No. 21-848

IN THE

Supreme Court of the United States

SPIRE MISSOURI INC., ET AL.,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ENVIRONMENTAL DEFENSE FUND

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QUESTION PRESENTED

Whether the court of appeals erred by setting aside—as opposed to remanding without vacating—agency orders marred by serious deficiencies, in the absence of evidence that vacatur would have disruptive effects.

RULE 29.6 STATEMENT

Environmental Defense Fund is a nonprofit organization with no corporate parent, and in which no publicly held company owns an interest.

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BRIEF IN OPPOSITION

The D.C. Circuit's conclusion that two unlawful orders of the Federal Energy Regulatory Commission should be vacated, rather than left in effect, is correct and unworthy of further review. Petitioners accept—as they did in their unsuccessful applications for panel and en banc rehearing, for a stay in the court of appeals, and for a stay in this Court—that FERC acted unlawfully for all the reasons stated by the court of appeals. Only its remedy is disputed.

The court of appeals determined the proper remedy—vacatur—using the framework set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). The petition claims that the D.C. Circuit's decades-old framework, though undeniably benign, was misapplied. That is not the sort of claim that merits this Court's attention, particularly because the claim here rests on allegations of third-party harms from vacatur that were not timely presented to the court of appeals, and that are now obsolete. Moreover, any possibility that the analysis in this case could control in a future case "has been eliminated by recent developments" at FERC and the D.C. Circuit. Pet. 20 n.4. And there is no circuit conflict. All the decisions of other courts of appeals that petitioners cite are consistent with *Allied-Signal* and with its factbound application here. The petition should be denied.

STATEMENT

1. In 2016, despite decades of "flat demand" for natural gas in the St. Louis area, Pet. App. 34a, petitioner Spire STL Pipeline LLC—a newly formed entity with the same corporate parent as petitioner Spire Missouri, Inc., a gas shipper with captive customers, *id.* at 4a—announced a proposal to build a sixth interstate pipeline in the area, *id.* at 11a. Unaffiliated shippers did not sign onto Spire STL's

proposal. *Id.* at 11a. As Spire Missouri had explained when "declin[ing] to subscribe to [other] proposals for new natural gas pipelines in the region," a new pipeline simply "did not make operational and economic sense for its customers." *Id.* But, in the case of *this* proposal, Spire Missouri was Spire STL's ace in the hole. The two corporate siblings "privately entered into a precedent agreement"—a commitment by the pipeline developer to ship gas through the proposed pipeline, and a commitment by the shipper to buy some of the pipeline's transportation capacity. *Id.* at 4a. Spire STL then used the "agreement" with its affiliate as the centerpiece of its application to FERC for a "certificate of public convenience and necessity" under the Natural Gas Act. 15 U.S.C. § 717f(c)(1).

The NGA forbids construction or operation of an interstate gas pipeline unless such a certificate is in force, so as "to protect the consumer interests against exploitation at the hands of private natural gas companies" that would build unneeded infrastructure for which ratepayers ultimately foot the bill. *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944). To decide whether a certificate should issue, "FERC first considers whether there is a market need for the proposed project." Pet. App. 3a. A certificate cannot issue absent a demonstration of need. *Id.* at 7a. If there is market need, the Commission "determines whether there will be adverse impacts," and then "balances the evidence of public benefits to be achieved against the residual adverse effects." *Id.* at 3a.

Spire STL's certificate application "conceded that the proposed pipeline was not being built to serve new [demand]" but proffered its private deal with Spire Missouri as "evidence of need" for the project. Pet. App. 4a. That was enough for FERC, which did not "second guess Spire

Missouri's purported 'business decision'" to ship its gas through the pipeline of an affiliate that could not attract shippers on the open market. *Id.* at 5a (quoting FERC's order). FERC stated that whether Spire STL and Spire Missouri "had engaged in anticompetitive behavior was irrelevant to its determination." *Id.* at 16a. The Commission "rejected calls for a market study to assess the need for a new pipeline." *Id.* And FERC "explicitly declined to resolve any related factual questions," *id.* at 17a, or "apply heightened scrutiny to the Certificate application," *id.* at 14a, in light of the less-than-arm's-length relationship between pipeline developer and shipper. In August 2018, the Commission issued an order granting Spire STL a certificate to build and operate the pipeline. *Id.* at 41a–257a.

2. The NGA has a "virtually unheard-of" "mandatory petition-for-rehearing requirement," *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (Scalia, J.), that allows a certificate to take effect, yet bars judicial review, while rehearing is underway. See 15 U.S.C. § 717r. And the D.C. Circuit for many years permitted FERC to grant itself unlimited extensions of time (and postponements of judicial review). In 2020, the en banc court held that regime unlawful, *Allegheny Def. Proj. v. FERC*, 964 F.3d 1 (D.C. Cir. 2020), and the Commission promulgated a regulation that prohibits a certificate holder from building a pipeline while rehearing is pending, 18 C.F.R. § 157.23. But those rules were not in effect during the 15 months that the rehearing petition of respondent Environmental Defense Fund (EDF) was pending in this case.

FERC entered an open-ended "stay" of its rehearing proceeding, see Pet. App. 19a, during which time Spire STL exercised the federal eminent-domain power to seize rights-of-way through "well over 200 acres of privately

owned land," *id.* at 40a—including lands owned by EDF members, *id.* at 28a—and "complete[] virtually all construction of the pipeline," *id.* at 19a. Not until November 2019, after the pipeline was built—and one week after the Commission approved it to begin operation—did FERC open the gate to judicial review by denying rehearing of its certificate order. *Id.* at 268a–353a.[1]

3. EDF sought review of FERC's certificate and rehearing orders in January 2020. Petitioners moved to intervene to defend the Commission, but their motions did not proffer evidence or argument about any disruptive effect of vacating Spire STL's certificate. EDF's brief argued, in eight separate places, that FERC's orders should be held unlawful—and vacated. EDF C.A. Br. 5, 15, 19, 26, 30, 34, 40, 41. The entirety of petitioners' response on this point consisted of reciting *Allied-Signal*'s framework for deciding when remand without vacatur is warranted, and then asserting without further explanation that, in this case, "it would be plausible that FERC would 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." Spire STL & Spire Missouri C.A. Br. 42 (cleaned up). Petitioners did not support this

[1] Petitioners attempted to immunize FERC's orders from judicial scrutiny altogether by arguing that EDF's compliance with binding circuit law—which made an actual, rather than a constructive, denial of administrative rehearing a prerequisite to judicial review, see *Allegheny*, 964 F.3d at 17–18—constituted as a forfeiture of EDF's right to judicial review. The court of appeals disagreed. Pet. App. 29a–31a.

generic assertion of "disruption" with evidence in the administrative record or adduced elsewhere.[2] At oral argument, petitioners were silent on remedy during their 32 minutes at the virtual lectern. C.A. Arg. 1:07:30–1:39:30.

4. In June 2021, a unanimous panel of the court of appeals held FERC's orders unlawful and set them aside. Pet. App. 1a–40a.

Applying the Administrative Procedure Act standard of review, the court of appeals held FERC's orders arbitrary and capricious. Pet. App. 21a. The court found "that the Commission ignored record evidence of self-dealing" when assessing the need for Spire STL's pipeline. *Id.* at 6a. No authority "endors[ed] a Commission Certificate in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline." *Id.* at 33a–34a. The court of appeals further determined that, having failed to properly assess market need, FERC also "failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement." *Id.* at 6a. In this instance, the Commission's balancing "consisted largely of [an] *ipse dixit*" supported by "no concrete evidence." *Id.* at 33a. And FERC's later order denying rehearing had mustered only "a superficial effort to remedy

[2] Amicus curiae Interstate Natural Gas Association of America, which now faults the court of appeals for "all but ignoring" disruptive effects of vacatur, Am. Gas Ass'n Amicus Br. 1, proffered no evidence of such effects in the brief that it submitted to the court of appeals.

the obvious deficits," *id.* at 34a, in the Commission's "ostrich-like approach" to its statutory charge, *id.* at 37a.

As to remedy, the court of appeals applied the *Allied-Signal* framework, under which "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." Pet. App. 39a (quoting 988 F.2d at 150–51). In this case, the "serious deficiencies" the court of appeals "identified … in the Commission's orders" made it "far from certain" and "not at all clear," that FERC "chose correctly," and cast doubt on whether the Commission could "rehabilitate its rationale" given this administrative record. *Id.* at 39a–40a.

The court of appeals "underst[oo]d that the pipeline [wa]s operational" and that vacatur of FERC's certificate order "*may*" have entailed "*some* disruption." Pet. App. 39a (emphases added). But the record did not reveal any pipeline benefits (beyond "increase[d] shareholder earnings," *id.* at 13a) that "were real." *Id.* at 38a. Petitioners had proffered no evidence in the underlying Commission proceeding, or in litigation, that vacatur would adversely affect other parties. Moreover, FERC had "failed to seriously and thoroughly conduct" its core statutory function, *id.* at 6a, an error the gravity of which lessened whatever "weight[]" the abstract potential for disruption carried in the remedy analysis, *id.* at 39a.

The court of appeals also found room under *Allied-Signal* to consider harm that would follow from leaving Spire STL's certificate intact merely because its pipeline might, contrary to the record before the court, have shown itself to be meeting some need. To remand without vacatur "under these circumstances" would place judicial imprimatur

upon the practice of "allow[ing] building first and conducting comprehensive reviews later." Pet. App. 40a (cleaned up). The court of appeals' concern on this point was exacerbated by "the significant powers that accompany a certificate," including the power of eminent domain. *Id.*

For all these reasons, the court of appeals vacated Spire STL's permanent certificate "and remand[ed] the case to the Commission for appropriate action." Pet. App. 6a.

5. Unbeknownst to the court of appeals, Spire Missouri had elected to "organize [its] business affairs around the new infrastructure," Pet. 25, whose operating certificate was, belatedly, receiving—and failing—judicial scrutiny. Spire Missouri first modified its delivery system to rely heavily on gas shipped through Spire STL's pipeline, then allowed shipping contracts with other pipelines to expire. App., *infra*, at A-6. As a result of these changes to Spire Missouri's operations and contracts, some of its captive customers stood at risk of losing service for portions of the 2021–2022 winter heating season in the event that its affiliate's pipeline were to cease operation. *Id.* at A-22.

Seizing on its affiliate's (self-inflicted) predicament, Spire STL applied to FERC in July 2021 for "a temporary certificate … to assure maintenance of adequate service," 15 U.S.C. § 717f(c)(1)(B), to Spire Missouri's customers while the Commission considered appropriate action on the permanent certificate that the court of appeals had vacated. FERC requested more data on "changes that Spire Missouri made to its system since the Spire STL Pipeline went into service and how long those changes would take to reverse." App., *infra*, at A-9 to A-10. After petitioners supplied the Commission with details about those operational and contractual changes, EDF likewise "aver[red]

that a temporary certificate [wa]s needed to prevent a disruption of gas service in St. Louis for the 2021–2022 winter heating season." *Id.* at A-16.

6. While awaiting relief from FERC, petitioners asked the court of appeals in August 2021 to rehear the issue of remedy. Petitioners did not ask the panel or the full court to reconsider the holding that Spire STL's permanent certificate was unlawfully granted, nor any of the multiple grounds on which the panel had reached that conclusion. Nor did petitioners ask the D.C. Circuit to reconsider its *Allied-Signal* framework, or contend that it was incorrect. In a footnote buried in their rehearing request, petitioners stated that, although Spire STL had sought a temporary certificate from the Commission, "[t]he outcome of that proceeding, and the timing of FERC's decision, [we]re far from certain, and temporary authority is not identical to [the] permanent certificate" the panel had held unlawful. Spire STL & Spire Missouri C.A. Reh'g Pet. 6 n.2.

Petitioners' rehearing petition attached, for the first time in the court of appeals, evidence of third-party consequences similar to what they now present to this Court, namely, the potential that gas consumers, including the elderly and hospitals, might experience service losses in the 2021–2022 winter season without the Spire STL pipeline. But this evidence, in the form of a declaration from Spire Missouri's president, concerned events that predated the court's decision—indeed, that predated oral argument and, in many cases, the briefing. C.A. Reh'g Pet., *supra*, Ex. 2 (First Decl. of Scott Carter).

In September 2021, with FERC having moved expeditiously to consider Spire STL's parallel request for a temporary certificate, see Pet. App. 356a, the D.C. Circuit denied panel and en banc rehearing without noted dissent,

id. at 371a–374a. Petitioners then moved that the court of appeals stay its mandate pending the filing and disposition of a petition for certiorari in this Court.

7. Later in September 2021, while the court of appeals was considering petitioners' motion for stay, FERC sua sponte awarded Spire STL a certificate to operate for 90 days "under the terms, conditions, and authorizations previously issued." Pet. App. 361a. This certificate afforded the Commission more time to "complete its assessment of the validity of [petitioners'] claims and determine an appropriate course of action." *Id.* at 358a. FERC upheld this 90-day certificate on rehearing. See App., *infra*, at A-8.

After Spire STL accepted FERC's 90-day operating certificate, the court of appeals denied petitioners' request to stay the mandate pending proceedings in this Court. Cf. Fed. R. App. P. 41(d) (authorizing a stay of the appellate mandate, ordinarily limited to 90 days, upon showings of "good cause" and "that the petition [for certiorari] would present a substantial question").

8. In October 2021, with a 90-day operating certificate already in hand, and FERC reviewing Spire STL's application for a temporary certificate to last for the duration of the remand proceeding, petitioners filed a stay application in this Court, which the Chief Justice denied without comment. See *Spire Mo. Inc. v. Envtl. Def. Fund*, No. 21A56.

9. In November 2021, Spire STL renewed its request that FERC issue a permanent certificate. *Spire STL Pipeline LLC*, FERC No. CP-17-40, Request of Spire STL Pipeline LLC for Expedited Reissuance of Certificates (Nov. 10, 2021), https://tinyurl.com/bdzavt63. Spire STL submitted new evidence in support of its reapplication and stated that "the Commission must consider developments

that occurred after the [original] Certificate Order was issued." *Id.* at 18. Were FERC to "fail[] to consider current evidence" and rely only on the record previously compiled, Spire STL warned, "it would result in another reversal by the D.C. Circuit." *Id.* at 23 (capitalization altered).

FERC thereafter modified "the 'analytical steps' that guide its dispositions of [NGA] Certificate applications." Pet. App. 7a; see 87 Fed. Reg. 11,548 (Mar. 1, 2022). Those modifications will govern Spire STL's "pending application[] for [a] new certificate[]." 87 Fed. Reg. at 11,562. In particular, the Commission announced, "affiliate precedent agreements will generally be insufficient to demonstrate need." *Id.* at 11,557.

10. Meanwhile, notwithstanding that Spire STL's 90-day operating certificate was in effect, petitioners submitted in December 2021 a renewed application in this Court to recall and stay the mandate of the court of appeals. This renewed application was, without explanation, directed to Justice Thomas rather than the Chief Justice.

11. Before petitioners' renewed stay application had been docketed by the Court, however, FERC issued Spire STL a temporary certificate to operate the pipeline "until the Commission acts on remand on Spire's pending … application" for a new permanent certificate. App., *infra*, at A-41. The temporary certificate allows Spire STL to operate all facilities "that are currently in service" under the same "terms, conditions, and authorizations" set forth in Spire STL's original, now-vacated permanent certificate. *Id.* "This temporary certificate does not authorize the construction [or operation] of any additional facilities" that were allowed by FERC's original, unlawful order. *Id.*

In deciding to authorize Spire STL's pipeline to operate through completion of the remand proceeding, FERC

explained, it had "considered" information that was never presented to the court of appeals, including petitioners' response to the Commission's data request. App., *infra*, at A-10. FERC found that this and other newly presented information established "that an emergency exist[ed]," so it "grant[ed] a temporary certificate to allow maintenance of service" while FERC decides whether a permanent certificate should issue and, if so, on what terms. *Id.* at A-28.

12. After Spire STL had accepted FERC's temporary certificate, petitioners withdrew the renewed application to recall and stay the mandate of the court of appeals.

13. FERC "sustained" its temporary-certificate order on rehearing. App., *infra*, at A-61. In particular, the Commission denied EDF's request for "conditions on the temporary certificate to address the concerns of self-dealing between Spire [STL] and Spire Missouri," *id.* at A-59, reasoning that those concerns "will be addressed when the Commission acts on remand" on Spire STL's application for a permanent certificate, *id.* at A-60. EDF will not seek judicial review of the order issuing a temporary certificate.

FERC also denied on rehearing the request of certain affected landowners "to prohibit Spire [STL] from exercising eminent domain authority under the temporary certificate." App., *infra*, at A-53. Those landowners requested that the Commission stay Spire STL's temporary certificate—not "in its entirety, but only to the extent it grants eminent domain authority," *id.* at A-57 n.30—but FERC determined that it "would necessarily have to stay the effectiveness of the entire temporary certificate in order to restrict the temporary certificate holder's eminent domain authority," *id.* at A-58. The question whether the Commission can—and should—withhold the eminent-do-

main power from Spire STL, while still allowing the pipeline to operate, is now before the D.C. Circuit in *Turman v. FERC*, Case No. 22-1043 (pet. filed March 7, 2022). But the petitioners there have clarified that they are not asking the D.C. Circuit to stay or rescind Spire STL's operating authority, or "otherwise interfere with the pipeline's delivery of natural gas." Pet. for Review 3, *Turman*, *supra*.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because the remedy issue presented in this case has not divided the lower courts, the court of appeals resolved it correctly, and it is of diminishing importance—and no practical importance in this case.

The APA calls for arbitrary or capricious administrative action to be "h[e]ld unlawful *and* set aside." 5 U.S.C. § 706(2) (emphasis added). The courts of appeals (and the district courts, when review of agency action occurs there) nearly always impose that default remedy, and with good reason. Ordinarily, when a court holds that something a party is doing is unlawful, that party is not permitted to continue doing the unlawful thing. On the other hand, "remand without vacatur is a useful arrow in a court's remedial quiver," *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1030 (D.C. Cir. 2022), to be employed in the unusual case where vacating an agency's unlawful action would be inequitable.

The courts of appeals are not in conflict on the question when remand without vacatur is appropriate. Each circuit that has considered the question has been guided by the D.C. Circuit's decision in *Allied-Signal*, whose framework the court of appeals used in this case. No court of appeals has criticized *Allied-Signal* or adopted a framework inconsistent with that decision. Even petitioners allow that the considerations that the court of appeals weighed in this

case—the unlikelihood that the agency could lawfully take the same action on remand, the disruptive consequences of vacating the action, and the harm of leaving the action in place—are "the relevant equitable considerations" to be weighed in the remedy analysis. Pet. 21–23.

Petitioners claim (Pet. 21) that the D.C. Circuit did not "appropriate[ly] weigh[]" those considerations here. The D.C. Circuit's alleged misapplication of its own legal rule does not warrant this Court's attention. Moreover, the thrust of the petition—the court of appeals' purported indifference to vacatur's "life-threatening consequences," *id.* at 2—rests on an anachronism. The court of appeals conducted its remedy analysis at a time when no evidence in the judicial record showed that operation of Spire STL's pipeline was needed to supply natural gas to consumers. In particular, none of the evidence undergirding this petition for certiorari, including the steps Spire Missouri had taken that made this pipeline temporarily indispensable, was then before the court of appeals. "An appropriate weighing of the relevant equitable considerations," *id.* at 21, does not demand clairvoyance. When, at the rehearing stage, the court of appeals was made aware of what Spire Missouri had done, that court had no cause to modify its remedy disposition because FERC was taking appropriate steps to prevent any adverse effects on third parties.

Petitioners play one other card. They cast this case as the latest in a line of (two) cases in which "the D.C. Circuit has turned its *Allied-Signal* test into a forceful presumption in favor of vacatur, especially in cases challenging agency authorizations for the construction and operation of oil and gas pipelines." Pet. 15. That careful wording obscures the fact that the D.C. Circuit has yet to order any

pipeline shut down, even temporarily. Petitioners' sole exemplar of the D.C. Circuit's "forceful presumption" is a case in which that court *reversed* a district court's order that had shuttered a pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (2021), cert. denied sub nom. *Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-560 (Feb. 22, 2022). The odds of the D.C. Circuit ever shutting down an operative gas pipeline are even longer now that FERC has issued a regulation that forbids construction of a new pipeline before the certificate order becomes eligible for judicial review.

The dwindling importance of the remedy imposed by the court of appeals is further reason to deny the petition. The question whether FERC could have, on this record, lawfully licensed Spire STL's pipeline is academic because on remand the Commission is considering new evidence and using a new analytical framework. Meanwhile, Spire STL has accepted FERC's offer of a temporary certificate that authorizes continued operation of the pipeline until the Commission's remand proceeding ends. That interim relief (as petitioners take pains to emphasize, Pet. Supp. Br. 3–7) does not moot the dispute among the parties, but it does render the D.C. Circuit's choice of remedy irrelevant to the "innocent nonparties," Pet. 24, whom petitioners have forced to rely on this pipeline to meet their energy needs. What is left of the dispute over the remedy provided by the court of appeals is unworthy of this Court's review.

I. THE QUESTION PRESENTED HAS NOT DIVIDED THE COURTS OF APPEALS

1. Vacatur of unlawful agency action is universally recognized as "the normal remedy," Pet. App. 6a, including in actions taken under the NGA, see *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976)

("If the decision of the agency 'is not sustainable on the administrative record made, then the … decision must be vacated.'" (citation omitted)). The APA, after all, directs that agency action "held unlawful" be "set aside." 5 U.S.C. § 706(2). According to the Administrative Conference of the United States, the alternative remedy of remand *without* vacatur is used exceedingly rarely (and almost exclusively by the D.C. Circuit). Stephanie J. Tathum, *The Unusual Remedy of Remand Without Vacatur*, Report for the Administrative Conference of the United States 22 (2014). Were it otherwise, agencies would lack incentive to "get it right" the first time because courts would rarely disturb their initial actions, and aggrieved parties would have less incentive to challenge unlawful behavior.

Still, "the case-specific equitable discretion that courts possess in fashioning appropriate relief, which necessarily takes into account the particular facts and circumstances of the dispute before the court," Pet. 21, has led the D.C. Circuit and, to some extent, other courts to depart from this statutory default and to remand but not vacate unlawful agency action in unusual circumstances, when equity demands. Most prominently, courts decline to vacate unlawful agency action when that remedy runs counter to the prevailing party's interest. *E.g.*, *Natural Res. Def. Council v. U.S. E.P.A.* (*NRDC*), 808 F.3d 556, 584 (2d Cir. 2015). That courts retain discretion not to vacate in that situation makes good sense. It ensures that parties who derive *some* benefit from unlawful agency action—such as an inadequately protective environmental regulation—but who would benefit *more* from lawful action, are not left worse off for having challenged the unlawfulness.

Less frequently, courts remand without vacating unlawful agency action despite the prevailing party's preference for vacatur. Outside the D.C. Circuit, the courts of appeals have used this remedy sparingly, and on those occasions, invariably have looked to the D.C. Circuit's precedent and, in particular, its *Allied-Signal* distillation. The circuits are in accord on the standard for remand without vacatur, and the different results they reach in different cases are the expected, natural result of applying a uniform standard to different actions and factual settings.

The D.C. Circuit's "influential framework for assessing whether to order remand without vacation," Charles A. Wright et al., 33 Federal Practice & Procedure § 8382 (2d ed. 2018), applies a modest gloss to the fundamental, but necessarily elastic, principle that a court will consider all relevant circumstances before ordering an extraordinary remedy. Judge Williams's opinion in *Allied-Signal* stated that "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150–51 (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). These factors are "analogous," *Int'l Union*, 920 F.2d at 967, to those that courts use when deciding whether to stay a decision pending further judicial review: The first (seriousness of agency error) recalls the "likelihood of success" criterion, and the second (disruptive effects) recalls the other criteria. See *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Relying on a sample size of two (one of which is the decision below), the petition asserts (Pet. 15) that the D.C. Circuit pays *Allied-Signal* lip service but actually applies

"a forceful presumption in favor of vacatur, especially in cases challenging agency authorization for the construction and operation of oil and gas pipelines." That is plainly false—so much so that petitioners felt content to begin and end their remedy argument in the court of appeals by quoting *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), in which the D.C. Circuit remanded without vacating a certificate that authorized operation of a natural gas pipeline. See Spire STL & Spire Missouri C.A. Br. 42. Nor is the decision here indicative of a new trend in the D.C. Circuit of vacating federal authorizations for fossil-energy infrastructure. Cf. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (declining to vacate unlawful FERC orders that authorized construction of a natural gas pipeline).

2. *Allied-Signal* did not reinvent the wheel, but lower courts nationwide have found its framework for decision useful and widely adopted it—especially in cases, like this one, that review agency action using the APA standard of review. Even those circuits that have yet to "formally embrace[] the *Allied-Signal* … approach," *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018), still consider what outcome would result under it, see *id.* In fact, *Allied Signal* and its D.C. Circuit progeny are cited approvingly by every court whose decisions the petition canvasses in its futile quest to unearth a conflict. See *Prometheus Radio Project v. FCC* (*Prometheus*), 824 F.3d 33, 52 (3d Cir. 2016); *NRDC*, 808 F.3d at 584; *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *Cal. Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir.

2001); *Cent. & S.W. Servs., Inc. v. U.S. E.P.A.* (*Cent. S.W.*), 220 F.3d 683, 692 (5th Cir. 2000).

The petition cites no case that criticizes the D.C. Circuit's approach to remand without vacatur. The ostensibly "conflicting" decisions of other circuits that petitioners cite do not attest to a "sharp[] divide[]," Pet. 2, but rather are precisely what is to be expected from application of a uniform standard in a variety of factual settings.

The petition chiefly alleges (Pet. 16–17) a conflict with two Fifth Circuit cases. But, as the Fifth Circuit recently confirmed, those cases "applie[d] the same test" as "[t]he D.C. Circuit's test for whether vacatur is appropriate." *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021) (citing *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n* (*TAM*), 989 F.3d 368, 389–90 (5th Cir. 2021), and *Cent. S.W.* 220 F.3d at 692), cert. granted, No. 21-954 (Feb. 18, 2022).[3] The Fifth Circuit's statement that "only in rare circumstances is remand for agency reconsideration not the appropriate solution," *TAM*, 989 F.3d at 389 (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238–39 (5th Cir. 2007)), is taken out of context by petitioners. It comes from a Fifth Circuit decision that *upheld* vacatur

[3] This Court granted the Solicitor General's petition for certiorari in *Biden v. Texas*, No. 21-954, to consider questions that do not "fairly include[]," S. Ct. R. 14.1(a), the Fifth Circuit's affirmance of "the district court's decision to remand and vacate [an action of the Department of Homeland Security] rather than remanding without vacatur," 20 F.4th at 1000. The questions on which this Court granted certiorari are whether DHS's action violated the Immigration and Nationality Act; and whether DHS's further explanation for its action, produced on remand from the district court, has legal effect. There is no reason to hold this petition pending this Court's resolution of those questions. Indeed, shortly after granting plenary review in *Biden v. Texas*, this Court denied review in *Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-560, which presented a remedy question not unlike the one presented in the instant petition. See Pet. 9, 14, 15, 20, 28.

of an unlawfully issued agency permit, but reversed the district court's attempt to dictate the *means* of "agency reconsideration" on remand. *O'Reilly*, 477 F.3d at 239–40 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)). The Fifth Circuit had no qualms "enjoining the permit until the [agency] ha[d] complied" with the law *somehow*. *Id.* at 240.

The other Fifth Circuit case highlighted by petitioners (Pet. 16) left in effect a rule that an agency had issued without responding to a handful of public comments. *Cent. & S.W. Servs., Inc. v. U.S. E.P.A.*, 220 F.3d 683 (5th Cir. 2000, cert. denied sub nom. *Util. Solid Waste Activities Grp. v. EPA*, 121 S. Ct. 2215 (2001). Quoting *Allied-Signal* and other D.C. Circuit precedent approvingly, the Fifth Circuit recognized that the agency "m[ight] well be able to justify its decision" when it got around to responding to the comments on remand, and that vacatur "would be disruptive," particularly because the rule "applie[d] to other members of the regulated community." *Id.* at 692. Here, in contrast, the court of appeals found it "not at all clear" that FERC could fix "serious deficiencies," and only that vacatur "may" have caused "some disruption." Pet. App. 39a–40a. Moreover, the critical fact that drove the Fifth Circuit's analysis—the existence of many other regulated parties whom vacatur would affect—is absent in this adjudication of a single company's operating license.

In the same vein, the Third Circuit decided in *Prometheus Radio Project v. FCC* (cited at Pet. 17) not to "invite chaos" throughout "the broadcast industry" by "mass vacat[ing]" five unlawful agency rules. 824 F.3d 33, 52 (3d Cir. 2016). Petitioners rest their claim of a conflict with *Allied-Signal* on the Third Circuit's *quotation* of that D.C.

Circuit decision for the proposition that an agency's ability to rehabilitate its decision on remand weighs against vacatur. See *Prometheus*, 824 F.3d at 52 (quoting *Allied-Signal*, 988 F.2d at 151). The Third Circuit's decision not to vacate multiple agency actions when it "ha[d] no reason to suspect that" the agency could not "justify at least some" portion thereof, *id.*, is altogether consistent with *Allied-Signal* and the decision in this case.

The Eleventh Circuit's statement that remand without vacatur is appropriate "where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process," *Black Warrior Riverkeeper*, 781 F.3d at 1290, is likewise consistent with the decision in this case, where the nature of "the obvious deficits" in FERC's orders, Pet. App. 34a, signaled a serious risk of "incurabl[e] taint[]" in the decision to greenlight Spire STL's pipeline. Petitioners contend (Pet. 20) that the D.C. Circuit erected "an essentially insurmountable barrier to remand without vacatur—requiring that it be 'clear' or 'certain' to the court that an agency would be able to cure its errors on remand." But that plays a semantic game with the phrases "*far from* certain" and "*not at all* clear" by treating the italicized words as dicta. The court of appeals used those phrases in the same way as petitioners, see *supra*, page 8, and other users of ordinary English—to express "the extent of doubt," *Allied-Signal*, 988 F.2d at 150—without "foreclos[ing] the possibility," Pet. 15, that FERC could lawfully reach the same decision on remand. Statements that it is "far from certain that it *will* rain" and "far from certain that it *won't* rain" are not, as petitioners would have it, two ways of saying "we don't know for sure about rain"; they are starkly different probability statements, which support different courses of conduct.

The decisions of the First and Ninth Circuits that left in effect unlawful authorizations for energy infrastructure are not "irreconcilable," Pet. 13, with the holding in this case. In fact, the pair of First Circuit opinions in *Town of Weymouth v. Massachusetts Department of Environmental Protection* underscore the correctness of the D.C. Circuit's approach. After finding that a state agency had unlawfully issued a permit to a natural gas company to build a compressor station, the First Circuit initially *vacated* the permit, on the understanding that the remand proceeding "w[ould] be expedited" and that the administrative record was "insufficient" to cure the agency's errors. 961 F.3d 34, 58 (1st Cir. 2020). When both predictions proved incorrect, however, the court amended its judgment and remanded the permit without vacatur, 973 F.3d 143 (1st Cir. 2020), without calling into doubt the correctness of its original remedy. See also *Cent. Me. Power*, 252 F.3d at 48 (declining to vacate unlawful orders where the Commission "warrant[ed]" to the court that they were "needed now to assure adequate energy supplies"). In this case, by contrast, FERC acted promptly to alleviate any disruptive effects that vacatur of its order might otherwise have caused, and there was no subsequent "material development," *Weymouth*, 973 F.3d at 146, showing that the Commission's errors would be easier to fix than the court of appeals had found.

Finally, the Ninth Circuit's decision in *California Communities Against Toxics v. U.S. Environmental Protection Agency* "balance[d] the[] errors" in an agency's order "against the consequences of" vacating an authorization for "a much needed power plant." 688 F.3d 989, 993 (9th Cir. 2012). The court left in place an action whose vacatur would "be economically disastrous," would likely require

a legislative fix, and risked leaving a region without enough power. *Id.* at 993–94. With no basis in the record (or briefing) to find that Spire STL's pipeline was needed at all by any gas consumers, let alone "much needed," the court of appeals reasonably arrived at a different conclusion here.

3. To the extent any criticism of *Allied-Signal* has made it into the Federal Reports, it is of no possible help to petitioners. On a handful of occasions, individual judges of the D.C. Circuit have written separate opinions arguing that the court was wrong even to consider remand without vacatur, given the statutory text of the APA directing that unlawful actions "shall" be set aside. 5 U.S.C. § 706(2); see *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting); *Checkosky v. SEC*, 23 F.3d 452, 490 (D.C. Cir. 1994) (separate opinion of Randolph, J.); see also *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring). Those opinions, which argued not merely for "an overwhelming presumption in favor of vacatur," Pet. 19, but rather a *conclusive* one, have failed to carry the day in the D.C. Circuit—and, notably, there was no recorded dissent from the denial of rehearing en banc in this case, see Pet. App. 374a.

II. THE REMEDY DISPOSITION OF THE COURT OF APPEALS IS CORRECT

In determining a remedy for FERC's unlawful orders, the D.C. Circuit correctly analyzed and weighed each of "the relevant equitable considerations," Pet. 21, in light of the record then before the court.

First, the court of appeals found it to be "far from certain that FERC chose correctly in issuing a Certificate to Spire STL." Pet. App. 39a. Market need is a prerequisite for issuing a certificate of public convenience and necessity, and this record did not show a market need. *Id.* at 3a.

On the contrary, there was uncontradicted evidence of flat demand going forward, *id.* at 34a—and a powerful explanation for why Spire STL was nonetheless able to line up a (single) subscription to its pipeline: the existing "record evidence of self-dealing," *id.* at 6a. Without a market need, it is irrelevant whether any evidence of project benefits "may exist within the record," Pet. 8 (quoting Pet. App. 35a), though the court of appeals could not locate *that* evidence either. And even if the Commission were to uncover evidence of pipeline benefits, it would have to make a reasoned finding (not an "*ipse dixit*," Pet. App. 33a) that any such benefits outweigh "adverse impacts on 'existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, [and] landowners and communities affected by the route of the new pipeline." *Id.* at 3a.

Collectively, these flaws made it "not at all clear" that FERC could lawfully reissue Spire STL a permanent certificate. *Id.* at 40a. Petitioners' assertion that the Commission's "errors in reasoning could readily be cured" in the remand proceeding, Pet. 20, is unsupported, and belied by Spire STL's recognition in that proceeding that a reissued certificate premised on the record previously adduced could not survive judicial review, see *supra*, page 9.

Second, the court of appeals considered the possibility of disruptive effects from "de-issuance of the Certificate." Pet. App. 39a. It did not "declin[e] to give any weight to" that possibility. Pet. 20. But the record "d[id] not appear to speak to the effects of an interim change," *Int'l Union*, 920 F.2d at 967, in the ability of Spire STL's pipeline to operate. The court of appeals "underst[oo]d" that this pipeline was "operational." Pet. App. 39a. Yet that meant only that the pipeline was "authorize[d]" to ship natural gas, 15

U.S.C. § 717f(e), not that it *must* do so to meet immediate consumer needs. The record established, to the contrary, that Spire STL's pipeline was not needed to relieve unmet demand or lower consumer costs. Pet App. 33a. The court of appeals did not find that *any* benefit this pipeline purported to confer was "real." *Id.* at 38a. The panel did not know, because it had not been told, that Spire Missouri had taken steps during litigation to make its captive customers heavily reliant, albeit not irretrievably so, on this new pipeline.

The petition does not argue that the court of appeals erred by not amending its disruptive-effects finding at the rehearing stage, when petitioners first alerted the panel and en banc court to adverse implications for nonparties occasioned by Spire Missouri's predecisional activities. Any such argument would fail in any event. A rehearing petition must identify "a point of law or fact" that the court of appeals "overlooked or misapprehended." Fed. R. App. P. 40(a)(2). It is not a vehicle to proffer evidence that could have been presented to the court before its decision. Cf. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008). The court of appeals did not err by denying rehearing, particularly in light of FERC's prompt, contemporaneous actions to ensure that gas supply would not be disrupted during the upcoming winter heating season.

Third, the court of appeals considered the harm from leaving FERC's orders intact despite their "obvious deficits." Pet. App. 34a. Petitioners assert (Pet. 22–23) that "EDF has never identified any harm that would result from permitting the [pipeline] to remain operational during the remand proceedings." On the contrary, the court of appeals correctly found—based on evidence timely submitted by EDF—that "vacatur of [FERC's] orders" likely

would redress harms to EDF members' "property, economic, aesthetic, and emotional interests." Pet. App. 28a.

The court of appeals also recognized the harm in "encourag[ing]" FERC "to allow building first and conducting comprehensive reviews later." Pet. App. 40a (cleaned up). The court did not hold that such harm "would *always* justify vacatur of completed projects." Pet. 20. But it did supply "[f]urther[]" reason to vacate administrative action that had unlawfully granted Spire STL "significant powers," such as eminent domain. Pet. App. 40a; see *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 567 (1904) (discussing "the serious nature of the right of eminent domain").

In sum, the court of appeals selected a remedy based on the record as it existed "at th[at] juncture." Pet. App. 40a. That record cast serious doubt on FERC's ability to lawfully authorize Spire STL's pipeline to operate. That record was bereft of evidence that vacatur would threaten anyone's supply of natural gas. And that record showed that leaving the Commission's orders in effect would harm EDF and the public. The court of appeals' decision to set aside FERC's orders "under these circumstances," *id.*, is correct, factbound, and unworthy of this Court's review.

III. THE REMEDY DISPOSITION IN THIS CASE IS NOT AN IMPORTANT MATTER

In addition to everything else, the remedy imposed by the court of appeals lacks sufficient practical significance to merit this Court's review. FERC has ensured that Spire STL's pipeline will remain in operation during the Commission's remand proceeding. Further, as petitioners admit (Pet. 20 n.4), new developments at FERC and the D.C. Circuit ensure that no reviewing court will again confront the circumstances presented here, where a pipeline

was built and placed into service before any judicial review of its authorizing certificate could be had.

Spire STL's legal authority to operate its pipeline has never lapsed, and it is now secure "until the Commission acts on remand," App., *infra*, at A-41, just as it would have been if the court of appeals had not vacated FERC's orders. The parties' remedy dispute is not *moot*, because unlike Spire STL's vacated permanent certificate, its temporary certificate does not authorize construction of additional facilities. See *supra*, page 10; Spire STL & Spire Missouri C.A. Reh'g Pet. 6 n.2 ("temporary authority is not identical to a permanent certificate"); see also Pet. Supp. Br. 7 ("[T]his case presents a live controversy."). Petitioners do not argue, however, that this distinction will impair or impede pipeline operation during FERC's remand proceeding. Petitioners have never claimed, and no evidence reflects, an emergency need—or any need at all—for an additional facility whose construction was permissible under the Commission's original, unlawful certificate order, but that was never built. This Court's intervention is thus *not* needed "to ensure that the people of the St. Louis region enjoy uninterrupted natural-gas service," Pet. 3, or for any other pressing reason.

Petitioners maintain (Supp. Br. 7) that Spire STL even now "fac[es] the risk of losing its FERC operating authority during remand proceedings (as a result of rehearing or judicial review of [Commission's] Temporary Certificate Order)." But the deadline to request rehearing of that order has expired, only two requests were filed, and neither asked the Commission to suspend or revoke Spire STL's operating authority. See *supra*, page 11; see also 15 U.S.C. § 717r(b) (restricting judicial review to objections

presented to FERC on rehearing). In particular, the landowners that have sought rehearing—and judicial review, after the Commission constructively denied rehearing—*have not* urged that Spire STL "be required to cease operating" the pipeline while FERC revisits Spire STL's authority to operate it permanently. Pet. Supp. Br. 5; see *supra*, pages 11–12.

FERC's issuance of a temporary operating certificate to Spire STL is not the only recent Commission action that saps the importance of the court of appeals' remedy disposition. While this case was pending, FERC issued a new regulation that resolves "the serious concerns posed by the possibility of construction proceeding prior to the completion of Commission review," 85 Fed. Reg. 40,113, 40,114 (July 6, 2020)—the same concern that troubled the court of appeals, see Pet. App. 40a. Spire STL was able to construct and begin operating this pipeline only because EDF was "trapped, unable to obtain judicial review" during the 15 months that its rehearing petition was pending. *Allegheny*, 964 F.3d at 15; see Pet. App. 29a–30a. Under the new regime, "no authorization to proceed with construction activities will be issued" until rehearing petitions are resolved or constructively denied. 18 C.F.R. § 157.23.

Going forward, construction of new gas pipelines will not start—much less end—until after FERC's certificate order becomes eligible for judicial review. See 15 U.S.C. § 717r(b). "This welcome change defangs much of the injustice associated with deferred judicial review," *Allegheny*, 964 F.3d at 22 (Griffith, J., concurring), as does the D.C. Circuit's en banc decision in *Allegheny Defense Project* that bars FERC from forestalling that review indefinitely by granting itself "stays." The reviewing court now has the option, when presented with a meritorious request

for interim relief, to enjoin pipeline construction and thereby guarantee that no natural gas delivery will be disrupted if the Commission's action ultimately is set aside. If, on the other hand, interim relief is denied or not sought, the reviewing court will consider those "particular facts and circumstances," Pet. 21, before determining the appropriate remedy for a defective FERC action. Either way, the selection of a remedy will not be controlled, in the D.C. Circuit or elsewhere, by the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

177 FERC ¶ 61,147
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman; James P. Danly, Allison Clements, and Mark C. Christie.

Spire STL Pipeline LLC Docket No. CP17-40-007

ORDER ISSUING TEMPORARY CERTIFICATE

(Issued December 3, 2021)

1. On July 26, 2021, Spire STL Pipeline LLC (Spire) filed an application under section 7(c)(1)(B) of the Natural Gas Act (NGA)[1] for a temporary certificate of public convenience and necessity to assure maintenance of service to Spire's customers while the Commission addresses the issues on remand from the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Environmental Defense Fund v. FERC*.[2] As discussed below, we grant a temporary certificate of public convenience and necessity, subject to the conditions herein.

I. Background

A. Commission's Certificate Proceeding

2. On January 26, 2017, Spire filed an application pursuant to section 7(c) of the NGA[3] and Part 157 of the Commission's regulations[4] requesting authorization to construct and operate the Spire STL Pipeline Project (Spire

[1] 15 U.S.C. § 717f(c)(1)(B).

[2] 2 F.4th 953 (D.C. Cir 2021).

[3] 15 U.S.C. § 717f(c).

[4] 18 C.F.R. pt. 157 (2020).

STL Pipeline), a new, 65-mile-long interstate natural gas pipeline system, extending from an interconnection with Rockies Express Pipeline LLC (REX) in Scott County, Illinois, to interconnections with both Spire Missouri Inc. (Spire Missouri)[5] and Enable Mississippi River Transmission, LLC (MRT) in St. Louis County, Missouri. The Spire STL Pipeline, which is designed to provide 400,000 dekatherms per day (Dth/d) of firm transportation service to the St. Louis metropolitan area, eastern Missouri, and southwestern Illinois, is composed of two segments: (1) a 24-inch-diameter, 59-mile-long segment originating at the interconnection with REX and terminating at a new interconnection with Spire Missouri's Lange Delivery Station; and (2) a 24-inch-diameter, 6-mile-long segment originating at Spire Missouri's Lange interconnection and terminating at a new bidirectional interconnection with both MRT and Spire Missouri at the Chain of Rocks Station (North County Extension). The project also includes three new aboveground meter and regulating stations, interconnection facilities, and other appurtenant facilities.

3. On August 3, 2018, the Commission issued Spire a certificate of public convenience and necessity under section 7(c) of the NGA[6] to construct and operate the Spire STL Pipeline.[7] The Environmental Defense Fund (EDF), Missouri Public Service Commission, MRT, and Juli Steck[8] each filed timely requests for rehearing, and, on November 21, 2019, the Commission issued an order on

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[5] Spire Missouri, a local gas distribution company, was formerly known as Laclede Gas Company.

[6] 15 U.S.C. § 717f(c).

[7] *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order).

[8] Juli Steck was known as Juli Viel earlier in the Commission's certificate proceeding.

rehearing addressing the arguments raised and dismissing, rejecting, or denying the rehearing requests.[9] EDF and Juli Steck each petitioned for review with the D.C. Circuit. The project was constructed and placed into service while the appeal was pending.

B. D.C. Circuit's Opinion Vacating the Commission Orders

4. On June 22, 2021, the D.C. Circuit issued a decision granting EDF's petition and vacating the Commission's Certificate and Rehearing Orders authorizing the Spire STL Pipeline and remanding to the Commission for further proceedings.[10] The court found that the Commission improperly granted a certificate to Spire because it relied upon a single precedent agreement with an affiliated shipper, Spire Missouri, to establish need and failed to weigh the project benefits against the adverse effects.[11] Specifically, the court stated that:

> nothing in the Certificate Policy Statement suggests that a precedent agreement is conclusive proof of need in a situation in which there is no new load demand, no Commission finding that a new pipeline would reduce costs, only a single precedent agreement in which the pipeline and shipper are corporate affiliates, the affiliate precedent agreement was entered into privately after

[9] *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (Rehearing Order).

[10] *Env't Def. Fund v. FERC*, 2 F.4th 953. The court found that Juli Steck lacked standing to pursue her claims. *Id.* at 970.

[11] *Id.* at 973.

> no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.[12]

5. The court held that the Commission failed to engage with "plausible evidence of self-dealing" offered by EDF[13] and that the challenges raised were more than enough to require the Commission to "look behind" the precedent agreement in determining whether there is market need for the new pipeline. The court also faulted the Commission for failing to examine meaningfully the purported benefits of the project (i.e., retiring of Spire Missouri's propane peaking facilities, access to natural gas supplies from the Marcellus region, avoiding the New Madrid Fault[14]) even though EDF and others challenged whether the benefits were likely to occur.[15]

6. Applying the *Allied-Signal* test,[16] the court determined that it was appropriate to vacate the certificate given the "serious deficiencies" underlying the Commission's prior orders.[17]

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[12] *Id.*

[13] *Id.* at 975.

[14] The New Madrid Fault stretches 150 miles from Cairo, Illinois, through Hayti, Caruthersville, and New Madrid in Missouri.

[15] *Id.* at 973–74.

[16] Under *Allied-Signal, Inc. v. NRC*, the court's decision to vacate "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[17] *Env't Def. Fund v. FERC*, 2 F.4th at 976. The court further opined that "remanding without vacatur under these circumstances would give the Commission incentive to allow 'build[ing] first and conduct[ing] comprehensive reviews later.'" *Id.* (quoting *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021)).

7. On August 5, 2021, Spire filed a petition for panel rehearing or rehearing *en banc*, asserting that vacatur would cause service disruptions during the 2021–2022 winter heating season.[18] The court denied Spire's petitions for rehearing and rehearing *en banc*,[19] and, on September 13, 2021, Spire filed a motion for stay of the mandate pending its petition for a writ of certiorari before the Supreme Court of the United States. On September 23, 2021, EDF filed a motion in opposition to the stay and Spire answered on September 30, 2021. The D.C. Circuit denied Spire's motion for stay of the mandate on October 1, 2021, and issued the mandate on October 8, 2021. Spire subsequently filed an application for stay of the D.C. Circuit's mandate with the Supreme Court, which was denied on October 15, 2021.

8. Following the D.C. Circuit's mandate and remand, the Commission's orders and Spire's authorization under those orders are no longer valid and Spire's January 26, 2017 application for a certificate of public convenience and necessity is now pending before the Commission.

C. Spire's Temporary Certificate Application

9. On July 26, 2021, Spire filed an application for a temporary certificate under NGA section 7(c)(1)(B)[20] or in the alternative a limited-term certificate under sections 7 and 16.[21] Spire requests that the Commission issue a temporary or limited term certificate, to allow Spire Missouri

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[18] Spire Aug. 5, 2021 Petition for Rehearing at 7, D.C. Cir. Nos. 20-1016, 20-1017.

[19] Sept. 7, 2021 Order Denying Petition for Rehearing, D.C. Cir. Nos. 20-1016, 20-1017; Sept. 7, 2021 Order Denying Petition for Rehearing *En Banc*, D.C. Cir. Nos. 20-1016, 20-1017.

[20] 15 U.S.C. § 717f.

[21] *Id.* §§ 717f, 717o.

to continue transporting gas on the project during the 2021–2022 winter heating season and avoid potentially curtailing service to 175,000 of its 650,000 customers.

10. In its application, Spire states that changes by Spire Missouri to its system since the Spire STL Pipeline went into service cannot be reversed prior to the 2021–2022 winter heating season. It further notes that Spire Missouri has allowed some of its contracts on MRT's Mainline and the upstream pipelines that connect with MRT to expire. Spire also provides information regarding the availability of transportation service on other pipelines[22] and states that since the Spire STL Pipeline commenced service most of the market participants in eastern Missouri made substantial physical and operational changes and improvements that are now irreversible. Spire claims that, as a result, other pipelines in the region would be unable to offer Spire Missouri transportation service similar to what it previously had. Specifically, Spire asserts that: (1) MRT's Mainline has only 568 Dth/d of available firm transportation capacity; (2) Spire Missouri no longer connects directly to MRT's East Line (Spire Missouri volumes flowing on MRT's East Line are now delivered to an interconnection with the Spire STL Pipeline, for subsequent delivery by Spire to Spire Missouri); and (3) MoGas Pipeline LLC (MoGas) has only 10,000 Dth/d of additional firm service available.[23] Thus, Spire concludes that in order for Spire Missouri to maintain service to its customers through the 2021-2022 winter

[22] Spire includes an affidavit from Scott Carter to support assertions in its temporary certificate application, Spire Missouri's President. Spire Application at 3.

[23] During construction of the Spire STL Pipeline, MRT abandoned its East Line Chain of Rocks interconnection with Spire Missouri.

heating season, a temporary certificate authorization for Spire is needed.

11. Spire also sets forth the purported benefits of its project to Spire Missouri including: (1) access to the Marcellus and Rocky Mountain supply basins via REX; (2) the retiring of Spire Missouri's propane peaking facilities; (3) the retirement of three compressor stations at the Lange Storage Field, which is behind the city gate; and (4) increases in delivery pressures that Spire asserts have allowed Spire Missouri to forgo other necessary improvements to its system.

12. Spire further claims that the Spire STL Pipeline allowed Spire Missouri to maintain service during the February 2021 weather event (Winter Storm Uri) that led to extensive outages in the southern United States because the Spire STL Pipeline provided access to the Marcellus supply region. Spire states that during Winter Storm Uri the project allowed Spire Missouri to avoid service disruptions to 133,000 customers and saved Spire Missouri customers a total of approximately $300 million, or between $170 and $345 per customer.

D. Commission's *Sua Sponte* Temporary Certificate

13. On September 14, 2021, in advance of the D.C. Circuit's mandate and to avoid an emergency from the immediate cessation of service by Spire, the Commission, *sua sponte*, issued a temporary certificate for 90 days[24] while it evaluated Spire's temporary certificate application.[25] On October 14, 2021, the Landowner's Group and Niskanen

[24] The temporary certificate would expire on December 13, 2021.

[25] *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (Sept. 14 Temporary Certificate Order).

Center filed requests for rehearing and Spire filed a request for clarification. The Commission, on November 18, 2021, issued an order granting clarification and addressing the requests for rehearing.[26]

II. Notice, Comments, Interventions, and Protests

14. On August 6, 2021, the Commission issued a Notice of Application for Spire's Temporary Certificate Application. The notice established September 7, 2021, as the deadline for initial comments and interventions, with reply comments due by October 5, 2021. The Commission received over 100 comments and reply comments from various stakeholders regarding Spire's application. Several commenters support Spire's application, reiterating the necessity of a temporary certificate for the 2021–2022 winter heating season, while others oppose the application, reiterating the findings of the D.C. Circuit.

15. The following entities filed timely motions to intervene: 35 landowners (Landowner Group);[27] 4 landowners, 10 individuals, and the Niskanen Center[28] (jointly,

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[26] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021) (Nov. 18 Rehearing Order).

[27] The Landowner Group includes: Betty and Keith Jefferson; Kenneth Davis; William and Alice Ballard; Anne and Matthew Clayton; Hart Farms, LLC; Jo Ann Mansfield; Bernard H. Meyer Trust #9-11; Mary Lois Meyer Trust #9-11; Jacob D. Gettings; Mildred L. Gettings; Jacob "Jay" Gettings; TTE Land Trust; Dannie Malone; Sinclair Family Farm, LLC; 4850 Longhorn, LLC; Greg and Connie Stout; Sheila Segraves; Dennis and Virginia Schaeffer; Cletus Kampmann Jr.; Eugene and Joyce Weidner; Corgaf LLC: Cori Patricia Christiansen; Barry Michael Corona; Kathleen Ann Corona-Bittick; Karin Gaut; Alan and Barbara Schlemmer; Margaret G. Bell; Marc Steckel; and Phil Brown.

[28] The four landowners include: Forrest Jones; ST Turman Contracting, LLC; Scott Turman (both individually and as sole member of ST Turman Contracting, LLC); and Kenneth "Rusty" Willis. The individuals, who own land along the Atlantic Coast Pipeline, include: Dawn Averitt; William Barr; Melissa Barr; Carolyn Fischer; Demian

Niskanen Center); Natural Resources Defense Council and Sustainable FERC Project, jointly (NRDC); New Jersey Conservation Foundation and Sierra Club, jointly (Sierra Club); American Gas Association; MoGas; Symmetry Energy Solutions, LLC; Natural Gas Supply Association; Spire Marketing Inc.; and Southern Star Central Gas Pipeline, Inc. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[29] St. Charles County, Missouri and International Paper Company and WestRock Company each filed a late motion to intervene. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, we grant the late motion to intervene.[30]

16. The Landowner Group, EDF, and NRDC and Sierra Club, jointly, each protest Spire's application for a temporary certificate. Spire filed answers to the Landowner Group's and EDF's protests. EDF filed an answer to the Missouri PSC's October 5, 2021 reply comments Spire filed an answer and opposition to EDF's answer, and Spire Missouri filed an answer to EDF. Although the Commission's Rules of Practice and Procedure generally do not permit answers to protests,[31] we will accept the answers here because they provide clarification and information that has assisted in our decision-making.

17. On August 6, 2021, Commission staff issued a data request to Spire requesting information on: (1) the specific

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K. Jackon; Louis Ravina; Victor Baum; Lora Baum; Horizons Village Property Owners Association, Inc.; and Kenneth E. Hoglund (in his capacity as President of Horizons Village Board).

[29] 18 C.F.R. § 385.214 (2020).

[30] *Id.* § 385.214(d).

[31] 18 C.F.R. § 385.213(a)(2) (2020).

capacity available on other pipelines in the region; (2) changes that Spire Missouri made to its system since the Spire STL Pipeline went into service and how long those changes would take to reverse; (3) support for assertions made by Spire that the pipeline saved St. Louis ratepayers hundreds of millions of dollars during Winter Storm Uri; (4) impacts on MoGas if the Spire STL Pipeline were to cease operations; and (5) impacts on landowners if the pipeline were to cease operations. Spire filed its response to the data request on September 7, 2021.

18. The comments, reply comments, answers, and protests, as well as the response to the data request, have been fully considered and are discussed below.

III. Discussion

A. Section 7(c)(1)(B) of the Natural Gas Act

19. Section 7(c)(1)(B) of the NGA states that "the Commission may issue a temporary certificate in cases of emergency, to ensure maintenance of adequate services or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ."[32] Further, section 157.17 of the Commission's regulations implements section 7(c)(1)(B) and provides that:

> [i]n cases of emergency and pending the determination of any application on file with the Commission for a certificate of public convenience and necessity under section 7 of the Natural Gas Act, application may be made for a temporary certificate authorizing the construction and operation of extensions of existing facilities, interconnections

[32] 15 U.S.C. § 717f(c)(1)(B).

> of pipeline systems, or sales of natural gas that may be required to assure maintenance or adequate service, or to service particular customers.[33]

20. Courts have interpreted section 7(c)(1)(B) in only a few instances.[34] The Fifth Circuit, in *Hunt Oil Co. v. FPC*,[35] found that the Commission had authority under section7(c)(1)(B) to issue a temporary certificate in light of its finding that an emergency existed—i.e., consumers were dependent on the supply of natural gas provided under the original certificates.[36] In addition, the First Circuit, in *Algonquin Gas Transmission Co. v. FPC*,[37] affirmed the Commission's decision to deny a company's application for a temporary certificate so that it could complete construction of facilities needed to provide new service to a region that previously did not have natural gas service.[38] The court reviewed the legislative history of section 7(c) to determine what emergencies the temporary certificate provision was intended to cover, finding that "[t]he crucial phrases are 'to assure maintenance of adequate service' and 'to serve particular customers,'" and determined that "[i]t is for the Commission to find as a matter of fact whether the requisite emergency exists."[39]

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[33] 18 C.F.R. § 157.17 (2020).

[34] The Supreme Court has addressed temporary certificates in two instances involving section 7(e) and producer-to-pipeline sales pending permanent authorizations. *See Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378 (1959); *FPC v. Hunt*, 376 U.S. 515 (1964). However, these cases do not provide guidance in construing section 7(c)(1)(B) in this proceeding.

[35] 334 F.2d 474 (5th Cir. 1964).

[36] *Id.* at 479–80.

[37] 201 F.2d 334 (1st Cir. 1953).

[38] *Id.* at 337.

[39] *Id.* at 339.

The court concluded that Congress did not intend to authorize the Commission to issue temporary certificates in cases where customers were awaiting new service, but rather that "'[m]aintenance of adequate (natural gas) service' seems to imply some pre-existing natural gas service which is to be kept up"[40] and that "'to serve particular customers' might . . . be read as meaning that the proposed service must be to existing customers, i.e., to consumers now receiving natural gas service from the applicant for the temporary certificate."[41]

21. In *Pennsylvania Gas and Water Co. v. FPC*,[42] the D.C. Circuit vacated a temporary certificate because the applicants did not demonstrate an emergency as contemplated by Congress.[43] The Commission issued a temporary certificate to two companies to allow coordination of their operations while their section 7 application was

[40] *Id.* In reaching this conclusion the court relied in part on the legislative history regarding the inclusion of the limiting phrase "to assure maintenance of adequate service or to serve particular customers." The court found that the purpose of the emergency provision is not to "authorize the granting of temporary certificates for the purpose of enlarging a market but merely for . . . maintaining adequate service within the market that is already being served." *Id.* (quoting Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess. 6 (1941)).

[41] *Id.* Prior to Algonquin seeking the temporary certificate, it had obtained a permanent certificate from the Commission, and the Commission's order had been reversed by the Court of Appeals for the Third Circuit. The *Algonquin* court noted, in *dicta*, that it "was not clear" whether a temporary certificate would have been appropriate had, as posed hypothetically by Algonquin, the court decision required termination of existing service, and that it did not have that case before it. *Id.* at 341.

[42] 427 F.2d 568 (D.C. Cir. 1970).

[43] *Id.* at 569.

pending.[44] The court held this did not constitute an emergency and instead the matter should be set for hearing and proceed under section 7.[45] The court provided an overview of the legislative history of section 7(c)(1)(B), finding that the initial drafting of this provision included broad authority to issue temporary certificates in case of emergency, but that ultimately it was narrowed to read "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers."[46] The court cited to comments provided by the Commission to the House that "the (original) language in subsection (c) (relating to the grant of temporary certificates) was put in the bill primarily to provide for emergency interconnection of pipe lines, which are sometimes necessary to make it possible to maintain adequate service in cases of extraordinary peak demands, breakdowns, and so forth."[47] The court concluded that Congress did not intend for a complete new pipeline system to be constructed under the temporary certificate provision, and instead intended to limit a temporary certificate to emergency situations involving only comparatively minor extension or enlargement of the facilities of an existing system.[48] The court did not discuss whether the emergency provision extends to already constructed facilities requiring interstate authorization.

22. Next, in *Consumer Federation of America v. FPC*,[49] the D.C. Circuit reviewed a series of Commission

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[44] *Id.* 571–72.

[45] *Id.* at 575.

[46] *Id.* at 574 (citing H.R. 5249, 77th Cong., 1st Sess., 82, 83-84).

[47] *Id.*

[48] *Id.*

[49] 515 F.2d 347 (D.C. Cir. 1975).

orders exempting companies from the certification requirements of section 7 of the NGA for certain sales of natural gas for 180 days without becoming a natural gas company subject to the Commission's jurisdiction and relying on the temporary emergency certification provision of the NGA.[50] The court found, after reviewing the legislative history, that the section "was designed as a narrow exception to enable the companies and the Commission to grapple with temporary emergencies and minor acts or operations, like emergency interconnections to cope with breakdowns or sporadic excess demand for gas."[51] In its decision, the court noted that "the legislative history makes plain that it was never contemplated that the modest emergency provision in [section] 7 for orders without hearings would be employed to excise large volume, long-duration, widespread deliveries of gas."[52]

23. The Commission's previous use of temporary certificates also has been limited. In *Texas-Ohio Pipeline, Inc.*,[53] the Commission issued a temporary certificate to an intrastate pipeline company, which was transporting gas in interstate commerce without authorization, to continue interstate service to prevent bottlenecks during winter heating season and avoid forcing customers to purchase gas at higher prices.[54]

24. In the late 2000s and early 2010s, the Commission issued a number of Orders Granting Exemption for Temporary Acts and Operations to companies to drill wells to

[50] *Id.* at 352.

[51] *Id.* at 353.

[52] *Id.* at 355.

[53] 58 FERC ¶ 61,025 (1992).

[54] *Id.* at 61,059.

determine the feasibility of developing underground natural gas storage facilities.[55] In these orders, the Commission interpreted section 7(c)(1)(B) to allow exemption of:

> certain temporary acts or operations from the certificate requirements that would otherwise apply, if we find that such an exemption is in the public interest. Previously, we have granted such exemptions to allow operations of a temporary nature that have no effects on ratepayers, on the quality of service provided by a natural gas company, or on the public as a whole.[56]

25. Finally, although the Commission has not defined "emergency" for the purpose of applying NGA section 7(c)(1)(b), the Commission's regulations do define emergency for other actions. Specifically, section 157.202(b)(13) defines an emergency to be a "sudden unanticipated loss of gas supply or capacity that requires an immediate restoration of interrupted service for protection of life or health or for maintenance of physical property."[57]

26. As discussed below, we find that, consistent with the NGA and legislative history of section 7(c)(1)(b), an emergency exists and the public convenience and necessity requires issuance of a temporary certificate to Spire.

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[55] See *Perryville Gas Storage LLC*, 133 FERC ¶ 61,201 (2010); *Sawgrass Storage LLC*, 133 FERC ¶ 61,146 (2010); *D'Lo Gas Storage, LLC*, 133 FERC ¶ 61,088 (2010); *Ryckman Creek Resources, LLC*, 133 FERC ¶ 61,056 (2010); *Wabash Gas Storage LLC*, 132 FERC ¶ 61,205 (2010).

[56] *Perryville Gas Storage LLC*, 133 FERC ¶ 61,201 at P 8.

[57] 18 C.F.R. § 157.202(b)(13) (2020); *see also* 18 C.F.R. 284.262 (2020) (defining an emergency).

B. Necessity for a Temporary Certificate

27. Spire asserts that, without a temporary certificate to operate the Spire STL Pipeline, its shippers would be unable to meet their peak day demand throughout the 2021–2022 winter heating season. Spire Missouri, the Missouri Public Service Commission (Missouri PSC), and other commenters agree and support Spire's request. Similarly, in its reply comments, EDF avers that a temporary certificate is needed to prevent a disruption of gas service in St. Louis for the 2021–2022 winter heating season.[58]

28. Commenters argue that the potential supply issues that Spire Missouri faces are of its own making.[59] EDF questions how long it will take Spire Missouri to remedy the supply issue.[60] The Niskanen Group contends that Spire and Spire Missouri's assertions regarding the catastrophic effects of the pipeline ceasing to provide service may not be plausible given Spire's cursory treatment of possible vacatur before the D.C. Circuit on brief.[61] NRDC and Sierra Club claim that an emergency certificate should only be allowed for unforeseeable or emergency circumstances, and that here the decisions of Spire and

[58] EDF Oct. 5, 2021 Reply Comments at 1. EDF initially questioned whether Spire and Spire Missouri accurately represent the situation, for example, asking why Spire Missouri represented to the Missouri PSC that the propane peaking assets could be placed back in service and stating that the Missouri PSC staff recommended that it do so in Spire Missouri's pending rate case. EDF Aug. 5, 2021 Protest at 22.

[59] EDF Aug. 5, 2021 Protest at 31; NRDC and Sierra Club Sept. 7, 2021 Comments and Protest at 7.

[60] EDF Aug. 5, 2021 Protest at 28.

[61] Niskanen Center Sept. 7, 2021 Intervention and Protest at 7.

Spire Missouri created the precarious reliance on a single pipeline.[62]

29. In its response to Commission staff's August 6, 2021 data request, Spire provides information regarding Spire Missouri's past and current contracted capacity and the availability of capacity into the St. Louis region. Spire states that Spire Missouri allowed the expiration of contracts for 180,000 Dth/d of firm transportation service on MRT[63] and 170,000 Dth/d of firm upstream transportation service on Natural Gas Pipeline Company of America LLC (NGPL) and Trunkline Gas Company, LLC (Trunkline) which service was used, in part, to deliver Spire Missouri's gas supply to MRT for transportation to Spire Missouri's city gate interconnection with MRT.[64]

30. To support its claim that there is limited available capacity for the upcoming winter, Spire provides information from the electronic bulletin boards (EBB) or email correspondence with MRT, MoGas, Trunkline, and NGPL. Specifically, Spire asserts that, as of the time it prepared its response, the following transportation capacity was available at the Spire Missouri city gate:

[62] NRDC and Sierra Club Sept. 7, 2021 Comments 4–5.

[63] Prior to expiration of its contract on MRT, Spire Missouri held 660,329 Dth/d of firm transportation service to its city gate.

[64] Spire Sept. 7, 2021 Response to Data Request at 13 (Spire Response to Data Request).

Table 1: Available Capacity to the Spire Missouri City Gate[65]

Pipeline System	Available Capacity (Dth/d)[66]
MoGas	100,000
MRT Mainline	568
MRT East Line	135,548 to 181,402
Trunkline (Upstream to MRT)	100,000 to 180,000
NGPL (Upstream to MRT)	17 to 34,109

31. Spire states that Spire Missouri cannot use much of the available capacity to serve its load due to pressure delivery issues between the upstream NGPL and Trunkline pipelines and the MRT East Line.[67] However, it does acknowledge that Trunkline, in September 2021, announced via its EBB a proposed project to address the pressure issues, and that project was completed and went into service on November 1, 2021.[68] As for capacity release, Spire states that Spire Missouri and Ameren Missouri (Ameren)[69] are the primary shippers into the region

[65] *Id.* at 3–4.

[66] The quantity of available gas differs depending on whether obtained from the EBB or pipeline staff.

[67] Spire Response to Data Request at 5.

[68] This modification included construction of a new control valve near the Tuscola compressor station that will enable Trunkline to compress gas flowing to MRT from points north or south of this interconnect, providing increased pressures to allow firm delivery commitments into MRT. Trunkline Sept. 3, 2021 Reliability Modifications Notice ID 9145; Trunkline Nov. 3, 2021 Reliability Modifications Notice ID 25874.

[69] Ameren is the largest electric power provider in Missouri.

and, given the nature of their loads, any capacity to be released would be from these shippers and be recallable on peak days and thus would essentially be unavailable on those days.[70] Spire also provides data indicating that no firm transportation service is expiring in the near term on MRT or MoGas.[71]

32. Spire states that Spire Missouri receives deliveries into its system from Spire over three transportation paths: (1) direct delivery to the Spire Missouri city gate (189,400 Dth/d); (2) gas flowing from Spire STL Pipeline to MoGas for further delivery to the western side of Spire Missouri's system (90,600 Dth/d); and (3) gas flowing from Spire STL Pipeline to MRT for further delivery to the southern part of Spire Missouri's system (70,000 Dth/d).[72]

33. Spire states that if the Spire STL Pipeline is removed from service Spire Missouri's total firm transportation service under contract would decrease from 1,273,079 to 923,079 Dth/d.[73] By moving its receipt point on MRT from Spire's Chain of Rocks to Trunkline or NGPL, Spire asserts that Spire Missouri could offset 70,000 Dth/d of its current transportation service on the Spire STL Pipeline.[74] This would allow for gas that is currently transported to Spire Missouri's southern city gate delivery points via the Spire STL Pipeline to Chain of Rocks and to MRT's Mainline to be shipped via NGPL or

[70] We note that there would be no benefit to Spire Missouri releasing capacity to itself.

[71] Spire Response to Data Request at 4.

[72] *Id.* at 18.

[73] *Id.* at 10.

[74] *Id.*

Trunkline for delivery through MRT's Mainline.[75] However, Spire avers that without the Spire STL Pipeline Spire Missouri would have 60,000 Dth/d of firm contracted natural gas supply from REX Zone 3 stranded without a transportation path to its city gate.[76] Spire also asserts that suppliers are reluctant to sell firm supply for this winter given the disruptions during last winter.

34. Spire also discusses the changes that Spire Missouri made to its system after interconnecting with the Spire STL Pipeline. It states that Spire Missouri contracted for an additional 82,800 Dth/d of service on MoGas to transfer gas from the Spire STL Pipeline to the western and southwestern parts of Spire Missouri's distribution system, which allowed Spire Missouri to forgo construction of a large diameter, high-pressure pipeline.[77] Additionally, Spire states that Spire Missouri retired the compressors at its Lange Storage Field, and, although Spire Missouri believes they could be returned to service within a few months, the compressors are 70 years old, and without additional sources of supply to allow for injection into the storage field, restoring that compression would be of little benefit.[78] Spire Missouri states that it also decommissioned its propane peaking equipment, which supplied 160,000 Dth/d and previously enabled Spire Missouri to

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[75] *Id.*

[76] *Id.* at 11.

[77] *Id.* at 20. MoGas built an interconnection with the Spire STL Pipeline, which improved the pressure profile on the MoGas system and increased the supply volumes available to Spire Missouri's key western points. MoGas July 28, 2021 Comments at 3–5.

[78] Spire Missouri also notes that it has repurposed the Lange equipment as a natural gas heater and would need to modify the equipment and obtain a St. Louis County air permit to put the Lange facility back into service. Spire Response to Data Request at 21, 22.

cover its peak-day capacity requirements.[79] The propane facilities at Spire Missouri's Catalan propane injection point have been disconnected and, in addition, there are issues with obtaining a supply of propane at this location due to the abandonment of the line that supplied the propane by the operator.[80] Further, under present circumstances, the increased pressure on MoGas resulting from its interconnection with the Spire STL Pipeline has rendered construction of Spire Missouri's previously contemplated system reinforcements unnecessary.[81]

35. With respect to whether Spire Missouri could reestablish[82] a direct connection with MRT at or near Chain of Rocks (the location of an interconnect between Spire, Spire Missouri, and MRT), Spire Missouri estimates that it would take 9 to 12 months to construct the equipment[83] to reestablish an interconnect and that MRT could not construct a new interconnection that could be used this winter.[84] It further notes that MRT's old Chain of Rocks interconnection facility was located in a floodplain and has experienced flooding since it was abandoned and is no longer usable.[85] Should Spire Missouri reestablish an interconnect with MRT, gas would need to flow onto Spire Missouri's Line 880, which it states would need

[79] Spire Application Carter Affidavit at 44.

[80] Spire Response to Data Request at 21.

[81] *Id.* at 20.

[82] The prior interconnection between the MRT and Spire Missouri was abandoned. *Id.*

[83] Spire states this would include flow and pressure control, measurement, a natural gas heater, odorant injection, flood control, and associated piping and appurtenances. Spire believes that a floodplain permit would be required, but likely not an air permit. *Id.* at 6.

[84] *Id.*

[85] *Id.*

to be pressure-tested for integrity reasons and that the testing would likely not be completed by this winter.[86]

36. Spire states that it could be possible for the Chain of Rocks station to be sold and transferred from Spire to Spire Missouri, assuming MRT could deliver gas to the station at a pressure of 350 psig.[87] Under this scenario, Spire Missouri would also have to acquire the North County Extension and Lange Station from Spire[88] and Spire notes that Spire Missouri would need to independently secure any easements that Spire has not fully acquired. Spire Missouri states that after acquiring the Chain of Rocks station it would need to integrate the facilities into its control system and train its staff to operate them, asserting that it would take 3–4 months for all these steps to be implemented.[89]

37. Assuming a winter heating season similar to 2020–2021, Spire Missouri estimates that without the Spire STL Pipeline its customers would lose service for up to eight days.[90] Spire states that, even if Spire Missouri physically shut off all its interruptible customers recalled all its capacity that may have been released into the secondary market, and ignored the supply issues on MRT and upstream systems, it would still have lost service during Winter Storm Uri without the Spire STL Pipeline.[91] Spire

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[86] *Id.* at 7.

[87] *Id.*

[88] The Chain of Rocks station has a book value of $20,600,000, and the North County Extension and Lange Station have a combined book value of $33,300,000. *Id.* at 7–8.

[89] *Id.* at 8.

[90] *Id.* at 24.

[91] *Id.* at 24. Spire notes that, during Winter Storm Uri, Spire Missouri did not use all of its firm capacity on the Spire STL Pipeline, but the weather experienced during this time was 13 degrees warmer and

describes the impacts of a mass gas outage caused by curtailments during a peak day and estimates that, if Spire Missouri were to lose gas service, 400,000 customers would be without gas, and that it may take up to 100 days to reestablish service to all of its customers, depending on how many technicians are available to work on the outage.[92]

38. Spire Missouri filed comments and reply comments in support of Spire. It asserts that the firm natural gas supplies provided via the Spire STL Pipeline are essential to meeting its winter season and peak day design, and that uncertainty around the Spire STL Pipeline complicates its planning.[93] Spire Missouri reiterates the benefits of the Spire STL Pipeline, including the higher operating pressures of the pipeline and the benefits from the interconnection with MoGas.

39. In reply comments, Spire Missouri documents steps it has taken since Spire's certificate was vacated, including acquiring 10,000 and 568 Dth/d of capacity on MoGas and the MRT Mainline, respectively.[94] It further notes that it may shift its primary receipt point on the MRT East Line from the interconnection with the Spire STL Pipeline to Trunkline or NGPL, but it remains uncertain about delivery pressures on the upstream pipelines.[95] Spire Missouri states that it is exploring the potential for receiving deliveries of LNG by truck that would be re-vaporized into its distribution system, but this would be

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demand was 200,000 Dth/d less than the planned peak day temperature *Id.* at 12.

[92] Spire Application Carter Affidavit at 8–12; Spire Response to Data Request at 14.

[93] Spire Missouri Oct. 5, 2021 Reply Comments at 2.

[94] *Id.* at 4.

[95] *Id.* at 4–5, nn.9, 12.

expensive, and supplies are uncertain. Spire Missouri states that it has reserved LNG vaporization equipment should the Spire STL Pipeline cease operations, but these supplies who not be adequate to completely replace the Spire STL Pipeline.[96] Further, as described above, Spire Missouri states it explored re-commissioning the Catalan propane injection point, but the propane lateral serving Catalan was in the process of being abandoned by the operator and to place it back in service would require inspection and potential repairs.[97]

40. Finally, Spire Missouri documents its efforts to coordinate with the St. Louis community regarding the potential for large-scale outages if the Spire STL Pipeline is removed from service. Spire Missouri estimates it may spend approximately $5,000,000 in preparing for the potential for the upcoming winter heating season without service on Spire, including the costs of reserving incremental transportation and the costs for alternative supply, and states that preparation to pursue these options began in October.[98]

41. The Missouri PSC in its comments notes that, under Missouri law, Spire Missouri must furnish and provide service that is safe and adequate to those who desire service.[99] The Missouri PSC Staff Investigation Report of Spire STL Pipeline's Application for a Temporary Certificate notes that "Spire Missouri has made itself currently particularly reliant on Spire STL [Pipeline] and the interstate pipelines interconnected with Spire STL [Pipeline]

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[96] *Id.* at 5–6.

[97] *Id.*

[98] *Id.* at 7 n.15.

[99] *Id.* at 5.

to deliver gas and support pressure in parts of the distribution system."[100] Specifically, Missouri PSC staff's analysis of winter firm demand suggests that Spire Missouri could meet gas volume needs of a typical winter with current transportation capacity on pipelines other than the Spire STL Pipeline and its on-system underground storage, but this does not obviate potential concerns for peak or high demand days.[101] Further, the Missouri PSC report acknowledges Spire Missouri cannot reconfigure or restore older service components for the 2021–2022 winter heating season and that capacity is not readily available on existing pipelines into St. Louis.[102] In its reply comments the Missouri PSC reiterated its staff finding that "'there is a real risk of natural gas outages during the winter of 2021–2022 absent the availability of Spire STL [Pipeline] capacity from both a flow and pressure standpoint.'[] This constitutes an "emergency" under the NGA."[103]

42. MoGas filed comments confirming that the interconnection with the Spire STL Pipeline allowed MoGas to forgo a 50-mile-long looping project, estimated to cost $100 million.[104] MoGas also details how, although demand in the St. Louis region is flat, demand within the region is shifting—increased demand in the western suburbs and a corresponding decrease in demand in St. Louis proper. MoGas asserts that it could not meet new demand in the

[100] Missouri PSC Staff Report at 3.

[101] *Id.*

[102] *Id.* at 3, 4.

[103] Missouri PSC Oct. 5, 2021 Reply Comments at 2 (quoting Missouri PSC Staff Report).

[104] MoGas July 28, 2021 Comments at 6.

western suburbs without the Spire STL Pipeline.[105] MoGas also documents other benefits from its interconnection with the Spire STL Pipeline, such as the fact that increased delivery pressure allows for greater line pack, which increases its operational reliability. MoGas attests that the Spire STL Pipeline allowed it to better meet the demands during Winter Storm Uri.[106] It asserts that a cessation of operation of the Spire STL Pipeline would cause customers to lose service and MoGas to pursue the 50-mile looping project, which would take multiple years to develop and construct.[107]

43. Ameren Services Company filed a letter supporting the temporary certificate, noting that regulatory certainty allows pipelines to make investment decisions.

Commission Determination

44. Upon issuance of the D.C. Circuit's mandate, Spire lacked the necessary authority required by the NGA to operate the Spire STL Pipeline, jeopardizing Spire Missouri's ability to obtain adequate gas supply. The September 14 Temporary Certificate Order provided Spire with the authorization to operate for 90 days while we evaluated Spire's application for a temporary certificate. Although Spire Missouri may be able to obtain approximately 180,000 Dth/d of firm transportation capacity from MRT for the 2021–2022 winter heating season, the upstream pipelines, NGPL, and Trunkline cannot commit to delivering gas to MRT at the pressures needed for Spire Missouri to operate its system under its current conditions. Even though Trunkline announced a project on its EBB to remedy the pressure issues, Trunkline could not

[105] *Id.* at 5.

[106] *Id.* at 9.

[107] *Id.* at 10.

commit to the required delivery pressures.[108] Therefore, the record indicates that alternative firm interstate transportation for Spire Missouri to replace the Spire STL Pipeline is not available.

45. Additionally, the record reflects that Spire Missouri cannot construct replacements for the facilities that it removed from service or decommissioned in time to meet its obligations for this winter heating season. For example, to construct and place in service a new interconnection at the Chain of Rocks facility would take 9–12 months, and Spire Missouri would need to rely on a transmission line (Line 880) that would need to undergo pressure testing to transfer gas from Chain of Rocks to its distribution system. Similarly, it would take approximately 3–4 months to effectuate the sale and transfer of Spire's Chain of Rocks interconnection between Spire Missouri and MRT and of Spire's North County Extension, an approximately 7-mile-long pipeline connecting Chain of Rocks to Spire Missouri, a transaction that would obviate the need to return Line 880 to service. Finally, although the compressors at the Lange Storage Field could be brought back to service within a few months, the compressors are 70 years old and Spire Missouri lacks additional sources of supply for the storage field. The Missouri PSC's report corroborates these findings, stating that "Spire Missouri cannot reasonably reconfigure its system to replace or restore former capacity, or replace reliance on [the] Spire STL [Pipeline] for transportation before or during the Winter of 2021–2022."[109]

46. Commenters argue that the present situation is of Spire Missouri's own making and not an emergency. We

[108] *See* Spire Response to Data Request attach. 2.a.3 at 57–60.

[109] Missouri PSC Staff Report at 3.

do not, at this time, take a position on who is responsible for the current situation. It is sufficient for these purposes to determine that an emergency exists that requires granting a temporary certificate to allow maintenance of service, particularly during the winter heating season. Issues related to the prudence of Spire's decisions are best considered in the remand from the D.C. Circuit and related proceedings.

47. Under NGA section 7(c)(1)(B), "the Commission may issue a temporary certificate in cases of emergency, to ensure maintenance of adequate services or to serve particular customers . . . ."[110] Here, as detailed above, the record demonstrates that without a temporary certificate, Spire's customer, Spire Missouri, will experience a loss of gas supply potentially impacting hundreds of thousands of homes and business during the winter heating season. Therefore, we find that an emergency exists[111] and will issue Spire a temporary certificate.

C. Recourse Rates, Negotiated Rates, and Operations

48. Commenters request that the Commission condition the temporary certificate to limit the profits that Spire can recover by adjusting Spire's rate structure. EDF argues that the Commission, under its broad NGA section 16 authority,[112] should protect ratepayers and limit profits to Spire and Spire Missouri by requiring Spire to

[110] 15 U.S.C. § 717f(c)(1)(B).

[111] As stated in the September 14 Temporary Certificate Order, the precedent for the court cases examining section 7(c)(1)(B) are not dispositive here for determining whether an emergency exists. *See* Sept. 14 Temporary Certificate Order, 176 FERC ¶ 61,160 at P 10.

[112] EDF Aug. 5, 2021 Protest at 25 (quoting *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 606 (3rd Cir. 1977)).

shift 50% of its return and income taxes from its reservation charge to its usage charge. EDF avers that the Commission could further insulate Spire Missouri's ratepayers by requiring Spire Missouri to contract for interruptible service at the 100% load factor of the redesigned recourse rate.[113] EDF also suggests that the Commission require Spire to limit the use of the Spire STL Pipeline to instances where the use of the pipeline would only be for Spire Missouri to avoid curtailment.[114] EDF argues these measures would limit Spire from reaping benefits for a pipeline that is not demanded by the marketplace and allow for profits to be tied to transportation service actually provided, unlike a reservation charge which guarantees profits regardless of volumes shipped.[115] EDF further contends this would help to protect against self-dealing.[116]

49. NRDC and Sierra Club similarly argue that Spire should not be able to reap the rewards of having built a pipeline prior to the conclusion of judicial review. They ask that the Commission levy economic penalties against Spire and transfer those funds into an account to assist Spire Missouri's ratepayers.[117] NRDC and Sierra Club argue that once vacated, any rate the Commission approved in conjunction with the Spire STL Pipeline, including the approved negotiated rate agreement with Spire Missouri, would no longer be valid as the pipeline is unauthorized.[118]

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[113] *Id.* at 42.

[114] *Id.* at Lander Affidavit at 28. EDF further clarified this position in its reply comments by stating that Spire should be allowed to keep the pipeline "fully pressured." EDF Oct. 5, 2021 Reply Comments at 10.

[115] *Id.* at 41.

[116] *Id.*

[117] NRDC and Sierra Club Sept. 7, 2021 Comments at 9.

[118] *Id.*

50. In its answer, Spire states that a condition requiring it to only operate to the extent necessary to avoid curtailment "may not be operationally feasible, and would violate the Commission's policies on open access, standards of conduct, and non-discrimination."[119] Spire questions under what conditions it would be allowed to transport gas and how far in advance of Spire Missouri facing curtailment would Spire be allowed to transport gas, arguing that determining the exact set of conditions that the Commission would allow Spire to operate its pipeline is difficult to establish due to the many variables that dictate demand for an LDC (e.g., weather, time of day, etc.). Spire includes a few hypotheticals such as: (1) who determines when supply is low enough to require the use of the Spire STL Pipeline; (2) how is it determined that the supply will be needed; and (3) how far in advance of an impending curtailment may Spire Missouri move gas on the Spire STL Pipeline.

51. In its October 5, 2021 reply comments, the Missouri PSC requests that the Commission "not impose any conditions on a temporary certificate that would increase either the costs or the risk of service curtailments to Spire Missouri customers."[120] The Missouri PSC notes its exclusive authority to regulate and control Missouri LDCs, like Spire Missouri, and thus, the Commission has no authority to direct Spire Missouri to act in a certain manner or require any remedies that would appear to grant pre-approval of Spire Missouri's actions or cost recovery. Further, the Missouri PSC states that it can determine whether Spire Missouri imprudently incurred costs re-

[119] Spire Aug. 20, 2021 Answer to EDF at 12.

[120] Missouri PSC Oct. 5, 2021 Reply Comments at 2.

lated to the Spire STL Pipeline, and that its staff is currently conducting a prudency review, in which EDF has intervened.[121]

52. The Missouri PSC also raises concerns with the conditions proposed by EDF. With respect to EDF's proposed condition that the Commission limit the usage of the Spire STL Pipeline to those instances "strictly necessary to avoid service disruption to Spire Missouri firm customers,"[122] Missouri PSC argues that it remains unclear when or how Spire Missouri and its customers would be allowed to use capacity on the Spire STL Pipeline and such a condition might result in Spire Missouri purchasing gas at more expensive rates. The Missouri PSC also questions how EDF's proposed re-designed rate would compare to Spire Missouri's negotiated rate and asks that the Commission impose no condition that would cause Spire Missouri's customers to pay more than they would under its current rate agreement with Spire. Further, it wonders how the Commission could establish such a rate as there is no cost of service study for the Spire STL Pipeline.

53. EDF, in its October 20, 2021 answer, states that establishing a new rate for the temporary certificate would be consistent with the D.C. Circuit's finding that self-dealing occurred between Spire and Spire Missouri as there are no other competing shippers to create a reasonable cost benchmark; therefore it argues that the proposed rate structure would shift the related charges from a guaranteed monthly reservation charge to a usage charge based on the actual use of the Spire STL Pipeline. EDF prepared a comparison of the costs to Spire Missouri for

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[121] *Id.* at 5.

[122] *Id.* at 5 (citing EDF Aug. 5, 2021 Protest, Lander Affidavit at P 6).

the winter heating season using: (1) EDF's proposed rate structure; (2) Spire Missouri's scheduled quantities for last year; and (3) Spire Missouri using all available capacity on the MRT East Line before using its Spire STL Pipeline capacity.[123] EDF estimated this would save Spire Missouri approximately $600,000 ($9,900,000 total shipping cost using the redesigned rate and MRT East Line compared to $10,500,000 using the Spire STL Pipeline filed reservation rate and the Spire STL Pipeline).[124]

54. Spire states that the Temporary Certificate Application proceeding is not the appropriate place to alter the pipeline's rates. In any event, Spire asserts that the negotiated rate between Spire and Spire Missouri is approximately 33% less than the recourse rate for the Spire STL Pipeline and that the actual overall return on equity is approximately 8%.[125] Spire argues that EDF's proposed rate condition violates section 5 of the NGA because, it alleges, that EDF must file a complaint and show that the currently effective rates, including the negotiated rate with Spire Missouri, are unjust and unreasonable and propose an alternative just and reasonable rate.[126] Spire states that EDF's proposal is akin to the Commission's ratemaking policy before Order No 636, at which point the Commission employed Straight Fixed-Variable (SFV) ratemaking.[127] Spire asserts that EDF's proposal predates the Commission's current policy of using SFV rates and should not be used. Spire also states it would be amenable

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[123] EDF Oct. 20, 2021 Answer to Missouri PSC at 11–13.

[124] EDF notes that its calculation did not factor in the possibility of a lower negotiated rate on MRT.

[125] *Id.* at 15.

[126] Spire Aug. 20, 2021 Answer to EDF at 14.

[127] Spire Oct. 25, 2021 Answer to EDF at 3.

to filing its 3-year cost of service study based on the original date of operation.[128]

55. Spire Missouri also filed comments in response to EDF, stating that the "fundamental assumption—that Spire Missouri could toggle its gas supplies between MRT/upstream pipelines and the Spire SLT Pipeline, and swing back and forth reliably during the winter to keep Spire STL Pipeline deliveries to an arbitrary maximum volume—is operationally irrational and infeasible. . . ."[129] Spire Missouri also details how the total cost of delivered gas is higher on the MRT East Line when compared with the Spire STL Pipeline.[130]

Commission Determination

56. As the Commission explained in Order No. 636, when it required the unbundling of sales and transportation services, the Commission's role under the NGA is to:

> protect the consumers of natural gas from the exercise of monopoly power by pipelines . . . in order to ensure consumers access to an adequate supply of gas at a reasonable price. . . . This mission must be undertaken by balancing the interests of the investors in the pipeline, to be compensated for the risks they have assumed, and the interests of consumers . . . and in the light of current economic, regulatory, and market realities.[131]

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[128] *Id.* at 2–3.

[129] Spire Missouri Oct. 29, 2021 Answer to EDF at 3.

[130] *Id.* at 4.

[131] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No.

57. When considering whether to fashion a new rate or rate design for Spire under a temporary certificate, we evaluated these factors, in particular consumers access to adequate supply of gas at reasonable prices, and find that the continuation of Spire's currently effective rates is in the public interest.

58. EDF asks that the Commission establish a rate using the Commission's *Seaboard* rate design from the 1950's when natural gas sales and transportation were bundled.[132] Under this rate design, 50% of return and income taxes would be moved from the reservation to the usage charge. Although such a rate design could potentially limit the profits Spire receives from reservation charges and reduce Spire's earnings when the pipeline is not used, it would be inconsistent with Order No. 636, where the Commission elected to use straight fixed variable (SFV) ratemaking[133] and noted that "any party (or parties) advocating something other than SFV carries a heavy burden of persuasion."[134] EDF's proposed *Seaboard* rate design is thus not consistent with our policy.

636, FERC Stats. & Regs. ¶ 30,939, at 13,269 (cross- referenced at 59 FERC ¶ 61,030), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (cross-referenced at 60 FERC ¶ 61,102), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), aff'd in part and remanded in part sub nom. *United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[132] Under the *Seaboard* design, 50% of fixed costs are classified to the demand or reservation charge and 50% are classified to the commodity or usage charge, and 100% of the variable costs are classified to the commodity or usage charge. Commission Jun. 1999 Cost-of-Service Rates Manual at 31.

[133] Under the SFV rate design all fixed costs are classified to the demand or reservation charge and all variable costs are classified to the commodity or usage charge. *Id.* at 32.

[134] Order No. 636, 59 FERC ¶ 61,030 at P 48.

Nor can we require the exact operating scenario EDF proposes—i.e., requiring Spire Missouri to contract for additional capacity on MRT and use all available capacity on MRT before using its Spire STL Pipeline capacity[135]—because the Commission cannot mandate the conditions under which Spire Missouri uses its capacity on the Spire STL Pipeline. Accordingly, the intent of EDF's proposal to use the *Seaboard* rate design to limit profits to Spire cannot be accomplished and we will not alter Spire's rate design.

59. Next, EDF asks that the Commission require Spire to only operate the Spire STL Pipeline when Spire Missouri cannot obtain adequate capacity elsewhere. First, we note that the Commission does not have jurisdiction over Spire Missouri and cannot mandate how Spire Missouri meets its customers' needs. Further, as Spire notes, such a restriction would be difficult to administer as it would require the Commission to independently forecast demand in the St. Louis market and available natural gas supplies to St. Louis to determine when a curtailment may occur. We believe that Spire Missouri is the appropriate entity to make such determinations because it is best positioned to forecast its demand and make arrangements to ensure its customers have access to natural gas.[136]

60. With respect to NRDC and Sierra Club's request that the Commission levy economic penalties on Spire, we find that such an action would not be appropriate under these circumstances, particularly as no entity alleges that

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[135] *See* supra P 53.

[136] *See* Missouri PSC Oct. 5, 2021 Reply Comments at 3 (noting that the Commission lacks authority to direct the business decisions of an LDC—Spire Missouri).

Spire violated the NGA, the Commission's regulations, or the terms of its certificate when it was effective. We are mindful of the D.C. Circuit's concerns regarding the potential that Spire engaged in self-dealing and the Commission's failure to seriously examine those concerns.[137] Nevertheless, these matters have been remanded to the Commission, and are best addressed on remand.

D. Term of Temporary Certificate

61. Spire requests that the temporary certificate be for a limited duration of time, until the Commission can act on remand.[138] Spire also states that the temporary certificate will "ensure [its] customers can continue receiving service through the upcoming winter."[139] EDF, in its initial August 5 comments, argues that the Commission should include a clear end date for the temporary certificate to not extend beyond the 2021–2022 winter heating season, and require Spire to file information with the Commission regarding how long it will take to remedy the emergency conditions that Spire asserts in its application.[140] EDF, in its October 20 comments replying to the Missouri PSC, states that if the Commission issues a temporary certificate it should "be put in place for the period of time that is the greater of a) December 1, 2021 through March 31, 2022 or b) from December 1, 2021, until the Commission determines the final disposition of the remand proceeding or a potential new certificate application."[141] The Missouri PSC filed a response to the Tempo-

[137] *Env't Def. Fund v. FERC*, 2 F.4th at 975.

[138] Spire Aug. 20, 2021 Answer to EDF at 11.

[139] Spire Application at 1.

[140] EDF Aug. 5, 2021 Protest at 28.

[141] EDF Oct. 5, 2021 Answer at 6.

rary Certificate Application requesting that the Commission grant Spire's request until the Commission acts on remand or Spire Missouri implements a contingency plan to serve its customers without the Spire STL Pipeline.[142]

Commission Determination

62. To ensure that there are no disruptions to supply during the pendency of the remand proceeding, and as requested by Spire in its application and consistent with comments from the Missouri PSC and EDF, this temporary certificate will remain in effect until the Commission issues its order on remand.[143]

E. Eminent Domain Authority

63. The Landowner Group, Niskanen Center, and EDF each assert that Spire still lacks title to certain tracts of land, and after the D.C. Circuit's mandate, Spire's ability to rely on eminent domain to gain title to these properties will cease.[144]

64. The Landowner Group's protest focuses on the eminent domain proceedings that remain ongoing. In particular, the Landowner Group details how Spire gained possession through preliminary injunctions while the eminent domain proceedings wind their way through court

[142] Missouri PSC July 30, 2021 Comments at 4.

[143] The Commission may issue a temporary certificate "pending the determination of an application or a certificate." 15 U.S.C. § 717f(c)(1)(B). *See, e.g.*, *Texas-Ohio Pipeline, Inc.*, 58 FERC ¶ 61,025 (temporary certificate will expire upon the issuance of a final Commission order).

[144] Spire in its recent compliance filings states it cannot complete some of the restoration due to a lack of access on some properties and it would need to exercise eminent domain to regain the temporary access roads used during construction. *See e.g.*, Spire Nov. 1, 2021 Corrective Action Status Report.

system[145] and assert that Spire has yet to obtain legal title to some easements necessary to operate the project because the amount of just compensation has not been set by the court. Because of this, the Landowner Group argues that once the certificate is vacated, Spire will not be able to acquire these properties through eminent domain and must negotiate rights for these properties.[146] The Landowner Group claims that section 7(h) of the NGA does not confer eminent domain authority upon temporary certificate holders and the Commission should condition the temporary certificate accordingly. It also alleges that Spire continues to fail to properly restore the impacted properties and requests that Spire not receive a temporary certificate until it has resolved all previous restoration obligations.

65. The Niskanen Center notes that Spire's characterization of the impacts on landowners and surrounding communities is inaccurate and questions why Spire and Spire Missouri did not act sooner and with expediency to address the impacts of vacatur.

66. CLC and seven landowners, Greg Stout, Sheila Seagraves, Larry Meyer, Ray Sinclair, Pat Parker, Kenneth Davis, and Jay Gettings, filed similar letters documenting impacts to their property from the Spire STL Pipeline. The filings ask that the Commission make sure Spire takes all necessary actions to honor the restoration requirements previously mandated by the Commission.

67. Tim Brown, an impacted landowner, filed a comment requesting that the Commission reject Spire's temporary certificate application. He further alleges that his

[145] Landowner Group Aug. 5, 2021 Protest at 7.

[146] *Id.* at 9.

property value has decreased and the proximity of his home to the pipeline is unsafe.

68. Phil and Zena Brown, impacted landowners, filed comments and a protest of Spire's temporary certificate application asserting that Spire filed an injunction on June 15, 2021, to obtain access to remedy incomplete restoration work and that Spire did not communicate with the landowners prior to seeking the injunction. They further state that Spire offered the Browns an option to perform "self-restoration," but that the amount offered was not enough to remedy the issues.

69. Spire states that it engaged landowners in negotiations prior to initiating eminent domain proceedings[147] and has continued to try to engage landowners to negotiate easements. Further, it notes that the attorneys for the landowners have requested delays in determining just compensation.[148] As for restoration, Spire states that it files status reports tracking and addressing restoration and revegetation issues, which the Commission reviews. Further, Spire avers that it will work with all landowners to address any issues not identified in the Commission's March 18, 2021 Order.[149] Last, Spire contends that eminent domain should be granted to temporary certificate holders,[150] noting that court and Commission precedent precludes the Commission from determining whether eminent domain authority extends to a certificate.[151]

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[147] Spire Aug. 26, 2021 Answer to Landowners at 5.

[148] *Id.* at 6.

[149] *Id.* at 9.

[150] *Id.* at 10.

[151] *Id.* at 11 (citing *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018) (citing *Midcoast Interstate Transmis-*

Commission Determination

70. We reiterate our findings from the November 18, 2021 Rehearing Order regarding eminent domain authority and temporary certificates. As stated in that order, while courts have repeatedly held that Congress gave the Commission no authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain in a certificate issued pursuant to the procedures laid out in section 7(e), they have not had occasion to address whether the same holds in the case of a temporary certificate issued without those procedures. Accordingly, we believe that issue, which goes to the scope of section 7(h)—a provision that gives courts a particular implementing role—is better resolved by the courts than the Commission.[152]

71. This authorization does not permit Spire to engage in any construction or to provide any new service. As a condition of accepting this certificate, Spire must continue all restoration activities along the project right-of-way.[153]

F. Other Issues

72. Consistent with the November 18 Rehearing Order, Spire may provide transportation services under existing and new contracts with existing and new customers, so long as those services are consistent with the terms,

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sion, Inc. v. FERC, 198 F.3d 960, 973 (D.C. Cir. 2000)); *Limiting Authorizations to Proceed with Construction Activities Pending Reh'g*, Order No. 871-B, 175 FERC ¶ 61,098, at P 45 (2021).

[152] Nov. 18 Rehearing Order, 177 FERC ¶ 61,114 at PP 9–10.

[153] Spire has stated that it would not construct any new facilities and would continue to perform restoration, as required by the Commission, under any temporary certificate it received. Spire Aug. 26, 2021 Answer to Landowners at 11, 12.

conditions, and authorizations previously issued by the Commission, including Spire's approved tariff.[154]

73. Under section 380.4(27) of the Commission's regulations,[155] our issuance of this temporary certificate is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

The Commission orders:

(A) A temporary certificate of public convenience and necessity is issued to Spire STL Pipeline LLC (Spire) to continue to operate the facilities proposed in its application, as amended by Spire and the Commission, in Docket Nos. CP17-40-000 and CP17-40-001 and constructed that are currently in service, under the earlier terms, conditions, and authorizations, including its tariff. This temporary certificate does not authorize the construction of any additional facilities. As a condition of accepting this certificate, Spire must continue restoration activities along the project right-of-way.

(B) Spire must indicate its acceptance of this certificate, in writing, within three business days of the date of this order. Upon acceptance of this order, the authorization granted by the Commission's September 14, 2021 Temporary Certificate Order will be terminated.

(C) This certificate will be effective until the Commission acts on remand on Spire's pending certificate application.

(D) The motions for late intervention filed by St. Charles County, Missouri and International Paper Company and WestRock Company are granted.

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[154] Nov. 18 Rehearing Order, 177 FERC ¶ 61, 114 at P 7.

[155] 18 C.F.R. § 380.4(27) (2020).

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached. Commissioner Phillips is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC Docket No. CP17-40-007

(Issued December 3, 2021)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in today's order issuing a temporary certificate to Spire STL Pipeline LLC (Spire) to allow it to continue operating while the Commission considers what action to take on remand.[1] Having recently discovered the Fifth Circuit case, *Hunt Oil Company v. FPC*,[2] I now conclude that the case law interpreting the scope of the Commission's authority is not as one-sided as I had earlier thought it to be.[3] Since the Commission's action here constitutes at least a plausible exercise of our authority, is not explicitly prohibited, and Spire's shipper Spire Missouri Inc. (Spire Missouri) is, from the record now in hand, evidently in dire need of service, I support the issuance of a temporary certificate.

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[1] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (December 2021 Order).

[2] 334 F.2d 474, 480 (5th Cir. 1964) ("There is no indication that, at the time the temporary certificates were issued, the emergency no longer existed. In fact, at that time, the emergency had become bilateral. Consumers were then dependent on the supplies of gas provided pursuant to the original certificates. Under the circumstances, the Commission was authorized by [section] 7(c) of the Act to issue temporary authorization 'in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of (the) application for a certificate.'").

[3] *See Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at PP 2—4) (September 2021 Order).

2. While I concur with the issuance of a certificate under section 7(c), I dissent insofar as the Commission has again[4] refused to address whether section 7(h) of the Natural Gas Act (NGA) confers eminent domain authority upon temporary certificate holders.[5] It is a complicated question. The Commission should announce its view on the matter in the first instance.

3. While pleased that the Commission has authorized Spire to continue service, I remain troubled by how this entire proceeding has been handled. Although undoubtedly challenging, the Commission's prosecution of this matter has suffered a number of self-inflicted wounds. The first of which was the Chairman's decision not to seek rehearing of the court's vacatur of Spire's certificate, a decision taken in the face of a majority of the Commission deciding otherwise.[6]

4. The unforced errors continued with the Chairman's unprecedented decision to notice Spire's request for a temporary emergency certificate for a 60-day comment period ending October 5, 2021,[7] despite Spire noting the court's mandate could be issued as soon as August 13, 2021.[8] It is not typical Commission practice to establish

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[4] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021) (Danly, Comm'r, dissenting at PP 7–17).

[5] December 2021 Order, 177 FERC ¶ 61,147 at P 70.

[6] *See* September 2021 Order, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at P 9 & n.17).

[7] *See* September 2021 Order, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at P 7 n.11).

[8] Spire STL Pipeline LLC July 26, 2021 Application, Docket No. CP17-40-007, at 3 n.9.

such a long comment period; they are almost invariably set at 21 days.[9]

5. The Chairman then allowed unnecessary urgency to build by directing FERC's lawyers to neither seek delay of the issuance of the court's mandate nor to support Spire's request to do so. Though true that the "legal dream team"[10] failed to persuade the court to reconsider its ruling, nothing could have been lost by the Commission making such a request. And knowing that nothing could have been lost by asking for a stay or by supporting Spire's request for one, I can only imagine how the silence of the Commission (the agency charged with ensuring the continuity of service) was perceived.

6. The Commission then further complicated matters by issuing a temporary emergency certificate *sua sponte* to avoid a potential cessation of service to Spire Missouri and to buy time to "complete its assessment of the validity of [Spire's] claims and determine an appropriate course of

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[9] Standard practice is to notice a certificate application for a 21-day comment and intervention period. *See, e.g.*, Commission Staff September 7, 2021 Notice of Applications and Establishing Intervention Deadline in ANR Pipeline Company Docket No. CP21-488-000 (21-day comment and intervention deadline); Commission Staff September 1, 2021 Notice of Amendment to Application and Establishing Intervention Deadline in Roaring Fork Interstate Gas Transmission, LLC Docket No. CP21-462-000 (21-day comment and intervention deadline); Commission Staff August 26, 2021 Notice of Application Establishing Intervention Deadline in Diversified Midstream, LLC Docket No. CP21-484-000 (21-day comment and intervention deadline); Commission Staff August 26, 2021 Notice of Petition for Declaratory Order in Northern States Power Company Docket No. CP21-486-000 (21-day comment and intervention deadline); Commission Staff August 2, 2021 Notice of Applications and Establishing Intervention Deadline in Rover Pipeline, LLC Docket No. CP21-474-000 (21-day comment and intervention deadline).

[10] Tom Tiernan, *Glick disputes Danly, defends tweak to FERC litigation policy*, THE ENERGY DAILY, Oct. 26, 2021.

action."[11] Not only did this order allow the Commission to (temporarily) rescue the people of St. Louis from a trap that the Commission itself laid down, but it was logically unjustifiable. When reduced to its essence, the order amounted to a finding that there would be an emergency while at the same time explicitly reserving to the Commission the right to determine at a later date whether, in fact, there would be an emergency. Worst of all, the Commission—who issued this order *sua sponte* and could establish its contents according to its whim—set the temporary emergency certificate to expire in the middle of winter, on December 13, 2021, ginning up the artificial urgency leading to today's issuance.

7. The most recent failure came again today with the Commission's second refusal to interpret whether temporary emergency certificates holders are entitled to exercise eminent domain authority under NGA section 7(h). As I stated before, "[t]o require the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority upon temporary certificate holders is irresponsible and unnecessary."[12]

8. The impacts of this mismanagement should not be minimized. First responders and the public in St. Louis

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[11] September 2021 Order, 176 FERC ¶ 61,160 at P 8.

[12] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021) (Danly, Comm'r, dissenting at 8). *See also* Carolyn Elefant on behalf of landowners along the Spire STL Pipeline November 24, 2021, Docket No. CP17-40-004, Comments at 2 ("If these issues are not resolved, the landowners will be forced to invest even more time and money to seek appeal of court decisions such as the one attached . . . Although courts have played fast and easy with landowners' property rights under the Natural Gas Act, there is no precedent that would allow a company to take rights in perpetuity under a temporary certificated intended to operate as a short-term, backstop measure to avoid disruption that would otherwise flow from the invalidated authorization.").

expended significant resources to prepare for a potential state of emergency (loss of service from Spire starting December 13, 2021), despite there being "many more pressing issues that require[d] [their] time, attention, and money."[13] Likewise, Spire Missouri prepared for a potential emergency by "investigating and acquiring alternative sources of supply."[14] Spire Missouri stated it may "spend $5 million or more in preparation for the upcoming winter heating season without STL Pipeline service. . . . Spire Missouri will likely need to decide whether to incur these incremental costs in October, which would be unnecessary in the absence of uncertainty regarding Spire STL service . . . ."[15] It is now December. In addition, it is likely that commercial and industrial customers prudently hedged their positions by acquiring alternative sources of natural gas to ensure that they would be able to meet their contractual requirements.

9. Some may argue that these expenditures were unnecessary as it was unlikely that the Commission would allow St. Louis to lose natural gas service for the winter. That may be true. However, when one has a duty to serve the public or an obligation to fulfill the terms of a contract, one cannot simply rely on likelihoods. This is especially true here, given the extraordinarily unusual treatment of Spire's request,[16] the Commission's surprise issuances,[17]

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[13] Missouri Police Chief Association Oct. 28, 2021, Docket No. CP17-40-000, Comments at 1.

[14] Spire Missouri Oct. 5, 2021 Comments at 7.

[15] *Id.* at 7 n.15.

[16] *See supra* note 10.

[17] *See, e.g.*, ANR Pipeline Company et al., Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket Nos. CP20-484-000 and CP20-485-000 (July 7, 2021); Tennessee Gas Pipeline Company, L.L.C., et al., Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket Nos.

and the fact that neither the Commission nor any commissioner (to my knowledge) committed to act before the December 13 expiration until November 18, 2021.[18]

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly
Commissioner

CP20-50-000 and CP20-51-000 (June 30, 2021); North Baja Pipeline, LLC, Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-27-000 (May 27, 2021); Iroquois Gas Transmission System, L.P., Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-48-000 (May 27, 2021); Tennessee Gas Pipeline Company, L.L.C., Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-493-000 (May 27, 2021); Columbia Gulf Transmission, LLC, Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-527-000 (May 27, 2021); Adelphia Gateway, LLC, Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP21-14-000 (May 27, 2021); *see also N. Nat. Gas Co.*, 175 FERC ¶ 61,189 (2021) (Danly, Comm'r, concurring in part and dissenting in part at P 1) (discussing the "new 'standard'—referred to (by some) as the 'eyeball' test—for determining the significance of a project's emissions" set forth in *Northern Natural Gas Company*, 174 FERC ¶ 61,189 (2021)); *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (reopening the Atlantic Bridge Project certificate order).

[18] *See* Miranda Wilson, *FERC meeting: Pipelines, blackouts and 'fearmongering,'* ENERGYWIRE, Nov. 19, 2021 ("Although FERC did not take action yesterday to extend the company's temporary certificate, Glick said it was his 'intent' for the commission to act on Spire's application before Dec. 13.").

178 FERC ¶ 62,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC Docket No. CP17-40-012

NOTICE OF DENIAL OF REHEARINGS BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(February 3, 2022)

Rehearing has been timely requested of the Commission's order issued on December 3, 2021, in this proceeding. Spire STL Pipeline LLC, 177 FERC ¶ 61,147 (2021). In the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing (and any timely request for rehearing filed subsequently)[1] may be deemed denied. 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713 (2021); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 15 U.S.C. § 717r(a), the rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 15 U.S.C. § 717r(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing request will be entertained.

[1] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by Cal. Indep. Sys. Operator & Cal. Power Exch.*, 95 FERC ¶ 61,173 (2001).

Kimberly D. Bose,
Secretary.

178 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman; James P. Danly, Allison Clements, Mark C. Christie, and Willie L. Phillips.

Spire STL Pipeline LLC Docket No. CP17-40-012

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND DENYING STAY

(Issued February 17, 2022)

1. On December 3, 2021, the Commission issued a temporary certificate of public convenience and necessity under section 7(c)(1)(B) of the Natural Gas Act (NGA),[1] which authorized Spire STL Pipeline LLC (Spire) to continue operating the Spire STL Pipeline.[2]

2. On December 17, 2021, Scott Turman; ST Turman Contracting, LLC; Jacob Gettings; Kenny Davis; 4850 Longhorn; Sinclair Farm LLC; and the Niskanen Center (together, Niskanen Center) jointly filed a timely request for rehearing of the Temporary Certificate Order.[3] On January 3, 2022, Environmental Defense Fund (EDF) filed a timely request for rehearing.[4]

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[1] 15 U.S.C. § 717f(c)(1)(B).

[2] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (Temporary Certificate Order).

[3] Niskanen Center Dec. 17, 2021 Request for Rehearing (Niskanen Center Rehearing Request).

[4] Environmental Defense Fund Jan. 3, 2022 Request for Rehearing (EDF Rehearing Request).

3. Pursuant to *Allegheny Defense Project v. FERC*,[5] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the NGA,[6] we are modifying the discussion in the Temporary Certificate Order and continue to reach the same result in this proceeding, as discussed below.[7]

I. Background

4. On June 22, 2021, the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating and remanding the Commission's orders authorizing Spire to construct and operate[8] the 65-mile-long Spire STL Pipeline, running from Scott County, Illinois, to St. Louis County, Missouri.[9]

5. On July 26, 2021, before the court issued its mandate, Spire filed an application for a temporary certificate of public convenience and necessity under NGA section 7(c)(1)(B).[10] Spire explained that if the Spire STL Pipeline

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[5] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[6] 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[7] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Temporary Certificate Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[8] On November 14, 2019, the Spire STL Pipeline entered service during pendency of the appeal.

[9] *See Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order), *order on reh'g*, 169 FERC ¶ 61,134 (2019), *vacated sub nom. Envt'l Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir 2021).

[10] 15 U.S.C. § 717f(c)(1)(B).

is removed from service, Spire Missouri Inc. (Spire Missouri), a local distribution company and shipper on the pipeline, will be unable to obtain adequate supplies to satisfy peak demand in the St. Louis region during the 2021-2022 winter heating season.

6. On September 14, 2021, to ensure continuity of service for a limited period while the Commission considered appropriate next steps, the Commission acted *sua sponte* to issue Spire a temporary certificate to under NGA section 7(c)(1)(B)[11] allowing Spire to continue operation of the Spire STL Pipeline for 90 days.[12]

7. On December 3, 2021, acting on Spire's July 2021 application, the Commission issued Spire a temporary certificate of public convenience and necessity.[13] The temporary certificate did not authorize the construction of any new facilities and will remain effective until the Commission acts on remand on Spire's pending certificate application.[14]

II. Discussion

A. Eminent Domain Authority

8. The Niskanen Center argues that the Commission erred by failing to prohibit Spire from exercising eminent domain authority under the temporary certificate.[15] The

[11] *Id.* ("the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate ….").

[12] *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (September 2021 Order); *order on reh'g*, 177 FERC ¶ 61,114 (2021) (November 2021 Order).

[13] Temporary Certificate Order, 177 FERC ¶ 61,147.

[14] *Id.* at ordering paras. A, C.

[15] Niskanen Center Rehearing Request at 1, 8-9.

Niskanen Center notes that NGA section 7(h)[16] conveys the power of eminent domain to the holder of "a certificate of public convenience and necessity,"[17] but argues that section 7(h) refers only to a certificate issued under NGA section 7(e), and therefore the NGA does not confer eminent domain to the holder of a temporary certificate issued under section 7(c)(1)(B).[18] The Niskanen Center further contends that, because section 7(h) does not refer specifically to holders of "temporary certificates," the provision does not satisfy the principle that the Commission's grant of eminent domain must be expressly authorized and narrowly construed.[19] The Niskanen Center argues that it is incumbent on the Commission to take a position on whether eminent domain authority extends to temporary certificate holders[20] and that by refusing to opine on this issue the Commission is effectively endorsing Spire's use of eminent domain authority under the temporary certificate.[21]

9. In 1947, Congress added section 7(h) to the NGA, allowing "any holder of a certificate of public convenience and necessity" to exercise a federal right of eminent domain to acquire land or other property necessary to construct, operate, and maintain a pipeline and related equipment, if the certificate-holder cannot acquire the land or

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[16] 15 U.S.C. § 717f(h).

[17] Niskanen Center Rehearing Request at 8.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 9 (quoting November 2021 Order, 177 FERC ¶ 61,114 at P 8 (Danly, Comm'r, dissenting) ("To require the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority upon temporary certificate holders is irresponsible and unnecessary.")).

other property by contract.[22] Courts have repeatedly held that Congress did not give the Commission authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain with respect to a certificate issued pursuant to the procedures laid out in section 7(e).[23] Courts have provided less guidance, however, on whether the same holds true in the case of a temporary certificate.

10. The Commission continues to find that the applicability of NGA section 7(h) to temporary certificates is an

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[22] Section 7(h) states that:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h).

[23] *E.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion to deny a certificate holder the power of eminent domain." (internal citation omitted)); *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that NGA section 7(h) "contains no condition precedent" to the right of eminent domain, other than issuance of the certificate, when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) ("Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder .... Thus, FERC does not have discretion to withhold eminent domain once it grants a Certificate." (internal citation omitted)).

issue better resolved by the courts.[24] We disagree with the Niskanen Center's contention that by taking this approach, the Commission is "affirmatively endorsing Spire's attempts to complete condemnation."[25] To the contrary, by virtue of the Commission leaving this question to resolution by the judiciary, the Commission is respecting the prerogative of federal courts, which have jurisdiction over eminent domain proceedings under the NGA, to determine how such questions should be resolved.[26]

11. We note that two federal district courts recently held that temporary certificates confer eminent domain authority. In *Spire STL Pipeline LLC v. Jefferson*, the District Court for the Central District of Illinois held that "the only reasonable construction of § 717f is that temporary certificates issued under subsection (c) are 'certificates of public convenience and necessity' under subsection [7](h)" and thus eminent domain authority attaches to a holder of such a certificate.[27] Similarly, in *Spire STL Pipeline LLC v. 3.31 Acres of Land*, the District Court for

[24] *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at P 70; November 2021 Order, 177 FERC ¶ 61,114 at P 10.

[25] Niskanen Center Rehearing Request at 9.

[26] Temporary Certificate Order, 177 FERC ¶ 61,147 at P 70 (noting the particular implementing role conferred on the courts under NGA section 7(h)).

[27] No. 18-cv-03204, slip op. at *5-7 (C.D. Ill. Oct. 28, 2021) (denying defendant-landowners' Motion to Dissolve Injunction and Dismiss Condemnation Action for Lack of Subject Matter Jurisdiction and upholding Spire's authority to continue operating the Spire STL Pipeline through defendant-landowners' properties based on and subject to the terms of the September 2021 Order).

the Eastern District of Missouri concluded that "[a] temporary certificate confers eminent domain authority."[28]

12. The Niskanen Center also contends that, under Commission Order Nos. 871-B and 871-C, the temporary certificate is presumptively stayed pending the Commission's response to the requests for rehearing.[29] The Center asserts that, because the Commission can stay a certificate under Order Nos. 871-B and 871-C, the Commission necessarily can take the targeted step of staying only the eminent domain authority related to a temporary certificate.[30]

13. In Order Nos. 871-B and 871-C, the Commission adopted a policy of presumptively staying a certificate order during the 30-day rehearing period and pending Commission resolution of requests for rehearing filed by landowners, thereby addressing concerns regarding a certificate-holder's exercise of eminent domain prior to the conclusion of Commission proceedings.[31] Nevertheless, that

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[28] No. 4:18 CV 1327 DDN, 2021 WL 5492897, at *3 (E.D. Mo. Nov. 23, 2021) (denying defendant-landowners' motion to dismiss the condemnation action and dissolve the injunction and upholding Spire's authority under the September 2021 Order).

[29] Niskanen Center Rehearing Request at 10-12. *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), *order on reh'g*, Order No. 871-B, 86, Fed. Reg. 26,150 (May 13, 2021), 175 FERC ¶ 61,098 (2021), *order on reh'g*, Order No. 871-C, 176 FERC ¶ 61,062 (2021).

[30] Niskanen Center Rehearing Request at 11 ("Intervenors are not requesting that the Temporary Certificate be stayed in its entirety, but only to the extent it grants eminent domain authority. Having the power to stay the entire certificate, the Commission surely has the authority to stay only that provision.").

[31] Order No. 871-B, 175 FERC ¶ 61,098 at PP 45-46 (explaining that courts have held that the Commission lacks authority to restrict the exercise of the right of eminent domain, but the Commission un-

stay is "only presumptive" and the Commission made clear that "the question of whether to impose a stay will be decided on the circumstances presented in each particular certificate proceeding."[32] Here, the Commission found that an "emergency" exists, at least temporarily, because "without a temporary certificate, Spire's customer, Spire Missouri, will experience a loss of gas supply potentially impacting hundreds of thousands of homes and businesses during the winter heating season."[33] It would have been inconsistent with that finding of a temporary emergency to stay the certificate, thereby perpetuating the emergency circumstances that the certificate was issued to remedy. Under these circumstances, we find that it would be inappropriate to have temporarily stayed the certificate pending rehearing.

14. We also reject the Niskanen Center's contention that "[h]aving the power to stay the entire certificate, the Commission surely has the authority to stay only [the eminent domain] provision."[34] As discussed above,[35] the Commission lacks authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain; we view that restriction as encompassing a targeted stay. Thus, the Commission would necessarily have to stay the effectiveness of the entire temporary certificate in order to restrict the temporary certificate holder's eminent domain authority. Since the Commission has found that an

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questionably may determine the effective date of and stay its own orders, which in practice withholds the eminent domain authority conveyed through a certificate).

[32] Order No. 871-B, 175 FERC ¶ 61,098 at P 51.

[33] Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47.

[34] Niskanen Center Rehearing Request at 11.

[35] *See supra* paragraph 9.

emergency exists warranting the issuance of the temporary certificate,[36] we decline to stay the temporary certificate in its entirety, as would be required to effect a stay of Spire's eminent domain authority.

15. Moreover, the policy concern cited by the Niskanen Center that "it is fundamentally unfair for a pipeline developer to use a section 7 certificate to begin the exercise of eminent domain before the Commission has completed its review of the underlying certificate order"[37] does not apply in this case, where construction of the pipeline is complete and the purpose of the temporary certificate is merely to allow a developer to continue operating and maintaining the pipeline.[38]

B. Allegations of Self-Dealing

16. EDF argues that the Commission was arbitrary and capricious in declining to impose conditions on the temporary certificate to address the concerns of self-dealing between Spire and Spire Missouri raised by the D.C. Circuit in *Environmental Defense Fund v. FERC*.[39] It contends that despite the Commission's recognition in the Temporary Certificate Order of the D.C. Circuit's holding

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[36] *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47.

[37] Order No. 871-B, 175 FERC ¶ 61,098 at P 47.

[38] *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:18 CV 1327 DDN, 2021 WL 5492897, at *3 (E.D. Mo. Nov. 23, 2021) (similarly explaining that because Spire has already completed construction of the pipeline and is not permitted by the temporary certificate to engage in any new construction, Order No. 871-B does not presumptively stay plaintiff's eminent domain authority); *Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, slip op. at *8 (C.D. Ill. Oct. 28, 2021) (stating that the policy concerns underlying Order No. 871-B do not apply where construction of the pipeline has already been completed and the purpose of the temporary certificate is to allow a developer to continue operating and maintaining the pipeline).

[39] EDF Rehearing Request at 2.

that the record contained evidence of self-dealing and representation that it is addressing that issue on remand,[40] the Commission did not explain a basis upon on which it could ignore record evidence of self-dealing in issuing a temporary certificate.[41] EDF argues that the Commission has an obligation to consider the anti-competitive impacts of all section 7 authorizations, regardless whether they are temporary or permanent.[42]

17. As the Commission explained, it issued the Temporary Certificate Order upon a finding that an emergency existed which, absent the issuance of a temporary certificate, would potentially subject hundreds of thousands of homes and businesses to gas shortages during the winter heating season.[43] We acknowledge the D.C. Circuit's concern that the Commission did not adequately address potential self-dealing allegations in the Certificate Order; however, this issue has been remanded to the Commission and will be addressed when the Commission acts on remand on Spire's pending certificate application.

18. In vacating the Certificate Order, the D.C. Circuit questioned whether a single precedent agreement between Spire and Spire Missouri, its corporate affiliate, was sufficient to demonstrate the market need and benefits required for the Commission to issue a certificate of

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[40] Temporary Certificate Order, 177 FERC ¶ 61,147 at PP 60 ("We are mindful of the D.C. Circuit's concerns regarding the potential that Spire engaged in self-dealing and the Commission's failure to seriously examine those concerns. Nevertheless, these matters have been remanded to the Commission, and are best addressed on remand.").

[41] EDF Rehearing Request at 5.

[42] *Id.* at 3, 5 (citing *Pub. Utils. Comm'n of State of Cal. v. FERC*, 900 F.2d 269, 297 (D.C. Cir. 1990)).

[43] Temporary Certificate Order, 177 FERC ¶ 61,147 at P 47.

public convenience and necessity.[44] It found that evidence of potential self-dealing raised by EDF and other parties was "more than enough to require the Commission to 'look behind' the precedent agreement in determining whether there was market need."[45]

19. The Temporary Certificate Order contains extensive discussion of the harm that might befall Spire Missouri's customers if a temporary certificate were not issued, and ultimately culminated in the Commission determining that an emergency exists and that the temporary certificate is needed to stave off the potential of gas shortages during the winter.[46] That finding is all that is needed to support the Commission's action here where the pipeline was previously constructed and is currently in operation. As previously stated, while allegations of self-dealing must be taken seriously and merit additional consideration by the Commission on remand of the Certificate Order, that issue is not relevant to the question addressed by the Commission in this proceeding: whether to issue a temporary certificate in the heart of winter where the health and welfare of hundreds of thousands of customers is at stake.

The Commission orders:

(A) In response to the requests for rehearing filed by the Niskanen Center and EDF, the Temporary Certificate Order is hereby modified and the result sustained, as discussed in the body of this order.

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[44] 2 F.4th at 973.

[45] *Id.* at 975.

[46] *See* Temporary Certificate Order, 177 FERC ¶ 61,147 at PP 27-47.

(B) The request for stay filed by the Niskanen Center is denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,

Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC Docket No. CP17-40-012

(Issued February 17, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in the Commission's denial of the requested stay of Spire STL Pipeline LLC's (Spire) temporary certificate. The Commission properly recognizes that it "would be inappropriate to have temporarily stayed the certificate pending rehearing"[47] and that "the Commission lacks authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain."[48] I also concur in the Commission's decision to wait until the issuance of an order on remand to address the questions raised in *Environmental Defense Fund v. FERC*,[49] including the questions concerning self-dealing.[50]

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[47] *Spire STL Pipeline LLC*, 178 FERC ¶ 61,109, at P 13 (2022). I remain convinced that the Commission exceeded its authority in establishing the policy announced in Order Nos. 871-B and 871-C to presumptively stay Natural Gas Act (NGA) section 7(c) certificate orders. *See Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 176 FERC ¶ 61,062 (2021) (Danly, Comm'r, dissenting at PP 2-6) (Order No. 871-C); *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 175 FERC ¶ 61,098 (2021) (Danly, Comm'r, dissenting at PP 6-12) (Order No. 871-B). Section 19(c) sets forth the rule—that "[t]he filing of an application for rehearing under subsection (a) shall not . . . operate as a stay of the Commission's order"—and the exception to that rule—"unless *specifically* ordered by the Commission." 15 U.S.C. § 717r(c) (emphasis added).

[48] *Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 at P 14.

[49] 2 F.4th 953 (D.C. Cir. 2021).

[50] *See Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 at P 17 ("We acknowledge the D.C. Circuit's concern that the Commission did not

2. I dissent, however, from the Commission's decision to again[51] decline to take a position on whether NGA section 7(h)[52] confers eminent domain authority on the holder of a temporary certificate issued under NGA section 7(c)(1)(B).[53] This question is different from the issues more amenable to disposition in our order on remand because it concerns the rights of Spire as a current holder of a temporary certificate, i.e., whether such a certificate confers upon its holder the right to exercise eminent domain under NGA section 7(h). This question is ready to be decided. In fact, today's order acknowledges two recent federal district court cases holding that temporary certificates do confer eminent domain authority.[54]

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adequately address potential self-dealing allegations in the Certificate Order; however, this issue has been remanded to the Commission and will be addressed when the Commission acts on remand on Spire's pending certificate application."). NGA section 7(c)(1)(B) states "[t]hat the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, *without notice or hearing, pending the determination of an application for a certificate*." 15 U.S.C. § 717f(c)(1)(B) (emphasis added).

[51] *See Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (Danly, Comm'r, concurring in part and dissenting in part at PP 2, 7); *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021) (Danly, Comm'r, dissenting at PP 7-17).

[52] 15 U.S.C. § 717f(h).

[53] *Id.* § 717f(c)(1)(B).

[54] *See Spire STL Pipeline LLC* 178 FERC ¶ 61,109 at P 11 (citing *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:18 CV 1327 DDN (E.D. Mo. Nov. 23, 2021); *Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, slip op. (C.D. Ill. Oct. 27, 2021)). Assuming that NGA section 7(h) confers eminent domain authority upon temporary certificate holders, the Commission may not restrict such authority. *See supra* P 1 (agreeing with my colleagues that "the Commission lacks authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain") (citation omitted); *see, e.g.*, *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) ("The

3. The Commission is well-situated to speak in the first instance on the rights enjoyed by a temporary certificate holder under the statute that we administer. This question need not be left to others to decide. Requiring the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority is irresponsible and unnecessary.[55] To leave this issue to the courts is to deprive both the courts *and* the litigants the benefit of a pronouncement by the Commission—regardless of how the Commission comes out on the matter—and the reasoned decision making required to support that pronouncement. The Commission implements NGA section 7 and some degree of deference is owed to the Commission's reasonable interpretation of section 7(h).[56] At the very

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NGA, 15 U.S.C. § 717f(h), affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to 'acquire [the right of way] by contract.'"); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) ("Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . . Thus, FERC does not have discretion to withhold eminent domain power once it grants a Certificate.") (citation omitted); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . . The Commission does not have the discretion to deny a certificate holder the power of eminent domain.") (citation omitted).

[55] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (Danly, Comm'r, dissenting at P 8).

[56] *See PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135, at P 20 (2020) ("Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.") (citing *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at P 15 (2020); *City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*)); *PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135 at P 22 (rejecting an argument that "the Commission does not 'qualify for *Chevron* deference' when construing NGA section 7(h)"); *PennEast Pipeline Co., LLC*, 170

least, I expect the courts would be attentive to our thoughts on the matter.

4. The landowners and the Niskanen Center are correct: in declining to interpret NGA section 7(h), the Commission has once again "stuck its head in the sand."[57]

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly

Commissioner

FERC ¶ 61,064 at P 15 ("[O]ur interpretation of NGA section 7(h) merits deference. The Third Circuit's ruling does not diminish the Commission's authority to speak on a statute that we administer.") (citations omitted).

[57] Landowners & Niskanen Center December 17, 2021 Request for Rehearing at 8.