has not previously been before this Court or any other court. Petitioners filed a related petition challenging the above-noted Certificate and Deemed Denied Orders, and subsequently issued FERC Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,148 (March 17, 2023) on March 20, 2023 with this Court. Counsel for Petitioners is unaware of any other related cases within the meaning of DC Circuit Rule 28(a)(1)(C).

DATED: March 21, 2023

Respectfully submitted,

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PETITIONERS' CORPORATE DISCLOSURE STATEMENT

New Jersey Conservation Foundation (NJCF) is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of preserving land and natural resources throughout New Jersey. NJCF has no parent companies, and there are no publicly owned corporations that have a ten-percent or greater ownership interest in NJCF.

New Jersey League of Conservation Voters Education Fund (NJLCV) is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of environmental advocacy and conservation. It is part of a family of organizations, including New Jersey League of Conservation Voters, Inc., which is a 501(c)(4); New Jersey LCV Political Action Committee, which is a political action committee ("PAC"); and NJLCV Victory Fund, which is a super PAC. NJLCV has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in NJLCV.

Aquashicola Pohopoco Watershed Conservancy (APWC) is a 501(c)(3) not-for-profit organization founded in Pennsylvania for the purpose of environmental advocacy and conservation. APWC has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in APWC.

Dated: March 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2023, I caused to be served the foregoing New Jersey Conservation Foundation, *et al.* Emergency Motion for Stay upon all ECF-registered counsel via the Court's CM/ECF system.

/s/ Megan C. Gibson
Megan C. Gibson