ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1016 and 20-1017 (consolidated)

ENVIRONMENTAL DEFENSE FUND, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: NOVEMBER 13, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties before this Court are identified in Petitioners' Circuit Rule 28(a)(1) certificates. Dr. Susan Tierney and the American Antitrust Institute filed amici curiae briefs in support of Petitioner Environmental Defense Fund; the Interstate Natural Gas Association of America filed an amicus curiae brief in support of Respondent FERC.

B. Rulings Under Review

1. *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018), R.164, JA 932;

   and

2. *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019), R.424, JA 1144.

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no related cases pending elsewhere.

/s/ Anand R. Viswanathan
Anand R. Viswanathan

November 13, 2020

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GLOSSARY

Am. Antitrust Institute Amic. Br.	Brief of amicus curiae American Antitrust Institute
Certificate Order	*Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018), R.164, JA 932
Commission or FERC	Federal Energy Regulatory Commission
Environmental Fund	Petitioner Environmental Defense Fund
EDF Br.	Opening brief of Petitioner Environmental Defense Fund
Environmental Assessment	Environmental Assessment for the Spire Project (Sept. 29, 2017), R.96, JA 610
Laclede Gas Company	Predecessor of Spire Missouri, Inc.
NEPA	National Environmental Policy Act
Policy Statement or Certificate Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Project	Spire STL Pipeline LLC Project
R.	Item in the certified index to the record
Rehearing Order	*Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019), R.424, JA 1144
Spire	Intervenor Spire STL Pipeline LLC
Steck Br.	Opening brief of Petitioner Juli Steck
Tierney Amic. Br.	Brief of amicus curiae Dr. Susan Tierney

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

In this proceeding, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Spire STL Pipeline LLC ("Spire"). That certificate authorizes Spire to construct and operate, subject to certain operational and environmental mitigation conditions, a new 65-mile-long natural gas pipeline from an interconnection with the existing interstate

pipeline grid in Scott County, Illinois to interconnections in St. Louis, Missouri. *See Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) ("Certificate Order"), R.164, JA 932, *on reh'g*, 169 FERC ¶ 61,134 (2019) ("Rehearing Order"), R.424, JA 1144.

Spire's proposed project ("Project") would allow it to transport natural gas from multiple supply basins to the St. Louis area using a more direct path, closer to its existing distribution system and outside of an earthquake zone. Spire executed a long-term contract ("precedent agreement") with Spire Missouri, a local distribution company and affiliate of Spire, for nearly 90 percent of the Project's capacity.

Applying its policy statement on pipeline certificates, the Commission determined that the need for the Project, and the absence of any evidence of affiliate abuse or anticompetitive behavior, outweighed any adverse economic effects on landowners and the existing pipeline. Consistent with that policy, the Commission did not look behind the precedent agreement to make judgments about the needs of individual shippers. The Commission also considered and disclosed the Project's potential environmental impacts—including those related to greenhouse gas emissions—and found the Project

environmentally acceptable, so long as constructed and operated in accordance with prescribed mitigation measures.

On review, Petitioners Environmental Defense Fund ("Environmental Fund") and Juli Steck raise two issues:

1. Did the Commission adequately explain its determinations, under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, that the Project is required by the "public convenience and necessity," in light of Spire's long-term contractual commitment with its affiliate and in the absence of evidence that Spire discriminated against unaffiliated shippers, and that, on balance, public benefits exceed adverse impacts?

2. Did the Commission reasonably analyze environmental issues (greenhouse gas emissions and project alternatives) consistent with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*. ("NEPA")?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. Statutory and regulatory background

A. Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "encourage the orderly development of plentiful supplies of … natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). To that end, sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a certificate of public convenience and necessity under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted" by the Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

Under Natural Gas Act section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the

issuance of the certificate … such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures federal agencies must follow to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). Foremost amongst those requirements is that an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA's implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an

environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. §§ 1501.4, 1508.9.

II. Commission review of the Project

A. Environmental review

Spire filed an application with the Commission on January 26, 2017, and an amended application on April 21, 2017, under section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), and part 157 of the Commission's regulations, 18 C.F.R. pt. 157. Certificate Order P 1, JA 932; *see also* Envtl. Assessment at 1 (noting that the amendment adopted a route alternative), R.96, JA 622.

Spire proposed to construct and operate two pipeline segments totaling 65 miles in length to connect the St. Louis area with natural gas supply basins in the Rocky Mountain and Appalachian regions. Certificate Order PP 6, 11, JA 933, 935; *see also* Envtl. Assessment at 7 (map of Project), JA 628. This Project is designed to provide 400,000 dekatherms per day (enough to power roughly 4 million homes

annually) of firm transportation service[1] from a new interconnection with the Rockies Express Pipeline in Scott County, Illinois to delivery point interconnections with Spire Missouri and Enable Mississippi River Transmission in St. Louis County, Missouri. Certificate Order PP 1, 6-7, JA 932-34; *see also* Envtl. Assessment at 2 n.2 (describing assumptions behind translation of Project capacity to powering residential energy use), JA 623. After an open season for all interested shippers, Spire executed a precedent agreement with Spire Missouri for 350,000 dekatherms per day, or 87.5 percent of the Project's capacity. Certificate Order P 10, JA 935.

The Commission's pre-filing review of the Project began in July 2016. *Id.* P 200, JA 1014. Commission staff participated in five public meetings that Spire conducted in Illinois and Missouri in August 2016, to explain the Commission's environmental review process. *Id.* In October 2016, Commission staff issued a notice of intent to prepare an environmental assessment; this notice and a supplemental notice were

[1] "Firm" transportation service "means the delivery of natural gas is guaranteed regardless of the proportion of the pipeline's capacity that is in use." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 n.1 (D.C. Cir. 2015).

published in the Federal Register. *Id*. P 201, JA 1014. The notice and supplemental notice were also mailed to 1,141 and 342 interested parties, respectively, including federal, state, and local government representatives and agencies; elected officials; affected landowners; environmental groups; Native American tribes; and local libraries and newspapers. Envtl. Assessment at 4, JA 625. In response, the Commission received 50 comment letters, and 12 people presented oral comments at public scoping meetings. Certificate Order PP 201-02, JA 1014-15.

Commission staff issued an Environmental Assessment in September 2017, which addressed comments filed in response to the notice and supplemental notice. *Id*. P 203, JA 1015. The Environmental Assessment considered the Project's potential impacts on geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, socioeconomics, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. *Id*.

The Assessment concluded that approval of the proposed Project would not constitute a major federal action significantly affecting the

quality of the human environment, so long as Spire constructed and operated the proposed facilities in accordance with its application and with FERC staff's recommended mitigation measures. Envtl. Assessment at 161, JA 782.

B. The Commission orders

On August 3, 2018, the Commission issued a conditional certificate of public convenience and necessity to Spire. Certificate Order P 2, JA 932. (Two Commissioners dissented on certain issues.) The Commission applied the criteria set forth in its 1999 Certificate Policy Statement[2] to determine whether there is a need for the pipeline and whether it would serve the public interest. *Id.* PP 26-27, JA 940-41.

The Commission found a market need for the Project, as evidenced by Spire's long-term contract with its affiliate, Spire Missouri, for nearly 90 percent of the pipeline's capacity. *Id.* P 73, JA 962. The Commission deemed that contract valid evidence of need for the Project,

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[2] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) ("Policy Statement" or "Certificate Policy Statement").

consistent with Commission policy and with its finding of no evidence that Spire discriminated against any nonaffiliate shipper. *See id*. P 75, JA 963.

Under its policy, the Commission declines, as it did here, to "second guess the business decisions" of pipeline shippers and local distribution companies. *See id*. P 83 & n.153, JA 968. It also found that state commissions (here, the Missouri Public Service Commission) have jurisdiction to inquire into the "prudence and reasonableness" of decisions by local distribution companies (here, Spire Missouri) to obtain transportation service from a particular pipeline. *See id*. P 85, JA 969. And beside the precedent agreement, the other stated justifications for the Project—including replacement of expired or expiring contracts and access to gas supplies over a more direct and more secure transportation path—were sufficient to overcome concerns that the Project was not needed. *See, e.g.*, *id*. PP 84, 107, JA 968, 979-80; Rehearing Order P 24, JA 1155.

The Commission next found the Project consistent with the public interest, after reviewing and balancing the Project's benefits and potential adverse effects. *See* Certificate Order PP 107-19, 123, JA 979-

86. It found that Spire attempted to minimize impacts on landowners by, among other things, co-locating portions of the Project's proposed route with existing rights-of-way, not proposing to build any major above-ground facilities like compressor stations, and compensating crop production losses. *Id*. P 118, JA 984; Envtl. Assessment at 151, JA 772. The record before the Commission also reflected that Spire incorporated over 40 changes to the proposed route, 20 of which were requested by landowners (including Petitioner Juli Steck). Envtl. Assessment at 147, JA 768; *see also* Steck Decl. ¶ 4 (Spire changed the path of the Project to move it half a mile away from her property). While the Commission acknowledged the Project's likely impacts on existing pipelines like Enable, it also noted that its policy and precedent did not obligate it to shield incumbents from new market entrants. *See* Certificate Order PP 107, 122, JA 980, 986.[3]

Finally, based on the Environmental Assessment and the full record in the proceeding, the Commission found that the Project, if constructed and operated in accordance with required mitigation

[3] Enable requested rehearing of the Certificate Order, but subsequently withdrew its request. Rehearing Order PP 6-7, JA 1145.

measures, is an environmentally acceptable action. *See id.* P 263, JA 1038-39.

In a subsequent order, the Commission denied or dismissed all requests for rehearing of the Certificate Order. Rehearing Order P 1, JA 1144. (One Commissioner dissented.) As relevant here, the Commission rejected arguments that it: (1) violated the Natural Gas Act by relying on Spire's affiliate agreement (*id.* PP 14-24) and by failing to properly balance adverse effects and public benefits (*id.* PP 30-37); and (2) violated NEPA by failing to take a hard look at the Project's indirect effects (*id.* PP 58-65), cumulative effects (*id.* PP 68-70), and at reasonable alternatives (*id.* PP 51-56).

SUMMARY OF ARGUMENT

The Commission's first step in evaluating an application for a certificate of public convenience and necessity, under section 7 of the Natural Gas Act, is whether the proposed project will stand on its own financially because it meets a market need. The Commission views long-term contracts for a project's capacity as substantial—even sufficient—evidence of "need" for that project. This Court repeatedly has upheld the Commission's assessments of need on this basis.

The Commission, here, found a market need for a proposed pipeline project based on a contract between the certificate applicant (Spire) and its affiliate (Spire Missouri) for nearly 90 percent of the project's capacity. Although Environmental Fund presumes harm from "affiliate" transactions, the Commission does not view a pipeline's agreements with its affiliates as less meaningful than those with unaffiliated shippers when considering certificate applications.

Rather, the Commission's concern in this context is the prospect of a pipeline discriminating unduly against shippers not part of its corporate family. But Environmental Fund does not argue that Spire engaged in undue discrimination. Nor does it offer any real evidence to buttress its claims of self-dealing or affiliate abuse. And because the Commission found no evidence of undue discrimination or self-dealing here, it reasonably relied on Spire's agreement with Spire Missouri to find a need for the proposed Project.

Environmental Fund's other record-based challenges fail simply because the record here reflects reasoned agency deliberation and decisionmaking. Its claim that the Commission ignored evidence counter to the finding of need is not consistent with the record.

Environmental Fund similarly overlooks the Commission's reasonable consideration of the Project's potential adverse economic impacts on landowners and on the existing pipeline. The Commission also reasonably found Environmental Fund's concerns over the terms of Spire's contract with its affiliate (a local distribution company) and over potential increased retail costs properly within the purview of the Missouri Public Service Commission.

In keeping with NEPA requirements, the Commission adequately considered and disclosed the environmental impact of its actions. On indirect effects, the Commission reasonably found no record evidence that the Project would induce additional natural gas production. It also explained its conclusion that end use of any gas transported by the Project would not represent new greenhouse gas emissions, but still provided a quantitative estimate of the Project's "full burn" downstream emissions.

The Commission also reasonably assessed cumulative effects within the same geographic area as the Project. And it explored a full range of alternatives, including "no action," and reasonably adopted Spire's statement of purpose for the Project. Petitioner Steck—whose

property is a half-mile away from the Project after Spire changed its path—offers nothing requiring a different result here.

ARGUMENT

I. Standard of review

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (cleaned up).

Because the grant or denial of a Natural Gas Act section 7 certificate of public convenience and necessity is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only

whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id.*

NEPA does not create a private right of action, so this Court applies the arbitrary and capricious standard "and its deferential standard of review" to NEPA-based challenges. *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

Agency actions taken under NEPA are entitled to a high degree of respect. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014), and has consistently declined to "flyspeck" the Commission's environmental analysis, *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is

entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotation marks omitted).

II. The Commission reasonably found the Project to be required by the "public convenience and necessity"

Section 7(e) of the Natural Gas Act grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *see Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission "vested with wide discretion to balance competing equities against the backdrop of the public interest"); *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority") (internal quotation marks omitted).

In its 1999 Certificate Policy Statement, the Commission set forth the criteria it considers in reviewing an application for a certificate of public convenience and necessity under Natural Gas Act section 7. *See City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019); *Sierra*

Club, 867 F.3d at 1379. First, the applicant must show that the project will "stand on its own financially because it meets a market need," without subsidies from existing customers. *Sierra Club*, 867 F.3d at 1379 (internal quotation marks omitted). Second, 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." *Id.*; *see also Myersville*, 783 F.3d at 1309 (noting that the balancing of adverse effects and public benefits of a proposed project is "'an economic test'" under FERC policy) (quoting Policy Statement, 88 FERC ¶ 61,227, at p. 61,745).

A. The Commission reasonably relied upon Spire's precedent agreement to find a market need for the Project

The Commission found that the Certificate Policy Statement's threshold test—i.e., whether a certificate applicant is prepared to financially support a project without subsidization from existing customers—does not apply where, as here, the applicant is a new pipeline entrant with no existing customers. Certificate Order PP 27, 31, JA 940, 942. Environmental Fund did not seek rehearing of this Commission finding and does not challenge it here. Environmental

Fund's challenge instead turns on the Commission's reliance on Spire's precedent agreement to show market need for the Project. *See, e.g.*, EDF Br. 2-3.

Under the Policy Statement, precedent agreements, though not required, "are still significant evidence of project need or demand." Rehearing Order P 14, JA 1150; Policy Statement, 88 FERC ¶ 61,227, at p. 61,748. Courts of appeals, including this Court, have repeatedly affirmed the agency's reliance on these agreements (including those with affiliates) as valid evidence of demand. *See, e.g.*, *Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019) (per curiam) ("We have repeatedly held that a project applicant may demonstrate market need by presenting evidence of preconstruction contracts for gas transportation service.") (internal quotation marks omitted); *Sierra Club*, 867 F.3d at 1379; *Minisink*, 762 F.3d at 111 n.10; *see also Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Minisink*, 762 F.3d at 111 n.10).

1. The Commission reasonably addressed the evidence that Environmental Fund claims to show that the Project is unnecessary

To avoid the weight of this Court's recurrent approval of FERC's reliance on precedent agreements, Environmental Fund argues that this case is distinct on its facts. In its view, here the Commission disregarded record evidence that rebutted the finding of need. EDF Br. 24-25; *see also* Tierney Amic. Br. 17. Not true.

First, Environmental Fund points to flat market demand in the St. Louis area as evidence that the Project was unnecessary. EDF Br. 31-32. The Commission, however, acknowledged flat demand in St. Louis but noted that all parties (including Spire) agreed that the Project's capacity is not intended to serve new demand. Certificate Order PP 49, 107, JA 951, 979; Rehearing Order P 23, JA 1155. The record also reflects that Spire Missouri's decision to obtain service from Spire "was driven by more than just cost or price considerations." Certificate Order P 84, JA 968; *see also id*. P 108 (noting evidence that cost differences of delivered gas were not materially significant), JA 980; Rehearing Order P 30 (same), JA 1159.

Of course, the Commission is not confined to approving only those projects intended to serve *new* demand. The Commission's 1999 Policy Statement expressly acknowledged that improving service and reliability for *existing* demand may justify a proposed project. *See* Policy Statement, 88 FERC ¶ 61,227, at p. 61,746 n.12 ("Projects designed to improve existing service for existing customers, by replacing existing capacity, improving reliability or providing flexibility, are for the benefit of existing customers."); *see also* Certificate Order P 79 (citing FERC precedent approving a similar pipeline project, subscribed to by affiliates of the project sponsor, that was intended not "to meet any additional natural gas demand, but rather . . . to strengthen the reliability and flexibility of service" to customers), JA 965. The Commission also explained its reasoning for placing more weight on long-term contracts for capacity than on broader market indicators like projections of demand. *See* Rehearing Order P 23, JA 1155.

This Court recently affirmed a Commission finding of market need grounded on other, extra-contractual evidence in the record, without even considering the agency's reliance on contracts. *See Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020) (en banc). The record

here is similar. Aside from its contractual commitment, Spire's other reasons for the Project were enough in the Commission's view to overcome concerns of overbuilding. *See, e.g.*, Rehearing Order P 24, JA 1155. These reasons include the ability to access multiple supply areas via a more direct path without crossing an earthquake zone,[4] the inability of existing pipelines to provide as much gas as the Project, and replacement of expiring contracts and aging facilities.[5] *See, e.g.*, Rehearing Order PP 24, 30, JA 1155, 1159; Certificate Order PP 68, 84, 107-08, JA 960, 968, 979-80; *see also* Certificate Order P 11 (Spire contended that the Project would enhance Spire Missouri's supply diversity and security, and its system reliability), JA 935; Rehearing Order P 23 (Project would enable diversification of supply), JA 1155.

Under Commission policy, the agency declines to inquire into these sorts of private business decisions, in the absence of evidence of discrimination or abuse and given the "substantial financial

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[4] Spire Application at 9 (Jan. 26, 2017) ("current transportation paths to the St. Louis area generally require service across multiple pipelines"), R.1, JA 95; Laclede Gas Co. Answer at 14-15 (Mar. 22, 2017), R.40, JA 287-88.

[5] Spire Application at 10 (noting "increasingly negative operational, cost, and availability issues" associated with the use of propane as "peaking supply"), JA 96; Laclede Gas Co. Answer at 10, JA 283.

commitment" that they entail. Rehearing Order P 24, JA 1155-56; *see also* Certificate Order P 83 & n.153 (longstanding Commission policy not to "second guess the business decisions of pipeline shippers, [local distribution companies], or end users (unless there is evidence of affiliate abuse)"), JA 968.

Second, Environmental Fund claims that an existing pipeline "could meet, and in fact was meeting, Spire Missouri's demand." EDF Br. 25. But Spire Missouri contradicted that claim, pointing out that other pipelines could not provide the amount of capacity it desired. Certificate Order P 84, JA 968; Laclede Gas Co. Answer at 17 (Mar. 22, 2017) (existing pipeline, Enable, has neither adequate capacity for the full amount of supply that the Project can provide nor access to "nearby liquid markets for new producing basins"), R.40, JA 289a; *see also* Laclede Gas Co. Answer at 13-14 (purchasing directly from a greater number of production basins permits optimization of supply choices in response to changing market conditions), JA 286-87. The Commission also found it reasonable for Spire Missouri to reconsider its transportation needs given that many of its existing contracts had

expired or were approaching expiration. *See* Certificate Order P 107, JA 980; Rehearing Order P 30, JA 1159.

Third, and to further support its claim that the Commission overlooked evidence of a lack of need, Environmental Fund points to expert testimony that the Project was "fundamentally uneconomic" and would increase costs to Spire Missouri. EDF Br. 32 (citing Enable's expert testimony). The Commission, however, reasonably found otherwise based on data from Spire and from the existing pipeline (Enable)—i.e., cost differences for the Project's gas deliveries to Spire Missouri were not materially significant compared to those through Enable's system. Rehearing Order P 30, JA 1159; Certificate Order P 108, JA 980.

As for the allegedly overlooked expert testimony, Environmental Fund did not specify it as part of its request for rehearing of the Commission's determination of market need, so its new argument here relying on that expert testimony is not preserved for appeal. *See* EDF Rehearing Br. 10-14 (Sept. 4, 2018), R.179, JA 1091-95; *see also* 15 U.S.C. § 717r(a) (rehearing application must "set forth specifically the ground or grounds upon which such application is based"); *Ameren*

Servs. Co. v. FERC, 893 F.3d 786, 793 (D.C. Cir. 2018) ("To bring a particular claim in a petition for review, a petitioner needs to have alerted the Commission to the specific legal argument presented on rehearing (absent a reasonable ground for not doing so).") (cleaned up).[6]

True, Environmental Fund cited this testimony in its rehearing brief, but did so for a different issue not raised in its opening brief to this Court—that the Commission erred in failing to establish an evidentiary hearing to resolve disputed issues of material fact, EDF Rehearing Br. 4, 8, JA 1085, 1089; *see also Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990) (under the Natural Gas Act's exhaustion requirement, "Petitioners cannot preserve an objection indirectly"). In any case, the Commission adequately addressed that issue, finding the existing written record sufficient to resolve all issues presented. Rehearing Order P 10, JA 1147.

[6] Though *Ameren* concerns jurisdictional requirements of the Federal Power Act, this Court follows "the familiar practice of applying interchangeably judicial interpretations of provisions from the Natural Gas Act to their substantially identical counterparts in the Federal Power Act." *City of Anaheim v. FERC*, 558 F.3d 521, 523 n.2 (D.C. Cir. 2009) (internal quotation marks omitted).

Fourth, Environmental Fund suggests that the Commission failed to consider a competing pipeline's claim that Spire Missouri had previously rejected other projects proposed by nonaffiliated shippers. EDF Br. 32. In fact, the Commission addressed this claim and found that differences between current market conditions and those that existed at the time of those rejected proposals reasonably justified Spire Missouri's decision to accept the Spire Project. Certificate Order P 84, JA 968; *see also* Laclede Gas Co. Answer at 5-6 (noting that Rockies Express Pipeline adding "east-to-west" transportation capacity from Appalachian supply areas had a major impact on pricing in the upper Midwest), JA 278-79. The Commission also reasonably relied upon other justifications Spire Missouri gave for the Project along with the existence of a long-term and binding precedent agreement, consistent with Commission policy. *See supra* at 21-22.

2. The Commission's reliance on Spire's precedent agreement to find market need is consistent with Commission policy

This Court's precedent—affirming the Commission's reliance on contracts when granting certificates of public convenience and necessity under 15 U.S.C. § 717f—is not limited to the facts of individual cases, as

Environmental Fund suggests, Br. 24-25. That precedent (*Minisink*, *Myersville*, *City of Oberlin*, and *Appalachian Voices*) recognizes Commission policy to treat a pipeline's contracts—even those with affiliates—as substantial evidence of market need while reserving judgment as to the needs of individual shippers. *See, e.g.*, Rehearing Order PP 14-15 (describing policy and citing cases), JA 1149-51.

As this Court noted recently, the Policy Statement "lays out a flexible inquiry that allows the Commission to consider a wide variety of evidence to determine the public benefits of the project." *City of Oberlin*, 937 F.3d at 605. So even as the Policy Statement broadened the types of evidence on public benefit an applicant may submit, it did not compel any additional showing beyond precedent agreements. Certificate Order P 72, JA 962; Rehearing Order P 14, JA 1150; *see also, e.g.*, *Myersville*, 783 F.3d at 1311 (holding that petitioners failed to identify anything in the Policy Statement or in any precedent "'construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers'") (quoting *Minisink*, 762 F.3d at 111 n.10). The Commission, accordingly,

noted here its "longstanding reliance on precedent agreements *as substantial and sufficient evidence of need*," affirmed by this Court. Certificate Order P 72 (emphasis added), JA 962.

In keeping with the Policy Statement's flexible approach, the Commission does not distinguish between long-term, binding contracts with affiliated or unaffiliated shippers, so long as there is no evidence of undue discrimination or anticompetitive behavior. *See City of Oberlin*, 937 F.3d at 605-06; *see also* Rehearing Order PP 14-15, JA 1150-51; Policy Statement, 88 FERC ¶ 61,227, at p. 61,748 (noting that the elimination of "a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers"); *Eastern Shore Nat. Gas Co.*, 132 FERC ¶ 61,204, at P 31 (2010) (FERC "gives equal weight to [contracts] with affiliates and non-affiliates and does not look behind contracts to determine whether the customer commitments represent genuine growth in market demand."). So too for Commission pipeline regulations, which mandate nondiscriminatory treatment of all customers, affiliates or not. 18 C.F.R. § 284.7(b); Rehearing Order PP 17 n.50, 21 n.61 (citing regulations), JA 1152, 1154; *see also* 18 C.F.R. § 358.4.

The Commission's reasoned adherence to its policy here thus was not arbitrary and capricious. Rehearing Order P 14, JA 1150-51; Certificate Order PP 72, 75 & n.136, 83, JA 962-63, 968; *see also City of Oberlin*, 937 F.3d at 605-06 (holding that FERC rationally explained its reliance on applicant's precedent agreements with affiliates because there was no evidence of self-dealing and because applicant bore the risk of any unsubscribed capacity); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (holding that FERC "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") (cleaned up).

By contrast, Environmental Fund's theory that the affiliate agreement here—or any affiliate transaction for that matter—requires "greater scrutiny" tosses out Commission policy. *See* EDF Br. 21, 28; *see also, e.g.*, Am. Antitrust Institute Amic. Br. 5-7. None of the irrelevant or outdated agency orders Environmental Fund cites for this theory demonstrates that the Commission's interpretation here of its 1999 Certificate Policy Statement was arbitrary and capricious. EDF

Br. 21 (citing two orders not involving the Natural Gas Act and one 1963 order involving pipeline rate regulation); *id.* at 28 (arguing that "heightened scrutiny in other contexts," i.e., the Federal Power Act, supported application of heightened scrutiny "of the merits (and demerits)" of Spire's precedent agreement); *see also Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (noting the Court's traditional deference to the Commission's interpretations of its own precedent).

Likewise, Environmental Fund's ratemaking cases, Br. 26-27, bear little relevance to the dispute here. *Compare Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003) ("[B]efore relying on existing contracts between a pipeline and its customers *to show that rates are reasonable*," FERC must first determine that the pipeline lacks significant market power) (emphasis added) (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) *with Sierra Club*, 867 F.3d at 1379 (finding that an applicant can show that a proposed project will stand on its own financially by presenting evidence of "preconstruction contracts" for gas transportation service) *and City of Oberlin*, 937 F.3d at 606 ("[T]his Court has also recognized

that 'it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.") (quoting *Myersville*, 783 F.3d at 1311).

Amicus curiae American Antitrust Institute calls for a comprehensive policy shift—away from the Policy Statement and toward so-called *Copperweld* doctrine from the antitrust context. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984) (treating parents and wholly owned subsidiaries as a single entity under section 1 of the Sherman Act); Am. Antitrust Institute Amic. Br. 7 (citing *Copperweld*). This policy preference, however, belongs before the Commission in the first instance, not before this Court on review of a specific project. In any case, no party raised this issue here; nor did this amicus intervene as a party in the agency proceeding. *See* 15 U.S.C. § 717r(b) (judicial review is available only for parties in FERC proceedings); *Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001) (amicus curiae may not raise new issue on appeal); *cf. Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (intervenor as nonparty "cannot expand the proceedings" or introduce new issues).

3. The Commission reasonably found no record evidence that Spire discriminated against nonaffiliate shippers

The Commission's primary concern with contracts between pipelines and their affiliates is the prospect of undue discrimination against nonaffiliate shippers. *See* Certificate Order P 75, JA 963; Rehearing Order P 17, JA 1152; *see also* 18 C.F.R. § 284.7(b) (requiring nondiscriminatory access to interstate pipelines).

Environmental Fund, for its part, does not even mention discrimination. Environmental Fund does not argue here—and did not argue before the Commission—that Spire discriminated (unduly or otherwise) against nonaffiliates. *See, e.g.*, EDF Rehearing Br. 13 (noting that FERC's concern about undue discrimination is "simply irrelevant to the case at hand"), JA 1094; *see also* Certificate Order P 75 (noting that the record reflected no allegations that Spire discriminated against nonaffiliates), JA 963; Rehearing Order P 17, JA 1152.

If there is any record evidence on this point, it seems to cut the other way: before filing its application, Spire held an open season for capacity on the Project, during which "all potential shippers had the opportunity to contract for service." *See* Certificate Order P 77, JA 964.

The Commission thus reasonably found "no valid allegations of undue discrimination" against Spire. Rehearing Order P 17, JA 1152.

Environmental Fund's objection to the affiliate agreement here is not about undue discrimination—but rather amorphous "evidence" of corporate self-dealing and a lack of arm's-length negotiation, purportedly ignored by the Commission. *See* EDF Br. 21-23. Far from any reasonable quantum of evidence, however, Environmental Fund offers little more than its own presumption of some generalized specter of harm arising from transactions among affiliates. *See id.* at 21 (opining that utilities like Spire Missouri have "little incentive" to avoid costs that retail customers will bear); *id.* at 22 (citing Spire's statements about Spire Missouri as "evidence" of "the lack of arm's-length negotiations" and of "no meaningful difference" between Spire and Spire Missouri) (citing Spire Answer at 8, 12-13 (Mar. 17, 2017), R.38, JA 263, 267-68).

Environmental Fund even endorses the claim that corporate self-dealing must be "the only rational explanation" for the Project, Br. 22-23—yet offers nothing at all resembling evidence to back this claim. Still more, it implies malfeasance merely because market conditions, in

its view, made the Project unnecessary. *See id.* at 22 ("*no reasonable company* would subscribe to capacity" on the proposed Project "when demand is flat" and "existing capacity is sufficient") (emphasis added). And while Environmental Fund offers the dissenting Commissioner's opinion that the record was "replete with evidence" of self-dealing by Spire's parent, *id.* at 23, it does not offer any actual evidence of such self-dealing, much less rebut the Commission majority's evaluation of the record. That evaluation revealed no "evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse." Rehearing Order P 15 (responding to dissent), JA 1151-52. As this Court has confirmed, the mere fact that the applicant's precedent agreement is with an affiliate "does not render FERC's decision to rely on [that agreement] arbitrary or capricious." *Appalachian Voices*, 2019 WL 847199, at *1.

Without any evidence of self-dealing or abuse here, the Commission reasonably found that Spire Missouri's affiliation with the project sponsor (Spire) did not lessen its need for capacity and its contractual obligation to pay for such service. Rehearing Order P 15, JA 1151-52. The agency, by policy, does not distinguish between

pipeline agreements with affiliates or independent marketers in establishing a market need for a proposed project, so long as the agreements are long-term, binding, and not indicative of anticompetitive or discriminatory behavior. *Id.*; Certificate Order PP 75, 80, JA 963, 966.

And notwithstanding Spire's affiliation with its counterparty, the Commission explained that Spire: (1) bears the risk of unsubscribed capacity; and (2) was required to (and did) file a written statement confirming the legitimacy of its financial commitment embodied in the agreement. Rehearing Order P 21, JA 1154; *see also City of Oberlin*, 937 F.3d at 605 (rejecting challenge to FERC's reliance on affiliate agreements because FERC found no evidence of self-dealing and because the applicant bore the risk of unsubscribed capacity). The Commission's reasonable explanations for its reliance on the Spire precedent agreement are thus sufficient to withstand Environmental Fund's claim of arbitrary and capricious agency action.

4. The Commission reasonably explained its findings on the limits of its statutory jurisdiction

Environmental Fund demands a Commission inquiry into "the merits (and demerits)" of Spire's precedent agreement, EDF Br. 28. The

Commission, though, reasonably declined the invitation, deferring to the judgment of the state regulator.

"The prudence and reasonableness of the considerations underlying Spire Missouri's decision to obtain transportation service from Spire and enter into the precedent agreement are squarely within the jurisdiction of the Missouri [Public Service Commission]." Certificate Order P 85, JA 969; *see also* Rehearing Order P 16, JA 1152; *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 60 (2017) ("[A]ny 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."). The Commission's view on which regulator properly may review the substance of the agreement is consistent with that expressed below by the Missouri Public Service Commission. *See, e.g.*, Mo. Pub. Serv. Comm'n Protest at 14 (Feb. 27, 2017) (requesting that FERC "explicitly state . . . that it is not approving the terms of the Precedent Agreement"), R.21, JA 152; Mtn. for Clarification of Mo. Pub. Serv. Comm'n at 2-3 (May 18, 2018) (noting "no disagreement" among the Missouri Public Service Commission, Spire Pipeline, and Spire Missouri

that FERC's review of the precedent agreement as evidence of need for the project does not require FERC "to approve or accept the Precedent Agreement"), R.158, JA 927-28. And that state regulator, a party in the agency proceeding, pursued no objection on rehearing to the Commission's jurisdictional finding. *See* Mo. Pub. Serv. Comm'n Rehearing Br. at 1 (Aug. 31, 2018) (seeking rehearing only of the rate of return authorized by FERC), R.176, JA 1070.

Environmental Fund's concern over imposition of costs on "captive" customers and end users is again misplaced. EDF Br. 27. The Missouri Public Service Commission, not FERC, has authority to protect retail customers from excessive retail rates and to disallow costs not justified under state law. Rehearing Order PP 27-28, JA 1157-58.

Consequently, it is up to that state regulator to consider Spire Missouri's ability to recover costs associated with the decision to subscribe for service on the Project—and just because that review is retrospective "does not make it ineffective." Certificate Order P 86, JA 969; *see also* Rehearing Order P 27, JA 1157; Tierney Amic. Br. 24-26 (arguing that state regulatory authority is limited, in part because state "prudency reviews . . . do not necessarily occur prior to the

construction of a pipeline"). This reasonable Commission interpretation of the contours of its own statutory jurisdiction is entitled to deference. *See Pub. Utils. Comm'n of Cal. v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998) ("We defer to FERC's interpretation of its authority to exercise jurisdiction if it is reasonable.") (internal quotation marks omitted); *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). To the extent Environmental Fund now claims inconsistency with prior agency precedent (Br. 29), this claim is not properly before this Court because it was not raised before the Commission on rehearing. 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."); *Ameren*, 893 F.3d at 793.

Environmental Fund's claim that the Commission ignores its public-interest obligations (Br. 26) by not reviewing the merits of the precedent agreement fundamentally misapprehends the Commission's multi-step review of certificate applications under the Natural Gas Act. At the threshold stage of the "public convenience and necessity"

analysis—i.e., whether a proposed project "will stand on its own financially"—the Commission may rely on contracts to show a market need, without regard to whether the contracts involve affiliates of the applicant. *See, e.g.*, *City of Oberlin*, 937 F.3d at 605-06; *Sierra Club*, 867 F.3d at 1379. Upon finding a market need for a proposed project, the Commission then moves to step two of its public interest review: balancing the project's public benefits against its potential adverse consequences. *See* Policy Statement, 88 FERC ¶ 61,227, at p. 61,745; *Myersville*, 783 F.3d at 1309.

As described in the next section of this brief, the Commission reasonably found that the Project's benefits outweigh any potential adverse effects.

B. The Commission reasonably balanced the Project's adverse effects and public benefits under the Natural Gas Act and Commission policy

The Natural Gas Act confers, for the benefit of the public interest, broad discretionary authority on the Commission. *See Transcon. Gas Pipe Line*, 365 U.S. at 7; *Columbia Gas Transmission*, 750 F.2d at 112. Here, the Commission reasonably explained its finding that the Project

is consistent with the public interest.

It first found that Spire took adequate steps (route choices and other steps described *infra*) to minimize adverse impacts on landowners. *See, e.g.*, Rehearing Order PP 35-36, JA 1161-62. That finding, by Environmental Fund's telling, was "simply untethered from the record evidence," Br. 35. But the sheer number of condemnation actions Spire filed (*after* the Commission granted the certificate) says nothing about whether the agency's grant of the certificate evinced reasoned decisionmaking. *See* EDF Br. 35 & n.3; Rehearing Order P 36 n.104, JA 1162.

The record here shows a rational connection between the facts the Commission found and the choice it made. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. The Commission noted, for example, that Spire attempted to minimize construction and operational impacts by locating 15 percent of the Project's proposed route adjacent to existing rights-of-way and by not proposing to build any major above-ground facilities like compressor stations. *See* Rehearing Order P 34, JA 1161; Envtl. Assessment at 151, JA 772; *see also* Certificate Order P 118 (noting Spire plan to compensate landowners for crop production losses to

account for construction impacts on farmland), JA 984. Spire also incorporated over 40 changes to the Project's proposed route, 20 of which were requested by landowners. Envtl. Assessment at 147, JA 768; *see also* Rehearing Order P 35, JA 1161-62; Certificate Order P 119 (noting that no landowners moved to intervene or protest the Project on the basis of impacts to property values), JA 985. One of those changes moved the pipeline route half a mile away from Petitioner Steck's property, as she acknowledges. Steck Decl. ¶ 4. All of this demonstrates that the Commission's finding on landowners was firmly tethered to the record.

The same goes for its finding on the existing pipeline. The Commission acknowledged that nearby pipelines like Enable "will likely see a drop in utilization," as a result of Spire Missouri's contracted capacity on the Project replacing its capacity on Enable's system. Rehearing Order P 30, JA 1158-59. The Commission also pointed out that Enable recognized, as did Spire and Spire Missouri, that many of Spire Missouri's existing contracts with Enable "reached or are approaching the end of their terms." *Id.*; Certificate Order P 107, JA 980. And while Commission policy obligates the agency to consider

a proposed project's impact on existing pipelines serving the market, it imposes no obligation to protect incumbents from the risk of losing market share to new entrants. Certificate Order P 122, JA 986; Rehearing Order P 31, JA 1160; Policy Statement, 88 FERC ¶ 61,227, at p. 61,748. Enable, for its part, opted to withdraw its request for rehearing of the Certificate Order, *see* Rehearing Order PP 6-7, JA 1145, and has not intervened in support of Environmental Fund's petition for review.

Environmental Fund also contends that the Commission lacked a record basis for its determination of the Project's public benefits and failed to provide a meaningful comparison of benefits and adverse impacts. EDF Br. 39-40. But to the extent Environmental Fund seeks some mathematical tally ("a transparent weighing of costs and benefits," *id*. at 40), the Natural Gas Act imposes no such requirement.

The Act instead vests the Commission with "broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink*, 762 F.3d at 111 (internal quotation marks omitted). This is because determining the public interest "entails not merely economic and mathematical analysis but value

judgement." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 (1991); *see also Transcon. Gas Pipe Line*, 365 U.S. at 29 ("a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency"); *Conservation Law Found. v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000) ("Certainly nothing in the statute requires the Commission to place a dollar value on nonpower benefits.").

Far from any showing of arbitrary agency action, Environmental Fund's dismissal of the Commission's reliance on Spire's precedent agreement (Br. 39) boils down to a fundamental disagreement with the agency on a (settled) policy question. *See, e.g.*, *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 297 (D.C. Cir. 2014) (petitioner's disagreement with FERC's rationale did not demonstrate it was arbitrary and capricious); *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004). As described above, however, Commission policy and this Court's precedent support findings of market need based on the existence of precedent agreements. *See supra* at 19, 27-29; *see also, e.g.*, *City of Oberlin*, 937 F.3d at 605 (finding that Policy Statement "lays out a flexible inquiry

that allows the Commission to consider a wide variety of evidence to determine the public benefits of the project"); *Myersville*, 783 F.3d at 1311. And again, the Commission's consideration of the Project's other benefits—both physical and contractual—stayed within the bounds of FERC policy not to have agency decisionmakers supplanting business decisions of private entities. *See supra* at 21-23; *see also, e.g.*, Certificate Order PP 83-84, 107-08, JA 968, 979-80; Rehearing Order PP 24, 30-31, JA 1155-56, 1158-60.

III. The Commission's environmental review fully complied with the National Environmental Policy Act

Council on Environmental Quality regulations implementing NEPA require the Commission to examine the direct, indirect, and cumulative impacts of proposed actions. 40 C.F.R. § 1508.25(c). *Indirect impacts* are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) ("NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause," akin to the "familiar doctrine of proximate cause from tort law.") (internal quotation marks omitted); *EarthReports, Inc, v.*

FERC, 828 F.3d 949, 955 (D.C. Cir. 2016) ("To warrant consideration under NEPA, an effect had to be sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.") (cleaned up).

Cumulative impacts are those impacts that would result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. These regulations also require environmental assessments to include a "brief" discussion of *reasonable alternatives* to the proposed action. *See id.* § 1508.9(b).

Petitioner Steck claims the Commission's consideration of each of these NEPA requirements was arbitrary and capricious. None of these claims has merit.

A. The Commission reasonably analyzed upstream indirect effects

To the extent Ms. Steck challenges the Commission's findings on causation, that challenge appears limited to upstream effects resulting from natural gas production. Steck Br. 19 ("FERC does not even say who the causative actor is unless it is Spire itself – an untenable grant

of self-permitting. The Commission says that neither Spire nor the states could know exactly *where the gas was coming from*.") (emphasis added).

But Ms. Steck fails to show a reasonably close causal relationship between the Project and any upstream natural gas production. The Commission reasonably found that a causal relationship sufficient to warrant analysis of these effects "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)." Certificate Order P 251, JA 1032; *see also* Rehearing Order P 60, JA 1174.

Like the *Birckhead* petitioners, however, Ms. Steck "identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project." 925 F.3d at 517; Rehearing Order P 70 (noting that Ms. Steck "identifies no specific locations within the Spire Project's geographic scope where additional production will occur as a result of the Spire Project"), JA 1178; *see also* Rehearing Order P 62 (finding no forecasts in the record to enable the Commission

to meaningfully predict production-related impacts), JA 1174; *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59, 69 (D.C. Cir. 2016) (Commission adequately explained its conclusion that the project would not "necessitate an increase in domestic natural gas production"). To meet this evidentiary threshold, conclusory quotes from the Petitioner's own pleadings are not enough. *See* Steck Br. 22 (quoting rehearing brief that the Project "will directly induce new production because existing wells will not feed the pipeline for its lifetime, which may be 50 years").

It is unsurprising that Ms. Steck cannot cite any evidence of new production induced by the Project, considering that it is not intended to serve new demand and is likely to replace capacity transported on an existing pipeline system. *See, e.g.*, Certificate Order P 107, JA 979-80; Rehearing Order PP 23, 30, JA 1155, 1158-59; *see also supra* at 9-10, 20 (discussion of Commission's finding of need for Project). Indeed, the dissenting Commissioner did not object to the agency's findings on indirect effects (upstream or downstream), noting that, because "there is no additional demand for natural gas in the region," the "stakes of the

Commission's [greenhouse gas] analysis are relatively low." Rehearing Order, Comm'r Glick Dissent PP 29-30, JA 1200.

Besides finding no evidence of new production induced by the Project, the Commission also recognized that many factors spur production, "such as domestic natural gas prices and production costs." Certificate Order P 251, JA 1032; *see also* Rehearing Order P 62 (listing the sort of information needed to conduct a meaningful analysis of production impacts), JA 1175. These findings based on agency "expertise and experience," left undisputed in Ms. Steck's opening brief, warrant deference. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 67 (D.C. Cir. 2014).

This Court has held in several recent decisions that the Commission's Natural Gas Act authority to deny pipeline certificates makes the agency a legally relevant cause of the direct and indirect environmental effects of pipelines it approves. *See Birckhead*, 925 F.3d at 519 (citing *Sierra Club*, 867 F.3d at 1373); Steck Br. 19. But the Commission's finding on causation here was rooted not on an absence of legal authority but rather the absence of record evidence—i.e., evidence demonstrating the necessary connection between the proposed Project

and increased upstream production. *See, e.g.*, Rehearing Order PP 60, 62, JA 1174-75; *see also* Certificate Order P 252 (even assuming a causal relationship, potential production related impacts were not reasonably foreseeable), JA 1032-34. The agency thus reasonably declined to treat upstream production as an indirect impact of the Project in its NEPA analysis. *See, e.g.*, Certificate Order P 254, JA 1035; Rehearing Order P 58, JA 1173.

Ms. Steck shows no basis to reverse that reasoned finding; nor does she challenge the agency's efforts to develop the record. This is not enough to show either a violation of NEPA or an arbitrary and capricious action under the Administrative Procedure Act. *See Birckhead*, 925 F.3d at 518 ("We are thus left with no basis for concluding that the Commission acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production."); *see also Sierra Club*, 867 F.3d at 1367 ("Our mandate is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.") (cleaned up).

B. The Commission reasonably analyzed downstream indirect effects

This Court's *Sierra Club* decision held that NEPA's "reasonable forecasting" requirement obligated the Commission to either provide "a quantitative estimate" of downstream greenhouse gas emissions that will result from burning natural gas that a proposed pipeline will transport or explain more specifically why it cannot do so. 867 F.3d at 1374; *see also Birckhead*, 925 F.3d at 518-19. The Environmental Assessment included such an estimate: 7.7 million metric tons of carbon dioxide per year from end-use combustion, assuming the Project's full capacity of 400,000 dekatherms per day of natural gas is transported and combusted. Envtl. Assessment at 144, JA 765; Rehearing Order P 63, JA 1175.

Ms. Steck misstates the record in contending that the Commission ignored this downstream estimate. Steck Br. 21; *see also id.* at 20-21 (arguing that displacement of existing supply "does not excuse the Commission from estimating downstream emissions"); Steck Rehearing Br. 4 ("A full burn could be calculated here.") (Aug. 31, 2018), R.177, JA 1076. In fact, the Commission referenced the Environmental Assessment's conservative "full burn" estimate as evidence that the

Assessment exceeded NEPA requirements. Rehearing Order P 63, JA 1175. Ms. Steck's claim (Br. 21) of contradictory Commission conclusions fares no better: The Commission's citation of an estimate of *downstream* emissions does not contradict its finding that *upstream* production impacts are too uncertain to forecast in a meaningful environmental analysis of a specific project. *See id.* PP 62-63, JA 1174-75.

Ms. Steck also contends (Br. 22) that the Commission must find that the Project will drive existing pipelines out of business before it may conclude that the Project will not lead to an increase in downstream emissions. She is wrong. The Commission's conclusion that the Project would not contribute *new or additional* downstream effects rested on a finding no one disputes—the Project was "not intended to meet an incremental demand for natural gas above existing levels." Certificate Order P 253, JA 1035; Rehearing Order P 64, JA 1176; *see also* Steck Br. 3 ("Spire conceded there was no new demand to be served."); Certificate Order P 107 ("All parties, including Spire, agree that the new capacity is not meant to serve new demand . . . ."), JA 979. And the Commission acknowledged that utilization of existing

pipelines likely would drop once the Project goes into service. Certificate Order P 107, JA 979-80.

The Commission thus reasonably adopted the Environmental Assessment's explanation that the majority of gas transported by the Project "would be replacing, not adding to, other fuel sources that are currently contributing [greenhouse gases] to the atmosphere," and that end-use of that gas was not anticipated to represent new greenhouse gas emissions. Envtl. Assessment at 144-45, JA 765-66; Rehearing Order P 64, JA 1175-76; *see also* Rehearing Order, Comm'r Glick Dissent PP 29-30 (acknowledging Environmental Assessment's conclusion of "little chance" of the Project causing "a considerable increase" in greenhouse gas emissions), JA 1200. That record-based "replacement" conclusion is not arbitrary.

C. The Commission reasonably analyzed cumulative effects

In Ms. Steck's view, it was also arbitrary and capricious for the Commission not to use a global or national geographic scope when considering the Project's cumulative effects. *See, e.g.*, Steck Br. 25 ("'The global nature of global warming does not release the agency from the duty of assessing the cumulative impacts of its actions.'") (quoting

Steck Rehearing Br. 6, JA 1078); *id.* at 26 ("The entire national natural gas pipeline network cumulatively contributes to the climate crisis."); *id.* at 27 ("cumulative sources and effects of [greenhouse gases] are regional, national and global").[7] But that "draws the NEPA circle too wide." *Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 50 (D.C. Cir. 2016) (rejecting a request for a nationwide cumulative effect analysis).

Sierra Club (Freeport) drew upon well-settled NEPA jurisprudence from this Court confirming that a cumulative-impact analysis need only consider effects "'in the same geographic area'" as the one under review. *Id.* (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)); *see also Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002) (NEPA cumulative impacts apply to "impacts in the same area"). The Commission rightly followed that standard here. *See, e.g.*, Envtl. Assessment at 131-32, JA 752-53; Rehearing Order PP 67-69, JA 1177-

[7] While Ms. Steck now suggests that the Commission erred by not defining a specific geographic area for analysis of climate change effects, Br. 25, she failed to preserve this objection in her request for rehearing, Rehearing Br. 5-6. *See* 15 U.S.C. § 717r(b); *Ameren*, 893 F.3d at 793 ("Petitioners must raise each argument with specificity.") (internal quotation marks omitted).

78; *see also* Envtl. Assessment at 133 (defining geographic scope for each affected resource, such as a 1-mile radius for land-use impacts and a 0.25-mile radius for construction impacts on noise and air quality), JA 754.

Because determinations as to the appropriate size and location of the relevant geographic area require "'a high level of technical expertise,'" this Court has deemed them "'assigned to the special competency of' the Commission." *Sierra Club (Freeport)*, 827 F.3d at 49 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 414 (1976). Here, the Environmental Assessment identified distinct geographic areas for each specific environmental resource that would be affected by the Project. Envtl. Assessment at 132-33, JA 753-54; Rehearing Order P 69, JA 1177-78. Nowhere did Ms. Steck suggest some alternative scope—beyond bare references to effects at "global" or "national" levels—that the Commission failed to consider. With this record, Ms. Steck cannot show that the Commission's choices here were arbitrary.

D. The Commission reasonably analyzed alternatives

NEPA requires the Commission to take a "hard look" at reasonable alternatives to a proposed action. *See, e.g.*, *Sierra Club*, 867

F.3d at 1367. The requisite discussion of alternatives "need not be exhaustive," so long as there is "information sufficient to permit a reasoned choice." *Birckhead*, 925 F.3d at 515 (internal quotation marks omitted).

This Court has approved agency considerations of alternatives that accord "substantial weight to the preferences of the applicant." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197-98 (D.C. Cir. 1991) (internal quotation marks omitted); *see also City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). As here, when an agency is asked to approve a specific plan, "the agency should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington*, 938 F.2d at 196 (cited at Rehearing Order P 52 & n.153, JA 1170); *see also City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.") (cited at Rehearing Order P 51 & n.150, JA 1170).

The Environmental Assessment here thus reasonably adopted Spire's statement of purpose for the Project. *See* Rehearing Order P 52,

JA 1170; Envtl. Assessment at 2 ("According to Spire, the purpose of the Project is to provide about 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.") (footnote omitted), JA 623. The Commission further explained that the agreement between Spire and Spire Missouri supported that stated purpose. Rehearing Order P 52, JA 1170.

Ms. Steck presumes error (Br. 13) because the Environmental Assessment adopted the applicant's statement of purpose. But this overlooks established caselaw interpreting NEPA. This Court and other courts consistently apply a rule of reason to both the agency's definition of objectives and its selection of alternatives. Rehearing Order P 55 & n.160 (citing cases), JA 1171; *see, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011); *Citizens Against Burlington*, 938 F.2d at 195-96; *see also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (stating that both of these inquiries demand "considerable deference to the agency's expertise and policy-making role"). In other words, the agency's choice of objective has been held reasonable when that choice permits

consideration of a reasonable range of alternatives. *See, e.g.*, *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73-74.

Along those lines and given this Court's approval of the agency according "substantial weight" to the applicant's purpose, *see supra* at 55, Ms. Steck does not—indeed cannot—explain how adoption of the pipeline's stated purpose was unreasonable here. Nor does the record support Ms. Steck's "foregone conclusion" claim from rejection of the "no action" alternative and adoption of the pipeline's stated purpose. Steck Br. 17 ("Once FERC adopted Spire's purpose as its own, it was a foregone conclusion *that it would approve the pipeline*.") (emphasis added).

"No action" apart, the Environmental Assessment considered a reasonable range of alternatives to the Project. These included three system alternatives, two major route alternatives, and one minor route variation. Envtl. Assessment at 146-55, JA 767-76. It evaluated each not solely through the lens of the Project's stated purpose but also through other criteria like "technical and economic feasibility and practicality" and whether it presented "significant environmental advantage over the proposed action." *Id.* at 146, JA 767. And as for no

action, the Assessment explained (and the Commission agreed) that this alternative would fail to fulfill the stated objectives of the Project, e.g., greater diversity of supply sources, a more direct transportation path, and improved security and reliability. *Id.* at 147, JA 768; Rehearing Order P 56, JA 1172.

Taken alongside NEPA's relatively lower hurdle for discussion of alternatives in an environmental assessment, 40 C.F.R. § 1508.9(b), the record here meets NEPA's twin aims "of fostering well-informed decisionmaking and public comment" with room to spare. *Sierra Club*, 867 F.3d at 1369; *see also Balt. Gas & Elec.*, 462 U.S. at 97; *Myersville*, 783 F.3d at 1323 (contrasting regulatory requirements for alternatives discussions in NEPA environmental reviews). The Environmental Assessment provided a thorough explanation as to how each of the other options (besides no action) entailed greater environmental impacts or offered other downsides compared to the proposed Project. *See, e.g.*, Envtl. Assessment at 150-51 (system alternatives either may result in greater environmental impacts or reliability risks, or would be less economically viable), JA 771-72; *id.* at 154 (two major route alternatives "would be longer than the proposed route" and would result

"in greater construction and operational impacts," "greater impacts on managed and/or federally owned lands and wetlands," and would be closer to more residences than the proposed route), JA 775; *id*. at 155 (Mississippi River route variation "would result in a larger construction footprint (6.8 acres) and would have greater impacts on wetlands and forested land"), JA 776.

Ms. Steck mentions none of this in her opening brief. This Court, accordingly, should defer to the agency's definition of the purpose of, and need for, the Project. *See, e.g.*, *Sierra Club*, 867 F.3d at 1376 ("We defer to the agency's discussion of alternatives, and uphold it 'so long as the alternatives are reasonable and the agency discusses them in reasonable detail.'") (quoting *Citizens Against Burlington*, 938 F.2d at 196); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (agencies get "considerable discretion to define the purpose and need of a project") (cited at Rehearing Order P 55 n.160, JA 1171). Ms. Steck's disagreement with the Commission's consideration of alternatives gives "no reason to doubt the reasonableness of the Commission's conclusion." *EarthReports*, 828 F.3d at 956.

CONCLUSION

The petitions for review should be denied, and the orders should be upheld in all respects.

Respectfully submitted,

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November 13, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,034 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 365.

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November 13, 2020

ADDENDUM

STATUTES
AND
REGULATIONS

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STATUTES: **PAGE**

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and

each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-

[4] Mathematically the price difference ratio is P_2—P_1/P_1; Where P_2=the price of fuel oil or coal and P_1=the price of natural gas. The ratio indicates the percent difference between natural gas and alternate fuel prices. For example in January 1980 electric utilities reported that in that month they paid 1.897 times more (189.7 percent) for No. 2 fuel oil than they paid for natural gas. As determined in Docket No. RM79–40 NOPR issued June 3, 1980, corrected for clerical/typographical error.

[Order 55–B, 45 FR 54740, Aug. 18, 1980]

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

Subpart A—General Provisions and Conditions

Subpart B—Certain Transportation by Interstate Pipelines

Subpart C—Certain Transportation by Intrastate Pipelines

Subpart D—Certain Sales by Intrastate Pipelines

Subparts E–F [Reserved]

Subpart G—Blanket Certificates Authorizing Certain Transportation by Interstate Pipelines on Behalf of Others and Services by Local Distribution Companies

Subpart H [Reserved]

Subpart I—Emergency Natural Gas Sale, Transportation, and Exchange Transactions

Subpart J—Blanket Certificates Authorizing Certain Natural Gas Sales by Interstate Pipelines

AUTHORITY: 15 U.S.C. 717–717z, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

SOURCE: Order 46, 44 FR 52184, Sept. 7, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 284 appear at 65 FR 10222, Feb. 25, 2000.

Subpart A—General Provisions and Conditions

§ 284.1 Definitions.

(a) *Transportation* includes storage, exchange, backhaul, displacement, or other methods of transportation.

(b) *Appropriate state regulatory agency* means a state agency which regulates intrastate pipelines and local distribution companies within such state. When used in reference to rates and charges, the term includes only those agencies which set rates and charges on a cost-of-service basis.

(c) *Market center* means an area where gas purchases and sales occur at the intersection of different pipelines.

(d) *Major non-interstate pipeline* means a pipeline that fits the following criteria:

(1) It is not a ''natural gas company'' under section 1 of the Natural Gas Act, or is a ''natural gas company'' and has obtained a service area determination under section 7(f) of the Natural Gas Act from the Commission;

(2) It delivers annually more than fifty (50) million MMBtu (million British thermal units) of natural gas measured in average deliveries for the previous three calendar years; or, if the pipeline has been operational for less than three years, its design capacity permits deliveries of more than fifty (50) million MMBtu of natural gas annually.

[44 FR 52184, Sept. 7, 1989, as amended by Order 636, 57 FR 13315, Apr. 16, 1992; Order 720, 73 FR 73517, Dec. 2, 2008; Order 720–A, 75 FR 5201, Feb. 1, 2010]

§ 284.2 Refunds and interest.

(a) *Refunds.* Any rate or charge collected for any sale, transportation, or assignment conducted pursuant to this part which exceeds the rates or charges authorized by this part shall be refunded.

(b) *Interest.* All refunds made pursuant to this section must include interest at an amount determined in accordance with § 154.501(d) of this chapter.

[44 FR 52184, Sept. 7, 1979, as amended at 44 FR 53505, Sept. 14, 1979; Order 273, 48 FR 1288, Jan. 12, 1983; Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.3 Jurisdiction under the Natural Gas Act.

(a) For purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation or sale in interstate commerce of natural gas if such a transaction is authorized pursuant to section 311 or 312 of the NGPA.

(b) For purposes of the Natural Gas Act, the term ''natural gas company'' (as defined by section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transaction involving natural gas if the provisions of the Natural Gas Act do not apply to such transaction by reason of paragraph (a) of this section.

(c) The Natural Gas Act shall not apply to facilities utilized solely for

transportation authorized by section 311(a) of the NGPA.

[44 FR 52184, Sept. 7, 1979, as amended by Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.4 Reporting.

(a) *Reports in MMBtu.* All reports filed pursuant to this part must indicate quantities of natural gas in MMBtu's. An MMBtu means a million British thermal units. A British thermal unit or Btu means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit, determined in accordance with paragraphs (b) and (c) of this section.

(b) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (c) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(c) *Standard conditions.* The standard conditions for purposes of paragraph (b) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

[Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.5 Further terms and conditions.

The Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part.

§ 284.6 Rate interpretations.

(a) *Procedure.* A pipeline may obtain an interpretation pursuant to subpart L of part 385 of this chapter concerning whether particular rates and charges comply with the requirements of this part.

(b) *Address.* Requests for interpretations should be addressed to: FERC Part 284 Interpretations, Office of General Counsel, Federal Energy Regulatory Commission, Washington, DC 20426.

[44 FR 66791, Nov. 21, 1979; 44 FR 75383, Dec. 20, 1979, as amended by Order 225, 47 FR 19058, May 3, 1982; Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.7 Firm transportation service.

(a) *Firm transportation availability.* (1) An interstate pipeline that provides transportation service under subpart B or G or this part must offer such transportation service on a firm basis and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on a firm basis.

(3) *Service on a firm basis* means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.

(4) An interstate pipeline that provided a firm sales service on May 18, 1992, and that offers transportation service on a firm basis under subpart B or G of this part, must offer a firm transportation service under which firm shippers may receive delivery up to their firm entitlements on a daily basis without penalty.

(b) *Non-discriminatory access.* (1) An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under subpart B, C or G must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(2) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller.

(3) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may

not include in its tariff any provision that inhibits the development of market centers.

(c) *Reasonable operational conditions.* Consistent with paragraph (b) of this section, a pipeline may impose reasonable operational conditions on any service provided under this part. Such conditions must be filed by the pipeline as part of its transportation tariff.

(d) *Segmentation.* An interstate pipeline that offers transportation service under subpart B or G of this part must permit a shipper to make use of the firm capacity for which it has contracted by segmenting that capacity into separate parts for its own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible.

(e) *Reservation fee.* Where the customer purchases firm service, a pipeline may impose a reservation fee or charge on a shipper as a condition for providing such service. Except for pipelines subject to subpart C of this part, if a reservation fee is charged, it must recover all fixed costs attributable to the firm transportation service, unless the Commission permits the pipeline to recover some of the fixed costs in the volumetric portion of a two-part rate. A reservation fee may not recover any variable costs or fixed costs not attributable to the firm transportation service. Except as provided in this paragraph, the pipeline may not include in a rate for any transportation provided under subpart B, C or G of this part any minimum bill or minimum take provision, or any other provision that has the effect of guaranteeing revenue.

(f) *Limitation.* A person providing service under Subpart B, C or G of this part is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.

[Order 436, 50 FR 42493, Oct. 18, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §284.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov.*

§ 284.8 Release of firm capacity on interstate pipelines.

(a) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must include in its tariff a mechanism for firm shippers to release firm capacity to the pipeline for resale by the pipeline on a firm basis under this section.

(b)(1) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(2) The rate charged the replacement shipper for a release of capacity may not exceed the applicable maximum rate, except that no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release. Payments or other consideration exchanged between the releasing and replacement shippers in a release to an asset manager as defined in paragraph (h)(3) of this section are not subject to the maximum rate.

(c) Except as provided in paragraph (h) of this section, a firm shipper that wants to release any or all of its firm capacity must notify the pipeline of the terms and conditions under which the shipper will release its capacity. The firm shipper must also notify the pipeline of any replacement shipper designated to obtain the released capacity under the terms and conditions specified by the firm shipper.

(d) The pipeline must provide notice of offers to release or to purchase capacity, the terms and conditions of such offers, and the name of any replacement shipper designated in paragraph (b) of this section, on an Internet web site, for a reasonable period.

(e) The pipeline must allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of the release. If more than one person offers the highest rate and meets the terms and conditions of the release, the released capacity may be allocated on a

SUBCHAPTER S—STANDARDS OF CONDUCT FOR TRANSMISSION PROVIDERS

PART 358—STANDARDS OF CONDUCT

Sec.
358.1 Applicability.
358.2 General principles.
358.3 Definitions.
358.4 Non-discrimination requirements.
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358.6 No conduit rule.
358.7 Transparency rule.
358.8 Implementation requirements.

AUTHORITY: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: 73 FR 63829, Oct. 27, 2008, unless otherwise noted.

§ 358.1 Applicability.

(a) This part applies to any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of part 284 of this chapter and conducts transmission transactions with an affiliate that engages in marketing functions.

(b) This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and conducts transmission transactions with an affiliate that engages in marketing functions.

(c) This part does not apply to a public utility transmission provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO). If a public utility transmission owner participates in a Commission-approved ISO or RTO and does not operate or control its transmission system and has no access to transmission function information, it may request a waiver from this part.

(d) A transmission provider may file a request for a waiver from all or some of the requirements of this part for good cause.

§ 358.2 General principles.

(a) As more fully described and implemented in subsequent sections of this part, a transmission provider must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage with respect to any transportation of natural gas or transmission of electric energy in interstate commerce, or with respect to the wholesale sale of natural gas or of electric energy in interstate commerce.

(b) As more fully described and implemented in subsequent sections of this part, a transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in this part or otherwise permitted by Commission order.

(c) As more fully described and implemented in subsequent sections of this part, a transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees.

(d) As more fully described and implemented in subsequent sections of this part, a transmission provider must provide equal access to non-public transmission function information disclosed to marketing function employees to all its transmission customers, affiliated and non-affiliated, except as permitted in this part or otherwise permitted by Commission order.

[74 FR 54482, Oct. 22, 2009]

§ 358.3 Definitions.

(a) *Affiliate* of a specified entity means:

(1) Another person that controls, is controlled by or is under common control with, the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.

(2) For any exempt wholesale generator (as defined under § 366.1 of this

chapter), affiliate shall have the meaning set forth in §366.1 of this chapter, or any successor provision.

(3) ''Control'' as used in this definition means the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity. A voting interest of 10 percent or more creates a rebuttable presumption of control.

(b) *Internet Web site* refers to the Internet location where an interstate natural gas pipeline or a public utility posts the information, by electronic means, required under this part 358.

(c) *Marketing functions means:*

(1) in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity; and

(2) in the case of interstate pipelines and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, natural gas, subject to the following exclusions:

(i) Bundled retail sales,

(ii) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities,

(iii) Sales of natural gas solely from a seller's own production,

(iv) Sales of natural gas solely from a seller's own gathering or processing facilities, and

(v) On-system sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, by a local distribution company, or by a local distribution company operating under section 7(f) of the Natural Gas Act.

(d) *Marketing function employee* means an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions.

(e) *Open Access Same Time Information System* or *OASIS* refers to the Internet location where a public utility posts the information required by part 37 of this chapter, and where it may also post the information required to be posted on its Internet Web site by this part 358.

(f) *Transmission* means electric transmission, network or point-to-point service, ancillary services or other methods of electric transmission, or the interconnection with jurisdictional transmission facilities, under part 35 of this chapter; and natural gas transportation, storage, exchange, backhaul, or displacement service provided pursuant to subparts B or G of part 284 of this chapter.

(g) *Transmission customer* means any eligible customer, shipper or designated agent that can or does execute a transmission service agreement or can or does receive transmission service, including all persons who have pending requests for transmission service or for information regarding transmission.

(h) *Transmission functions* means the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.

(i) *Transmission function employee* means an employee, contractor, consultant or agent of a transmission provider who actively and personally engages on a day-to-day basis in transmission functions.

(j) *Transmission function information* means information relating to transmission functions.

(k) *Transmission provider* means:

(1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or

(2) Any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of part 284 of this chapter.

(3) A transmission provider does not include a natural gas storage provider authorized to charge market-based rates.

(l) *Transmission service* means the provision of any transmission as defined in §358.3(f).

(m) *Waiver* means the determination by a transmission provider, if authorized by its tariff, to waive any provisions of its tariff for a given entity.

[73 FR 63829, Oct. 27, 2008, as amended at 74 FR 54482, Oct. 22, 2009]

§ 358.4 Non-discrimination requirements.

(a) A transmission provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if the tariff provisions do not permit the use of discretion.

(b) A transmission provider must apply all tariff provisions relating to the sale or purchase of open access transmission service in a fair and impartial manner that treats all transmission customers in a not unduly discriminatory manner, if the tariff provisions permit the use of discretion.

(c) A transmission provider may not, through its tariffs or otherwise, give undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing).

(d) A transmission provider must process all similar requests for transmission in the same manner and within the same period of time.

§ 358.5 Independent functioning rule.

(a) *General rule.* Except as permitted in this part or otherwise permitted by Commission order, a transmission provider's transmission function employees must function independently of its marketing function employees.

(b) *Separation of functions.* (1) A transmission provider is prohibited from permitting its marketing function employees to:

(i) Conduct transmission functions; or

(ii) Have access to the system control center or similar facilities used for transmission operations that differs in any way from the access available to other transmission customers.

(2) A transmission provider is prohibited from permitting its transmission function employees to conduct marketing functions.

§ 358.6 No conduit rule.

(a) A transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.

(b) An employee, contractor, consultant or agent of a transmission provider, and an employee, contractor, consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

§ 358.7 Transparency rule.

(a) *Contemporaneous disclosure.* (1) If a transmission provider discloses non-public transmission function information, other than information identified in paragraph (a)(2) of this section, in a manner contrary to the requirements of § 358.6, the transmission provider must immediately post the information that was disclosed on its Internet Web site.

(2) If a transmission provider discloses, in a manner contrary to the requirements of § 358.6, non-public transmission customer information, critical energy infrastructure information (CEII) as defined in § 388.113(c)(1) of this chapter or any successor provision, or any other information that the Commission by law has determined is to be subject to limited dissemination, the transmission provider must immediately post notice on its Web site that the information was disclosed.

(b) *Exclusion for specific transaction information.* A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee. The transmission provider is not required to contemporaneously disclose information otherwise covered by § 358.6 if the information relates solely to a marketing function employee's specific request for transmission service.

(c) *Voluntary consent provision.* A transmission customer may voluntarily consent, in writing, to allow the transmission provider to disclose the

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase ''to the fullest extent possible'' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as ''NEPA.''

§1508.3 Affecting.

Affecting means will or may have an effect on.

§1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

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CERTIFICATE OF SERVICE

I hereby certify that, on November 13, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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