169 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Spire STL Pipeline LLC Docket No. CP17-40-002

ORDER ON REHEARING

(Issued November 21, 2019)

1. On August 3, 2018, the Commission issued Spire STL Pipeline LLC (Spire STL) a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations[2] to construct and operate the Spire STL Pipeline Project (Spire Project) extending from an interconnection with Rockies Express Pipeline LLC (REX) in Scott County, Illinois, to interconnections with both Spire Missouri, Inc. (Spire Missouri) and Enable Mississippi River Transmission, LLC (MRT), in St. Louis County, Missouri.[3] The Missouri Public Service Commission (Missouri PSC), MRT, the Environmental Defense Fund, and Juli Viel filed timely requests for rehearing. This order dismisses, rejects, or denies the requests for rehearing.

I. Background

2. The Spire Project is a new pipeline system designed to provide 400,000 dekatherms per day (Dth/day) of new pipeline transmission service to markets in the St. Louis metropolitan area, eastern Missouri, and southwest Illinois. The project includes a new 24-inch-diameter, 65-mile pipeline that will be constructed in two segments: a 59-mile segment originating at a new interconnection with REX in Scott County, Illinois, and terminating at a new interconnection with Spire Missouri's Lange Delivery Station; and a 6-mile segment, known as the North County Extension, 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

[1] 15 U.S.C. § 717f(c) (2018).

[2] 18 C.F.R. pt. 157 (2019).

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

Station interconnect. The project also includes three new aboveground meter and regulating stations, interconnection facilities, and other appurtenant facilities.

3. Spire STL proposes to reconfigure MRT's existing Chain of Rocks Station interconnect with Spire Missouri to accommodate bidirectional interconnection flows between the Spire Project and MRT. MRT will continue to make physical deliveries at Chain of Rocks; however, those deliveries will be received into Spire STL's facilities for redelivery to Spire Missouri, rather than directly into Spire Missouri's facilities. In addition, the new bi-directional Chain of Rocks Station interconnect will enable Spire STL to make physical or displacement deliveries into MRT's system at Chain of Rocks, to the extent permitted by MRT. All changes associated with the MRT Chain of Rocks Station interconnect will be performed at the sole cost of Spire STL.

4. In the Certificate Order, the Commission agreed with the conclusions presented in the Environmental Assessment (EA) and adopted the EA's environmental conditions as modified in the order. The Certificate Order determined that the Spire Project, if constructed and operated as described in the EA, would not significantly affect the environment and is required by the public convenience and necessity.

5. Missouri PSC, MRT, the Environmental Defense Fund, and Ms. Viel filed timely requests for rehearing of the Certificate Order.

II. Procedural Matters

A. Withdrawal of Rehearing Request

6. On September 9, 2019, MRT filed a notice of withdrawal of its request for rehearing.

7. Pursuant to Rule 216 of the Commission's Rules of Practice and Procedure,[4] the withdrawal of any pleading is effective at the end of 15 days from the date of the filing, if no motion in opposition to the notice of withdrawal is filed within that period and if the Commission takes no action disallowing withdrawal. The Commission did not receive any motions in opposition to the notice of withdrawal and we are not taking action to disallow MRT's withdrawal. Accordingly, MRT's August 31, 2018 request for rehearing is withdrawn.

B. Motion for Stay

8. On November 16, 2018, Ms. Viel filed a motion requesting that the Commission stay the Certificate Order and revoke the notice to proceed pending issuance of an order

[4] 18 C.F.R. § 385.216 (2019).

on rehearing.[5] On November 30, 2018, Spire STL filed an answer to Ms. Viel's request for stay. Our rules permit answers to motions; accordingly, we accept Spire STL's answer to Ms. Viel's stay motion.[6] However, this order addresses and dismisses, rejects, or denies the requests for rehearing; as a result, we dismiss the request for stay as moot.

C. The Commission Appropriately Denied an Evidentiary Hearing

9. The Environmental Defense Fund argues that the Commission must hold an evidentiary hearing to resolve substantial disputed issues.[7] Specifically, the Environmental Defense Fund states that a hearing would resolve whether: (1) precedent agreements with an affiliated shipper demonstrate sufficient need for the project;[8] (2) potential increased costs will harm captive customers;[9] (3) the project will cause adverse operational impacts to MRT's system;[10] and (4) the project will increase system reliability.[11] The Environmental Defense Fund contends that where, as here, genuine issues of material fact exist and cannot be resolved on the written record, the Commission's "obligation to hold an evidentiary hearing is mandatory, not discretionary."[12] Additionally, the Environmental Defense Fund states that the Commission may not resolve matters on a written record when there are issues over: (1) motive, intent, or credibility or (2) a disputed past event.[13] Here, the Environmental Defense Fund claims both are present, including examples of affiliate abuse between Spire STL and Spire Missouri[14] and a dispute over Spire Missouri's decision to obtain

[5] Ms. Viel November 16, 2018 Request for Stay.

[6] 18 C.F.R. § 385.213(d) (2019).

[7] Environmental Defense Fund Request for Rehearing at 4-10.

[8] *Id*. at 4-5.

[9] *Id*. at 8.

[10] *Id*. at 8-9.

[11] *Id*. at 9-10.

[12] *Id*. at 4.

[13] *Id*. at 6 (citing *Union Pac. Fuel, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997)).

[14] *Id*. at 6-7.

service from Spire STL, but not other similar unaffiliated projects.[15] The Environmental Defense Fund argues that the Commission's failure to hold an evidentiary hearing to address these issues is inconsistent with the requirements of due process.[16]

10. We disagree that our denial of the Environmental Defense Fund's request for an evidentiary hearing in the Certificate Order was a denial of due process. The purpose of the NGA section 7(c) hearing requirement is to "permit … all interested parties to be heard and therefore facilitate full presentation of the facts necessary" to the Commission's decision regarding a certificate application.[17] An evidentiary, trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.[18] No party has raised a material issue of fact that the Commission cannot resolve on the basis of the written record. Even when disputed facts are at issue, the Commission need not hold a trial-type hearing if the issues may be adequately resolved on the basis of the written record.[19] As demonstrated by the discussion below, the existing written record provides a sufficient basis to resolve the issues relevant to this proceeding. The Commission has done all that is required by giving interested parties an opportunity to participate through evidentiary submission in written form.[20] Therefore, we will deny the request for a trial-type evidentiary hearing.

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[15] *Id*. at 7.

[16] *Id*. at 5.

[17] *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1425 (10th Cir. 1992) (quoting *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 538 (1979)).

[18] *See, e.g.*, *S. Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc*., 141 FERC ¶ 61,183, at P 15 (2012).

[19] *See CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994); *Public Util. Comm'n of Cal. v. FERC*, 24 F.3d 275, 282 (D.C. Cir. 1994); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (*Moreau*); *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1565-66 (D.C. Cir. 1993); *Citizens for Allegan Cnty, Inc. v. FPC*, 414 F.2d 1125, 1129 (D.C. Cir. 1969).

[20] *Moreau*, 982 F.2d 556 at 568.

III. Discussion

A. The Certificate Order Complied with the Requirements of the NGA

1. The Certificate Order Complied With The Certificate Policy Statement

11. The Environmental Defense Fund argues that the Commission violated the NGA by failing to establish that the Spire Project is required by present or future public convenience and necessity.[21] Specifically, the Environmental Defense Fund asserts that the Commission: (1) inappropriately relied on precedent agreements between Spire STL and its affiliate, Spire Missouri, to establish need;[22] (2) failed to find sufficient need for the project in order to prevent overbuilding;[23] (3) failed to explain how approval of the project will not impact Missouri PSC's review of utility costs;[24] (4) did not balance the impacts of the project on existing pipelines and their customers;[25] and (5) did not balance the impacts of the project on landowners and the environment.[26]

a. Precedent Agreements with Affiliated Shippers Are Appropriate Indicators of Project Need

12. The Environmental Defense Fund asserts that the Certificate Order violated the Certificate Policy Statement when it relied on a single precedent agreement between Spire STL and its affiliate to demonstrate need for the project.[27] The Environmental Defense Fund argues that the Commission skirted its NGA section 7 duty to protect consumers by relying exclusively on an affiliate precedent agreement and failing to look

[21] Environmental Defense Fund Request for Rehearing at 10-15.

[22] *Id*. at 10-16.

[23] *Id*. at 19.

[24] *Id*. at 15-17.

[25] *Id*. at 17-18.

[26] *Id*. at 19-22.

[27] *Id*. at 10.

behind that sole piece of evidence based on the guise that the Commission will not second guess the business decisions of local distribution companies.[28]

13. The Environmental Defense Fund argues that the Commission must rigorously evaluate the agreements that a pipeline makes with its affiliate.[29] The Environmental Defense Fund states that "[t]he hallmark characteristic of arm's length bargaining is that it is negotiated rigorously, selfishly and with an adequate concern for price. If the negotiating parties have common economic interest in the outcome of negotiations, their bargaining is not at arm's length."[30] The Environmental Defense Fund claims that the Certificate Order directly contradicted this finding and ignored the fact that transactions between affiliates create special concerns because they can never be arms-length.[31]

14. We disagree and affirm the Certificate Order's finding that the Commission is not required to look behind precedent agreements to evaluate project need, regardless of the affiliate status of the project shipper.[32] The Certificate Policy Statement established a

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[28] Environmental Defense Fund Request for Rehearing at 11 (citing *Atl. Refining Co. v. P.S.C. of N.Y.*, 360 U.S. 378, 388 (1959); *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010); *Ca. Gas Producers Ass'n v. FPC*, 421 F.2d 422, 428-29 (9th Cir. 1970)).

[29] *Id*. at 11, 16.

[30] *Id*. at 13 (citing *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶ 61,070, at P 93 (2010)).

[31] *Id*. at 14.

[32] Certificate Order, 164 FERC ¶ 61,085 at P 75 (citing *Millennium Pipeline Co. L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) (*Millennium*) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project"). *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Order Clarifying Policy Statement) (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project); Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts) (citing *Transcontinental Gas Pipe Line Corp*., 82 FERC ¶ 61,084, at 61,316 (1998) (*Transcontinental*)). *See also Fla. Se. Connection, LLC*, 163 FERC ¶ 61,158, at P 23 (2018) ("The mere fact that

new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[33] These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to customers, or a comparison of projected demand with the amount of capacity currently serving the market.[34] The Commission stated that it would consider all such evidence submitted by the applicant regarding project need. Nonetheless, the policy statement made clear that, although companies are no longer required to submit precedent agreements for Commission review, these agreements are still significant evidence of project need or demand.[35] As the court held in *Minisink Residents for Environmental Preservation and Safety v. FERC*,[36] the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers.[37] The dissent notes that *Minisink Residents* did not involve precedent agreements with affiliates; however, we find this is a distinction without a difference. The D.C. Circuit has subsequently upheld the Commission's reliance on precedent agreements to support a finding of market need in a case that did involve affiliates, stating that "the fact that the agreements are with corporate affiliates does not render [the Commission's] decision to rely on these agreements arbitrary and

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Florida Power & Light is an affiliate of Florida Southeast does not call into question the need for the project or otherwise diminish the showing of market support.").

[33] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747. As we explained in the Certificate Order, prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. The Spire Project, at 87.5 percent subscribed, would have satisfied this prior, more stringent, requirement. Certificate Order, 164 FERC ¶ 61,085 at n.131.

[34] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747.

[35] *Id*. at 61,747.

[36] 762 F.3d 97 (D.C. Cir. 2014) (*Minisink Residents*).

[37] *Minisink Residents*, 762 F.3d at 110 n.10; *see also Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, at P 67 n.39 (2016), *order on reh'g*, 156 FERC ¶ 61,160 (2016), *vacated sub nom*. *Sierra Club v. FERC*, 867 F.3d 1359 (D.C. Cir. 2017) (*Sabal Trail*) (finding that pipeline project proponent satisfied Commission's "market need" where 93 percent of the pipeline project's capacity has already been contracted).

capricious."[38] Moreover, it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers.[39] Likewise, *Minisink Residents* confirms that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.[40]

15. Affiliation with a project sponsor does not lessen a shipper's need for capacity and its contractual obligation to pay for its subscribed service.[41] The dissent asserts that the Commission must "carefully scrutinize the record to determine whether the Spire Pipeline is actually needed or just financially advantageous to the Spire Companies."[42] "[A]s long as the precedent agreements are long term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing market need for a proposed project."[43] We find that the relationship between Spire STL and Spire Missouri will neither lessen Spire Missouri's need for new capacity

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[38] *Appalachian Voices v. FERC*, No. 17-1271, at 3 (D.C. Cir. Feb. 19, 2019); *see City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) (finding petitioners' argument that precedent agreements with affiliates are not the product of arms-length negotiations without merit, because the Commission explained that there was no evidence of self-dealing and stated that the pipeline would bear the risk of unsubscribed capacity).

[39] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental*, 82 FERC ¶ 61,084 at 61,316). *See Millennium*, 100 FERC ¶ 61,277 at P 57 ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project").

[40] *Minisink Residents*, 762 F.3d at 112 n.10. *See also Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (*Myersville*) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

[41] *See Mountain Valley Pipeline, LLC & Equitrans, L.P.*, 161 FERC ¶ 61,043, at P 45 (2018), *order on reh'g*, 163 FERC ¶ 61,197, at P 90, *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271, at 3 (D.C. Cir. Feb. 19, 2019) (*Mountain Valley*). *See also, e.g., Greenbrier Pipeline Co., LLC*, 101 FERC ¶ 61,122, at P 59 (2002), *reh'g denied*, 103 FERC ¶ 61,024 (2003).

[42] Dissent at P 7.

[43] *Millennium*, 100 FERC ¶ 61,277 at P 57 (citing *Tex. E. Transmission Corp.*, 84 FERC ¶ 61,044 (1998).

nor diminish Spire Missouri's obligation to pay for its capacity under the terms of its contract.[44] The Commission evaluated the record and did not find evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse.[45] The Commission is not in the position to evaluate Spire Missouri's business decision to enter a contract with Spire STL for natural gas transportation, which as described below will be evaluated by the state commission.[46]

16. As the Certificate Order explained, issues related to a utility's ability to recover costs associated with its decision to subscribe for service on the Spire Project involve matters to be determined by the relevant state utility commissions; those concerns are beyond the Commission's jurisdiction.[47] The review that the Environmental Defense Fund seeks in this proceeding,[48] looking behind the precedent agreements entered into by state-regulated utilities, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate.[49]

17. When considering applications for new certificates, the Commission's sole concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.[50] We affirm the Certificate Order's determination and find that no valid allegations of undue discrimination have been made against Spire STL.[51]

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[44] Further, without compelling record evidence, we will not speculate on the motives of a regulated entity or its affiliate.

[45] *Id*. PP 77, 83 & 86.

[46] *Id*. at P 33; *see supra* n.32,

[47] *Id*. PP 85, 87.

[48] Environmental Defense Fund Request for Rehearing at 11, 16.

[49] Certificate Order, 164 FERC ¶ 61,085 at P 75.

[50] *See* 18 C.F.R. § 284.7(b) (2019) (requiring transportation service to be provided on a non-discriminatory basis).

[51] Certificate Order, 164 FERC ¶ 61,085 at P 75; *see City of Oberlin, Ohio v. FERC*, 937 F.3d at 605-606.

18. The Environmental Defense Fund states that the Certificate Order erred by dismissing ample record evidence of affiliate abuse.[52] Specifically, the Environmental Defense Fund argues that the Certificate Order missed the mark when it said that its primary concern with affiliate precedent agreements was whether the company unduly discriminated against a non-affiliate.[53] Instead, the Environmental Defense Fund contends that the Commission should perform a heightened review of local distribution company (LDC)-affiliate midstream companies, because they raise the concern "that a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from captive customers of the franchised public utility to the affiliate and its shareholders."[54]

19. A majority of the Environmental Defense Fund's arguments regarding anticompetitive behavior and discrimination involve allegations against Spire Missouri, the affiliate shipper, rather than Spire STL, the regulated pipeline company in this case.[55] We affirm the Certificate Order's finding that Spire Missouri is not regulated by this Commission and thus we have no authority to dictate its practices for procuring services.[56] Our jurisdiction does not extend to costs incurred by LDCs or the rates they charge to their retail customers. State regulatory commissions are responsible for approving any expenditures by state-regulated utilities.[57]

20. We can and do require jurisdictional pipelines proposing to construct new capacity to have an open season to ensure that any new capacity is allocated among all potential shippers on a not unduly discriminatory basis.[58] Spire STL held an open season for

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[52] Environmental Defense Fund's Request for Rehearing at 11-12.

[53] *Id*. at 13.

[54] *Id*. (quoting *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, at P 4 (2008)).

[55] Environmental Defense Fund Request for Rehearing at 12.

[56] Certificate Order, 164 FERC ¶ 61,085 at P 76.

[57] *See*, *e.g.*, *Sabal Trail*, 154 FERC ¶ 61,080 at P 67 n.39 (where the Commission rejected an argument of a protestor that the project would result in subsidization because the Florida Public Service Commission issued an order stating that shipper Florida Power & Light may pass the costs of the pipeline onto its ratepayers).

[58] *See Pine Prairie Energy Center, LLC*, 135 FERC ¶ 61,168, at P 30 (2011), *order on reh'g*, 137 FERC ¶ 61,060, at P 21 (2011).

capacity on the Spire Project, and all potential shippers had an opportunity to contract for service. Following the open season, Spire STL entered into a long-term, firm precedent agreement with Spire Missouri for 87.5 percent of the full design capacity of the project.[59] This information was publicly available in the record.[60]

21. Finally, project rates are calculated based on design capacity; therefore, Spire STL will be at risk for unsubscribed capacity, giving it a powerful incentive to market the remaining unsubscribed capacity and serving as strong deterrent to constructing pipelines not supported by market demand.[61] In addition, to confirm the legitimacy of the financial commitments agreed to in affiliate precedent agreements, and thereby confirm the financial viability of the project, Spire STL filed a written statement affirming that it executed contracts for service at the levels provided for in the precedent agreements as required by Ordering Paragraph (E) of the Certificate Order.[62] Therefore, Spire STL's identified affiliation with Spire Missouri does not alter the basis for our finding that there is a market need for the project and the project is required by the public convenience and necessity.

b. The Commission Found Sufficient Need for the Spire Project To Prevent Overbuilding

22. The Environmental Defense Fund argues that the Certificate Order failed to address any claims of overbuilding.[63] Specifically, the Environmental Defense Fund states that the Certificate Order failed to address its contention that there is no need for the project because the Spire Project brings duplicative sources of natural gas to the St.

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[59] *See* Certificate Order, 164 FERC ¶ 61,085 at P 10.

[60] *See Myersville*, 783 F.3d at 1311 (observing that an affidavit and motions to intervene constituted substantial evidence that pipeline was subscribed).

[61] We also note that Spire STL will be required to comply with the Commission's Part 358 Standards of Conduct, which require Spire STL to treat all customers, whether affiliated or non-affiliated, on a non-discriminatory basis. 18 C.F.R. pt. 358 (2019). Spire STL's tariff incorporates these requirements. *See* Spire STL's Application at Exhibit P-1 (Tariff).

[62] *See* Spire STL's September 24, 2018 Letter. *See also* Certificate Order, 164 FERC ¶ 61,085 at Ordering Para. (E).

[63] Environmental Defense Fund's Request for Rehearing at 19.

Louis market area from REX and the Marcellus production region.[64] The dissent also contends that we ignored evidence of: (1) lack of market demand due to flat demand in the St. Louis market area and (2) evidence that Spire Missouri could have accessed its capacity from other projects.

23. Commission policy is to examine the merits of individual projects and assess whether each project meets the specific need demonstrated. Projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given this uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand. We recognize that the current load forecasts for the St. Louis market area are flat and that the capacity created by the Spire Project will enable a diversification of supply alternatives, rather than necessarily supply additional volumes of gas to serve new demand.[65] However, where, as here, it is demonstrated that a specific shipper has entered into precedent agreements for project service, the Commission places substantial reliance on those agreements to find that the capacity to be provided by the project is needed.[66]

24. As the Certificate Order explained, Spire Missouri noted several reasons other than load growth for entering into a precedent agreement with Spire STL, including: the ability to access supplies flowing on REX with direct access to a liquid supply point in close proximity to its distribution system and away from a seismic zone; enhancing the reliability of its system; the inability of current pipelines to provide an additional 350,000 Dth/day of firm transportation service; and the planned retirement of its propane peaking facilities and replacement with pipeline capacity.[67] We find these benefits sufficient to overcome any concerns of overbuilding. Based on the record, we find no reason to second guess the business decision of this shipper given the substantial

[64] *Id*.

[65] Certificate Order, 164 FERC ¶ 61,085 at P 107.

[66] *See Mountain Valley*, 161 FERC ¶ 61,043 at P 42, *order on reh'g*, 163 FERC ¶ 61,197 at PP 35-44, *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271 at 2.

[67] Certificate Order, 164 FERC ¶ 61,085 at P 84.

financial commitment required under executed contracts,[68] and based on this policy and Commission precedent, we find no need to do so here.[69]

c. The Certificate Order Does Not Impact Missouri PSC's Review

25. The Environmental Defense Fund argues that the Commission confuses its authority to determine whether there is need for the project with Missouri PSC's authority to review Spire Missouri's business decisions.[70] The Environmental Defense Fund further disagrees with the Certificate Order's contention that the Missouri PSC will be able to disallow recovery of some of Spire Missouri's costs.[71] The Environmental Defense Fund argues that Missouri PSC's retrospective Annual Cost Adjustment and Purchase Gas Adjustment processes are just and reasonable processes only when the Commission regulates transportation charges passed through that mechanism.[72] The Environmental Defense Fund states that the Certificate Order created a gap in regulation when it held that issues of inappropriate self-dealing between the pipeline and its affiliate are issues properly before this Commission, but then failed to look behind the affiliate precedent agreements by arguing that evaluation of those agreements are properly before state regulators.[73]

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[68] *See Millennium*, 100 FERC ¶ 61,277 at P 201. *See also Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 42 (2006); *S. Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,635 (1996), *order issuing certificate and denying reh'g*, 79 FERC ¶ 61,280 (1997), *order amending certificate and denying stay and reh'g*, 85 FERC ¶ 61,134 (1998), *aff'd*, *Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960 (D.C. Cir. 2000) (*Southern Natural*).

[69] *See, e.g.*, *Mountain Valley*, 161 FERC ¶ 61,043 at P 53; *Atlantic Coast Pipeline, LLC*, 161 FERC 61,042, at PP 59-60 (2017); *E. Shore Natural Gas Co.*, 132 FERC ¶ 61,204, at PP 30-33 (2010) (*Eastern Shore*); *Southern Natural*, 76 FERC ¶ 61,122 at 61,635; *Williams Natural Gas Co.*, 70 FERC ¶ 61,306, at 61,924 (1995); *Tenn. Gas Pipeline Co.*, 69 FERC ¶ 61,239, at 61,901 (1994).

[70] Environmental Defense Fund Request for Rehearing at 15-17.

[71] *Id*. at 16-17.

[72] *Id*. at 15.

[73] *Id*. at 16.

26. The Environmental Defense Fund misunderstands the Commission's and Missouri PSC's responsibilities. First, as discussed at length in the Certificate Order, the Commission found that the Spire Project is required by the public convenience and necessity.[74] The Commission did not delegate or attempt to delegate its NGA section 7 authority to any other entity. Second, the Commission evaluates whether there is any inappropriate self-dealing between a pipeline and its affiliate. As explained above, the Commission finds that Spire STL did not engage in anticompetitive behavior or affiliate abuse.[75] The Certificate Order delegated none of these responsibilities to the Missouri PSC.

27. As a state regulator, Missouri PSC evaluates issues related to Spire Missouri's ability to recover costs associated with its decision to subscribe for service on the Spire Project. Those concerns are beyond the scope of the Commission's jurisdiction. We affirm the Certificate Order's finding that Missouri PSC's Purchased Gas Adjustment and Annual Cost Adjustment processes protect Spire Missouri's customers from imprudently incurred costs.[76] It is for this reason that the Certificate Order concluded that any attempt by the Commission to look behind the precedent agreements in this proceeding might infringe upon the role of state regulators in determining the prudency of expenditures by the utilities that they regulate.[77] Our finding in no way diminishes Missouri PSC's processes for protecting customers from excessive rates or imprudently incurred costs.

28. Further, the dissent and Environmental Defense Fund gloss over the important role played by the Missouri PSC, which is responsible for setting retail rates for Spire Missouri.[78] As discussed above, the Missouri PSC will disallow costs that are not justified according to Missouri state law after considering the interests of Missouri

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[74] Certificate Order, 164 FERC ¶ 61,085 at PP 72-84, 107-123.

[75] *See* P 17, *supra*. *See also* Certificate Order, 164 FERC ¶ 61,085 at P 86.

[76] Certificate Order, 164 FERC ¶ 61,085 at P 86.

[77] *Id*. P 87.

[78] The Missouri PSC's supervision of the contracts boosts their probative value. *See Guardian Pipeline, L.L.C,* 91 FERC ¶ 61,285, at 61,966-67 (2000) (citing *Southern Natural*, 76 FERC ¶ 61,122 at 61,635) ("It is also the Commission's preference not to second guess the business decisions of end users or challenge the business decision of an end user on whether it is economic to undertake direct service from a pipeline supplier, particularly when that decision has been approved by the appropriate state regulatory body.").

ratepayers, among other interests.[79] We reiterate that matters relating to Spire Missouri's retail rates are matters for the Missouri PSC and are beyond the scope of an NGA section 7 proceeding.[80]

d. The Certificate Order Balanced the Adverse Impacts on Existing Pipelines and Their Customers

29. The Environmental Defense Fund argues that the Certificate Order avoids any substantive analysis of whether and to what extent the Spire Project provides an economic and rate benefit to Spire Missouri's customers.[81] The Environmental Defense Fund disagrees with the Certificate Order's finding that any adverse impacts on existing pipelines or their customers are speculative;[82] rather, the Environmental Defense Fund asserts that existing pipelines in the area will see a drop in utilization when the project commences service.[83]

30. The Certificate Order evaluated the Spire Project's impacts on existing pipelines and their customers. Specifically, the order found that although the Spire Project would bring up to 400,000 Dth/day of new pipeline capacity into the St. Louis area, this capacity is not meant to serve new demand because current load forecasts for the region are flat for the foreseeable future.[84] We agree with the Environmental Defense Fund's market characterization that without new demand, existing pipelines in the area, particularly

[79] The Missouri PSC has the jurisdiction and authority to regulate rates and charges for the sale of natural gas to consumers within Missouri. *See* Missouri PSC February 2, 2017 Motion to Intervene (Accession No. 20170203-5054).

[80] *See* Certificate Order, 164 FERC ¶ 61,085 at P 87 n.38 ("Issues related to Spire Missouri's ability to recover costs associated with its decision to subscribe for service on the Spire STL Pipeline Project involve matters to be determined by the relevant state utility commissions; those concerns are beyond the Commission's jurisdiction.").

[81] Environmental Defense Fund Request for Rehearing at 17-18.

[82] *Id*. at 18 (citing Certificate Order, 164 FERC ¶ 61,085 at P 115).

[83] Environmental Defense Fund's Request for Rehearing at 18.

[84] Certificate Order, 164 FERC ¶ 61,085 at P 107.

MRT,[85] will likely see a drop in utilization once supplies begin to flow on the project.[86] Namely, Spire Missouri's contracted capacity on the Spire Project will replace the transportation capacity Spire Missouri holds on MRT's system. However, as acknowledged by Spire STL, Spire Missouri, and MRT, many of Spire Missouri's contracts with MRT reached or are approaching the end of their terms.[87] The Certificate Order evaluated cost differences of gas delivered to Spire Missouri from both the Spire Project and MRT's existing system and found that the differences in costs were not materially significant.[88] The extent to which the Spire Project will provide economic and rate benefits to Spire Missouri's customers, all go to the reasonableness and prudence of Spire Missouri's decision to switch transportation providers. All of those issues fall within the scope of the business decision of a shipper. Thus, we find Spire Missouri's evaluation of its contracts appropriate and will not second guess the business decisions of an end user.

31. We acknowledge the dissent's concern that the Spire Project will lead to unsubscribed capacity on MRT's system and adversely impact its captive customers; however, there is no showing that these impacts are a result of unfair competition.[89] The

[85] MRT's East Line currently delivers gas to Spire Missouri via interconnections with the Natural Gas Pipeline Company of America, LLC and Trunkline.

[86] Certificate Order, 164 FERC ¶ 61,085 at P 107.

[87] *See id*. n.155 (citing MRT's February 27, 2017 Protest at 12-14) ("Spire Missouri's largest contract still in effect with MRT, Contract No. 3310, is for 660,329 Dth per day of capacity; 437,240 Dth per day of that capacity expires on July 31, 2018. However, on June 28, 2018, Spire Missouri and MRT executed a contract for 437,240 Dth per day of transportation service from August 1, 2018 to July 31, 2019. As of November 1, 2018, Spire Missouri's remaining contracts with MRT will be for 223,089 Dth per day under Contract No. 3310, expiring in 2020; and for 75,000 Dth per day under Contract No. 3311, expiring in 2020.").

[88] *Id*. P 108.

[89] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, at P 29 (2018); *Questar Pipeline Co.*, 142 FERC ¶ 61,127, at P 17 n.15 (2013) ("The Commission explained what constitutes unfair competition in cases involving an interstate pipeline's proposal to bypass a local distribution company (LDC), over the LDC's objection, to directly serve the LDC's customer." (citing *Panhandle E. Pipe Line Co.*, 64 FERC ¶ 61,211, at 61,612 (1993); *William Natural Gas Co.*, 47 FERC ¶ 61,080, at 61,225 (1989)); *Ruby Pipeline*, 128 FERC ¶ 61,224, at P 37 (2009) ("We find that Ruby's proposal is consistent with Commission policy, as any adverse impacts of the proposal on competing pipelines and their existing customers will be the result of fair

Commission has an obligation to ensure fair competition and we have done so here. The Certificate Policy Statement holds that the Commission must recognize a new project's impact on existing pipelines serving the market, but this recognition "is not synonymous with protecting incumbent pipelines from the risk of loss of market share to a new entrant."[90] Therefore, we affirm the Certificate Order's finding that unless a petitioner provides evidence of anticompetitive behavior, and here petitioners have not, it is not the role of the Commission to protect pipelines from new entrants when they offer a new opportunity for a shipper.[91] Further, in these cases, the Commission has refrained from second guessing the business decisions of LDCs to achieve what they deem to be more desirable service from new suppliers,[92] and relied on the fact that state public service commissions will assure that any cost shifting effects that do occur at the state level will be allocated reasonably and in accord with state goals and policies.[93]

e. The Commission Appropriately Balanced the Need for the Project Against Harm to Landowners and Communities

32. The Environmental Defense Fund states that the Certificate Policy Statement requires the Commission to balance the public need for the project with the harm to landowners and the environment, and claims that if the Commission appropriately balanced these interests, it would have denied the project.[94] The Environmental Defense Fund explains that the project's impact to landowners through the taking of land by eminent domain will have a "momentous effect" on landowners.[95]

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competition."); *Guardian Pipeline, L.L.C.*, 91 FERC ¶ 61,285, at 61,977 (2000) ("The Commission's longstanding policy has been to allow pipelines to compete for markets and to uphold the results of that competition absent a showing of anticompetitive or unfair competition.").

[90] Certificate Policy Statement, 88 FERC ¶ 61,277 at 61,748.

[91] Certificate Order, 164 FERC ¶ 61,085 at P 122.

[92] *N. Natural Gas Co.*, 74 FERC ¶ 61,172, at 61,604 (1996).

[93] *Transcontinental Gas Pipe Line Corp.*, 87 FERC ¶ 61,136, at P 61,551 (1999).

[94] Environmental Defense Fund Request for Rehearing at 19-22.

[95] *Id*. at 20.

33. Consistent with the Certificate Policy Statement,[96] the need for and benefits derived from the Spire Project must be balanced against the adverse impacts on landowners. Here, the Commission balanced the concerns of all interested parties and did not give undue weight to the interests of any particular party.[97]

34. The Commission concluded that Spire had taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities.[98] The Commission considered the amount of acres and the land uses affected by the project. The Spire Project consists of two pipeline segments, totaling approximately 65 miles of pipeline, and three aboveground meter stations. No major aboveground facilities (e.g., compressor stations) are proposed for the project. The Commission found that operation of the project will affect approximately 415 acres, most of which is agricultural land,[99] defined as hayfields, pastures, and crop production land (for corn and soybeans), with approximately 16 acres permanently converted to natural gas use by the operation of the meter stations.[100] Approximately 15 percent of the pipeline route would be adjacent to existing rights-of-way, and an additional 12 percent would be parallel to, but offset from, existing rights-of-way at varying distances ranging from 30 to 90 feet.[101]

35. The Commission considered the steps that Spire STL took to avoid unnecessary impacts on landowners. The Commission explained that Spire STL worked to minimize impacts on landowners by: locating the pipeline on less-developed areas to reduce the overall impact to residential areas; reduce the pipeline construction right of way width to avoid or minimize impacts on residences; compensate landowners for crop production losses in accordance with terms of individual landowner agreements, due to the loss of

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[96] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744. *See also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012) (*National Fuel*).

[97] Certificate Order, 164 FERC ¶ 61,085 at P 117.

[98] *Id.* P 119.

[99] Approximately 80 percent of the land required for the operation of the project is agricultural land (330 acres); the project also affects forested (35 acres), open (23 acres), and developed land (11 acres), as well as less than 8 acres each of land classified as wetlands and open water. EA at 83.

[100] Construction of the project will affect approximately an additional 589 acres of land. *Id.*

[101] EA at 9.

one growing season as a result of pipeline construction; and working to address new and ongoing landowner and community concerns and input.[102]

36. The Commission also relied on its policy to urge companies to reach mutual negotiated easement agreements with all private landowners prior to construction.[103] Here, the Certificate Order recognized Spire STL's commitment to make good faith efforts to negotiate with landowners for any needed rights, and to resort only when necessary to the use of the eminent domain.[104] We are mindful as the dissent also notes, that Spire STL has been unable to reach easement agreements with many landowners; however, for purposes of our consideration under the Certificate Policy Statement, we affirm the Certificate Order's finding that Spire STL has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.[105]

37. The Environmental Defense Fund contends that the Commission should have balanced the project's need against adverse environmental effects, such as water and Karst terrain crossings, right-of-way clearing, construction of permanent roads, and degrading water quality.[106] The EA analyzed these issues[107] and the Commission

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[102] Certificate Order, 164 FERC ¶ 61,085, at P 118.

[103] *See Mountain Valley*, 163 FERC ¶ 61,197 at P 49.

[104] Certificate Order, 164 FERC ¶ 61,085 at P 118. The dissent appears to suggest that the Commission should have known the extent to which Spire STL would initiate condemnation proceedings to gain the rights to private land for construction and operation of the pipeline. Under NGA section 7(h), once a natural gas company obtains a certificate of public convenience and necessity Congress conferred the right to exercise eminent domain in a U.S. District Court or a state court. 15 U.S.C. § 717f(h) (2018). At the time the Commission issued the Certificate Order, it had no way of knowing precisely how much land Spire STL would need to condemn for construction and operation of the pipeline and encouraged Spire STL to continue to use good faith efforts to obtain the required easements. Moreover, the number of eminent domain proceedings does not affect our determination that Spire STL took sufficient steps to avoid unnecessary landowner impacts. Therefore, we find that the Commission appropriately balanced the adverse impacts to landowners and the potential use of eminent domain and found that those risks were outweighed by the benefits of the project.

[105] *Id*. P 119.

[106] Environmental Defense Fund Request for Rehearing at 19-20, n.88.

[107] EA at 44-45 (discussing mitigation measures for water and karst terrain crossing that would result in no significant impact); 65 (finding that impacts on

concluded that if constructed and operated in accordance with Spire STL's application and supplements, and in compliance with the environmental conditions in the appendix to this Certificate Order, the Commission's approval of the project would not constitute a major federal action significantly affecting the quality of the human environment.[108] The Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic test, not an environmental analysis.[109] Only when the benefits outweigh the adverse effects on the economic interests will the Commission proceed to consider the environmental analysis where other interests are addressed. In addition, Spire STL filed a written statement affirming that it executed contracts for service at the levels provided for in the precedent agreements as required by the Certificate Order;[110] thus ensuring avoidance of unnecessary environmental impacts.

38. Based on the foregoing, we affirm the Certificate Order's conclusion that Spire STL demonstrated public need for Spire Project.

2. The Commission Properly Accepted a 14 Percent Return on Equity

39. On rehearing, Missouri PSC argues that the 14 percent return on equity (ROE) is unsupported by substantial evidence and will result in excessive rates.[111] Missouri PSC asserts that by setting a 14 percent ROE the Commission afforded itself more discretion than the U.S. Supreme Court allows under *Atlantic Refining Co. v. Public Service Commission of New York* (*CATCO*), because the Commission abdicated its responsibility to carefully scrutinize the pipeline's initial rates and protect consumers.[112]

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vegetation as a result of clearing the right-of-way would not be significant); 64, 67, 70 (impacts from the construction of roads will not be significant on vegetation, fisheries and aquatics, agricultural lands and will result in some short-term and long-term impacts on wildlife); and 52 (pipeline construction will result in temporary impacts to water quality).

[108] Certificate Order, 164 FERC ¶ 61,085 at P 263.

[109] *National Fuel*, 139 FERC ¶ 61,037 at P 12.

[110] *See* Spire STL September 24, 2018 Letter; *see also* Certificate Order, 164 FERC ¶ 61,085 at ordering para. (E).

[111] Missouri PSC Request for Rehearing at 3-4.

[112] *Id*. at 4 (citing *CATCO*, 360 U.S. 378).

40. We find that setting a 14 percent ROE in no way abdicates the Commission's responsibilities described in *CATCO*. In *CATCO*, the Court contrasted the Commission's authority under NGA sections 4 and 5 to approve changes to existing rates using existing facilities with its authority under section 7 to approve initial rates for new services and services using new facilities. The Court recognized "the inordinate delay" that can be associated with a full-evidentiary rate proceeding and concluded that was the reason why, unlike sections 4 and 5, NGA section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certificates new facilities, expansion capacity, and/or services.[113] The Court stressed that under section 7, in deciding whether proposed new facilities or services are required by the public convenience and necessity, the Commission is required to "evaluate all factors bearing on the public interest," and an applicant's proposed initial rates are not "the only factor bearing on the public convenience and necessity."[114] Thus, as explained by the Court, "Congress, in [section] 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require when the Commission exercises authority under section 7,"[115] and the Commission therefore has the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA.[116]

41. We disagree that the treatment of ROE or the resulting recourse rates in these proceedings are flawed. Because the establishment of recourse rates is based on estimates, the Commission's general policy is to accept the pipeline's cost components if they are reasonable and are consistent with Commission policy.[117] For new pipelines, the Commission has determined that equity returns of up to 14 percent are acceptable as long as the equity component of the capitalization is no more than 50 percent.[118] The

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[113] *CATCO*, 360 U.S. at 390.

[114] *Id*. at 391.

[115] *Id*.

[116] *Id*. at 392.

[117] *See Transcontinental*, 82 FERC ¶ 61,084 at 61,315; *Southern Natural*, 76 FERC ¶ 61,122 at 61,637.

[118] *See, e.g.*, *Sabal Trail*, 154 FERC ¶ 61,080 at P 117, *reh'g denied,* 156 FERC ¶ 61,160 at P 20, *aff'd in relevant part sub nom. Sierra Club v. FERC,* 867 F.3d at 1377 (finding that the Commission "adequately explained its decision to allow Sabal Trail to

Certificate Order applied the Commission's established policy, which balances both consumer and investor interests, in establishing Spire STL's initial rates. Specifically, the Commission approved Spire STL's proposed 14 percent return on equity, based on a capital structure of 50 percent equity and 50 percent debt.[119]

42. Missouri PSC argues that the Commission's approval of Spire STL's requested 14 percent ROE is arbitrary and capricious, as the Certificate Order does not perform a discounted cash flow analysis, or any other type of analysis to establish an appropriate ROE.[120] Missouri PSC states that without performing a discounted cash flow analysis, the Commission cannot be certain that the 14 percent ROE satisfies the public interest standard.[121]

43. Missouri PSC cites to NGA section 4 rate proceedings as evidence of the appropriate range of reasonableness that the Commission should use in section 7 cases to determine the ROE.[122] As we explained in the Certificate Order, an initial rate is based on estimates until we can review Spire STL's cost and revenue study at the end of its first three years of actual operation.[123] Spire STL's proposed initial rates are an estimate, which is not supported by any operating history, of what appropriate rates for the service should be. The actual costs associated with constructing the pipeline and providing service may increase or decrease and the revenues recovered may not closely match the projected cost of service. Conducting a more rigorous discounted cash flow analysis in an individual certificate proceeding when other elements of the pipeline's cost of service are based on estimates would not be the most effective or efficient way to determine an appropriate ROE and would unnecessarily delay proposed projects with time sensitive in-

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employ a hypothetical capital structure" of 50 percent debt and 50 percent equity, with a 14 percent return on equity).

[119] Certificate Order, 164 FERC ¶ 61,085 at P 126.

[120] Missouri PSC Request for Rehearing at 6-7.

[121] *Id*. at 7.

[122] Missouri PSC Request for Rehearing at 6-7 (citing *El Paso Nat. Gas Co.*, 154 FERC ¶ 61,120 (2016) and *Portland Nat. Gas Trans. Sys.*, 142 FERC ¶ 61,197 (2013)).

[123] Certificate Order, 164 FERC ¶ 61,085 at P 138.

service schedules.[124] In an NGA section 4 or 5 proceeding, parties have the opportunity to file and examine testimony with regard to the composition of the proxy group in the use of the discounted cash flow analysis, the growth rates used in the analysis, and the pipeline's position within the zone of reasonableness with regard to risk. It would be difficult, if not impossible, to complete this type of analysis in section 7 certificate proceedings in a timely manner. As stated above, the Commission's current policy is an appropriate exercise of our discretion to approve initial rates under the "public interest" standard of NGA section 7.[125] As conditioned herein, the approved initial rates will "hold the line" and "ensure that the consuming public may be protected" until just and reasonable rates are adjudicated under NGA sections 4 or 5.[126] Here, that opportunity for review is required no later than three years after the in-service date for Spire STL's facilities.[127]

44. Missouri PSC contends that it is arbitrary and capricious to rely on this approach when market conditions have changed and argues that the Commission must use current market data given the current low cost of capital, as the Commission has done in the electric industry.[128] Specifically, Missouri PSC points out that Spire STL's proposed ROE is inflated relative to other investments, such as the return for electric utilities.[129] The returns approved for other utilities, such as electric utilities and LDCs are not

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[124] *See Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125, at P 39 (2017).

[125] The distinction between the Commission's approach to ROE under NGA sections 4 and 5, on the one hand, and NGA section 7, on the other hand, likewise demonstrates Missouri PSC's error in relying on the Commission's action in *Ass'n of Businesses Advocating Tariff Equity v. MISO*, 156 FERC ¶ 61,234 (2016). *See* Missouri PSC's Request for Rehearing at 10. That case arises under FPA section 206, 16 U.S.C. § 824e (2018), which is parallel to NGA section 5, and thus requires the Commission to apply the "just and reasonable" standard. More specifically, the utilities at issue in *Ass'n of Businesses Advocating Tariff Equity* are unlike Spire STL here; as existing transmission-owning members of the Midcontinent Independent System Operator (MISO), their cost-of-service data is not, as here, based on estimates.

[126] *CATCO*, 360 U.S. at 392.

[127] Certificate Order, 164 FERC ¶ 61,085 at PP 138, 140.

[128] Missouri PSC Request for Rehearing at 5-6, 9-10.

[129] *Id*. at 10.

relevant because there is no showing that these companies face the same level of risk as faced by greenfield projects proposed by a new natural gas pipeline company.[130]

45. Missouri PSC alleges that the Commission's justification for its ROE based on the business risk to similarly situated pipeline companies is flawed.[131] Missouri PSC points out that rates of return approved in recent decisions, in NGA section 4 rate cases, were well below 14 percent and that the Commission has not adequately quantified the risk associated with the Spire Project.[132] Missouri PSC further contends that Spire STL faces less risk because it is structured on affiliate agreements and has a parent company who is not a new entrant in the natural gas industry.[133]

46. We are not persuaded that we should reconsider Spire STL's proposed ROE. In the case cited by Missouri PSC, *Petal Gas Storage L.L.C.* (*Petal*),[134] the Commission decided that Petal proposed a moderate risk compared to other *established* pipeline companies, not new entrants, like Spire STL.[135] Additionally, *Petal* does not reflect the Commission's current practice in determining the ROE in section 7 certificate proceedings.[136] In *Petal*, the Commission established a proxy group to determine the appropriate ROE. However, our current practice for established pipelines is to use the

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[130] The Commission has previously concluded that distribution companies are less risky than a pipeline company. *See, e.g.*, *Trailblazer Pipeline Co.*, 106 FERC ¶ 63,005, at P 94 (2004) (rejecting inclusion of local distribution companies in a proxy group because they face less risk than a pipeline company).

[131] Missouri PSC Request for Rehearing at 8.

[132] *Id*. at 8, 11-12.

[133] *Id*. at 8, 12.

[134] Missouri PSC Request for Rehearing at 8 (citing 97 FERC ¶ 61,097, *on reh'g*, 106 FERC ¶ 61,325 (2001), *vacated in part*, *Petal Gas Storage, L.L.C., v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) (*Petal*)).

[135] *Petal*, 106 FERC ¶ 61,325 at PP 4, 29.

[136] *Transcontinental Gas Pipe Line Company, LLC*, 156 FERC ¶ 61,092, at P 27 (2016) ("The Commission's current policy of calculating incremental rates for expansion capacity using the Commission-approved ROEs underling pipelines' existing rates is an appropriate exercise of its discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA,").

last Commission-approved ROE underlying the pipeline's existing rates until just and reasonable rates are adjudicated under NGA sections 4 or 5.

47. Further, we do not agree with Missouri PSC's argument that we must reevaluate the ROE because Spire STL only contracted with an affiliate. As stated above, the Commission has determined that, for new pipelines, equity returns of up to 14 percent are reasonable until such time as the ROE may be further evaluated in an NGA section 4 or 5 proceeding.[137]

48. Finally, Missouri PSC argues that granting a 14 percent ROE to new entrants incentivizes unnecessary new pipeline construction.[138] We disagree. There is no evidence that this ROE will incentivize the construction of an unneeded pipeline. As discussed, the Commission conducts a separate public needs determination and is satisfied that there is demand for the Spire Project.[139] Moreover, the Commission requires that initial rates be designed on 100 percent of the design capacity of the project, thereby placing the risk of underutilization on the pipeline.

B. National Environmental Policy Act Review

1. The EA Properly Assessed the Project's Purpose and Reasonable Alternatives

49. Section 102(C)(iii) of the National Environmental Policy Act (NEPA) requires that an agency discuss alternatives to the proposed action in an environmental document.[140] Based on a brief statement of the purpose and need for the proposed

[137] *See, e.g.*, *Sabal Trail*, 154 FERC ¶ 61,080 at P 117, *reh'g denied,* 156 FERC ¶ 61,160 at P 20, *aff'd in relevant part sub nom. Sierra Club v. FERC,* 867 F.3d at 1377 (finding that the Commission "adequately explained its decision to allow Sabal Trail to employ a hypothetical capital structure" of 50 percent debt and 50 percent equity, with a 14 percent return on equity).

[138] Missouri PSC Request for Rehearing at 10.

[139] *See supra* PP 12-34.

[140] 42 U.S.C. § 4332(C)(iii) (2012). Section 102(E) of NEPA also requires agencies "to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(E).

action,[141] the Council on Environmental Quality's (CEQ) regulations require agencies to evaluate all reasonable alternatives, including no-action alternatives and alternatives outside the lead agency's jurisdiction.[142] Agencies use the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.[143] Guidance from CEQ explains that reasonable alternatives "include those that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable from the standpoint of the [permit] applicant."[144] Yet CEQ has also stated that there is "no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives."[145] For eliminated alternatives, agencies must briefly discuss the reasons for the elimination.[146] An agency's specification of the range of reasonable alternatives is entitled to deference.[147]

50. Ms. Viel asserts that the Commission defined the Spire Project's purpose and need so narrowly that all other alternatives were ruled out by definition.[148]

51. We disagree. The EA did not narrowly interpret the project purpose so as to preclude consideration of other alternatives. While an agency may not narrowly define the proposed action's purpose and need, the alternative discussion need not be

[141] 40 C.F.R. § 1502.13 (2019).

[142] *Id*. § 1502.14.

[143] *See Col. Envtl. Coal. v. Dombeck,* 185 F.3d 1162, 1175 (10th Cir. 1999).

[144] *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

[145] *Guidance Regarding NEPA Regulations,* 48 Fed. Reg. 34,262, 34,267 (July 22, 1983).

[146] *See* 40 C.F.R. § 1502.14(a) (2019).

[147] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[148] Ms. Viel Request for Rehearing at 2-3.

exhaustive.[149] When the purpose of the project is to accomplish one thing, "it makes no sense to consider the alternative ways by which another thing might be achieved."[150]

52. The EA adopted Spire STL's stated project purpose[151] "to provide 400,000 dekatherms per day of year-round transportation service of natural gas to markets in the St. Louis metropolitan area, eastern Missouri, and southwest Illinois."[152] That purpose is supported by a precedent agreement executed for 87.5 percent of the firm transportation service of the project. Here, the EA's statement of the purpose and need was defined appropriately to allow for the evaluation of reasonable alternatives to the proposed project. Under NEPA, the description of the purpose of and need for the project must be "reasonable," and when, as here, "an agency is asked to sanction a specific plan . . . the agency should take into account the needs and goals of the parties involved in the application."[153] The EA satisfied these requirements.[154]

53. Moreover, we also disagree with Ms. Viel's claim that the Commission accepted without questioning the applicant's assertion that there is a need for the project.[155] Ms. Viel appears to conflate the Commission's acceptance of Spire STL's description of the purpose of and need for the project for the purposes of the required NEPA review with the Commission's determination of "public need" under the public convenience and necessity standard of section 7(c) of the NGA. As discussed above, when determining "public need," the Commission balances public benefits, including market need, against project impacts to captive retail customers, existing pipelines and their customers, and

[149] *See State of N.C. v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976).

[150] *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

[151] *City of Grapevine, Texas v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (upholding federal agencies' use of applicants' identified objectives as the basis for evaluating alternatives).

[152] EA at 2.

[153] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 196.

[154] We note that NEPA regulations require the agency to "briefly specify" the purpose and need for the projects. 40 C.F.R. § 1502.13.

[155] Ms. Viel Request for Rehearing at 2-3.

landowners and communities.[156] The EA appropriately explained that some issues presented by commenters about the project purpose were beyond the scope of the environmental document (i.e., harm to existing pipelines and their customers);[157] under NGA section 7(c), the final determination of the need for the projects lies with the Commission (whereas the EA is a staff document). Neither NEPA nor the NGA requires the Commission to make its determination of whether the project is required by the public convenience and necessity before its final order.

54. The Environmental Defense Fund and Ms. Viel state that the Commission misconstrued and misapplied NEPA by failing to appropriately evaluate a no-action alternative for the project.[158] Petitioners assert that the no-action alternative is the most appropriate option because: (1) there is no need for the project, (2) alleged negative non-environmental consequences of the project will be avoided; (3) consumers will not be locked into an inflexible 20 year contract underwriting Spire STL; and (4) captive retail ratepayer will not be compelled to bear the risk of inter-affiliate contracting decisions to maximize profits to an LDC owner.[159]

55. Courts review both an agency's stated project purpose and its selection of alternatives in association with its NEPA review under the "rule of reason," where an agency must reasonably define its goals for the proposed action, and an alternative is deemed reasonable if it can feasibly achieve those goals.[160] When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal, adopting

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[156] *See supra* PP 12-34 (affirming the Certificate Order's public needs determination).

[157] EA at 147-148.

[158] Environmental Defense Fund Request for Rehearing at 22-23; Ms. Viel Request for Rehearing at 3.

[159] Environmental Defense Fund Request for Rehearing at 22-23; Ms. Viel Request for Rehearing at 3.

[160] *See, e.g.*, *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.). *See also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2019) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

the proposal, or adopting the proposal with some modification.[161] An agency may eliminate those alternatives that will not achieve a project's goals or which cannot be carried out because they are too speculative, infeasible, or impractical.[162]

56. The EA found that taking no action would avoid adverse environmental impacts, but would fail to fulfill the objective of the proposed project.[163] The EA recognized that the project was not developed to serve new demand; rather, the purpose of the project is to increase diversity of supply sources and transportation paths to lower delivered gas costs, improve security and reliability of supply, and achieve an operationally superior peak-shaving strategy.[164] Accordingly, we affirm the EA's recommendation that adoption of the no-action alternative is not appropriate.[165]

2. The Potential Increase In Greenhouse Gases Is Not An Indirect Impact of the Spire Project

57. Ms. Viel alleges that the Certificate Order and the EA failed to account for the indirect impacts of upstream natural gas production, downstream greenhouse gas emissions, and the resulting climate change impacts from these emissions.[166] Ms. Viel claims that the project would be responsible for enabling upstream gas production and

[161] *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72-74 (D.C. Cir. 2011).

[162] *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.") (quoting *All Indian Pueblo Council v. United States,* 975 F.2d 1437, 1444 (10th Cir. 1992) (internal quotation marks omitted)); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (same). *See also Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives).

[163] EA at 147-148.

[164] *Id*. at 147.

[165] *Id*. at 148.

[166] Ms. Viel Request for Rehearing at 3-4.

downstream gas consumption – effects that would not occur absent the Commission's issuance of a certificate for the project.[167]

58. The Certificate Order discussed why NEPA does not require the Commission to analyze the environmental impacts from upstream natural gas development as indirect impacts.[168] On rehearing, Ms. Viel raises no new arguments disputing the Commission's reasoning; therefore, we need not address them in detail here. Further, Ms. Viel fails to acknowledge, much less identify error with, the Commission's analysis of either the estimated upstream or downstream impact analyses.

59. As discussed in the Certificate Order, CEQ defines "indirect impacts" as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[169] With respect to causation, "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause" in order "to make an agency responsible for a particular effect under NEPA."[170] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[171] Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation" will not fall within NEPA if the causal chain is too attenuated."[172] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[173]

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[167] *Id*. at 4.

[168] Certificate Order, 164 FERC ¶ 61,085 at PP 247-252.

[169] *Id*. P 248.

[170] *Id*. P 249 (citing *U.S. Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, at 767 (2004) (*Pub. Citizen*) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983))).

[171] Certificate Order, 164 FERC ¶ 61,085 at P 249 (quoting *Pub. Citizen*, 541 U.S. at 767).

[172] *Id*. P 249 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. at 774).

[173] *Id*. P 249 (quoting *Pub. Citizen*, 541 U.S. at 770).

60. The Certificate Order thoroughly discussed the Commission's reasons for determining that the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline nor reasonably foreseeable consequences of an infrastructure project, as contemplated by the CEQ regulations.[174] With respect to causation, we noted that a causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).[175]

61. The Certificate Order added that even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, such potential impacts, including greenhouse gas emissions impacts, resulting from such production are not reasonably foreseeable.[176] Courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[177] Although courts have held that NEPA requires "reasonable forecasting," an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."[178]

62. The Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline; states, rather than the Commission, have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. Moreover, there are no forecasts on record which would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized.[179] Thus, we found that, even if the Commission knows the general source area of gas likely

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[174] *See id*. PP 251-252 (explaining that upstream production impacts are not indirect impacts of the Project, as they are neither causally related nor reasonably foreseeable, as contemplated by the CEQ regulations). *See also* EA at 143-145.

[175] *Id*. P 251.

[176] Certificate Order, 164 FERC ¶ 61,085 at P 252.

[177] *EarthReports, Inc. v. FERC*, 828 F.2d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[178] *N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011).

[179] Certificate Order, 164 FERC ¶ 61,085 at P 252.

to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary by producer and depend on the applicable regulations in the various states.[180] Accordingly, we found that here, the impacts of natural gas production are not reasonably foreseeable because they are "so nebulous" that "we cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts of a proposed interstate natural gas pipeline.[181]

63. Notwithstanding our conclusions regarding indirect impacts, the EA for the project provided a general analysis of the potential impacts, including greenhouse gas emissions impacts, associated with natural gas consumption, based on a publicly-available U.S. Environmental Protection Agency (EPA) methodology.[182] Contrary to Ms. Viel's assertions,[183] the EA went beyond that which is required by NEPA, and quantified the estimated downstream greenhouse gas emissions, assuming that the project always transports the maximum quantity of natural gas each day and that the full quantity of gas is used for additional consumption.[184]

64. Finally, we affirm the Certificate Order's finding that approval of the Spire Project will not spur additional identifiable gas consumption.[185] Ms. Viel cites to *Sierra Club v. FERC*,[186] to support the presumption that the burning of gas is not only foreseeable but is the entire purpose of the project.[187] We disagree that this case applies here. The court held that where it is known that the natural gas transported by a project will be used for a specific end-use combustion, the Commission should "estimate[] the amount of power-

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[180] *Id*. P 252.

[181] *Id*. P 252.

[182] EA at 144.

[183] Ms. Viel Request for Rehearing at 4-5.

[184] EA at 144.

[185] Certificate Order, 164 FERC ¶ 61,085 at P 253.

[186] 867 F.3d 1357.

[187] Ms. Viel Request for Rehearing at 4 (citing *Sierra Club v. FERC*, 867 F.3d at 1372).

plant carbon emissions that the pipelines will make possible."[188] However, as the Certificate Order noted, the Southeast Market Pipelines Project at issue in *Sierra Club v. FERC* is factually distinct from the Spire Project.[189] The record in that case indicated that natural gas would be delivered to specific customers – power plants in Florida – such that the court concluded that the consuming of the gas in those plants was reasonably foreseeable and the impacts of that activity warranted environmental examination.[190] In contrast, here, the gas to be transported by the Spire Project will be delivered by the project's sole shipper, an LDC, who will provide the gas to improve the reliability and supply diversity for its customers. The Spire Project is not intended to meet an incremental demand for natural gas above existing levels. As the EA explained, the Spire Project would replace, rather than add to, other fuel sources that are currently contributing greenhouse gases to the atmosphere; thus, the EA did not anticipate that the end-use emissions would represent new greenhouse gas emissions to contribute incrementally to future climate change impacts.[191]

65. Accordingly, we deny rehearing and affirm the Certificate Order's determination that the potential increase of greenhouse gas emissions associated with the production, processing, distribution, or consumption of gas are not indirect impacts of the Spire Project.[192]

3. The Commission Evaluated the Cumulative Impacts of the Spire Project

66. Ms. Viel asserts that the Commission failed to adequately consider cumulative impacts related to climate change impacts from the pipeline and upstream natural gas

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[188] *Sabal Trail*, 867 F.3d at 1371. *See also Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1065 (D.C. Cir. 2017) (explaining that in *Sierra Club v. FERC*, "the court invalidated an indirect effects analysis because the agency had technical and contractual information on 'how much gas the pipelines [would] transport' to specific power plants, and so could have estimated with some precision the level of greenhouse gas emissions produced by those power plants. The court also recognized that 'in some cases quantification may not be feasible.'") (citation omitted).

[189] Certificate Order, 164 FERC ¶ 61,085 at P 253.

[190] *Sabal Trail*, 867 F.3d at 1371.

[191] EA at 145.

[192] Certificate Order, 164 FERC ¶ 61,085 at P 254.

development.[193] Ms. Viel argues that the Commission improperly limited its cumulative impacts analysis to the geographic scope of the proposed action.

67. The CEQ regulations define cumulative impact as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[194] The D.C. Circuit has held that a meaningful cumulative impact analysis must identify: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.[195] The geographic scope of our cumulative impact analysis varies from case to case, and resource to resource, depending on the facts presented.

68. Although the scope of our cumulative impacts analysis will vary from case to case, and resource to resource, depending on the facts presented, we have concluded that where the Commission lacks meaningful information about potential future natural gas production within the geographic scope of a project-affected resource, then production-related impacts are not reasonably foreseeable so as to be included in a cumulative impacts analysis.[196]

69. Consistent with the CEQ guidance and case law, the EA identified the criteria that defined the project's geographic scope, and used that scope in the cumulative impact analysis to describe the general area for which the project could contribute to cumulative impacts.[197] The EA determined that the Spire Project had a geographic scope for potential cumulative impacts of: the construction workspace for soils and geologic resources; the hydrologic unit code 12 watershed for impacts on ground and surface water resources, wetlands, vegetation, and wildlife; overlapping impacts within the area of potential effect for cultural resources; a 1-mile radius for land use impacts; 0.25-mile

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[193] Ms. Viel Request for Rehearing at 5-6.

[194] 40 C.F.R. § 1508.7 (2019).

[195] *Sierra Club v. FERC*, 827 F.3d 36, 39 (D.C. Cir. 2016) (*Freeport LNG*) (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002)).

[196] *See Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255, at P 120 (2017).

[197] EA at 131-145.

and existing visual access points for visual resources; overlapping noise sensitive areas for operational noise impacts; 0.25 mile surrounding the pipeline or aboveground facility for construction noise impacts and air quality (0.5 mile from horizontal direction drilling or direct pipe installation); and affected counties and municipalities for socioeconomics.[198] In total, the EA identified 14 current, proposed, or reasonably foreseeable actions within the geographic scope of the project, including four active oil/gas wells;[199] however, the EA determined that the project will contribute a negligible to minor cumulative effect and would not be significant.[200]

70. For the same reasons explained above with respect to indirect impacts, because the impacts of upstream natural gas production are not reasonably foreseeable, such impacts were correctly excluded from the EA's cumulative impacts analysis. As we have also explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline, and that is the case here.[201] We note that Ms. Viel identifies no specific locations within the Spire Project's geographic scope where additional production will occur as a result of the Spire Project, and believe that her failure to do so only highlights the speculative nature of the inquiry she advocates. Accordingly, we continue to believe that broadly analyzing effects related to upstream production using generalized assumptions will not assist us in making a reasoned decision regarding the siting of proposed natural gas pipelines.[202]

4. The EA Evaluated Impacts of Methane Emissions

71. On rehearing, Ms. Viel reiterates her prior claims that the EA's review of methane emissions was too narrow in concluding that methane emissions would only occur during construction, and that the Commission inaccurately identified the global warming

[198] *Id*. at 133, Table B-25.

[199] *Id*. at 132.

[200] *Id*. at 145.

[201] *See supra* P 57.

[202] We are not "aware of any basis that indicates the Commission is required to consider environmental effects that are outside of our NEPA analysis of the proposed action in our determination of whether a project is in the public convenience and necessity under section 7(c)." *Dominion Transmission*, 163 FERC ¶ 61,128 at P 43 (citing *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)).

potential for methane.[203] Ms. Viel contends that the EA did not evaluate fugitive emissions from the project.[204] Finally, Ms. Viel urges the Commission to use the global warming potential for methane from the Intergovernmental Panel on Climate Change Fifth Assessment Report, which provides a 100-year global warming potential for methane of 36 or a 20-year global warming potential for methane of 87.[205]

72. We disagree. On rehearing, Ms. Viel raises no new arguments disputing the Commission's reasoning, therefore we need not address them in detail. As explained in the Certificate Order and the EA,[206] emissions of greenhouse gases are typically quantified in terms of carbon dioxide equivalents by multiplying emissions of each greenhouse gas by its respective global warming potential. Methane emissions were included in the total estimated carbon dioxide equivalent emissions for the project.[207] Estimates of applicable emissions that would be generated during construction and operation of the project are presented in the EA, including fugitive emissions of methane.[208] The EA's use of the global warming potential for methane designated as 25, is appropriate and specifically follows EPA guidance for methane.[209] The use of a 100-year global warming potential for methane of 25 is the current scientific methodology used for consistence and comparability with other emissions estimates in the United States and internationally, including the EPA's Greenhouse Gas Mandatory Reporting Rule.[210] This context would be lost if we used Ms. Viel's suggested 100-year global

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[203] Ms. Viel Request for Rehearing at 6-7.

[204] *Id*. at 6.

[205] *Id*. at 7.

[206] Certificate Order, 164 FERC ¶ 61,085 at P 244. EA at 111, 143-144.

[207] *See* EA at 110-111 (explaining that the EPA added greenhouse gases to its definition of pollutant and specified that those greenhouse gases include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride).

[208] *Id*. at 113, 114.

[209] Available at: https://www.epa.gov/sites/production/files/2018-01/documents/2018_complete_report.pdf.

[210] *See* EPA Revisions to the Greenhouse Gas Reporting Rule and Final Confidentiality Determinations for New or Substantially Revised Data Elements, 78 Fed. Reg. 71,903 (Nov. 29, 2013). *See also Texas E. Transmission*, *Lp*, 146 FERC ¶ 61,086, at P 122 (2014) (explaining that the Commission uses the global warming potentials in EPA's Greenhouse Gas Reporting Rule in effect when the NEPA document is prepared);

warming potential for methane of 36 or a 20-year global warming potential for methane of 87. Accordingly, we deny rehearing.

The Commission orders:

(A) The Missouri Public Service Commission's, the Environmental Defense Fund's, and Juli Viel's requests for rehearing are dismissed or denied.

(B) Juli Viel's motion for stay is dismissed as moot.

(C) Enable Mississippi River Transmission, LLC's request for rehearing is withdrawn.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Dominion Transmission, Inc., 158 FERC ¶ 61,029, at P 4 (2017) (applying the global warming potential for methane from EPA's 2013 Greenhouse Gas Reporting Rule).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC Docket No. CP17-40-002

(Issued November 21, 2019)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because there is nothing in the record to suggest that this interstate natural gas pipeline is needed. Prior to receiving a certificate pursuant to section 7(c) of the Natural Gas Act (NGA),[1] a pipeline developer must demonstrate a need for its proposed project.[2] Today's order turns this requirement into a meaningless check-the-box exercise.

2. The Commission is supposed to "consider all relevant factors reflecting on the need for the project"[3] and balance the evidence of need against the project's adverse impacts.[4] Today's order, however, falls well short of that standard, failing utterly to provide the type of meaningful assessment of need that Commission precedent and the basic principles of reasoned decisionmaking require. The record suggests that this project—the Spire STL Pipeline Project (Spire Pipeline)—is more likely an effort to enrich the shared corporate parent of the developer, Spire STL Pipeline LLC (Spire STL), and its only customer, Spire Missouri, Inc. (Spire Missouri), than a response to a genuine need for new energy infrastructure. Yet today's order refuses to engage with that

[1] 15 U.S.C. § 717f(c) (2018).

[2] *See, e.g. Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,747-48 (1999) (1999 Certificate Policy Statement); *see also Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, at P 26 (2018) (Certificate Order) (beginning the Commission's discussion of the 1999 Certificate Policy Statement with a discussion of the "criteria for determining whether there is a need for a proposed project"); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) ("To ensure that a project will not be subsidized by existing customers, the applicant must show that there is market need for the project.").

[3] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747.

[4] *Id.* at 61,748 ("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.").

evidence or seriously consider the arguments against giving the Spire Pipeline the Commission's stamp of approval. As a result, the Commission's conclusion that the Spire Pipeline is required by the public convenience and necessity is arbitrary and capricious.

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3. One of the foundational principles of administrative law is that an agency may not ignore an important aspect of the issue it is addressing.[5] Especially where a statute vests an agency with a broad and flexible mandate, failing to wrestle with an important "aspect of the problem" is the essence of what it means to be arbitrary and capricious.[6] But that is exactly what the Commission has done here. The record is replete with evidence suggesting that the Spire Pipeline is a two-hundred-million-dollar effort to enrich Spire's corporate parent rather than a needed piece of energy infrastructure.[7] Unfortunately, the Commission refuses to grapple with that evidence, instead insisting that a precedent agreement between two corporate affiliates is all that is required to conclude that a proposed pipeline is needed, regardless of the contrary evidence in the record. That is not reasoned decisionmaking. Whatever probative weight that agreement has, the Commission cannot simply point to the agreement's existence and then ignore the evidence that undermines the agreement's probative value. In so doing, the Commission ignores arguably the most import aspect of the problem in this case: Whether the precedent agreement on which it rests its entire determination of need actually tells us anything about the need for this pipeline.

4. The relevant evidence is straightforward and largely undisputed. The parties agree that demand for natural gas in the region is flat and that Spire Missouri is merely shifting

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[5] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*) (listing the "normal[]" bases for finding an agency action arbitrary and capricious, including that the agency "entirely failed to consider an important aspect of the problem"); *SecurityPoint Holdings, Inc. v. TSA*, 867 F.3d 180, 185 (D.C. Cir. 2017) ("[T]he court must vacate a decision that 'entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency.'").

[6] *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that, even where a statutory "term leaves agencies with flexibility, an agency may not 'entirely fail to consider an important aspect of the problem'" (quoting *State Farm,* 463 U.S. at 43)).

[7] Certificate Order, 164 FERC ¶ 61,085, at P 9 (2018) ("Spire estimates that the cost of the proposed facilities will be approximately $220,276,167.").

its capacity subscription from an existing pipeline to a new one owned by its affiliate.[8] Indeed, some record evidence suggests that natural gas demand in the region may actually be declining.[9] In any case, neither Spire Missouri nor Spire STL has explained why the capacity available on the pre-existing pipeline, owned by Enable Mississippi River Transmission, LLC (MRT), is not sufficient to meet Spire Missouri's needs. In short, the record does not contain any evidence—let alone substantial evidence—suggesting a need for additional interstate natural gas pipeline capacity in the St. Louis region.

5. If there is no need for new capacity, one might think that the project would at least reduce the cost of natural gas delivered to the region.[10] But the Commission itself concluded that the natural gas transported through the Spire Pipeline would not be any cheaper than that transported through existing infrastructure.[11] Nor does the record show that the Spire Pipeline would meaningfully diversify Spire Missouri's access to different sources of natural gas. Although Spire STL claimed that the project might access new supplies, MRT convincingly explained how its existing pipeline could provide access to the same natural gas basins[12]—an explanation that today's order does not rebut.

6. Given that evidence, it should come as no surprise that Spire Missouri repeatedly rejected opportunities to contract for capacity on proposed pipelines that were substantially similar to the Spire Pipeline.[13] But it may be surprising that Spire Missouri

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[8] *See Spire STL Pipeline LLC*, 169 FERC ¶ 61,135, at P 24 (2019) (Rehearing Order) ("We recognize that the current load forecasts for the St. Louis market area are flat.").

[9] *See* MRT Comments at 13-15 (Oct. 25, 2019) (discussing evidence that may indicate demand for natural gas is actually falling).

[10] *Cf. Empire Pipeline, Inc.*, 166 FERC ¶ 61,172 (2018) (Glick, Comm'r, dissenting at P 6) ("[I]f a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be 'needed' in the first place.").

[11] Rehearing Order, 169 FERC ¶ 61,135 at P 30 ("The Certificate Order evaluated cost differences of gas delivered to Spire Missouri from both the Spire Project and MRT's existing system and found that the differences in costs were not materially significant.").

[12] *See, e.g.*, MRT February 27, 217 Protest at 22.

[13] Certificate Order, 164 FERC ¶ 61,085 at P 57; MRT April 10, 2017 Answer at 3; *see also* Missouri PSC February 27, 2017 Protest at 10 (listing additional projects that

has now decided to enter into a contract to support the development of the Spire Pipeline, especially since Spire STL held an open season to solicit customers for the Spire Pipeline and no one but Spire Missouri signed up.[14] Of course, there is a critical difference between the Spire Pipeline and the similar pipelines that Spire Missouri spurned: The profits Spire STL makes off Spire Missouri's purchases of natural gas transportation service will go to their shared corporate parent, rather than an unaffiliated third party.

7. That may make good business sense for the Spire corporate family, but that does not necessarily mean that the project is in the public interest or consistent with the public convenience and necessity. The Spire companies' obvious financial motive coupled with the abundant record evidence casting doubt on the need for the project ought to have caused the Commission to carefully scrutinize the record to determine whether the Spire Pipeline is actually needed or just financially advantageous to the Spire companies. Instead, the Commission asserts that the existence of the precedent agreement between Spire STL and Spire Missouri is sufficient, in and of itself, to find that the Spire Pipeline is needed, no matter the contrary evidence.[15] But, as explained below, the Commission's failure to consider that contrary evidence renders today's order arbitrary and capricious and not the product of reasoned decisionmaking.

I. The Commission Failed to Adequately Consider Whether Spire Is Needed

8. The first step in reviewing an application for an NGA section 7 certificate to develop a new, stand-alone interstate natural gas pipeline is to determine whether there is a need for that project. A finding that a proposed pipeline is not needed would presumably mean that the project is not consistent with the public convenience and *necessity* since the project's benefits would, almost by definition, not outweigh its

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were proposed, including projects to connect the region to the REX pipeline, but that Spire Missouri did not take service from).

[14] Certificate Order, 164 FERC ¶ 61,085 at P 10. Spire STL asserts that it "received interest from multiple prospective shippers," but provides no evidence to substantiate that claim. Spire STL March 17, 2017 Answer at 6; *see* Certificate Order, 164 FERC ¶ 61,085 at n.13.

[15] *See* Rehearing Order, 169 FERC ¶ 61,135 at P 14 ("We disagree and affirm the Certificate Order's finding that the Commission is not required to look behind precedent agreements to evaluate project need, regardless of the affiliate status of the project shipper").

adverse impacts.[16] Accordingly, given the importance of the need determination, reasoned decisionmaking requires the Commission to engage in a thorough review of the record that considers all relevant evidence.

9. In recent years, however, the Commission has adopted an increasingly doctrinaire position that the mere existence of agreements between a pipeline developer and one or more shippers to contract for capacity on the proposed pipeline is *sufficient*, by itself, to demonstrate the need for the proposed pipeline. The Commission describes this policy as an unwillingness to "look behind" a precedent agreement.[17] But, in practice, it amounts to a "policy" of ignoring any record evidence that might undermine its decision to issue an NGA section 7 certificate. Applied to this proceeding, that policy is arbitrary and capricious in several respects.

10. First and foremost, it permits the Commission to ignore the record evidence suggesting that the Spire Pipeline may not actually be needed. As discussed above, there is ample evidence suggesting that Spire Missouri's decision to contract with Spire STL may have reflected a business decision by the Spire companies to capture the profit margin on Spire Missouri's purchase of natural gas transportation service instead of paying that margin to another company that owns an existing pipeline.[18] In addition to that clear financial motive, Spire Missouri's pattern of behavior should have concerned the Commission. As noted, Spire Missouri repeatedly declined to enter into precedent agreements with similar pipelines and no party other than Spire Missouri was willing to contract with Spire STL for capacity on the Spire Pipeline.[19] Furthermore, there is no evidence that the Spire Pipeline will provide the typical benefits of a new interstate natural gas pipeline, such as satisfying new demand or reducing the price of delivered natural gas.

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[16] *See Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) ("If FERC finds market need, it will then proceed to balance the benefits and harms of the project, and will grant the certificate if the former outweigh the latter.").

[17] *See, e.g.*, Rehearing Order, 169 FERC ¶ 61,135 at P 14.

[18] The Commission makes much of its refusal to question a company's business decision. Rehearing Order, 169 FERC ¶ 61,135 at PP 15, 24, 30. But the fact that building a new interstate pipeline may be in a particular company's business interest does not necessarily mean that it is required by the public convenience and necessity or in the public interest, which is what the Commission is actually charged with evaluating.

[19] *See supra* n.14 and accompanying text.

11. In light of that contrary evidence, the Commission must do more than simply point to the limited evidence that it believes supports its conclusion.[20] At the very least, it must consider and weigh the evidence that casts doubt on the probative value of the agreement between Spire Missouri and Spire STL and explain why that agreement is sufficient to establish a need for the Project notwithstanding the contrary evidence. Simply pointing to the existence of a precedent agreement does not cut it.

12. That is not to say that the Commission could never have shown that the Spire Pipeline is needed or that a precedent agreement, even one among affiliated companies, is irrelevant to the question of need. But where the record raises serious questions about the probative value of the single precedent agreement, the Commission cannot rely only on the evidence that supports its preferred conclusion and ignore the evidence that undermines that finding.[21]

13. In my view, the record in this proceeding indicates that Spire STL has not met its burden to show that the pipeline is required by the public convenience and necessity.[22] Although a precedent agreement can serve as an important indicator of need, an agreement between two affiliates carries less weight because that agreement will not necessarily be the result of the two parties' independent business decisions or reached through arms-length negotiations. When viewed in light of the considerable record evidence casting doubt on the need for the Spire Pipeline, I do not believe that the

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[20] *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation."); *id*. ("'Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.'" (quoting *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010)); *see also Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003) (explaining that a court "may not find substantial evidence 'merely on the basis of evidence which in and of itself justified [the agency's conclusion], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn'" (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

[21] *See, e.g.*, *Genuine Parts*, 890 F.3d at 312.

[22] *See Atl. Ref. Co. v. FPC*, 316 F.2d 677, 678 (D.C. Cir. 1963) ("The burden of proving the public convenience and necessity is, of course, on the natural gas company."); see *Williams Gas Processing—Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011, 1021 (D.C. Cir. 2003) ("In a public interest analysis, the burden of proof is on the applicant for abandonment to show . . . the public convenience and necessity." (internal quotation marks omitted)).

precedent agreement between Spire Missouri and Spire STL is sufficient—on its own—to satisfy Spire STL's burden to show that the project is in the public interest and required by the public convenience and necessity. Accordingly, I would deny its application for an NGA section 7 certificate. But it is not necessary to agree my reading of the record to see why the Commission's reasoning is arbitrary and capricious. By focusing only on the presence of a precedent agreement between Spire Missouri and Spire STL and refusing to consider the evidence suggesting that the Spire Pipeline is primarily an effort to benefit the Spire corporate family, today's order fails to consider "an important aspect of the problem" and is arbitrary and capricious.[23]

14. In addition, today's order is also arbitrary and capricious because it is an unreasonable application of the Commission's 1999 Certificate Policy Statement. As noted, the 1999 Policy Statement provides that the Commission will "consider all relevant factors reflecting on the need for the project" with no single factor being determinative.[24] Those factors "might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[25] Contrary to the suggestion in today's order, the 1999 Certificate Policy Statement never adopted the position that the Commission would not look behind precedent agreements, at least in some circumstances. And it certainly never suggested that a single precedent agreement between affiliated entities could excuse a full review of the record, particularly where that record raised doubts about whether unaffiliated parties would have entered the same agreement.[26] Indeed, if the Commission had believed that precedent agreements were always sufficient to establish the need for a project, there would have been no need to list

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[23] *State Farm*, 463 U.S. at 43.

[24] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747; *see also* Rehearing Order, 169 FERC ¶ 61,135 at P 14 (summarizing the 1999 Certificate Policy Statement, including the examples of evidence that the Commission might consider).

[25] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747.

[26] In addition, the Commission's 1999 Certificate Policy Statement explained that the amount of evidence needed to demonstrate the need for a project will vary, and, for example, "projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline." *Id.* at 61,748. But the approach in today's order does not allow for varying displays of need. Instead, contrary to the 1999 Certificate Policy Statement, a single binary consideration—whether or not the developer has obtained one or more precedent agreements—is the only factor that the Commission relies upon to show need. That too is inconsistent with the policy statement and arbitrary and capricious.

the other types of evidence it considers alongside precedent agreements.[27] To the extent that the Commission relies on its 1999 Certificate Policy Statement as support for its refusal to look behind the single precedent agreement in this proceeding, its explanation is arbitrary and capricious.[28]

15. The Commission also points to two cases from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to support its exclusive reliance on the precedent agreement between Spire Missouri and Spire STL: *Minisink Residents for Environmental. Preservation and Safety v. FERC*[29] and *Myersville Citizens for a Rural Community v. FERC*.[30] Both cases are readily distinguishable since neither one involved a precedent agreement among affiliates. Recognizing that fact, the Commission responds by referencing a pair of more recent D.C. Circuit decisions, which did involve precedent agreements among affiliates.[31] But those cases are not much help to the Commission either. All the court held in both cases was that basing a finding of need on precedent agreements among affiliates was not inherently unreasonable.[32] Those cases certainly do

[27] *Id.* at 61,747.

[28] *See, e.g.*, *Cal. Pub. Utilities Comm'n v. FERC*, 879 F.3d 966, 977 (9th Cir. 2018) (finding the Commission's interpretation of its own rule to be unreasonable and arbitrary and capricious).

[29] 762 F.3d 97 (D.C. Cir. 2014).

[30] 783 F.3d 1301 (D.C. Cir. 2015).

[31] Rehearing Order, 169 FERC ¶ 61,135 at P 14.

[32] Both cases indicate that the court was rejecting the specific arguments advanced by the petitioners, not categorically blessing reliance on precedent agreements among affiliates. *See City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) ("The Commission rationally explained that it fully credited Nexus's precedent agreements with affiliates because it found no evidence of self-dealing (a finding Petitioners do not dispute)."); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) ("The fact that [the pipeline's] precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; the Certificate Order reasonably explained that an affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened *just because* it is affiliated with the project sponsor. (emphasis added) (internal quotation marks omitted)).

not stand for the proposition that relying on a precedent agreement among affiliates is always reasonable or will always be a sufficient basis to find need.

16. In addition, both cases expressly did not address the situation in which the record contained evidence of potential self-dealing or evidence that the affiliated parties may have had ulterior motives for entering the relevant precedent agreement.[33] Here, by contrast, there is considerable evidence indicating that Spire Missouri's decision to enter into a precedent agreement with Spire STL may have been motivated more by a desire to benefit the Spire corporate family than a response to a genuine need for a new pipeline. Indeed, the principal point of this entire dissent is that the record before us suggests that it is unreasonable to rely on the Spire Missouri-Spire STL precedent agreement *because* of all the record evidence indicating that it should not be taken at face value. The weight that the Commission places on a series of cases that, by their own measure, do not touch the circumstances before us is some of the best evidence yet that the Commission's issuance of an NGA section 7 certificate was not the product of reasoned decisionmaking.

17. Finally, the Commission's response to the concerns raised in the various rehearing requests are themselves arbitrary and capricious.[34] In response to the Environmental Defense Fund's (EDF) contention that it is arbitrary and capricious for the Commission to rely exclusively on a precedent agreement between affiliated entities,[35] the Commission asserts that an affiliation between the parties does not lessen the binding nature of a precedent agreement or a shipper's need for capacity.[36] Similarly, in a variation on that theme, the Commission states that where a shipper has entered a precedent agreement with a pipeline, the Commission places substantial reliance on that agreement, even where there is no evidence of incremental demand.[37]

18. Neither argument is a reasoned response. The point is not that a precedent agreement among affiliates is not an actual agreement; it surely is. Rather, the point is

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[33] *See, e.g.*, *City of Oberlin*, 937 F.3d at 605 (noting that the petitioners did not question the Commission's finding that there had been no inappropriate self-dealing among the affiliates).

[34] *See also Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) ("We review an agency's response to comments under the same arbitrary-and-capricious standard to which we hold the rest of its actions.").

[35] EDF Rehearing Request at 10-14.

[36] Rehearing Order, 169 FERC ¶ 61,135 at P 15.

[37] *Id.* P 23.

that the Spire companies may have had reasons other than a genuine market need for natural gas transportation capacity to enter into their precedent agreement and, therefore, that it is arbitrary and capricious to treat that agreement as conclusive evidence of need for the Spire Pipeline. Similarly, even if Spire Missouri would eventually have to pay for the capacity it reserved on the Spire Pipeline, that does not address the concern that Spire Missouri entered that agreement primarily for the purpose of benefitting its corporate parent, meaning that the agreement may not reflect a genuine need for that capacity.[38]

19. In addition, the Commission responds by repeatedly attempting to pass the buck to the Missouri PSC using the theory that looking behind a precedent agreement would "infringe" on state regulators' prudence reviews.[39] Not so. For one thing, that is exactly the kind of review that the Missouri PSC—the entity over whose jurisdiction the Commission professes to be concerned—urged us to undertake here so that we could develop a complete picture of the need for the project.[40] Indeed, the Missouri PSC expressly argued that a precedent agreement among affiliates will not always be dispositive of need and that the Commission must "carefully review" the need for the Spire Pipeline.[41] Moreover, although the Missouri PSC has authority to conduct a prudence review of Spire Missouri's decision to take service from Spire STL rather than another pipeline,[42] that review takes the Commission-jurisdictional rates as a given and will not necessarily be able to address whether it was prudent to build the pipeline in the

[38] By the same token, even if the Commission is correct that precedent agreements are generally superior predictors of demand than a detailed market study, *id.*—an open question from my perspective—that statement does not explain how *this* precedent agreement is a superior indicator of need, given the record evidence calling its probative value into question.

[39] *Id.* at P 16; *see id.* P 27 & nn. 78-79.

[40] Missouri PSC February 27, 2017 Protest at 4-5 ("request[ing] the Commission thoroughly examine all of the circumstances and impacts of the proposed pipeline as the Commission determines whether Spire has shown that construction of the pipeline is in the public interest" and stating that "it is not clear that there is need for the project").

[41] *Id.* at 4-5; *see id.* at 4 ("[A] precedent agreement is not always dispositive of need.").

[42] *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. 1983).

first place.[43] Accordingly, the Missouri PSC's review of Spire Missouri's contracting decisions is not a substitute for the Commission's assessment of need.

20. In any case, section 7 of the NGA makes it the Commission's responsibility to determine whether a proposed pipeline is required by the public convenience and necessity—a determination that requires the Commission to consider more than just the wholesale rates and terms under its jurisdiction.[44] And the Commission regularly relies on factors that it cannot regulate directly when assessing the need for a proposed pipeline.[45] Indeed, the Commission's entire argument for why the Spire Pipeline is needed rests on the prudence of Spire Missouri's decision to enter into a precedent agreement with Spire STL—a decision that, by its own admission, the Commission lacks authority to evaluate.[46] The practical effect of the approach in today's order 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. As I explained in my dissent from the Certificate Order, if we are really going to "abdicate this responsibility to state commissions, then Congress might as well return responsibility for the entire siting process to the states, as there would be little remaining purpose to Commission review of proposed pipelines."[47]

21. Next, the Commission responds to EDF's argument that Spire STL and Spire Missouri may have abused their affiliate relationship to drum up a false picture of the

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[43] *See* EDF Rehearing Request at 16-17 (explaining that the Missouri PSC's retrospective review of rates for natural gas transportation service does not consider whether the pipeline was needed in the first place).

[44] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that in consideration an application for a section 7 certificate, the Commission must consider "all factors bearing on the public interest").

[45] The D.C. Circuit recently explained that attempting to ignore factors relevant to the public interest because the Commission lacks authority to regulate those factors directly is a "line of reasoning [that] get the Commission nowhere." *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019).

[46] *See* Rehearing Order, 169 FERC ¶ 61,135 at P 16 ("Looking behind the precedent agreements entered into by state-regulated utilities, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate.").

[47] Certificate Order, 164 FERC ¶ 61,085 (Glick, Comm'r, dissenting at 6).

need for the project by asserting (1) that it lacks jurisdiction to regulate Spire Missouri and (2) that it required Spire STL to conduct an open season.[48] Both responses are beside the point. The argument is not that the Commission should regulate Spire Missouri, but rather that Spire Missouri's conduct provides evidence that is relevant to a decision that is squarely within the Commission jurisdiction: Whether there is a need for the Spire Pipeline. As noted above, that Commission cannot justify ignoring that conduct simply because it lacks authority to regulate it directly.[49] Similarly, Spire STL's open season does not indicate there was a need for the project in the first place.[50] Indeed, the fact that Spire STL conducted an open season and only Spire Missouri entered a precedent agreement would, on its face, seem to strengthen EDF's argument, not undermine it.

22. Lastly, in what might charitably be described as a throw-away paragraph, the Commission attempts to bolster its finding of need by pointing to some of the other purported benefits that the Spire Pipeline might provide.[51] That paragraph cannot transform the Commission's determination into a product of reasoned decisionmaking. For one thing, it does not change the fact the Commission's position is that the precedent agreement itself is the basis for its determination of need. In any case, the Commission recites the supposed non-capacity benefits of the project and then characterizes those issues as ones that fall within the scope of a shipper's "business decision."[52] As best as I can tell, that phrase is intended to suggest that those other purported benefits could potentially have supported Spire Missouri's decision to enter into an agreement with Spire STL and so the Commission will not question that agreement.

23. But the invocation of a "business decision" dredges up the same concerns regarding the precedent agreement between the two Spire companies. Under ordinary

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[48] Certificate Order, 164 FERC ¶ 61,085 at PP 20, 27.

[49] After all, as noted above, the Commission's entire basis for finding that the Project is needed—the prudence of Spire Missouri's decision to enter a contract with Spire STL—is a decision that the Commission, by its own admission, lacks jurisdiction to regulate. *See* Rehearing Order, 169 FERC ¶ 61,135 at P 16. The Commission cannot have it both ways.

[50] An open season is an important protection against concerns that a pipeline is giving a preference to an affiliated shipper over one or more unaffiliated shippers, but it does not necessarily tell us anything about need, especially when it is undersubscribed and the only entity that does subscribe is an affiliate.

[51] Rehearing Order, 169 FERC ¶ 61,135 at P 24.

[52] *Id.*; *see id.* P 30.

circumstances, deference to companies' business judgments makes sense because they presumably reflect the product of disinterested decisionmaking and/or arms-length negotiations. Where those factors are not present, the invocation of a 'business decision' "is simply a talismanic phrase that does not advance reasoned decision making."[53] Deferring to a "business decision" is particularly problematic here because Spire Missouri has captive customers to which it will, in the ordinary course of business, pass on whatever costs it incurs taking service from Spire STL. That means that there is little risk that the affiliates' shared corporate parent will not recover its investment in the Spire Pipeline plus a handsome rate of return.[54] As a result, the financial risk that typically disciplines a business's judgment simply is not present in the same way. Accordingly, although the precedent agreement is technically the result of a business decision, it does not have anywhere near the probative value of an agreement reached through an arms-length transaction with actual money seriously at risk. The Commission, however, never wrestles with those concerns, instead simply repeating its talismanic phrase.[55] The Commission's failure to meaningfully respond to these arguments on rehearing is yet another reason its finding that the Spire Pipeline is needed was not the product of reasoned decisionmaking.[56]

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[53] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015) (rejecting an argument that "is simply a talismanic phrase that does not advance reasoned decision making").

[54] The Commission granted the Spire STL an initial return on equity of 14 percent. Rehearing Order, 169 FERC ¶ 61,135 at P 40**.**

[55] EDF Rehearing Request at 11.

[56] *See Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("The arbitrary and capricious standard in the Administrative Procedure Act, includes a requirement that the agency respond to relevant and 'significant' public comments." (internal citations, quotation marks, and alterations omitted)). The Commission's failure to respond to these detailed criticisms of its decision highlights the error it made in refusing to hold a hearing to explore the significant issues of material fact regarding these considerations. *See* EDF Rehearing Request at 4-10. The issues raised regarding these other purported sources of need for the Spire Pipeline are exactly the type of issue for which the evidentiary record developed in a hearing would have been useful. The Commission might also then be able to point to actual evidence one way or another rather than relying on unsupported incantations of a "business decision."

II. The Commission Failed to Adequately Weigh the Pipeline's Benefits and Adverse Impacts

24. Today's order is also arbitrary and capricious because the Commission failed to adequately balance the project's benefits and adverse impacts. The Commission's 1999 Certificate Policy Statement explains that it must weigh a proposed pipeline's benefits against its adverse impacts and that it will require more evidence of benefits in response to greater adverse impacts.[57] For example, the Commission noted that, where a project developer was unable to acquire all the land needed to build and operate the project, meaning that some degree of eminent domain would be necessary, "a showing of significant public benefit might outweigh the modest use of federal eminent domain authority."[58]

25. Today's order does not contain any serious effort to weigh the Spire Pipeline's benefits against the adverse impacts. The Certificate Order included a single conclusory sentence stating that the benefits outweigh the potential impacts[59] and today's order reaches the same conclusion in a similarly terse fashion.[60] There is no effort to balance the benefits of the project against Spire STL's extensive use of eminent domain, even though that is the very example contemplated in the policy statement.[61] It was clear when the Commission issued the underlying order that building Spire Pipeline could well require extensive use of eminent domain.[62] And, in fact, it did: Spire STL prosecuted

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[57] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

[58] *Id.* at 61,749.

[59] Certificate Order, 164 FERC ¶ 61,085 at P 123 ("We find that the benefits that the Spire STL Project will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities.").

[60] *See, e.g.*, Rehearing Order, 169 FERC ¶ 61,135 at P 24 ("We find the[stated] benefits sufficient to overcome any concerns of overbuilding.")

[61] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,749 ("The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures.").

[62] Certificate Order, 164 FERC ¶ 61,085 at P 119 (noting that Spire has yet to "finalize easement agreements with affected landowners for most of the land required for the project").

eminent domain actions against over 100 distinct entities and involving well over 200 acres of privately owned land.[63] For comparison, the Environmental Assessment (EA) estimated that the entire 65-mile project would affect roughly 400 acres in the course of its permanent operations.[64] All told, it appears that Spire prosecuted condemnation proceedings against roughly 40 percent of the relevant landowners in Missouri and 30 percent of the relevant landowners in Illinois.[65] It should go without saying that such extensive use of eminent domain has a considerable effect on landowners and surrounding communities. The Commission, however, made no effort to weigh the harm caused by the then-likely, and now actual, use of extensive eminent domain or explain why the benefits of the Spire Pipeline outweighed those potential adverse impacts. Instead, the Commission notes that it encouraged Spire STL to work with landowners to secure the necessary rights of way and that it believes that Spire STL "took sufficient

[63] Spire STL brought condemnation actions against roughly 180 acres of land in Missouri, *see* Docket, *Spire STL Pipeline LLC v. 3.31 Acres of Land,* No. 4:2018-CV-1327 (RWS) (DDN) (E.D. Mo.) (listing consolidated condemnation actions against roughly 150 acres of land); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN), 2018 WL 6528667, at *1 (E.D. Mo. Dec. 12, 2018) (granting Spire STL's motion to condemn the land in the consolidated actions); Memorandum Supporting Second Motion for a Preliminary Injunction, No. 2018-cv-1327 (Feb. 8, 2019), Exh. A (describing an additional roughly 30 acres of land that Spire STL sought to condemn); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN), 2019 WL 1232026, at *1 (E.D. Mo. Mar. 15, 2019) (granting Spire STL's second motion), and roughly 80 acres in Illinois, *see* Verified Complaint for Condemnation of Pipeline Easements, No. 3:18-CV-1502 (NJR) (SCW) (S.D. Ill. Aug. 15, 2018) (listing consolidated condemnation actions against roughly 80 acres); *Spire STL Pipeline, LLC v. Turman*, No. 3:18-CV-1502 (NJR) (SCW), 2018 WL 6523087, (S.D. Ill. Dec. 12, 2018) (granting Spire STL's motion).

[64] Rehearing Order, 169 FERC ¶ 61,135 at P 34.

[65] *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 4:2018-CV-1327 (RWS) (DDN), 2018 WL 7020807, at *4 (E.D. Mo. Nov. 26, 2018), *report and recommendation adopted as modified*, No. 4:2018-CV-1327 (RWS) (DDN), 2018 WL 6528667 (E.D. Mo. Dec. 12, 2018) (stating that Spire STL was able to reach agreements with roughly 60 percent of the relevant landowners before beginning condemnation proceedings); *Spire STL Pipeline, LLC v. Turman*, 2018 WL 6523087, at *2 (stating that Spire STL was able to reach agreements with roughly 70 percent of the relevant landowners before beginning condemnation proceedings).

steps to avoid unnecessary landowner impacts."[66] But those statements relate to how Spire STL acted with the authority it had, not whether it was appropriate to give it eminent domain authority in the first place.[67] The failure to consider the adverse impacts caused by eminent domain is an arbitrary and capricious unexplained departure from the balancing required by the 1999 Certificate Policy Statement.[68]

26. In addition, the Commission's limited discussion of many of the Spire Pipeline's adverse impacts was itself not the product of reasoned decisionmaking. Most importantly, today's order gives short shrift to the record evidence indicating that the Spire Pipeline will cause a substantial increase in the rates for MRT's remaining customers. If the development of a new pipeline will cause certain customers to pay higher rates—because, for example, they must now bear a higher share of an existing pipeline's fixed costs—those rate impacts are something the Commission must consider when evaluating whether the pipeline is consistent with the public interest.[69] That is

[66] Rehearing Order, 169 FERC ¶ 61,135 at n.104.

[67] The Commission responds by noting that, "[u]nder NGA section 7(h), once a natural gas company obtains a certificate of public convenience and necessity it may exercise the right of eminent domain in a U.S. District Court or a state court." *Id*. That is exactly the point. Because a section 7 certificate comes with eminent domain authority that the Commission cannot circumscribe, we must seriously consider whether conveying eminent domain authority is consistent with the public interest *before* issuing a section 7 certificate. Exhortations to work with landowners are no substitute for considering whether the pipeline should be built in the first place.

[68] *ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) ("Because an agency's unexplained departure from precedent is arbitrary and capricious, we must vacate the Board's order."); *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457 (D.C. Cir. 2005) ("[A]ny agency's 'unexplained departure from prior agency determinations' is inherently arbitrary and capricious in violation of [the Administrative Procedure Act].").

[69] 1999 Certificate Policy Statement, 88 FERC 61,227 at 61,748 ("The interests of the existing pipeline's captive customers are slightly different from the interests of the pipeline. The interests of the captive customers of the existing pipelines are affected because, under the Commission's current rate model, they can be asked to pay for the unsubscribed capacity in their rates."); *Atl. Ref. Co.*, 360 U.S. at 391 (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

particularly so here because the pre-existing pipelines in the region had *already* filed with the Commission to substantially increase their rates because of the Spire Pipeline.[70]

27. Although the Commission "acknowledge[s]" this concern,[71] it refuses to do anything about it. Instead, the Commission notes that any adverse impacts are the result of Spire's business decisions and that the Commission's review of adverse impacts "is not synonymous with protecting incumbent pipelines from the risk of loss of market share to a new entrant."[72] That misses the point. As an initial matter, the fact that adverse impacts are the result of business decisions does not excuse the Commission from adequately considering those impacts. As noted, our responsibility is to evaluate whether a proposed project is required by the public convenience and necessity; not whether it is the result of business decisions (as it typically will be).[73] Similarly, although the Commission is not in the business of protecting existing pipelines from competition, we are very much in the business of protecting customers[74]—a task that we cannot accomplish if we refuse to consider the impact of a new pipeline on existing

[70] *See* MRT Transmittal Letter, Docket No. RP18-923-00, at 3-4 (June 29, 2018) (proposing a rate increase primarily due to the decision by Spire Missouri to shift its capacity reservations to the Spire Pipeline); MoGas Transmittal Letter, Docket No. RP18-877-000, at 2 (May 31, 2018) (explaining that a rate discount for Spire Missouri was one of the principal causes of its proposed rate increase); MoGas Answer, Docket No. RP18-877-000, at 4-5 (June 18, 2018) (explaining that MoGas was forced to offer Spire Missouri the discounted rate because of the Spire Pipeline); *see also Spire STL Pipeline LLC*, 169 FERC ¶ 61,074 (2019) (Glick, Comm'r, dissenting at P 2) ("Three major pipelines serving the region have proposed significant rate increases that are all due, at least in part, to the Spire Pipeline.")

[71] Rehearing Order, 169 FERC ¶ 61,135 at P 31.

[72] *Id.*

[73] In addition, even if this type of "business decision" test is often the appropriate standard of review, the evidence suggesting that Spire Missouri's agreement with Spire STL may not have been an arms-length or disinterested business decision should have caused the Commission to pause before relying on that standard to brush aside the Spire Pipeline's impact on existing ratepayers. *See supra* P 23.

[74] *See, e.g.*, *City of Chicago, Ill. v. FPC*, 458 F.2d 731, 751 (D.C. Cir. 1971) ("the primary purpose of the Natural Gas Act is to protect consumers." (citing, *inter alia*, *City of Detroit v. FPC*, 230 F.2d 810, 815 (1955)).

customers.[75] When the record indicates that building a new pipeline will harm existing customers, as it does here,[76] the Commission must carefully consider that evidence and weigh it against the purported benefits of the pipeline. Refusing to do so by framing any such inquiry as amounting to the protection of an incumbent pipeline ignores one of the Commission's fundamental responsibilities under the NGA and is arbitrary and capricious.[77]

28. All told, the Commission failed to seriously weigh the meager evidence of the need for the pipeline against the harms caused by its construction, including the harms to ratepayers, landowners and communities (e.g., through eminent domain), and the environment.[78] As noted, the Commission's 1999 Certificate Policy Statement explains that "[t]he 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

[75] It appears that the Commission would prefer to limit its inquiry only to those impacts that it deems to be the result of "unfair" competition, however that is defined, *see* Rehearing Order, 169 FERC ¶ 61,135 at P 31. But nothing in the 1999 Certificate Policy Statement or the concept of the public interest generally supports taking such a blindered review of the impact on existing customers. 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748 ("The interests of the existing pipeline's captive customers are slightly different from the interests of the pipeline. The interests of the captive customers of the existing pipelines are affected because, under the Commission's current rate model, they can be asked to pay for the unsubscribed capacity in their rates.").

[76] *See supra* note 70.

[77] In addition, the Commission suggests that any adverse impacts on existing customers is a matter to be resolved under the Missouri PSC's jurisdiction. Rehearing Order, 169 FERC ¶ 61,135 at P 31. Once again though, the Missouri PSC disagrees, urging the Commission to consider these adverse impacts when assessing the public interest and not leave it to the state to triage the harm caused by a pipeline that was not in the public interest in the first place. Missouri PSC Protest at 9-10.

[78] The Commission notes that the Environmental Assessment performed in this proceeding found that the Spire Pipeline would not significantly affect the human environment. Rehearing Order, 169 FERC ¶ 61,135 at P 4. But the fact that those adverse impacts may not have required the preparation of the Environmental Impact Statement does mean that they should go unmentioned in the Commission's public interest analysis. As EDF noted, the project could potentially have a variety of adverse impacts including through "water and Karst terrain crossings, right-of-way clearing, construction of permanent roads, and degrading water quality." EDF Rehearing Request n.88 and accompanying text.

interests."[79] It follows from that proposition that, where the evidence of need is extremely limited, as it is here, the Commission must carefully scrutinize the adverse impacts to ensure that they do not actually outweigh the need for the project and whatever benefits it might provide. Nothing in today's order indicates that the Commission conducted that careful assessment or considered the strength of Spire STL's demonstration of need when assessing whether the Spire Pipeline's benefits outweigh its adverse impacts, as required by the 1999 Certificate Policy Statement. For that reason too, today's order is arbitrary and capricious.

III. The Commission's Consideration of the Spire Pipeline's GHGs Emissions

29. Today's order rehashes many of the Commission's usual reasons for refusing to give the greenhouse gas (GHG) emissions caused by a new natural gas pipeline the 'hard look' that the law demands. But, for once, the stakes of the Commission's GHG analysis are relatively low. Unlike most other natural gas infrastructure projects that come before the Commission—which are usually designed to facilitate a sizeable increase in natural gas production or consumption and can sometimes produce considerable direct emissions themselves—the EA concludes that there is little chance that the Spire Pipeline will cause a considerable increase in GHG emissions.[80]

30. That makes sense. After all, as noted, there is no additional demand for natural gas in the region and there is no evidence that the Spire Pipeline will reduce the cost of natural gas in the region, which could spur production or consumption of natural gas even without an increase in demand. Under those circumstances, the Commission's estimate that the project will cause roughly 15,000 tons of GHG emissions per year during construction and roughly 10,000 tons per year after that both seems reasonable and suggests that is unlikely to significantly contribute to climate change.[81] But although that may be good news for the climate, it only underscores my concerns about whether the project is needed in the first place.

IV. The Commission Has Been Fundamentally Unfair to the Litigants

31. Finally, I would be remiss in failing to mention the profound unfairness of how the Commission has handled the rehearing requests and the motion for stay filed by Juli Viel.

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[79] 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

[80] EA at 144 ("[W]e do not anticipate that the end-use would represent new GHG emissions.").

[81] EA Tables B-16 & B-17.

The Commission issued its certificate order via a 3-2 vote on August 3, 2018.[82] Four rehearing requests were filed by early September. Ms. Viel subsequently requested a stay pending the Commission's decision on rehearing.[83] The Commission is finally acting on those requests today, nearly 15 months[84] after they were filed and more than a year after the Commission granted Spire's request to begin construction of the pipeline.[85]

32. While rehearing was pending—and before any party had an opportunity to challenge the Commission's decision in court—Spire disturbed what it the Certificate Order estimated to be over 1,000 acres of land and brought eminent domain proceedings against over 100 distinct entities.[86] Indeed, as noted, Spire successfully prosecuted eminent domain proceedings involving well over roughly 200 acres of privately owned land—a number equivalent to more than half of total number of acres needed to permanently operate the pipeline.[87] Those eminent domain proceedings all took place when the Commission's order was "final enough for [the pipeline] to prevail in an eminent domain action," but "non-final" for the purposes of judicial review.[88]

33. That is fundamentally unfair. Although the rehearing requests in this proceeding were not filed by landowners fighting eminent domain, as they were in *Allegheny Defense Project*, and therefore do not implicate identical due process concerns to those at

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[82] Certificate Order, 164 FERC ¶ 61,085.

[83] *See* Juli Viel Motion for Stay (Nov. 16, 2018). Ms. Veil's motion requested a stay only until the Commission acted on rehearing. The Commission denies the stay request not on the merits, but only on the basis that it has become moot after the Commission finally ruled on the merits of the rehearing requests, 11 months later.

[84] During that time, one of the parties, MRT, withdrew its rehearing request after it had sat at the Commission for over a year. Rehearing Order, 169 FERC ¶ 61,135 at P 6.

[85] Spire STL requested authorization to commence construction on November 1 and the Commission granted it two business days later on November 5th. *Compare* Spire STL Request for Notice to Proceed (Nov. 1, 2018) *with* Delegated Letter Order re: Notice to Proceed with Construction (Nov. 5, 2018).

[86] Certificate Order, 164 FERC ¶ 61,085 at P 117 & n.212; *supra* note 64.

[87] *See supra* note 64.

[88] *Allegheny Def. Project v. FERC*, 932 F.3d 940, 949 (2019) (D.C. Cir. 2019) (Millett, J., concurring).

issue in that case,[89] good government is about more than meeting the absolute minimum of constitutional due process. In this proceeding, several parties were stuck in limbo, unable to even seek judicial relief, while Spire STL seized land and proceeded to build the pipeline. A regulatory construct that allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court ensures that irreparable harm will occur before any party has access to judicial relief.[90] That ought to keep every member of this Commission up at night. Under those circumstances, dismissing as moot Ms. Viel's year-old request for a stay pending rehearing because the Commission finally issued an order on rehearing[91] is a level of bureaucratic indifference that I find hard to stomach.

34. The Commission can and should do better. After all, there were plenty of options available for the Commission to act before irreparable harm occurred. For example, it could have stayed the project pending its decision on rehearing, either on its motion or by granting Ms. Veil's request. Alternatively, the Commission could have taken "the easiest path of all" by simply denying the rehearing requests by not issuing its standard tolling order.[92] Either approach would have given the parties an opportunity to pursue their day in court before Spire STL built the project. Instead, by relying on what Judge Millett correctly described as "twisted . . . precedent" and a "Kafkaesque regime,"[93] the Commission has guaranteed substantial irreparable harm occurs before any party can even set foot in court.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

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[89] *Id.* at 953-54 (Millett, J., concurring).

[90] *Id.* at 954 (Millett, J., concurring) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) and *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-325 (D.C. Cir. 1987)).

[91] Rehearing Order, 169 FERC ¶ 61,135 at P 8.

[92] *Allegheny Def.*, 932 F.3d at 956 (Millett, J., concurring) ("[T]he Commission could try the easiest path of all: take absolutely no action on the rehearing application. That would have the effect of denying the request as a matter of law. And that approach would have opened the courthouse doors. (internal citations omitted)).

[93] *Id.* at 948 (Millett, J., concurring).