

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC

Project No. CP17-040-002

(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),<sup>1</sup> a pipeline developer must demonstrate a need for its proposed project.<sup>2</sup> 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”<sup>3</sup> and balance the evidence of need against the project's adverse impacts.<sup>4</sup> 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

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<sup>1</sup> 15 U.S.C. § 717f(c) (2018).

<sup>2</sup> 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.”).

<sup>3</sup> 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747.

<sup>4</sup> *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.”).

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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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 important 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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<sup>5</sup> 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.'").

<sup>6</sup> 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)).

<sup>7</sup> 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.").

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its capacity subscription from an existing pipeline to a new one owned by its affiliate.<sup>8</sup> Indeed, some record evidence suggests that natural gas demand in the region may actually be declining.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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<sup>12</sup>—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.<sup>13</sup> But it may be surprising that Spire Missouri

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<sup>8</sup> 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.”).

<sup>9</sup> See MRT Comments at 13-15 (Oct. 25, 2019) (discussing evidence that may indicate demand for natural gas is actually falling).

<sup>10</sup> 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.”).

<sup>11</sup> 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.”).

<sup>12</sup> See, e.g., MRT February 27, 2017 Protest at 22.

<sup>13</sup> 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 *(continued ...)*)

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.<sup>14</sup> 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.<sup>15</sup> 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).

<sup>14</sup> 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.

<sup>15</sup> *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").

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adverse impacts.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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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<sup>16</sup> 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.”).

<sup>17</sup> See, e.g., Rehearing Order, 169 FERC ¶ 61,135 at P 14.

<sup>18</sup> 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.

<sup>19</sup> See *supra* n.14 and accompanying text.

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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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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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<sup>20</sup> *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))).

<sup>21</sup> See, e.g., *Genuine Parts*, 890 F.3d at 312.

<sup>22</sup> 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)).

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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.<sup>23</sup>

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.<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup> 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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<sup>23</sup> *State Farm*, 463 U.S. at 43.

<sup>24</sup> 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).

<sup>25</sup> 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747.

<sup>26</sup> 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.

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the other types of evidence it considers alongside precedent agreements.<sup>27</sup> 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.<sup>28</sup>

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*<sup>29</sup> and *Myersville Citizens for a Rural Community v. FERC*.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Those cases certainly do

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<sup>27</sup> *Id.* at 61,747.

<sup>28</sup> *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).

<sup>29</sup> 762 F.3d 97 (D.C. Cir. 2014).

<sup>30</sup> 783 F.3d 1301 (D.C. Cir. 2015).

<sup>31</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 14.

<sup>32</sup> 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)).

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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.<sup>33</sup> 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.<sup>34</sup> 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,<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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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<sup>33</sup> 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).

<sup>34</sup> 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.").

<sup>35</sup> EDF Rehearing Request at 10-14.

<sup>36</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 15.

<sup>37</sup> *Id.* P 23.

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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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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,<sup>42</sup> 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

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<sup>38</sup> 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.

<sup>39</sup> *Id.* at P 16; *see id.* P 27 & nn. 78-79.

<sup>40</sup> 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”).

<sup>41</sup> *Id.* at 4-5; *see id.* at 4 (“[A] precedent agreement is not always dispositive of need.”).

<sup>42</sup> *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm’n*, 465 A.2d 735 (Pa. 1983).

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first place.<sup>43</sup> 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.<sup>44</sup> And the Commission regularly relies on factors that it cannot regulate directly when assessing the need for a proposed pipeline.<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup>

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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<sup>43</sup> 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).

<sup>44</sup> *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”).

<sup>45</sup> 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).

<sup>46</sup> 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.”).

<sup>47</sup> Certificate Order, 164 FERC ¶ 61,085 (Glick, Comm'r, dissenting at 6).

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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.<sup>48</sup> 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.<sup>49</sup> Similarly, Spire STL's open season does not indicate there was a need for the project in the first place.<sup>50</sup> 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.<sup>51</sup> 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."<sup>52</sup> 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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<sup>48</sup> Certificate Order, 164 FERC ¶ 61,085 at PP 20, 27.

<sup>49</sup> 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.

<sup>50</sup> 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.

<sup>51</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 24.

<sup>52</sup> *Id.*; *see id.* P 30.

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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."<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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<sup>53</sup> *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").

<sup>54</sup> The Commission granted the Spire STL an initial return on equity of 14 percent. Rehearing Order, 169 FERC ¶ 61,135 at P 40.

<sup>55</sup> EDF Rehearing Request at 11.

<sup>56</sup> *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."

(continued ...)

## 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.<sup>57</sup> 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."<sup>58</sup>

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<sup>59</sup> and today's order reaches the same conclusion in a similarly terse fashion.<sup>60</sup> 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.<sup>61</sup> It was clear when the Commission issued the underlying order that building Spire Pipeline could well require extensive use of eminent domain.<sup>62</sup> And, in fact, it did: Spire STL prosecuted

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<sup>57</sup> 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

<sup>58</sup> *Id.* at 61,749.

<sup>59</sup> 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.").

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

<sup>61</sup> 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.").

<sup>62</sup> 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").

(continued ...)

eminent domain actions against over 100 distinct entities and involving well over 200 acres of privately owned land.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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

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<sup>63</sup> 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).

<sup>64</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 34.

<sup>65</sup> *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).

(continued ...)

steps to avoid unnecessary landowner impacts.”<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> That is

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<sup>66</sup> Rehearing Order, 169 FERC ¶ 61,135 at n.104.

<sup>67</sup> 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.

<sup>68</sup> *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].”).

<sup>69</sup> 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”).

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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.<sup>70</sup>

27. Although the Commission “acknowledge[s]” this concern,<sup>71</sup> 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.”<sup>72</sup> 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).<sup>73</sup> 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<sup>74</sup>—a task that we cannot accomplish if we refuse to consider the impact of a new pipeline on existing

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<sup>70</sup> 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.”)

<sup>71</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 31.

<sup>72</sup> *Id.*

<sup>73</sup> 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.

<sup>74</sup> 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))).

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customers.<sup>75</sup> When the record indicates that building a new pipeline will harm existing customers, as it does here,<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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

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<sup>75</sup> 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.").

<sup>76</sup> *See supra* note 70.

<sup>77</sup> 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.

<sup>78</sup> 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.

*(continued ...)*

interests.”<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> 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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<sup>79</sup> 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

<sup>80</sup> EA at 144 (“[W]e do not anticipate that the end-use would represent new GHG emissions.”).

<sup>81</sup> EA Tables B-16 & B-17.

*(continued ...)*

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

32. While rehearing was pending—and before any party had an opportunity to challenge the Commission's decision in court—Spire disturbed what the Certificate Order estimated to be over 1,000 acres of land and brought eminent domain proceedings against over 100 distinct entities.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup>

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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<sup>82</sup> Certificate Order, 164 FERC ¶ 61,085.

<sup>83</sup> See Juli Viel Motion for Stay (Nov. 16, 2018). Ms. Viel'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.

<sup>84</sup> 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.

<sup>85</sup> 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).

<sup>86</sup> Certificate Order, 164 FERC ¶ 61,085 at P 117 & n.212; *supra* note 64.

<sup>87</sup> See *supra* note 64.

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

(continued ...)

issue in that case,<sup>89</sup> 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.<sup>90</sup> 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<sup>91</sup> 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.<sup>92</sup> 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,"<sup>93</sup> 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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<sup>89</sup> *Id.* at 953-54 (Millett, J., concurring).

<sup>90</sup> *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)).

<sup>91</sup> Rehearing Order, 169 FERC ¶ 61,135 at P 8.

<sup>92</sup> *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)).

<sup>93</sup> *Id.* at 948 (Millett, J., concurring).