ORAL ARGUMENT NOT YET SCHEDULED

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

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

ENVIRONMENTAL DEFENSE FUND,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

INITIAL REPLY BRIEF OF PETITIONER ENVIRONMENTAL DEFENSE FUND

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Term	Description
Br.	Brief
Certificate Order	*Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018)
Certificate Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *modified by*, 89 FERC ¶ 61,040 (1999), *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128, *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000)
Decl.	Declarations contained in the Environmental Defense Fund's Addendum on Standing to its Opening Brief
EDF	Petitioner Environmental Defense Fund
Enable	Enable Mississippi River Transmission, LLC
FERC	Respondent Federal Energy Regulatory Commission
JA	Joint Appendix
Missouri Commission	Missouri Public Service Commission
P	Paragraph numbers in Federal Energy Regulatory Commission Orders
p.	Page numbers in Federal Energy Regulatory Commission Orders
R	Citation to the Index of the Record filed in these proceedings on March 12, 2020 by the Federal Energy Regulatory Commission
Rehearing Order	*Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019)
REX	Rockies Express Pipeline
Spire Affiliates	Spire STL Pipeline LLC and Spire Missouri, Inc.
Spire Missouri	Spire Missouri, Inc.
Spire STL	Spire STL Pipeline LLC

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Energy Regulatory Commission's ("FERC") principal defense is that Spire STL Pipeline LLC's ("Spire STL") agreement with its utility-affiliate, Spire Missouri, Inc. ("Spire Missouri"), was sufficient evidence that the pipeline is "required by the present or future public . . . necessity." But this Court has *never* held a single precedent agreement with a utility-affiliate is, *ipso facto*, evidence of public need. Agreements between affiliates are markedly different from arm's-length agreements between parties that bear the risk of investment decisions. That distinction is even more significant where, as here, the transaction involves a utility-affiliate that can pass the costs of the agreement to captive customers. FERC's treatment of the utility-affiliate agreement as *sufficient* proof of need is an egregious failure to fulfill its statutory responsibility, turning what Congress intended to be a serious, independent investigation of need into a "meaningless check the box exercise." R424, *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) ("Rehearing Order"), Commissioner Glick's Dissent, P 1; [JA ___].

FERC's rubber-stamp certification subjects landowners and the environment to substantial—and unnecessary—impacts associated with the construction and operation of a duplicative pipeline. If a corporation's internal decision to saddle captive customers with millions in costs by shifting load from an existing pipeline to one it owns is automatically deemed to be *required* by "public necessity," FERC's obligation to serve as the "guardian of the public interest in determining whether certificates of

convenience and necessity shall be granted" is rendered meaningless. *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961).

This Court should reject FERC's attempt to punt its own obligations under the Natural Gas Act to Missouri utility regulators. State regulators have authority to conduct "prudence" reviews (though, as a practical matter, only after pipelines are built), but they cannot alter FERC-approved rates that utilities are committed to; and they lack jurisdiction to adjudicate market need or evaluate an unnecessary pipeline project's adverse impacts on property rights, the environment, and burdens on other consumers.

Consistent with Supreme Court precedent, FERC's Certificate Policy Statement[1] explicitly requires a fact-specific evaluation of all factors bearing on the public interest, *see* Certificate Policy Statement, pp. 61,737, 61,745-50, and states that a stronger showing of need is required in the face of "potential adverse effects." *Id.*, p. 61,747. FERC's claim that the Certificate Policy Statement does "not compel any additional showing beyond precedent agreements" to justify a finding of market need is wrong. FERC Br., 27. The facts here vividly show a *lack* of need: There is no new gas demand in St. Louis. The Project provides no material cost savings to customers. There is

[1] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 ("Certificate Policy Statement"), *modified by*, 89 FERC ¶ 61,040 (1999), *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128 ("Order Clarifying Certificate Policy Statement"), *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000).

available, excess capacity in the region on multiple different pipelines. FERC and the Spire Affiliates' attempts at *post hoc* justifications of need are unavailing.

FERC disregarded the pipeline's significant adverse effects, which demanded a probing review. Ignoring its independent obligations as the guardian of the public interest, FERC allowed a "private business decision" to override the wide-sweeping *public interest* ramifications on the Spire Missouri's captive customers, the viability of neighboring pipelines, the degradation of the environment, and the persistent and invasive seizure of private property by eminent domain.

FERC's orders are arbitrary and capricious, inconsistent with the Certificate Policy Statement, this Court's precedent, Section 7 of the Natural Gas Act, and the record in this proceeding. The Court should therefore vacate the orders.

ARGUMENT

A. Jurisdiction Is Proper

FERC does not challenge this Court's jurisdiction. But the Spire Affiliates contend (Spire Affiliates Br., 1-2) the petitions for review are untimely because *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc) overturned precedent allowing "tolling orders" to stave off judicial review. *See* 15 U.S.C. § 717r(a) (petitions for rehearing "may be deemed to have been denied" and thus reviewable when FERC does not act within 30 days).

The Spire Affiliates' argument is meritless. *Allegheny* interprets Section 717r(a), the "deemed denied" provision, 964 F.3d at 16, and does not hold petitions that are

filed 60 days after a rehearing order are untimely. Indeed, *Allegheny* forecloses such a claim: The en banc Court reviewed on the merits petitions challenging a rehearing order issued eight months after the "deemed denied" date. 964 F.3d at 8-9, 19. None of the cases the Spire Affiliates cite comes close to holding that a right to review agency action that, under then-governing circuit precedent *could not* have been challenged earlier, is extinguished by a party's "failure" to take that futile and forbidden step. It is doubtful that due process could countenance any such regime, and this Court's precedents show a healthy intolerance for such "pervers[e]" theories. *See Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1007 (D.C. Cir. 1975).

B. Treating a Single Utility-Affiliate Agreement As, *Ipso Facto*, Evidence of Public Necessity Is Contrary to Applicable Law and Unsupported by Relevant Precedent

FERC's brief reiterates that its orders' finding of market need was based solely on Spire STL's contract with its utility-affiliate. *See* FERC Br., 9 (FERC "deemed that contract valid evidence of need for the Project"); *id.*, 13 (FERC "found a market need for a proposed pipeline project based on a contract between the certificate applicant (Spire) and its affiliate (Spire Missouri) for nearly 90 percent of the project's capacity."). FERC contends this Court has approved that rationale, citing decisions upholding FERC's reliance upon precedent agreements as evidence of need. *Id.,* 19. The law—including this Court's precedents—does not support FERC's reliance on the Spire agreement.

First, *none* of the cases FERC relies upon holds that a single precedent agreement with a pipeline's utility-affiliate is sufficient to establish need. *See* EDF Opening Br., 23-26. Indeed, FERC's Certificate Order acknowledges that "there has never [been] a proposal" where need was based on a single precedent agreement with a utility-affiliate with captive customers. R164, *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, P 78 (2018) ("Certificate Order"); [JA ___]. The presence of a utility-affiliate creates powerful incentives that require close regulatory scrutiny. EDF Opening Br., 21-23. This Court has held that FERC must consider "whether the [utility's] interests are sufficiently likely to be congruent with those of ultimate consumers that it may rely upon the [utility's] agreement as dispositive of the consumers' interests." *Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993). FERC's refusal to consider those interests is legal error, and FERC has gone astray to the extent it has misread this Court's decisions as allowing FERC to decree *any* precedent agreement, regardless of the circumstances, sufficient to support a finding of necessity.

In addition to lacking support in judicial precedent, FERC's reliance on the Spire Affiliates' contract alone is inconsistent with multiple, overlapping legal obligations. The Natural Gas Act requires FERC to analyze whether a pipeline is required by a present or future public convenience and necessity. EDF Opening Br., 1, 20. That analysis requires consideration of "all factors bearing on the public interest." *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959); *see also Permian Basin Area Cases*, 390 U.S. 747, 784 (1968) ("Although the Natural Gas Act is premised upon a continuing

system of private contracting, [FERC] has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests.") (citations omitted). The inherent risks posed by a contract with the applicant's utility-affiliate merit serious analysis, not perfunctory box-checking.

FERC's deficient approach also contravenes its own Certificate Policy Statement, which requires case-specific analysis. Certificate Policy Statement, pp. 61,737, 61,748-50. Consistent with the Supreme Court's holding in *Atlantic Refining*, that analysis involves consideration of "all relevant factors reflecting on the need for the project." Certificate Policy Statement, p. 61,747. The Certificate Policy Statement expressly rejects any "[b]right line test" based on one factor. *Id.*, p. 61,749.

To survive review under the arbitrary and capricious standard, FERC must also "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983) (citation omitted). Given the inherent risks posed to the utility-affiliate's captive customers, and record evidence demonstrating a clear *lack* of need, FERC's blinkered reliance upon a single utility-affiliate precedent agreement flunks basic requirements of reasoned decisionmaking.

In sum, FERC was obligated to perform a fact-specific examination of need. It flouted that obligation, issuing a certificate after nothing more than a "meaningless

check the box exercise." R424, Rehearing Order, Commissioner Glick's Dissent, P 1; [JA ___].

Perhaps recognizing its deficient "analysis" of need, FERC offers a *post hoc* justification that, beyond the precedent agreement, it relied on "extra-contractual evidence in the record" that was "enough in [FERC's] view to overcome concerns of overbuilding." FERC Br., 21-22 (citing the ability to access multiple supply areas, the inability of existing pipelines to provide as much gas as the Project, and replacement of expiring contracts and aging facilities). FERC's *post hoc* claim is undermined by the Certificate Order, where FERC declined to review these issues because they "fall within the scope of the business decision of a shipper," R164, Certificate Order, P 83; [JA ___]; and the Rehearing Order, where FERC characterized these issues as "benefits" for consideration in the public interest balancing analysis, R424, Rehearing Order, P 24; [JA ___]. EDF therefore addresses these purported "benefits" in discussing the balancing test in Section F below.

C. The Utility-Affiliate Agreement Required Heightened Scrutiny Given FERC's Primary Statutory Duty to Guard the Public Interest Against Pipeline Abuses

Affiliate contracts pose significant threats not presented by other kinds of contracts. EDF Opening Br., 21-22; Tierney Amicus Br., 10-14; Antitrust Amicus Br., 8-13. Concerns with affiliate agreements are particularly pronounced where an affiliate is a regulated utility, which can pass costs on to captive retail customers. EDF Opening Br., 1-2, 27.

Because FERC determined that the existence of the utility-affiliate agreement obviated the need for meaningful analysis, it did not consider whether and how the Spire Affiliates' relationship compromised the precedent agreement's value as an indicator of objective market need. Rather, FERC insists it may indiscriminately lump all precedent agreements into one category, drawing no distinction "between long-term binding contracts with affiliated or unaffiliated shippers, so long as there is no evidence of undue discrimination or anticompetitive behavior." FERC Br., 28.

FERC itself, however, has previously recognized that contracts between affiliates are fundamentally different from arm's-length transactions where each party rigorously negotiates in its own economic interest. *Seaway Crude Pipeline Co.*, 154 FERC ¶ 61,070, PP 92-93 (2016). Furthermore, some affiliate contracts pose a higher degree of risk than others. An affiliated marketer or producer that risks its own capital to capture benefits is fundamentally different from a utility-affiliate that can pass the risks of the contract on to captive customers. With affiliated marketers or producers, there is more of an assurance of legitimate need than there is for the latter because utility-affiliates have incentives to execute capacity contracts when they can recover the costs from captive customers. *See Millennium Pipeline Co.*, 100 FERC ¶ 61,277, P 57 (2002); Tierney Amicus Br., 11-14, 19; Antitrust Amicus Br., 8-13.

Here, the very structure and terms of the deal—a retail utility with captive customers saddled with over $600 million in reservation charges for the next 20 years while the affiliate pipeline developer earns a hearty return for developing duplicative

facilities—underscored FERC's obligation to protect the public interest and fulfill its consumer-protection obligation. But FERC refused to engage with the issue. *See* FERC Br., 30-31 (explaining that FERC did not "look behind" the utility-affiliate agreement).

FERC claims that EDF's request for greater scrutiny of affiliate transactions "tosses out [FERC] policy," describing EDF's citations as "irrelevant or outdated." *Id.*, 29. But just last week FERC issued a Proposed Policy Statement that expressed the same concern and relied upon the authorities it now brushes aside as "outdated." *See Oil Pipeline Affiliate Contracts*, Proposed Policy Statement, 173 FERC ¶ 61,063, P 9 n.18 (2020) (citing *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048, P 100 (2014), which was cited in EDF's Opening Br., 21). FERC recognizes the harm affiliate arrangements can pose and acknowledges that it has "adopted policies in these other contexts to mitigate concerns that affiliates may coordinate in ways that involve self-dealing and anti-competitive behavior to the detriment of other customers." *Id.*, P 9. Contrary to FERC's brief, concerns about affiliate abuse are not outdated or inapplicable to certificate applications—they are highly relevant, indeed critical, to FERC's fulfillment of its statutory responsibilities.

In other matters involving affiliate agreements, FERC has not demanded "additional evidence" of anticompetitive behavior, as it suggests was needed here, to trigger heightened review. Rather, FERC determined that heightened review was necessary based on the fact that competitive market forces do not exist between affiliated parties that share the same parent company. *Tapstone Midstream, LLC*, 150

FERC ¶ 61,016, P 15 (2015); *TECO Power Servs. Corp.*, 52 FERC ¶ 61,191, p. 61,697 (1990) ("Although sales between affiliates are not necessarily unduly discriminatory or unduly preferential, these agreements provide the potential for preferential pricing" and, therefore, FERC "must carefully scrutinize them."). FERC's uncritical reliance on the Spire Affiliates' utility-affiliate agreement as dispositive of need is arbitrary and capricious.

If the Court accepts FERC's claim that nothing more is needed under these facts, "private business decisions" (FERC Br., 22) will—contrary to the role Congress assigned to FERC in the Natural Gas Act—define "the public interest." *See Permian Basin Area Cases*, 390 U.S. at 784; *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 582-83 (D.C. Cir. 2010).

D. State Commissions' Separate Prudence Reviews Do Not Relieve FERC of Its Independent Statutory Obligation to Protect the Public from Unneeded Pipelines

In a failed attempt to justify its lack of meaningful examination of the utility-affiliate agreement, FERC points to the separate review by the Missouri Public Service Commission ("Missouri Commission"), claiming such review would implicate limits on FERC's "jurisdiction." FERC Br., 36-38. The Missouri Commission's state-law responsibility to review "excessive retail rates and to disallow costs not justified under state law" (FERC Br., 37) is distinct from, and no substitute for, the congressionally-prescribed inquiry under Natural Gas Act Section 7, which charges *FERC* with determining whether the public necessity requires pipelines. *See* R164, Certificate

Order, P 86 ("The Missouri [Commission's] mechanisms are not meant to address … issues of pipeline need."); [JA ___]. If FERC can rely on utility-affiliate precedent agreements as sufficient proof of "need," it must examine their substance, rather than pretend that state commissions' review will somehow satisfy FERC's obligations to protect the public interest.

As Commissioner Glick explained, the "practical effect" of FERC's position is that "no regulatory body would ever be able to conduct a holistic assessment of the need for a proposed pipeline simply by virtue of the fact that Congress divided jurisdiction over the natural gas sector between the federal and state governments." R424, Rehearing Order, Commissioner Glick's Dissent, P 20; [JA ___].

Even if the Natural Gas Act did not forbid it, punting FERC's review to state commissions would be untenable. "[A]lthough the Missouri [Commission] has authority to conduct a prudence review of Spire Missouri's decision to take service from Spire STL rather than another pipeline, that review takes the [FERC-jurisdictional] rates as a given and will not necessarily be able to address whether it was prudent to build the pipeline in the first place." *Id.*, Commissioner Glick's Dissent, P 19; [JA ___]; Tierney Amicus Br., 24 (noting that state commissions "cannot undo a [FERC] approval for [pipeline] construction"). Factors including limitations on state's legal

authority, resource constraints, and other challenges demonstrate the insufficiencies of retroactive state regulator review. *See generally* Tierney Amicus Br., 26-27.[2]

In the Natural Gas Act, Congress required the "necessity" inquiry to *precede* pipeline certification and construction. *See* 15 U.S.C. § 717f(c)(1)(A) (no "construction or extension" of gas facilities without a certificate from FERC). FERC must determine whether the applicant met its burden to make the necessary showings. *Id.* § 717f(e). Even if state-commission review ultimately found a utility's agreement with a pipeline applicant was imprudent under state law, that finding would not remedy the myriad public harms resulting from construction and operation of an unnecessary pipeline. Nor should it. The Natural Gas Act charges FERC with protecting the public interest.

E. The Court Should Reject the Spire Affiliates' *Post Hoc* Rationalizations and Consider the Actual Basis for FERC's Determination of Need, i.e., the Affiliate Agreement

Attempting to salvage FERC's unfounded decisions, the Spire Affiliates present numerous *post hoc* rationalizations, implying that FERC's repeated references to its exclusive reliance on the utility-affiliate agreement (FERC Br., 3, 13, 27-28) do not accurately capture the basis for the finding of need. Spire Affiliates Br., 15-23. The

[2] Nor is FERC's abdication excused by the Missouri Commission's decision not to appeal. FERC Br., 37. The Missouri Commission is not charged with ensuring faithful execution of FERC's statutory duties and, in fact, urged a "much more rigorous review" than what FERC performed. R21, 9-10; *see also* R424, Rehearing Order, Commissioner Glick's Dissent, P 19 (noting that the Missouri Commission "expressly argued that a precedent agreement will not always be dispositive of need and that [FERC] must 'carefully review' the need for the Spire Pipeline"); [JA ___; ___].

Court may not consider theories on which FERC did not rely on below. *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006). In any event, the Spire Affiliates' revisionist characterization of FERC's actions fails on its own terms.

The Spire Affiliates repeatedly trumpet the "open season" as if that process provided some degree of protection against affiliate abuse. Spire Affiliates Br., 3, 11, 15. Although Spire STL held an open season, its Project was not born out of a competitive solicitation. No entities bid on the capacity and the precedent agreement resulted from "negotiations" within the Spire corporate family *before* the open season. R164, Certificate Order, P 77 ("[T]he precedent agreement was not the direct result of the open season, but stemmed from prior discussions between Spire [STL], Spire Missouri, and their corporate parents . . . ."); [JA ___]. That fact should have been material to FERC's analysis. *See Millennium*, 100 FERC ¶ 61,277, p. 62,141 (discussing FERC's rationale for finding a precedent agreement that "was not the result of, or related to," an open season "did not constitute reliable evidence of market need"). No protections against affiliate abuse were in effect when the Spire Affiliates executed their contract. R164, Certificate Order, P 104 (Spire STL claimed it would be "unduly burdensome" to separate its "pipeline development personnel" and "gas supply and operations personnel"); [JA ___].

Complaining that "St. Louis ratepayers will not cover even the rate of return that FERC allowed," the Spire Affiliates cite their negotiated rate compliance filing. Spire Affiliates Br., 21. That filing is outside the administrative record and, indeed, did not

exist when FERC issued its orders. In any event, the filing undermines FERC's claim that no further analysis is needed because it allows Spire STL to *increase* the negotiated rate paid by captive customers and specifies that Spire Missouri "will not oppose [Spire STL's] filing." FERC Docket No. RP20-70, Spire STL's Compliance Filing, App'x 2 (October 16, 2019). That the affiliates—acting in complete and admitted unity of interest (Spire Affiliates Br., 16)—forbid the utility to voice concerns on behalf of captive customers highlights the anticompetitive concerns with the utility-affiliate contract FERC relied on to certificate the Project.

F. FERC Misapplied Its Own Certificate Policy Statement

Implementing the requirement that it evaluate "all factors bearing on the public interest," *Atl. Ref.*, 360 U.S. at 391, FERC adopted a balancing test whereby the public benefits of a project must outweigh any adverse effects. Certificate Policy Statement, pp. 61,749-50. FERC offers no persuasive response to our demonstration that FERC's orders here failed to adhere to this standard. EDF Opening Br., 32-39.

FERC claims it applied the Certificate Policy Statement's criteria, FERC Br., 9, 29, and criticizes EDF for demanding "some mathematical tally" of benefits and adverse impacts not required by the Act. *Id.*, 42; *but see id.* (recognizing FERC's obligation to engage in "mathematical analysis"). But FERC policy expressly embraces a proportional inquiry, whereby the "amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests." Certificate Policy Statement, p. 61,748. FERC's

orders failed to identify record evidence of need sufficient to overcome the extensive evidence of adverse effects. FERC's attempt to justify its unreasoned decision with boilerplate references to "broad discretion" and "value judgment[s]," FERC Br., 42, cannot satisfy its responsibility to actually "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43.

1. FERC Failed to Examine Supposed Project "Benefits"

The sole basis for FERC's determination of market need—and thus the core of FERC's finding of public benefit—is the utility-affiliate precedent agreement. *See* FERC Br., 9. A single precedent agreement with a utility-affiliate, however, is not a reliable indicator of need, particularly where record evidence demonstrates a *lack* of need. EDF Opening Br., 30-32. Commissioner LaFleur described the Project as "the unusual case of a pipeline application that squarely fails the threshold economic test." R164, Certificate Order, Commissioner LaFleur's Dissent, p 2. And under FERC's proportional approach, even *if* the Spire Affiliates' contract had been appropriate to establish market need, analysis of the Project's potential benefits is still required to ensure they outweigh the adverse effects. FERC violated its Certificate Policy Statement by neglecting that analysis.

FERC argues that it considered "the Project's other benefits—both physical and contractual," FERC Br., 44, but the record evidence demonstrates the purported benefits are illusory. Recitation of statements by the Spire Affiliates contained in the Certificate Order cannot justify FERC's decision, *see* R164, Certificate Order, PP 68,

107-08—especially since FERC similarly recited EDF's arguments but ultimately rejected them. *Id.,* P 69; [JA ___, ___; ___].

Moreover, FERC expressly declined to consider these "benefits" in its public interest analysis in the Certificate Order. *Id.*, P 83; [JA ___] (stating that the issues "fall within the scope of the business decision of a shipper"). The Rehearing Order identifies several "benefits," R424, Rehearing Order, P 24; [JA ___], which FERC now attempts to claim as the basis for its determination of need: (1) the Project allowed access to multiply supply areas via a more direct path; (2) the Project would not cross an earthquake zone; (3) existing pipelines were unable to provide as much gas; and (4) Spire Missouri needed to replace expiring contracts and aging facilities. FERC Br., 22. FERC admits, however, that it did not meaningfully investigate or require Spire STL to substantiate these claims. *Id.* (FERC "decline[d] to inquire into these sorts of private business decisions"). Had it bothered to inquire, FERC would have found persuasive evidence undercutting each *ipse dixit* justification.

First, multiple pipelines already provide Spire Missouri access to natural gas from the Marcellus Shale via the Rockies Express ("REX") pipeline—Spire STL is simply another pipeline that can do so. Spire Affiliates Br., 6 n.1 (MoGas Pipeline, LLC, which connects to REX, supplies Spire Missouri). The Spire Affiliates tout the "benefits" of "connecting the St. Louis area to the REX pipeline and its cheap, abundant gas." *Id.*, 3, 6. But price data in the record shows "existing [Enable Mississippi River

Transmission, LLC's ("Enable")] facilities provide similar or better economic alternatives than REX." R42, Enable's Answer, 11; [JA ___].[3]

Second, the Spire Affiliates' emphasis on a "path without crossing an earthquake zone" is little more than bluster. Portions of Spire Missouri's own service territory are within the seismic zone, rendering illogical the notion that a pipeline supplying the region must avoid that zone to be reliable. R24, Enable's Protest, 42 ("portions of [Spire Missouri's] own service territory are within the New Madrid seismic zone and the St. Louis area could also be affected by earthquakes"); [JA ___]. Moreover, the chance of a large earthquake in the region is infinitesimally small. *Id.*, Exhibit MRT-0037, 1; [JA ___].

Third, invocation of the "inability of existing pipelines to provide as much gas as the Project" (FERC Br., 22) is, under the circumstances, nonsensical. Spire Missouri has not even signed up for the total amount of available capacity on the Project—and of course, neither has anyone else. The material question is whether there is sufficient existing capacity in the region to serve Spire Missouri's needs, and the answer the record

[3] Any "supply diversity" benefit depends on Spire Missouri's contractual rights on REX. To access Marcellus supplies, Spire Missouri must either have gas delivered to Spire STL by a third party or reserve capacity on REX. Spire Missouri only holds 20,000 Dth/day of east-to-west firm capacity on REX. R24, Enable's Protest, Exhibit MRT-0003, 5; [JA ___]. Thus, to access Marcellus supplies on a firm basis for 20 years to match its 350,000 Dth/day commitment on Spire STL, Spire Missouri must access supplies held by existing shippers on REX, "exposing its ratepayers to 20-years of potentially changing market conditions in that area." R42, Enable's Answer, Exhibit MRT-0044, 2; [JA ___].

yields is a resounding yes. R24, Enable's Protest, 15 (detailing available, unsubscribed capacity on four pipelines in St. Louis); [JA ___].

Fourth, FERC's embrace of Spire Missouri's *post hoc* "aging propane facility" rationale is the epitome of unreasoned decisionmaking. FERC Br., 22 n.5. The actual costs of operating the propane facilities are not in the record—they remain within Spire Missouri's closed books. When FERC asked the Spire Affiliates to compare the costs of the propane facilities and the proposed pipeline, the Spire Affiliates were unwilling (or unable) to respond. R137, Spire STL Data Response, 26 ("Spire Missouri does not have quantitative data illustrating the 'what if' scenario of Spire Missouri continuing to rely on the propane system."); [JA ___]. Meanwhile, record evidence shows that on the three days when Spire Missouri used the propane facilities over the past five years, R24, Enable's Protest, Exhibit MRT-0003, 6-12; [JA ___], Spire Missouri released capacity on existing pipeline Enable that would have satisfied the demand served by the propane facilities. R148, Exhibit Answer to Data Responses, 8; [JA ___].

2. FERC's Review of Adverse Effects Was Inadequate

In addition to failing to meaningfully analyze public benefits, FERC violated its Certificate Policy Statement by minimizing or disregarding record evidence of adverse effects to existing pipelines and their customers, nearby landowners and communities, and the environment. *See, e.g.*, R424; R24, 11-19, 48-51; R179, 19-21; R172, 1-2; [JA ___; ___-___, ___-___; ___-___; ___-___].

Existing Pipelines and their Customers. FERC and the Spire Affiliates admit, as they must, that the Project has negative economic effects on existing pipelines. FERC Br., 41; Spire Affiliates Br., 23. The Spire Affiliates maintain this harm is a necessary byproduct of "healthy competition" and FERC insists it has no obligation to protect incumbents against losing market share. FERC Br., 42. Neither position satisfies the requirement that FERC "ensure fair competition." Certificate Policy Statement, p. 61,748. "Fair" in this context means a "regulatory environment in which no gas seller has a competitive advantage over another gas seller." *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, F.E.R.C. Stats. & Regs. (CCH) p. 30,939, p. 30,393 (1992).

Record evidence demonstrated that when faced with a choice to either take service from: (1) a neighboring pipeline and provide 100% of its transportation costs to that pipeline, or (2) its affiliate pipeline and send approximately 50% of the money it collects from captive ratepayers to its own shareholders, a profit-maximizing firm such as Spire STL will choose the latter. R146, EDF's Answer, 11 n.47; [JA ___].

Record evidence also demonstrated that Spire STL would have (and did have) a competitive advantage over other suppliers seeking to sell gas to Spire Missouri. For example, another neighboring pipeline was "forced to offer Spire Missouri [a] discounted rate because of the Spire Pipeline." R424, Rehearing Order, Commissioner

Glick's Dissent, n.70 (citation omitted); [JA ___]. This situation is anything but "fair competition."

Neither FERC nor the Spire Affiliates meaningfully rebut EDF's arguments about FERC's failure to protect captive customers of existing pipelines. But before FERC even issued the Certificate Order, three major pipelines serving the St. Louis region had already proposed significant rate increases, due at least in part, to the Spire STL Pipeline (R164, Certificate Order, Commissioner Glick's Dissent, p. 2)—yet another significant, adverse effect of the Project.

Landowners and Communities. FERC contends that its "finding on landowners was firmly tethered to the record." FERC Br., 41. But FERC's statement that Spire STL sought to minimize construction and operational impacts by locating a mere 15% of the route along existing rights-of-way disregarded the many route segments where Spire STL was unable to reach agreement with landowners due to their opposition to the Project and concerns over its environmental impacts. *Id.*, 40. Under FERC policy, Spire STL's inability to acquire most of the land "by negotiation" is a negative effect FERC should account for in assessing "public benefits and adverse consequences." Order Clarifying Certificate Policy Statement, 90 FERC ¶ 61,128, p. 61,398. FERC's selective review of the record, and refusal to grapple with evidence of harmful impacts to many landowners, does not constitute the required examination of "relevant data" and "satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. Because the record here indicates that the Project would have significant adverse

effects, FERC's Certificate Policy Statement demanded a heightened demonstration of need and FERC erred by refusing to require it.

Environment. FERC and the Spire Affiliates focus on the economic aspects of the balancing analysis to the exclusion of environmental harms the pipeline inflicts, *see* FERC Br., 39; Spire Affiliates Br., 23, further demonstrating that FERC's evaluation "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. FERC's consideration of adverse effects of a project must include "deleterious environmental impact on the surrounding community," *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019), and FERC's Certificate Policy Statement recognizes that "the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project." Certificate Policy Statement, p. 61,748; *see also* Order Clarifying Certificate Policy Statement, p. 61,396. Adverse environmental effects must be considered within FERC's public interest determination, and this requirement is not satisfied by the separate analysis required under the National Environmental Policy Act. *See City of Oberlin*, 937 F.3d at 602.

FERC's uncritical reliance on the mere existence of an affiliate utility precedent agreement to find need, and its failure to meaningfully consider the adverse effects of the Project, would, if blessed by this Court, render meaningless the Natural Gas Act's public interest standard.

G. Vacatur Is the Appropriate Remedy

EDF's requested remedy, vacatur of the FERC Certificate Orders, is wholly appropriate and warranted. "[U]nsupported agency action normally warrants vacatur." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). The Spire Affiliates assert that vacatur is inappropriate because it would be "quite disruptive" to the now operational pipeline. Spire Affiliates Br., 42. But the construction and operation of an unneeded and legally unjustifiable pipeline has been and continues to be highly "disruptive" to EDF's members, and the Court should grant the remedy sought. EDF Opening Br., Gettings Decl. ¶¶ 14, 21-23; *id.*, Stout Decl. ¶¶ 25-26; *id.*, Davis Decl. ¶¶ 20-24; *id.*, Parker Decl. ¶¶ 21-23. It is bad enough that (as here) pipelines are often largely or completely constructed, and landowners' property "irreparably transformed," before challengers have their day in court. *See Allegheny*, 964 F.3d at 20 (Griffith, J., concurring). FERC's unlawful efforts to delay judicial review for as long as possible cannot also become a basis for denying relief to prevailing challengers.

CONCLUSION

The Court should vacate FERC's unlawful orders.

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Dated: October 23, 2020

CERTIFICATE OF COMPLIANCE

Per Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 29(a)(5), and the Court's March 19, 2020 order, I certify that this Initial Brief complies with the type-volume limitations because its textual portions, including headings, footnotes, and quotations contain 5,397 words of the 8,000 total words allocated to Petitioners, as counted by the "Word Count" feature of Microsoft Word 2010, the program with which this brief was prepared. This word count excludes: (1) the cover page; (2) the table of contents; (3) certificates; (4) the glossary of abbreviated terms and terms of art; and (5) the signature block.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this 23rd day of October 2020, I served the foregoing Initial Reply Brief of Petitioner Environmental Defense Fund, by first class mail, postage prepaid or electronic mail through the Court's CM/ECF system upon the parties to the proceeding below as listed in the Service Preference Report.

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