

ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1064

(Consolidated with 23-1074, 23-1077, 23-1129, 23-1130, 23-1137)

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

NEW JERSEY CONSERVATION FOUNDATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC,
Intervenor for Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW,
AND RELATED CASES**

I. Parties

A. Petitioners

Petitioners in Nos. 23-1064, 23-1074, and 23-1137 are New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Association, and Catherine Folio.

New Jersey Conservation Foundation (“NJCF”) is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of preserving land and natural resources throughout New Jersey. NJCF has no parent companies, and there are no publicly owned corporations that have a ten percent or greater ownership interest in NJCF.

New Jersey League of Conservation Voters Education Fund is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of environmental advocacy and conservation. It is part of a family of organizations, including New Jersey League of Conservation Voters, Inc., which is a 501(c)(4); New Jersey League of Conservation Voters Political Action Committee, which is a political action committee; and New Jersey League of Conservation Voters Victory Fund, which is a super political action committee. New Jersey League of Conservation

Voters has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in New Jersey League of Conservation Voters.

Aquashicola Pohopoco Watershed Conservancy is a 501(c)(3) not-for-profit organization founded in Pennsylvania for the purpose of environmental advocacy and conservation. Aquashicola Pohopoco Watershed Conservancy has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in Aquashicola Pohopoco Watershed Conservancy.

Petitioners in Nos. 23-1077 and 23-1130 are the Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper.

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Petitioners in No. 23-1129 are Sierra Club and Food & Water Watch.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment. Sierra Club is a non-governmental corporate party with no parent corporation, and there are no publicly held corporations that have a ten percent or greater ownership in Sierra Club.

Food & Water Watch is a 501(c)(3) not-for-profit organization founded in 2005 to ensure access to clean drinking water, safe and sustainable food, and a livable climate. Food & Water Watch has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in Food & Water Watch.

B. Respondent

The Respondent in this case is the Federal Energy Regulatory Commission.

C. Intervenors

Intervenor for Petitioners is New Jersey Rate Counsel.

Intervenors for Respondent are Transcontinental Gas Pipe Line Company, LLC and Exelon Corporation.

D. Amici

No individuals or entities have yet sought leave to participate as *amicus curiae*.

II. Rulings Under Review

Petitioners challenge the following orders of the Federal Energy Regulatory Commission:

1. Order Issuing Certificate and Approving Abandonment, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,006 (2023).
2. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 62,146 (Mar. 13, 2023).
3. Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,148 (2023).
4. Notice to Proceed with Construction – Tree Felling, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230316-3044 (Mar. 16, 2023).
5. Notice to Proceed with Construction and Approval of Mount Effort Contractor Yard, *Transcontinental Gas Pipe Line Co.*, FERC

Docket No. CP21-94, Accession No. 20230323-3094 (Mar. 23, 2023).

6. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 62,054 (2023).

7. Order on Rehearing and Stay Requests, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 61,071 (2023).

III. Related Cases

This case has not previously been before this Court or any other court.

/s/ Moneen Nasmith

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Board Order	Order, <i>In re Exploration of Gas Capacity and Related Issues</i> , New Jersey Board of Public Utilities Docket Nos. GO19070846 & GO20010033 (Jun. 29, 2022)
Certificate Order	Order Issuing Certificate and Approving Abandonment, <i>Transcontinental Gas Pipe Line Co.</i> , 182 FERC ¶ 61,006 (2023).
Dth/d	Dekatherms per day
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse Gas(es)
NEPA	National Environmental Policy Act
New Jersey Agencies	New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel
NJ Agencies Study	London Econ. Int'l, <i>Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers</i> (Nov. 5, 2021), filed as an attachment to New Jersey Parties' Mot. to Intervene & Lodge, <i>Transcontinental Gas Pipe Line Co.</i> , FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022)
NJCF	New Jersey Conservation Foundation

Skipping Stone Study Skipping Stone, *Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project* (Sept. 8, 2022), filed as Exhibit A to Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022)

Transco Transcontinental Gas Pipe Line Company, LLC

Transco Study Levitan & Assocs., *Regional Access Energy Expansion* (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (Apr. 22, 2022)

JURISDICTIONAL STATEMENT

This Court has jurisdiction over these petitions for review of final orders of the Federal Energy Regulatory Commission (“FERC” or the “Commission”). 15 U.S.C § 717r(b).

On January 11, 2023, FERC issued an order granting Petitioners’ intervention and issuing a certificate of public convenience and necessity allowing construction of a gas pipeline under the Natural Gas Act, 15 U.S.C. § 717f(c). Order Issuing Certificate and Approving Abandonment ¶ 4, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,006, JA____ (“Certificate Order”). Petitioners timely moved for rehearing, which was denied by operation of law on March 13, 2023. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 62,146, JA____. FERC issued an order on rehearing addressing the merits on March 17, 2023. Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,148, JA____. Petitions for review were timely filed on March 13 (23-1064), March 20 (23-1074 & 23-1077), and May 12, 2023 (23-1129).

FERC issued notices to proceed with construction on March 16 and 23, 2023 (Notice to Proceed with Construction – Tree Felling, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230316-3044, JA____, and Notice to Proceed with Construction and Approval of Mount Effort Contractor Yard, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230323-3094, JA____), and denied Petitioners’ motions for rehearing and stay on May 1, 2023. Order on Rehearing and Stay Requests, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 61,071, JA_____.

Timely petitions for review were filed on May 12 and May 25, 2023 (23-1130 & 23-1137).

STATEMENT OF ISSUES

In approving the Regional Energy Access Expansion Project:

1. Did FERC violate Section 7 of the Natural Gas Act, 15 U.S.C. §§ 717r and 717f, and the Administrative Procedure Act, 5 U.S.C. § 706, by determining that the Project would provide sufficient public benefits where the record does not support the finding of need for the Project, including:
 - a. where the relevant agencies in New Jersey, the state where most of the Project's gas will go, demonstrated that it does not need additional gas capacity;
 - b. where the record demonstrates that New Jersey has more than a sufficient gas supply to meet future demand, even in the case of a potential extreme weather event and where the record demonstrates that the Project will harm New Jersey's consumers;
 - c. where the record does not support the finding that the Project is needed for reliability purposes;

- d. where the record demonstrates the for-profit private motives for suppliers to enter into contracts for supply on the Project; and
 - e. where approval of the Project ignored New Jersey's state energy laws and goals?
2. Did FERC violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 706, by:
- a. failing to evaluate reasonable alternatives and defining the Project's purpose and need unlawfully narrowly;
 - b. failing to consider the Project's foreseeable upstream emissions;
 - c. failing to discuss and evaluate the significance of the Project's greenhouse gas and climate change impacts; and
 - d. failing to adequately evaluate the Project's downstream emissions of criteria pollution?
3. Did FERC violate Section 7 of the Natural Gas Act, 15 U.S.C. §§ 717r and 717f, and the Administrative Procedure Act, 5 U.S.C. § 706, by determining that the Project's public benefits

outweighed public harms based on a record that did not establish adequate public benefits and discounted or ignored substantial harms?

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in an addendum.

STATEMENT OF THE CASE

I. Introduction.

Petitioners challenge FERC's approval of the Regional Energy Access Expansion Project (the "Project"), which would consist of building approximately 22.3 miles of 30-inch-diameter lateral gas pipeline and 13.8 miles of 42-inch-diameter loop pipeline in Pennsylvania; one new gas-fired compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; and the modification and addition of other ancillary facilities. Certificate Order P 4, JA____.

Despite having a record before it that is replete with evidence that the Project's additional capacity in New Jersey, where a majority of the gas will be delivered, is unneeded, FERC nevertheless concluded that the Project's capacity is needed by the public. FERC's Orders authorizing the Project are rife with reversible errors, including misstatements about the data and analyses in the independent expert studies submitted to the record—one of which was a state-commissioned independent gas capacity study. Those studies demonstrated that there is no need for the Project and that the Project

would, in fact, harm New Jersey consumers. Despite significant evidence that undermined any claims of Project “need,” and the un rebutted evidence demonstrating the predominantly profit-driven motive for the Project, the Commission nevertheless approved the Project. FERC also based its approval of the Project on an inadequate and flawed review of the Project’s environmental harms under the National Environmental Policy Act (“NEPA”). As a result, FERC’s conclusion that the Project’s public benefits outweigh its harms and thereby fulfills the Natural Gas Act’s requirement that it is required by the public convenience and necessity, is arbitrary and capricious, contrary to law, and must be reversed and remanded.

II. Legal Framework

A. Natural Gas Act

The Natural Gas Act was enacted by Congress in 1938 after a finding 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 . . . is necessary in the public interest.” 15 U.S.C. § 717(a). Section 7(c) requires applicants seeking to construct, operate, or acquire facilities for transporting or selling natural gas to

obtain a certificate of public convenience and necessity. *Id.* at § 717f(c)(1)(A). Section 7(e) provides that a certificate shall be issued only if the action proposed by the natural gas company “is or will be required by the present or future public convenience and necessity.” *Id.* at § 717f(e). FERC is also authorized to condition the certificate as reasonably required by the public convenience and necessity. *Id.*

In 1999, FERC promulgated its Statement of Policy explaining the process by which it would “determin[e] whether there is a need for a specific project and whether, on balance, the project will serve the public interest.” Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,737 (1999), *clarified* 90 FERC ¶ 61,128 (2000), *further clarified* 92 FERC ¶ 61,094 (2000). In February 2022, FERC published an Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, noting the importance of “regional projections for both gas supply and market growth, as well as pipeline-specific studies in these areas,” and finding that “comments from state utility or public service commissions as to how a proposed project may impact existing pipelines [are] particularly useful.” *See* Updated Policy Statement on Certification of New Interstate Natural Gas Facilities,

178 FERC ¶ 61,107, PP 55–58, 70 (2022). FERC also published a companion Interim Policy Statement concerning the consideration of greenhouse gas (“GHG”) emissions in natural gas infrastructure project reviews. *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022). One month later, FERC issued an order designating both policies as “draft” only. *See Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022).

B. National Environmental Policy Act

NEPA was enacted to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321. The Council on Environmental Quality has promulgated regulations implementing NEPA. *See* 40 C.F.R. Parts 1500–1508. NEPA requires all Federal agencies, including FERC, to prepare a “detailed statement” on “reasonably foreseeable environmental effects” of any proposed “major

Federal action[],” including adverse effects of the proposal and alternatives to the proposal including a “no action” alternative. *See* 42 U.S.C. § 4332(2)(C). This Court has found that, when preparing an environmental impact statement (“EIS”), the Commission must “detail[] the action’s environmental impacts, potential mitigation methods . . . and reasonable alternatives to the action, including a no-action alternative.” *Sierra Club v. FERC*, 38 F.4th 220, 226 (D.C. Cir. 2022) (citing 40 C.F.R. §§ 1502.14, 1502.16, 1501.3(a)(3)). In addition, “[t]he primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to ensure agencies consider the environmental impacts of their actions in decision making.” 40 C.F.R. § 1502.1. NEPA demands that agencies “take a hard look at the environmental consequences before taking a major action.” *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). A thorough discussion of an action’s environmental consequences “forms the scientific and analytic basis for the comparisons” in the analysis of alternatives, including the no action alternative. 40 C.F.R. § 1502.16(a).

III. Factual Background.

A. New Jersey Agencies Determined Existing Gas Capacity into the State Is Sufficient, and Additional Pipeline Infrastructure Is Not Needed.

The majority of the Project’s gas capacity is destined for delivery in New Jersey. *See* Certificate Order PP 7–8, JA__–__. In February 2019, the New Jersey Board of Public Utilities—the entity charged with “general supervision and regulation of and jurisdiction and control over all public utilities” and protecting New Jersey utilities customers from “unjust, unreasonable, insufficient or unjustly discriminatory or preferential” rates, N.J.S.A. §§ 48:2-13(a), 48:2-21(b)(1)—opened a docket to determine if the state had sufficient gas capacity to meet future New Jersey customer needs, prospectively. *In re Exploration of Gas Capacity and Related Issues*, New Jersey Board of Public Utilities Docket Nos. GO19070846 & GO20010033, 1 (Jun. 29, 2022) (“Board Order”), JA__.¹ As part of this process, the New Jersey Board of Public Utilities engaged an independent expert who determined, after

¹ The Board Order was attached to New Jersey Parties’ Mot. to Intervene and Lodge, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022).

reviewing existing supply into the state and projected future demand in extreme winter conditions, that New Jersey has sufficient gas capacity, and that there was no need for any additional capacity for the state's gas utilities through 2030. London Econ. Int'l, *Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 5, 2021) ("NJ Agencies Study"), JA ___–__.² The New Jersey Board of Public Utilities formally adopted this finding of no need for additional gas capacity in New Jersey in a June 2022 order. Board Order at 11, JA___. The Board Order also found support "against the need for additional interstate pipeline capacity," noting that "under most demand scenarios, barring a major catastrophic event impacting one or more primary paths on a major interstate pipeline, New Jersey is well positioned with available interstate [natural gas] supply beyond 2030." *Id.*

More specifically, the NJ Agencies Study found that "through 2030, New Jersey's firm gas capacity can meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal

² The NJ Agencies Study was also attached to New Jersey Parties' Motion to Intervene and Lodge.

weather on a scale experienced in the past, and 3) in the case of a design day,” *i.e.*, the coldest projected day in a 90-year period. *Id.*

“Design day” “reflects the highest gas demand a [gas utility] expects to be obligated to serve on an extremely cold winter day.” Certificate Order P 21 n.41, JA____. The method of calculating design day is at the discretion of each gas utility and is not uniform, but generally each utility uses data from historical “peak” demand days—when demand is its highest point during a given winter season—and adjusts those values in various ways to estimate projected future demand growth. *Id.* The independent expert and the Board of Public Utilities thus concluded that New Jersey did not need any additional gas capacity then, now, or in future—even in the case of an extreme weather event.

B. Transco Sought Approval from FERC to Expand Gas Capacity into New Jersey.

While the New Jersey gas capacity proceedings above were pending, in March 2021, Transcontinental Gas Pipe Line Company, LLC, (“Transco”) applied to FERC for a certificate of public convenience and necessity under the Natural Gas Act to construct and operate the Project to expand delivery of gas by 829,400 dekatherms per day (“Dth/d”). Certificate Order P 1, JA____. Most of the gas—73.5%—would

be delivered to locations in New Jersey, with the rest going to New York, Delaware, Maryland, and Pennsylvania. *Id.* at P 7, JA____.

Construction of the Project would consist of building approximately 22.3 miles of 30-inch-diameter lateral gas pipeline and 13.8 miles of 42-inch-diameter loop pipeline in Pennsylvania; one new gas-fired compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; and the modification and addition of other ancillary facilities. *Id.* at P 4, JA____. Petitioners all successfully intervened in the FERC proceeding. *Id.* at P 11, JA____.

C. New Jersey Agencies Opposed the Project.

On July 11, 2022, shortly after the New Jersey Board of Public Utilities issued the Board Order adopting the NJ Agencies Study, the Board and the New Jersey Division of Rate Counsel (collectively, “New Jersey Agencies”) intervened in the FERC proceedings in opposition to the Project. New Jersey Parties’ Mot. to Intervene & Lodge at 2, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022), JA____ (noting that they had “good cause to intervene in order to represent consumer interests for the State of New Jersey, who do not need to be burdened with

unnneeded natural gas capacity”). As the New Jersey Agencies noted to FERC, “Rate Counsel’s statutory duties require it to ensure that New Jersey ratepayers are not paying for capacity the State’s regulator has determined is unnecessary,” and that the Board “has a statutory duty to ensure that New Jersey’s ratepayers are paying just and reasonable rates for natural gas.” *Id.* at 6, JA____.

The New Jersey Agencies actively participated in building the record before FERC. They submitted the NJ Agencies Study and the Board Order to the Commission. New Jersey Parties’ Mot. to Intervene & Lodge 1, JA____. New Jersey Rate Counsel also rebutted gas utilities’ claims to FERC that there is limited supply in some places that may impact utilities’ ability to respond to “extreme weather events,”³ and that the Project is necessary to “ensure deliverability of plentiful gas supplies to New Jersey,”⁴ by countering that “this is simply not the case.” Comments of NJ Div. of Rate Counsel, *Transcontinental Gas Pipe*

³ See Comments of South Jersey Resources Group, LLC, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20221109-5084, 1 (Nov. 9, 2022), JA____.

⁴ See Comments of New Jersey Natural Gas Co., *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20221109-5041, 1 (Nov. 9, 2022), JA____.

Line Co., FERC Docket No. CP21-94, Accession No. 20221121-5157, 1 (Nov. 21, 2022), JA____. Rate Counsel found that the Project would “impose additional unnecessary costs onto New Jersey ratepayers.” *Id.* at 2, JA____. Rate Counsel further informed FERC that “New Jersey’s current natural gas infrastructure is able to meet peak demand through 2030 even during design day conditions and the demand will only decrease during the course of the next decade.” *Id.*, JA__ (citing NJ Agencies Study at 2, 51, JA____, ____).

D. Petitioners Submitted Additional Evidence to FERC That There Is No Need for the Project.

In addition to the submissions made by the New Jersey Agencies, Petitioners submitted expert materials to FERC that also concluded that there is no public need for the Project. Petitioner NJCF filed a findings by expert energy consultants, Skipping Stone, LLC, that calculated that New Jersey’s available gas capacity is even greater than what the NJ Agencies Study found. *See Verified Statement of Gregory Lander of Skipping Stone*, 2–4 (Feb. 7, 2022), JA____–____ (noting that the NJ Agencies Study contains analytical errors that result in an understatement of gas capacity available to gas distribution

companies).⁵ NJCF also filed a winter reliability study that concluded that, even during extreme weather events, New Jersey gas utilities did not need additional gas capacity. Skipping Stone, *Analysis of Regional Pipeline System's Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018)*, at 3 (Feb. 11, 2018), JA___ (“This analysis shows that [an interstate pipeline] is not needed to meet peak winter demand, not even for a single day, even during extreme weather events.”).⁶

Petitioner NJCF⁷ moved for an evidentiary hearing on September 6, 2022, to give the Commission and parties the opportunity to conduct discovery and to ask questions to further explore Transco's claims that the project was needed. NJCF et al. Mot. for Evidentiary Hr'g, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220906-5099 (Sept. 6, 2022), JA_____.

⁵ This statement was filed as Exhibit C of Attachment A to NJCF's Motion to Lodge, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220722-5109 (July 22, 2022).

⁶ The winter reliability study was filed as Attachment B to NJCF's Motion to Lodge.

⁷ Two affected landowners were also on the motion.

Shortly thereafter, Petitioner NJCF submitted an expert report, also prepared by Skipping Stone, which concluded that the Project “is flatly unneeded and uneconomical.” Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220909-5000, 2 (Sept. 9, 2022), JA____; *see also id.* at Ex. A, Skipping Stone, *Capacity Sufficiency Study for Transco’s Proposed Regional Energy Access Expansion Project* (Sept. 8, 2022), JA___ (“Skipping Stone Study”). The Skipping Stone Study examined the Project’s additional capacity and found that “N[ew] J[ersey] ratepayers would bear the entire cost of infrastructure not designed to meet or serve their demand, while the [gas utilities’] shareholders would reap the economic rewards of [the gas utilities’ sale] and/or release of excess capacity.” Skipping Stone Study at 4, JA_____.

E. FERC Purported to Review the Project’s Environmental Harms.

FERC issued a Draft EIS on March 2, 2022. Draft EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220302-3021 (Mar. 2, 2022). Petitioners noted in comments that FERC’s environmental analysis of the Project was done

in a manner that is inconsistent with the Council on Environmental Quality's regulations interpreting NEPA and that the Draft EIS did not (1) consider a broad enough project purpose and need or a reasonable range of alternatives; (2) analyze reasonably foreseeable indirect upstream greenhouse gas emissions; (3) assess the significance of greenhouse gas emissions caused by the Project; or (4) adequately address downstream air pollution. *See, e.g.*, NJCF et al. Comments on Draft EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220425-5460, 2–7 (Apr. 25, 2022), JA____–____; Delaware Riverkeeper Network Comments on Draft EIS, Accession No. 20220425-5423, 9–18 (Apr. 25, 2022), JA____–____; Food & Water Watch Comments on Draft EIS, Accession No. 20220422-5196, 2–17 (Apr. 22, 2022), JA____–____.

The U.S. Environmental Protection Agency also filed comments noting that FERC had “narrowly limited the purpose and need to natural gas transmission, therefore precluding other reasonable alternatives from consideration,” strongly recommending that FERC use estimates of the social cost of greenhouse gases “to assess climate impacts and help weigh their significance,” and recommending that

FERC include upstream emissions estimates and more clearly establish the need for the project. Env't Prot. Agency Comments on Draft EIS, Accession No. 20220425-5217, 3, 7, 9 (Apr. 25, 2022), JA____, ____, ____.

On July 29, 2022, FERC released its Final EIS, which largely emulated the Draft EIS and did not make many of the changes urged by Petitioners and the Environmental Protection Agency. *See* Final EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220729-3005 (Jul. 29, 2022).

F. Over the New Jersey Agencies' and Petitioners' Objections, FERC Approved the Project.

FERC authorized the Project on January 11, 2023. Certificate Order P 1, JA____. The Commission rested its conclusion that the Project was in the public convenience and necessity on the fact that Transco had contracts in place for all of the Project's capacity. *Id.* at P 38, JA____. FERC's Order incorporated the findings of the Final EIS into its conclusion that the Project's public benefits would outweigh its harms. *Id.* at PP 38, 81, JA____, ____.

All Petitioners requested rehearing of FERC's certificate order, and some Petitioners also requested a stay. NJCF et al. Req. for Reh'g and Mot. for Stay, *Transcontinental Gas Pipe Line Co.*, FERC Docket

No. CP21-94, Accession No. 20230210-5215 (Feb. 10, 2023); Delaware Riverkeeper Network Req. for Reh'g, Accession No. 20230210-5211 (Feb. 10, 2023); Food & Water Watch and Sierra Club Req. for Reh'g, Accession No. 20230210-5214 (Feb. 10, 2023). The rehearing requests argued that FERC had arbitrarily and capriciously found that the Project was needed, inappropriately crediting studies and statements submitted by Transco while effectively ignoring the bulk of the evidence in the record, including the New Jersey Agencies and Petitioners' submissions, that demonstrated a lack of need. *See, e.g.*, NJCF Reh'g Req. at 12–32, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 6–11, JA___–___; Food & Water Watch et al. Reh'g Req. at 4–12, JA___–___. New Jersey Rate Counsel filed a comment letter supporting and joining NJCF's Request for Rehearing and Motion for Stay, making two key points:

First, FERC misconstrued the New Jersey Board of Public Utilities' findings that New Jersey does in fact have sufficient natural gas capacity without [the Project] because it failed to accord the [Board of Public Utilities]-commissioned London Economics [International] capacity study appropriate weight.

...

Second, . . . FERC failed to recognize that New Jersey has imposed a statutory duty on its natural

gas utilities to reduce their demand by 1.1.% by 2026, with additional reductions expected in future years.

New Jersey Division of Rate Counsel Letter Joining NJCF's Reh'g Req., Accession No. 20230210-5206, 1–2 (Feb. 10, 2023), JA____–____.

The New Jersey Agencies further filed a Motion for Clarification requesting that FERC acknowledge and adopt the agencies' findings that existing pipeline capacity suffices to meet demand, even without energy efficiency gains or use of non-pipeline alternatives, and that FERC clarify that it recognizes that prudence determinations are left to state jurisdiction. Mot. for Clarification, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230210-5235 (Feb. 10, 2023), JA_____.

The rehearing requests also argued that FERC's approval violated NEPA and the Natural Gas Act because it was based on a faulty EIS that narrowly defined the purpose and need of the Project, NJCF Reh'g Req. at 39–44, JA____–____; Food & Water Watch et al. Reh'g Req. at 9–12, JA____–____; Delaware Riverkeeper Network Reh'g Req. at 11–15, JA____–____; did not evaluate a reasonable range of alternatives, NJCF Reh'g Req. at 44–47, JA____–____; Food & Water Watch et al. Reh'g Req.

at 12, JA___; Delaware Riverkeeper Network Reh’g Req. at 15–24, JA___–___; neglected to assess the Project’s upstream impacts, NJCF Reh’g Req. at 47–49, JA___–___; Food & Water Watch et al. Reh’g Req. at 13–19, JA___–___; Delaware Riverkeeper Network Reh’g Req. at 31–38, JA___–___; refused to discuss the significance of the Project’s climate change impacts, NJCF Reh’g Req. at 47–49, JA___–___; Food & Water Watch et al. Reh’g Req. at 21–25, JA___–___; Delaware Riverkeeper Network Reh’g Req. at 38–54, JA___–___; and lacked analysis of downstream air pollution effects (Food & Water Watch Reh’g Req. at 19–21, JA___–___). These cumulative errors under NEPA, Petitioners argued, resulted in a defective record and an impermissibly skewed balancing of the Project’s benefits and adverse impacts under the Natural Gas Act. NJCF Reh’g Req. at 33–38, JA___–___; Food & Water Watch et al. Reh’g Req. at 12, 26, JA___, ___; Delaware Riverkeeper Network Reh’g Req. at 54–57, JA___–___.

FERC denied the requests for rehearing by operation of law on March 13, 2023. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, 182 FERC ¶ 62,146 (2023), JA___–___. FERC issued an order on rehearing addressing the merits on March

17, 2023. Order on Reh’g, Granting Clarification, Den. Stay, and Dismissing Waiver, 182 FERC ¶ 61,148 (2023), JA___–__. In the order addressing the merits of the requests for rehearing, FERC also denied the motions to stay and the pending motion for evidentiary hearing. *Id.* at PP 9–16, 18–21, JA___–__.

FERC issued a Notice to Proceed with Construction to Transco later in March. Notice to Proceed, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230323-3094 (Mar. 23, 2023), JA____. Six Petitioners requested rehearing of the Notice to Proceed and moved for a stay. NJCF et al. Req. for Reh’g and Mot. for Stay, Accession No. 20230328-5274 (Mar. 28, 2023),; Delaware Riverkeeper Network Req. for Reh’g, Accession No. 20230330-5333 (Mar. 30, 2023). FERC denied them all. Notice of Denial of Reh’g by Operation of Law and Providing for Further Consideration, 183 FERC ¶ 62,054 (2023), JA___–__; Order on Reh’g and Stay Reqs., 183 FERC ¶ 61,071 (2023), JA____–__.

SUMMARY OF ARGUMENT

While FERC is responsible for ensuring that the construction and operation of interstate gas transportation infrastructure is carried out

in an orderly manner and approved only if it is consistent with the public convenience and necessity, FERC here did the very opposite by approving a gas system expansion primarily for the profit-driven interests of private gas companies while harming New Jersey ratepayers, the surrounding community, and the environment. The record before FERC clearly demonstrated that the state of New Jersey does not need and will not benefit from the Project's capacity. The New Jersey Board of Public Utilities and Rate Counsel submitted to FERC the Board's own independent study and Order, which found that no additional gas capacity is needed in New Jersey and that sources of gas capacity that utilities have relied upon for years are more than adequate to meet current and future demands, even in extreme winter scenarios. New Jersey Rate Counsel's submissions further demonstrated that the Project is unneeded and also explained that the Project would harm New Jersey ratepayers, thereby undermining New Jersey Rate Counsel's ability to fulfill its statutory mandate to protect consumers.

Petitioners bolstered the New Jersey Agencies' evidence by submitting their own independent expert reports, which showed that

the gas capacity available to New Jersey utilities was even more plentiful than the state originally calculated and was more than sufficient to meet any future demand. Petitioners' expert also found that using the Project to shore up any alleged reliability concerns would be extremely uneconomic and outrageously expensive for consumers and echoed concerns raised by New Jersey Rate Counsel that the Project is being driven primarily by the private for-profit objectives of Transco and its shippers.

Despite the raft of evidence demonstrating that a substantial proportion of the Project's capacity is not needed for any public purpose, the Commission approved the Project. In doing so, FERC effectively ignored the evidence showing there is no need for the Project's capacity using a series of incorrect or arbitrary justifications to dismiss these findings, including findings by New Jersey state entities. At the same time, the Commission gave substantial weight to any evidence supporting the need for the Project from the applicant and utility subscribers, refusing to probe their unsupported and highly suspect conclusions even while acknowledging the many flaws in the materials.

In addition, by relying on the mere existence of precedent agreements between Transco and its utility customers for authorization, and finding that their existence outweighed all other evidence in the record, FERC once again put its head in the sand to the profit-seeking motives these industry actors have to construct and operate an unneeded pipeline. Transco's gas utility shippers stand to reap significant profits for their shareholders by contracting for capacity unneeded by their customers on the Project, passing the cost of that capacity to their customers, and then reselling gas through that capacity to other entities.

The Commission's attempts to justify its approval of the Project on claims that the Project would provide a "reliability" benefit fare no better. There is no support in the record for these claims and, as more gas will always decrease reliability concerns, blindly invoking this rationale without record evidence of a specific and substantial reliability issue would justify approval of every new gas project. That reality is entirely at odds with FERC's responsibility under the Natural Gas Act to approve only those projects that are truly needed to serve the public.

In addition to finding benefits of the Project that are not supported by the evidence in the record, FERC failed to adequately consider the Project's harms in its NEPA review. The EIS contains several fundamental errors, including the failure to meaningfully assess potential alternatives, the Project's contributions to climate change, and the effects of the Project's contributions to downstream pollution on communities already suffering from poor air quality. Many of these deficiencies run directly counter to the Council on Environmental Quality's clear instructions on how federal agencies should conduct NEPA reviews, and all of them undermine FERC's conclusion that the Project was "environmentally acceptable" and that its benefits outweighed its adverse effects.

As a result of the lack of evidence for the Commission's conclusion that the Project serves a public need and its failure to adequately account for the Project's environmental and community harms, FERC's finding that there is a need for the Project, that the Project's benefits outweigh its costs, and that it is thus required by the public convenience and necessity is arbitrary, capricious, and contrary to the

Natural Gas Act, NEPA, and the Administrative Procedure Act and, therefore, must be reversed and remanded.

STANDING

Petitioners in Case Nos. 23-1064, 23-1074, and 23-1137 are an individual landowner, Catherine Folio, who is directly and adversely impacted by the proposed Project crossing her land, and nonprofit organizations whose organizational missions are germane to this challenge and whose volunteers and board members live, work, and recreate in areas that will be adversely impacted by the construction and ongoing operation of the Project. This Court can redress the harm to Catherine Folio and these organizations by vacating the Certificate Order and remanding to FERC. *Sierra Club v. FERC*, 867 F.3d 1357, 1365–66 (D.C. Cir. 2017) (“*Sabal Trail*”).

Petitioners will experience diminished use and enjoyment of impacted land as a result of the construction and operation of the Project. Folio Decl. ¶¶ 3, 7–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 4–9, 13–14; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3, 5; NJCF Decl. ¶¶ 4–5. Petitioners enjoy birding, fishing, hiking, and golfing on and near the lands the Project will cut across and adversely impact, and

those activities will be negatively impacted by the Project. Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 4–5, 10–12; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶¶ 3–4. The Project will damage land, endanger plant and animal species, and disrupt water supplies and ecosystems, including destroying habitats of birds, fish and other animals and potentially impact water quality, Folio Decl. ¶¶ 4, 6–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 5–9; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶ 4, thereby frustrating the purpose of the organizations whose mission it is to steward and protect natural resources. Folio Decl. ¶¶ 4, 6–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 5–9; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶ 4. The Project will contribute to greenhouse gas emissions and dust, thereby damaging air quality, contributing to climate change, and interfering with recreational activities near the construction activity, further frustrating Petitioners’ organizational purposes. Jones Decl. ¶¶ 11–14; New Jersey League of Conservation Voters Education Fund Decl. ¶ 5; NJCF Decl. ¶ 5.

Petitioner organizations in Case Nos. 23-1077, 23-1129, and 23-1130 have standing to bring this case on behalf of their members who

would be harmed by construction and operation of the Project and would otherwise have standing in their own right. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This lawsuit is germane to Petitioner organizations' missions. Van Rossum Decl. ¶¶ 3–7, 9. Neither the claims asserted, nor the relief requested, requires participation of individual members in this lawsuit.

Petitioners' members would be harmed by air pollution from the construction and operation of the planned new compressor station located near their homes, which would negatively impact their ability to enjoy outside activities like gardening, walking, and hiking, especially for a member who has asthma. Quinn Decl. ¶¶ 5–11; Simmons Decl. ¶¶ 4–7, 10. They would also be negatively impacted by the congestion and air pollution caused by construction traffic during the compressor station's construction. Quinn Decl. ¶ 12; Simmons Decl. ¶ 11.

Petitioners' members' aesthetic interests will also be harmed by degradation to the waterways and habitats that they live and recreate in. van Rossum Decl. ¶¶ 8, 10–15; Jackson Decl. ¶¶ 7–12; Steinberg Decl. ¶¶ 11–12. Petitioners' members will be further harmed by air pollution caused by the Project's direct and indirect emissions, both

through direct inhalation of the air pollution and because of the environmental degradation and hazards caused by the exacerbation of climate change. Van Rossum Decl. ¶¶ 8, 12–15; Steinberg Decl. ¶ 12.

ARGUMENT

I. Standard of Review

This Court reviews FERC’s Natural Gas Act decisions and NEPA analyses for whether they are arbitrary and capricious or otherwise contrary to law. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 967–68 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env’t Def. Fund*, 142 S. Ct. 1668 (2022) (“*Spire*”). The “overarching question in this case is whether ‘the Commission’s “decisionmaking was reasoned, principled, and based upon the record.’”” *Id.* (citation omitted). The Court will set aside the Commission’s decision if it failed to “examine the relevant data” or did not make a “rational connection between the facts found and the choices made.” *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). This Court only accepts FERC’s factual findings as conclusive if they are “supported by substantial evidence.” 15 U.S.C. § 717r(b).

II. FERC Arbitrarily and Capriciously Authorized an Unneeded Project in Violation of the Natural Gas Act.

The Natural Gas Act requires that FERC protect consumers against corporate abuse and encourage the orderly development of needed gas infrastructure. *See City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (citing *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)); accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015). Overbuilding unneeded projects is anything but orderly, and finding need on the basis of private contracts that enrich shareholders only enables corporate abuse. *See* Updated Policy Statement on Certification of New Interstate Natural Gas Facilities P 69 (“Ensuring the orderly development of natural gas supplies includes preventing overbuilding.”). As Former FERC Chairman Norman Bay warned:

Pipelines are capital intensive and long-lived assets. It is inefficient to build pipelines that may not be needed over the long term and that become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems.

Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc., 158 FERC ¶ 61,145, at *57 (2017) (Bay, Comm'r, concurring).

FERC's "ostrich-like approach" to approval of the Project—ignoring record evidence demonstrating that this Project is not designed to fulfill unmet demand or provide some other public benefit, but rather to boost corporate profits—is the very definition of arbitrary and capricious decision-making. *See Spire*, 2 F.4th at 975, 968. FERC violated the Natural Gas Act and the Administrative Procedure Act in concluding that the unneeded proposed Project is in the public interest under the Section 7 of the Natural Gas Act, by, *inter alia*, arbitrarily and capriciously: (1) disregarding the State of New Jersey's clear conclusion that it does not need more gas capacity generally, and does not need the specific gas capacity of this Project to fulfill its energy needs, including during peak winter demand; (2) discounting, misconstruing, or ignoring additional evidence in the record showing a lack of need; (3) invoking unsubstantiated and undefined concepts of reliability as purported Project benefits; (4) refusing to properly consider record evidence that the Project will largely serve the private, for-profit interests of the applicant and utilities; and (5) incorrectly

characterizing and dismissing the effect of binding New Jersey state laws requiring utilities to reduce demand for natural gas and emissions of greenhouse gases. These errors independently, collectively, and completely undermine the Commission's conclusion that the Project would serve a public need and thus be in the public convenience and necessity under Section 7 of the Natural Gas Act.

A. FERC Arbitrarily and Capriciously Ignored Clear Findings by New Jersey State Agencies that There Is No Public Need for the Project's Capacity.

The record firmly establishes that the majority of the Project's proposed capacity is destined for New Jersey markets (73.5% to be exact, *see* Order on Reh'g PP 32–33, JA___–___), and that New Jersey does not need the additional gas capacity. It is undisputed that the New Jersey Agencies concluded “that New Jersey ‘can easily meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal weather on a scale experienced in the past, and 3) in the case of a design day’ through 2030 using existing pipeline capacity.” Board Order at 11, JA___. In short, New Jersey has sufficient gas capacity even under extreme weather conditions. NJ Agencies Study at 2, 25, JA___, ___.

By approving the Project, the Commission effectively ignored the New Jersey Agencies' findings, supplanting its judgment for that of the state agencies responsible for ensuring adequate and reliable gas service as well as consumer protection. FERC overrode the New Jersey Agencies' resource-intensive findings, concluding instead, with little to no factual basis or analysis, that the self-serving Transco-sponsored study was the "more persuasive" representation of gas capacity needs in the area. *See, e.g.*, Certificate Order P 34, JA___; Order on Reh'g P 41, JA___. FERC's authorization is rooted in an arbitrarily skewed view of the record that does not support its determination, in violation of the Natural Gas Act, *see* 15 U.S.C. § 717r(b). FERC's decision is particularly inconsistent with its Natural Gas Act responsibilities because it will burden New Jersey ratepayers with the costs of unnecessary pipeline capacity. *See* New Jersey Rate Counsel Comments at 2, JA___.

FERC has acknowledged that it should accord due weight to state public utility commissions' perspectives in FERC proceedings, noting in its Draft Updated Policy Statement the obvious importance of regional projections as well as project-specific studies, and finding that

“comments from state utility or public service commissions as to how a proposed project may impact existing pipelines [are] particularly useful.” Updated Policy Statement on Certification of New Interstate Natural Gas Facilities PP 55–58, 70. Yet here, FERC took the opposite approach. The significance of the explicit finding by the New Jersey Agencies that New Jersey can “easily meet firm demand” even “in the case of a design day” using existing capacity, and of FERC ignoring that finding, cannot be understated. *See* New Jersey Parties’ Mot. to Intervene & Lodge 3–4, JA___; New Jersey Rate Counsel Comments at 2, Accession No. 20221121-5157, JA___ (“New Jersey’s current natural gas infrastructure is able to meet peak demand through 2030 even during design day conditions and the demand will only decrease during the course of the next decade.” (citing NJ Agencies Study at 2, 51, JA___, ___)). As Commissioner Clements noted, “the most glaring omission in the Commission’s need analysis is any discussion of the weight the Commission should accord to the finding of the [New Jersey Agencies] that no additional pipeline capacity is needed in New Jersey.” Certificate Order, Clements, Comm’r, concurring P 4, JA___ . By

approving the Project over New Jersey's clear objections, the Commission effectively gave the state's findings no weight at all.

Moreover, to the extent FERC attempted to justify its rejection of the New Jersey Agencies' conclusions by finding fault with the NJ Agencies Study, the Commission's rationale is not supported by the record. Critically, the NJ Agencies Study concluded that the Project is not needed because significant other sources of gas ("off-system peaking resources") are available during times of highest demand, which in-state gas utilities have used in the past to ensure adequate service. *See* NJ Agencies Study at 99–100, JA___–___ ("This analysis shows that sufficient firm capacity exists to meet firm demand from customers in New Jersey under a Normal Winter Day, a Historical Peak Day, and even on a Winter Design Day."). FERC summarily rejected New Jersey Agencies' projections for the availability of off-system peaking resources as "uncertain," Order on Reh'g P 38, JA___, even though the projections were based on the gas utilities' own outlooks. NJ Agencies Study at 98–99, JA___–___. As Commissioner Clements criticized, "the reasons the Commission gives for [this] uncertainty would have been true during past severe weather events, not just future ones; the Commission offers

no explanation for why the identified uncertainties are relevant only to the future availability of off-system peaking resources.” *Id.*, Clements, Comm’r, concurring in part P 3, JA____. In other words, FERC did not explain why the significant off-system gas resources that utilities have made use of in past years would suddenly no longer be available in the future.

In addition, “[t]he only factual basis the Commission cites for its criticism relating to [the allegedly uncertain availability of] off-system peaking resources is that one [New Jersey gas utility] projected its use of off-system peaking resources would decline to zero after 2022.” *Id.*, JA____. Although this utility contracted for approximately 200,000 dekatherms per day (“Dth/d”) of off-system peaking resources in the past, NJ Agencies Study at 91–92 nn.156, 158, JA____–____, that same utility now suddenly and without explanation projects to use zero. Certificate Order P 29, JA____; *see also* Order on Reh’g P 38 n.120, JA____. Despite the clear inconsistency between the utility’s past practices and its future plans, FERC failed to explore the veracity of the utility’s self-serving claims and based its rejection of the New Jersey Agencies’ findings in large part on this assertion alone.

The Commission also refused to investigate the profit-driven motives the utility had to manufacture a need for the Project, *see* NJCF Reh’g Req. at 25, JA___; *see also infra* at Section II.D. And FERC failed to consider the potential scenario raised by Commissioner Clements that the utility may have chosen not to enter into contracts for off-system peaking resources, not because such resources suddenly no longer exist, but because it does not anticipate needing those additional resources at all. *See* Order on Reh’g, Clements, Comm’r, concurring in part P 3, JA___. This plausible scenario, if true, would significantly undermine claims that the Project is needed to serve unmet demand, and yet the Commission failed to consider it. *Id.* FERC’s reliance on unsubstantiated conclusions and bald shipper assertions that are inconsistent with past practice to reject findings that are supported by data and analyses (including from the state most affected) is the very definition of arbitrary and capricious decision-making. *See Spire*, 2 F.4th at 968, 972–76.

FERC also erred in concluding that the NJ Agencies Study could be dismissed on the basis that it did not consider interruptible demand. Interruptible demand is subject to curtailment or “interruption” if

utilities need the supply to serve customers with firm contracts (*i.e.*, contracts that are not subject to “interruption” and take priority). *See* NJ Agencies Study at 10, JA___ (defining interruptible customers in New Jersey). First, in its Certificate Order, FERC suggests that interruptible demand should be considered in utility gas capacity planning, *see* Certificate Order P 31, JA___, even though gas utilities are, in fact, not permitted to consider such demand in their planning processes. FERC seems to acknowledge this reality, but oddly claims that FERC itself “can consider such important [interruptible] sectors of demand, *regardless of whether [gas utilities] may do so in their planning.*” Order on Reh’g P 63, JA___ (emphasis added).⁸ Second, FERC faults the NJ Agencies Study for “omit[ting] from its analysis interruptible natural gas generator and industrial demand,” *Id.*, JA___, and that of utilities, but the NJ Agencies Study *did* explicitly

⁸ FERC’s own approach to whether interruptible demand should be considered is inconsistent; the same order claimed that the Commission can and should consider such demand while on the other hand asserting that its “analysis focuses on firm capacity for [gas utilities],” Order on Reh’g P 45 n.138, JA___, *i.e.*, that its analysis did not include interruptible demand.

list the portion of demand attributable to interruptible customers as around 3% served by utilities. NJ Agencies Study at 29–30, JA____–____.

FERC is wrong that the New Jersey Agencies were required to consider interruptible demand. Even if interruptible demand were included in projected future demand scenarios, there would *still* be a significant amount of available capacity to meet the state’s gas utility needs, plus additional, unused capacity. *See* NJCF Reh’g Req. 23, JA____ (calculating that even if utilities added the 3% of interruptible load to design day planning, there would still be ample available capacity plus additional capacity unused by New Jersey utilities). Therefore, FERC failed to justify its reasoning for discrediting and discounting the study’s findings on this basis.

FERC also erroneously chose to ignore New Jersey’s projections that overall gas demand in the state must decrease over time, including by making the unsupported assumption that the projected decreases in demand from sources like residential use for heating and cooking will be replaced and even exceeded by interruptible demand from gas-fired electricity generators. *See* Order on Reh’g P 37 n.119, JA____. FERC did not cite any record evidence of future increased demand or any

independent fact-based assessment of New Jersey's future gas use projections to support this point. Instead, FERC cited only itself for alleged increased interruptible electric generation demand. *Id.*, JA____. As FERC has consistently eschewed any role under the Natural Gas Act to engage in regional gas planning, its unsupported conclusions regarding New Jersey's future demand projections are owed no weight. *See, e.g.*, Order Issuing Certificates and Granting Abandonment Authority, *Mountain Valley Pipeline LLC*, 161 FERC ¶ 61,043, P 42 (2017) (FERC cannot examine regional market need); *id.* at P 139 (“The Commission is not engaged in regional [gas] planning.”).

B. FERC Failed to Properly Consider Additional Evidence Further Demonstrating a Lack of Need.

In addition to the evidence showing the lack of need submitted by the New Jersey Agencies, FERC also had before it an expert report submitted by Skipping Stone, LLC, an independent global energy market consulting and technology services firm.⁹ Skipping Stone Study, JA____–____. The Skipping Stone Study analyzed firm sources of gas

⁹ *See* Skipping Stone, LLC, *About Us*, <https://skippingstone.com/index.php/about-us/> (last visited July 24, 2023).

capacity available to New Jersey utilities and concluded that there is more than enough supply of capacity to serve design day demand now and in the future, obviating the need for the proposed capacity of the Project. The Commission dismissed the results of this study based on two fundamental mischaracterizations: (1) that Skipping Stone did not take the appropriate approach in selecting and using data on future projected demand for gas, *see* Certificate Order P 27, JA___; and (2) that Skipping Stone did not accurately evaluate available supply capacity in times of system constraint, *see* Certificate Order P 33, JA___; Order on Reh’g P 44, JA___. Both critiques are demonstrably false and neither serve to rationally dismiss Skipping Stone’s conclusion that there is more than enough gas capacity in New Jersey without the Project.

1. Contrary to FERC’s Determination, the Skipping Stone Study Correctly Analyzed and Calculated Future Demand for Gas in New Jersey.

The Commission’s critiques of Skipping Stone’s approach to calculating future demand for gas in New Jersey are both wrong and illogical.

First, FERC misread the Skipping Stone Study as focusing “only on [utility] demand,” not taking into account demand from electric

generators and industrial users. Certificate Order P 27, JA___; *see also id.* at P 33, JA___; Order on Reh’g P 44, JA___. This is simply wrong—the Skipping Stone Study reflects *all* New Jersey demand in its analysis and data. In fact, it explicitly states that it includes consideration of New Jersey deliveries “to all load types (i.e., including Power generators and interruptible loads).” Skipping Stone Study at 16, JA___. The Skipping Stone Study emphasized this point, noting that its analysis represented:

all load demands in New Jersey, not just Firm [gas utility] demands, which demands are much less than the total of all loads served by pipelines in New Jersey. The demands that are in addition to the firm demands of New Jersey [gas utilities] are comprised of interruptible loads, such as those of most power generators.

Id. at 17 (internal cross-reference omitted), JA___; *see also id.* at 18, JA___. Despite these clear statements, FERC rejected the findings of the Skipping Stone Study based on the incorrect view that the study looked at an overly narrow segment of demand for gas in New Jersey. *See* Certificate Order P 33, JA___.

Second, the Commission wrongly concluded that Skipping Stone “focused exclusively on historical peak demand from [gas utilities]”

rather than future forecasts and “ignored ‘design day’ planning principles.” Certificate Order P 33, JA____. FERC repeated a similar error in its Order on Rehearing, incorrectly finding that the Study relied “on historical peak day demand” and failed “to account for design day criteria.” Order on Reh’g P 50, JA____–__. Again, this is patently false. *See, e.g.*, Skipping Stone Study at 19, Chart 2, JA____ (showing sum of gas utility-supplied design day figures). Skipping Stone began with “New Jersey [gas utilities] currently projected 2024-’25 Design Day figures and escalate[d] such amounts by an annual 1.2% growth rate.” *Id.* at 18, JA____. In fact, Skipping Stone used the same design day sources—namely, numbers from the official filings New Jersey utilities make to state officials on their supply needs—as Transco’s consultant used in its report. *Compare* Skipping Stone Study at 18 n.10, JA____ (noting that three of the design day figures were from the most recent New Jersey utilities’ state filings for 2022, with the remaining figure taken from Transco’s own study as not publicly available), *with* Transco

Study¹⁰ at 9 n.8, JA___ (noting that design day demand was based on New Jersey utilities' state filings for 2021). Therefore, FERC's complaint that the Skipping Stone Study did not use the gas utilities' own design day figures is flatly incorrect.

In addition, FERC failed to recognize that Skipping Stone likely overestimated future demand by conservatively escalating the 2024–25 design day figures by an annual growth rate that exceeded the one from the Transco Study by 15%. Skipping Stone Study at 18 nn.10, 11. JA___. Skipping Stone also conservatively excluded the impacts of New Jersey's Board Order requiring gas utilities to reduce demand. *See* Skipping Stone Study at 18–19, JA___–___; *see also* Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs, New Jersey Board of Public Utilities Docket Nos. QO19010040, QO19060748, & QO17091004 (June 10, 2020), available at <https://publicaccess.bpu.state.nj.us/DocumentHandler.ashx?>

¹⁰ Levitan & Assocs., *Regional Access Energy Expansion* (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (Apr. 22, 2022) (“Transco Study”), JA___–___.

document_id=1221939.¹¹ Had Skipping Stone included the mandatory reduction requirements in its study, the future increase in demand it predicted would not materialize. *See* Skipping Stone Study at 18–19, JA___–___.

Moreover, to the extent that Skipping Stone included analysis of historical peak data—*i.e.*, analyses of actual historical demand against existing supply—such analysis does not violate design day principles, as FERC suggests, but rather bolsters the findings from Skipping Stone’s design day analysis by supporting it with real-world data. First, it shows that New Jersey has in the past, and will continue to, meet all of its demand without any additional gas capacity, including from the proposed Project. *See* Skipping Stone Study at 16–17, JA___–___. Second, the actual historical demand levels that Skipping Stone

¹¹ Petitioners request that the Court take judicial notice of this Board Order and its legal mandates for gas utilities to achieve 0.75% annual demand reductions. *See* Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs, at 2. The facts contained therein “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Courts “must take judicial notice if a party requests it and the court is supplied with the necessary information,” Fed. R. Evid. 201(c)(2), and “may take judicial notice at any stage in the proceeding.” Fed. R. Evid. 201(d).

examined exceeded the gas utilities' own future projected design day demand levels, and yet were met with existing supply of capacity. *Id.* at 18–19, JA___–___. FERC failed to explain why lower demand levels in the future require the Project's additional supply, when Skipping Stone's examination of historical data showed that higher demand levels in the past were already met without the Project. *See also supra* at Section II.A (discussing FERC's failures to explain wholesale rejection of evidence of adequate capacity supply).

Lastly, the vague wording in FERC's orders is insufficient to convey the nature of any additional objections or provide a rational basis for rejecting Skipping Stone's findings based on an alleged failure to "account for 'design day criteria.'" *See* Order on Reh'g P 50, JA___. Aside from the fact that FERC is wrong that Skipping Stone did not use design data, the Commission failed to provide any meaningful insight on what other "design day" errors Skipping Stone may have committed. As FERC and the Transco Study acknowledge, there is no standard method for defining a "design day." Certificate Order P 21 n.41, JA___ ("Each [gas utility] uses its own criteria to define design day, but [sic] which is generally defined in a similar, but not uniform way."). Indeed,

each of the gas utilities to be served by the Project “uses its own specific criteria to define the design day.” Transco Study at 10 & n.9, JA____ (citing *id.*, n. 8, which has “information on each [gas utilities’] design day criteria”). Gas utilities do not even use standard timeframes for design day calculations. *See id.* at 11, JA____. FERC’s orders fail to point to any decisions or guidance that would elaborate on what “principles” Skipping Stone allegedly failed to follow—the Order on Rehearing only cites the Certificate Order, which also lacks any details or specifics. *See, e.g.,* Order on Reh’g P 50 nn.153 & 154, JA____ (citing Certificate Order P 33, JA____). In sum, the Commission failed to justify and explain its wholesale rejection of the substantial evidence before it. *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) (“[A]n agency’s decision is arbitrary and capricious when its ‘explanation for its decision runs counter to the evidence before the agency.’” (quoting *State Farm*, 463 U.S. at 43)).

2. FERC Arbitrarily Dismissed Evidence of Adequate Existing Supply Capacity.

FERC’s rejection of Skipping Stone’s conclusion, that there is more than enough supply of gas capacity available in New Jersey without the Project, is also without merit. Skipping Stone’s analysis

highlighted an existing supply of gas capacity available in New Jersey that gas utilities can use, and have used, to meet demand—including over the course of an especially cold winter. Skipping Stone Study at 18–19, JA__–__.¹² For example, in 2018–19, in-state gas demand was above 7,200,000 Dth/d—far exceeding the design day demand in 2032–33 projected by the gas utilities themselves—and was met by *existing* supply. *Id.*, JA__. Even without the Project’s proposed gas capacity, gas utilities were able to meet the high demand by using additional existing capacity sources identified in the Skipping Stone Study. NJCF Reh’g Req. at 20, JA__. And the amount of that additional capacity is not small. For example, the record clearly demonstrated that existing capacity that is stranded—*i.e.*, has no possible delivery point downstream of New Jersey, *see* Skipping Stone Study at 6, 12, JA__, __,

¹² New Jersey’s ability to meet its past demand was further supported by Skipping Stone’s winter reliability study, which FERC’s Orders failed to adequately address. *See* Skipping Stone, *Analysis of Regional Pipeline System’s Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018)*, JA__ (Attachment B to NJCF’s Motion to Lodge, Accession No. 20220722-5109 (July 22, 2022)). This study provided data and analysis showing why a previously proposed (and since canceled) pipeline with a capacity of 1.1 billion cubic feet per day was not needed to meet peak winter demand, not even for a single day, even during extreme weather events.

and is available to serve New Jersey demand *today* without a single infrastructure upgrade or modification—is more than the entire Project.¹³

A potentially useful analogy for New Jersey’s “stranded capacity” here is passengers (the gas) on a bus (a pipeline). Let’s say there are three buses traveling from Washington, D.C. to New York, and each bus can carry 30 passengers. In total, there are 90 passengers who want to transfer onto another bus in New York to continue their journey to Boston. However, the bus going from New York to Boston can only accommodate 70 passengers. This means that 20 passengers will not be able to board the bus to Boston and will be left “stranded” in New York. Now, let’s say that the seats on the bus from New York to Boston are reserved by shippers, who get to choose which passengers can continue their journey. Even if shippers select different passengers from the group of 90 arriving in New York, it doesn’t change the fact that only 70 passengers can board the bus to Boston. Consequently, 20

¹³ There is 893,140 Dth/d of net stranded capacity available to New Jersey. Skipping Stone Study at 6, JA__.

passengers will always be left behind, regardless of whom the shippers choose.

The Commission also demonstrated a fundamental misunderstanding with regards to stranded capacity, claiming that “if the downstream firm capacity customers exercise their rights to the capacity, then New Jersey [gas utilities] will not be able to rely on it.” Certificate Order P 32, JA___. FERC misses the point, as the fact is that utilities have used stranded capacity in the past. And if downstream shippers did exercise their firm rights¹⁴ for gas capacity, it would be drawn from elsewhere, *see* Skipping Stone Study, at 11–12, tbls. 9 & 10, JA__–___, leaving the stranded capacity untouched and available. Theoretically, if the downstream shippers decided to forgo drawing from their primary capacity, and instead, drew from stranded capacity on a secondary basis, then the downstream shippers’ primary capacity would be readily available to New Jersey.

¹⁴ When an entity or gas utility enters into a contract for “firm” gas capacity on a pipeline, that contract guarantees sufficient capacity will be available when the entity calls for it, and that it gets priority over any “interruptible” service contracts. NJ Agencies Study at 10, JA___.

By way of further example, one of the sources of stranded capacity is the pipelines feeding the Algonquin Gas Transmission system. Together, they have been sold 3.7 million metric Dth/d, on a firm basis capacity to the Algonquin system, but the Algonquin system only has capacity to receive 2.1 million metric Dth/d into its system in New Jersey. *Id.* at 7, JA____. This leaves the remaining gas capacity stranded—just like our ill-fated New York bus passengers above—among the delivering pipelines in New Jersey. *Id.* After factoring out capacity not available to *all* New Jersey gas utilities (as there is some available only to certain regions), there is over 586,919 Dth/d of stranded capacity to the Algonquin system available to all of New Jersey. *Id.*

Similarly, the Texas Eastern Transmission pipeline has contracted a 774,750 Dth/d delivery to the ConEd gas utility system in Manhattan, but ConEd's deliveries *have never exceeded* 465,529 Dth/d (and for the last five years have not exceeded 440,000 Dth/d) leaving at least 309,221 Dth/d unused. *Id.* at 8–9, JA____. The extent of this difference demonstrates that FERC is wrong that extreme weather events, like “Winter Storm Elliot,” would cause market demand to

consume all stranded capacity. *See* Order on Reh’g P 55, JA___. There is no evidence in the record to support the finding that gas needs in Manhattan would suddenly jump more than 66% over the highest demand ever recorded since its in-service date. Thus, it is not a question of downstream shippers unpredictably choosing whether or not to use the full contracted capacity, as FERC suggests. *See id.* Downstream shippers either cannot access additional supplies or will never have a need to access those supplies, and so the capacity to deliver those supplies is, and will continue to be, always reliably available to New Jersey utilities.

In total, Skipping Stone found over 6,728,520 Dth/d (approximately 6.7 billion cubic feet per day) of gas capacity that is available to New Jersey, and not subject to downstream firm exercise by utilities, *i.e.*, ‘firm’ capacity. Skipping Stone Study at 12 tbl.10, JA___. This 6.7 billion cubic feet per day of gas capacity available to New Jersey is far greater (approximately 1.5 billion cubic feet per day greater) than the conservatively estimated 2032–2033 Design Day demand of 5.18 billion cubic feet per day. *See id.* at 19, JA__ (grey line farthest to the left represents peak design day demand for 2032–33

based on gas utilities' filings). FERC's dismissal of this finding is without basis and its failure to adequately consider this data undermines its conclusion that there is a genuine public need for the Project. Moreover, the 7,260 million metric Dth/d (approximately 7.2 billion cubic feet per day) of actual, used capacity from 2018–2019 is more than 2,070,000 Dth/d *greater* than all New Jersey gas utilities' design day need based on their own design day figures,¹⁵ conservatively¹⁶ escalating those current (*i.e.*, 2024–2025) design day figures by a New Jersey Board of Public Utilities' Order governing those utilities, which mandates they reduce demand by 1.10% by 2026. *Id.* at 16, Chart 1 and 19, Chart 2, JA___, ___. Nowhere in FERC's Certificate Order does it truly grapple with this evidence or with how authorizing a Project that does nothing more than provide unnecessary redundancy

¹⁵ Design day figures were taken from New Jersey utilities' Basic Gas Supply Service filings, except for New Jersey Natural Gas, which neglected to publicly file its working paper. New Jersey Natural Gas' design day figures were instead taken from the Transco Study. Skipping Stone Study at 18 n.10, JA___.

¹⁶ Skipping Stone's modeled annual growth rate for demand exceeded the 1.02% annual growth rate used in the Transco Study by 15%. Skipping Stone Study at 18 n.11, JA___.

serves the public interest. This is plain error. *See Spire*, 2 F.4th at 968.¹⁷

In addition, FERC fails entirely to acknowledge the last bucket of capacity addressed by Skipping Stone that is potentially available to New Jersey utilities and is on top of the 6.7 billion cubic feet per day noted above and well above 2032–2033 Design Day estimates. This capacity is held firmly by “load serving entities” (such as utilities) and travels through New Jersey with available delivery points along the path. Skipping Stone Study at 5, JA__. This last bucket of capacity is the type that is *actually* subject to downstream firm exercise, unlike the above, and what FERC alludes to, *see* Certificate Order P 32, JA__, and adds another more than 3 billion cubic feet per day of available capacity. Skipping Stone Study, at 11, tbl. 9, JA__. For FERC to assert

¹⁷ FERC also incorrectly found that Skipping Stone included interruptible capacity—*i.e.*, capacity that can be stopped by the operator at any time to fulfill the needs of other customers with firm capacity reservations—and “double count[ed] some available firm capacity.” *See* Order on Reh’g P 45, JA__. This is another finding that is absolutely false. There is simply no inclusion of any interruptible supply to New Jersey gas utilities in the Skipping Stone Study’s cumulative calculation of supply available now to serve New Jersey load. *See* Skipping Stone Study at 12, tbl.10, JA__.

that the full utilization of this in-path capacity to load serving entities (*i.e.*, the capacity of 3,060,033 Dth/d) would impact the other 1.5 billion cubic feet per day of *existing available* capacity in excess of 2032-2033 Design Day is either mistaken or arbitrary, as this last bucket of capacity has nothing to do with the other capacity available, including stranded.

C. FERC’s Claims that the Project Will Provide “Reliability” and “Diversity” Benefits Are Arbitrary and Capricious.

FERC wrongly rests its authorization of the Project on generalized assertions that the Project will provide public benefits of “supply diversity,” reliability, and extra gas capacity that someone might want for electric generation. *See* Certificate Order P 25, JA__ (“the Commission finds that the construction and operation of the project will provide more reliable service on peak winter days and will increase supply diversity”); *id.* P 31, JA__; Order on Reh’g P 59, JA__. First, in doing so, FERC failed to point to a single piece of record evidence in support of these undefined benefits, let alone anything sufficient to justify authorization of the Project. Duplicating any pipeline network would arguably always provide some sort of reliability or redundancy

benefit, which would mean that FERC would approve virtually any and all pipeline projects that came before it. Here, FERC predicated its approval on vague assertions of “supply diversity,” “flexibility,” or “reliability” without record evidence showing *how* this project would increase supply diversity and flexibility or improve reliability. In fact, the Commission does not quantify or value such assertions of “supply diversity” or “flexibility;” it merely restates them. Certificate Order P 68, JA__ (indeed the project’s purpose is to diversify fuel supply access”). FERC further confirmed this in its Order on Rehearing, noting that “[a]lthough NJCF argues that the Commission should quantify these benefits, the Commission may rely on qualitative benefits, as it does here,” *id.* at P 59, JA__. This is plainly an insufficient basis for FERC to authorize a project as it is inconsistent with FERC’s own Policy Statement and the more searching inquiry of need required by the Natural Gas Act. 88 FERC ¶ 61,227, 61,748 (providing that “[v]ague assertions of public benefits will not be sufficient” to justify approval under Section 7 of the Natural Gas Act). Finding that FERC ran afoul of its own policy, this Court recently vacated FERC’s authorization of a pipeline based on similarly conclusory assertions of benefits other than

meeting new demand. *See Spire*, 2 F.4th at 972–74 (citing 88 FERC ¶ 61,227).

Second, supply diversity can either provide geographic or economic benefits. Here, however, the record contains no data or analysis substantiating the geographic benefits. As for alleged economic benefits, the record contains only vague statements by Project shippers that it is more cost-effective than other options to satisfy peak demand, without any actual proof of need. Certificate Order P 35, JA__ (“shippers note that the project capacity offers a more cost-effective means to satisfy their statutory obligations to provide safe, reliable, affordable and clean natural gas service to heat homes and business than continued reliance on third-party peaking services in the face of growing demand”) (citing project shippers’ assertions with zero record evidence supporting them); *see also* Certificate Order, Danly, Comm’r, dissenting, P 5, JA__ (reiterating the same unsubstantiated shippers’ assertions regarding pricing and reliability as support for the Order’s finding that “this project will provide more reliable service to the local distribution companies”).

Indeed, the only actual data or analysis on economic benefits in the record showed that the Project is actually a staggeringly costly method to meet any demand level that exceeds existing or projected peak levels. This is because the Project requires paying for year-round pipeline capacity to meet just a few days of hypothetical peak demand in an extreme scenario. *See* Skipping Stone Study at 17, JA__ (presenting analysis demonstrating how to model the per-Dth used cost of capacity, based on conservative assumptions regarding days used, drawn from 2018–19 shape of actual capacity usage figures and determining that the cost would be an exorbitant “\$63.49 per Dth, not including gas cost”). This is essentially the equivalent of buying a car because the owner needs to get to the airport a handful of times per year—having a car arguably might be more reliable than taxi services, but if a car costs \$15,000 to own all year and the owner only uses it ten times to get to and from the airport, each of those trips essentially costs the driver \$1,500 each—an exorbitant cost for a ride by any measure. FERC cannot rest its decision on such flimsy assertions of economic benefits and fails to address concrete claims regarding project costs. Unsubstantiated statements by self-interested New Jersey utilities do

not provide FERC with sufficient evidence by themselves, let alone when rebutted by actual evidence to the contrary.

D. FERC Failed to Consider Record Evidence of the Profit Motive for Building an Unneeded Project.

The Commission's decision to approve the Project is further undermined by its failure to examine evidence that the proponents of the Project have private profit motivations for claiming that the Project is needed. By failing to investigate the evidence of self-dealing in the record or explain its dismissal of such, *see Spire*, 2 F.4th at 964, FERC failed to perform its statutory duty to ensure that consumers are protected. *See also City of Clarksville*, 888 F.3d at 479 (citing *NAACP*, 425 U.S. at 669–70 and *Hope*, 320 U.S. at 610 (a “principal aim” of the Natural Gas Act is “protect[ing] consumers against exploitation at the hands of natural gas companies”) (internal quotation marks omitted)).

In particular, FERC ignored evidence that the gas utilities that have contracted for capacity on the Project have a substantial private for-profit incentive to enter into these agreements. New Jersey ratepayers would bear the entire cost of the Project, even if that infrastructure is not designed to meet or serve their demand. And if there is no actual public demand for the Project's gas, “the [gas

utilities’] shareholders would reap the economic rewards of [gas utilities’ sale] of and/or release of excess capacity.” Skipping Stone Study at 4, JA___. As the Skipping Stone Study highlighted, in light of this reality, FERC should have delved into the “significant questions” of “the interaction between state-level [gas utility] business operations and incentives that may accompany pipeline expansion proposals, which raise red flags [and] undermin[e] the probative value of the [Project’s] precedent agreements.” *Id.* at 19–20, JA___–___.

The D.C. Circuit has made it very clear that FERC must take a more careful look at the need for the projects it considers under Section 7 of the Natural Gas Act when there is evidence of self-dealing. *Spire*, 2 F.4th at 972–76. While the particular manifestations of self-dealing may vary from case to case, the Commission is obligated to ensure that a project serves a public need and not just the project proponents’ private, for-profit, interests. The form of self-dealing seen here is different from that in *Spire*, where the only precedent agreement for capacity on the project was with an entity affiliated with the project proponent, and, thus, the agreement did not constitute evidence that the project would serve new demand or any genuine public need. *See id.*

at 975. But just as in *Spire*, here FERC has been presented with and ignored credible evidence that there is no new, unmet, demand for the Project and that the Project shippers are entering their precedent agreements for purposes of private profit, not public interest.

Although non-affiliates have ostensibly subscribed to 82% of the Project's capacity, Order on Reh'g PP 66–67, JA__–__, FERC completely disregarded record evidence demonstrating that the subscribers have for-profit motives to sign these contracts for capacity they do not actually need. The reason the Commission looks to the existence of capacity agreements with non-affiliated entities as evidence of need is that private corporate entities should not typically enter into such agreements if they or their customers do not, in fact, genuinely need that capacity. However, here, FERC has been presented with credible evidence that there is no new, unmet, demand for additional capacity and that the Project's shippers stand to profit from the additional capacity. NJCF et al.'s Mot. for Evidentiary Hr'g at 3, JA__. A majority of the proposed capacity is contracted under this kind of agreement, where, if put into service, the Project “would serve as mere excess capacity that would only serve to benefit New Jersey [gas utilities] and

hurt N[ew] J[ersey] ratepayers.” Skipping Stone Study at 3–4, JA____–____. FERC’s Order fails to acknowledge the allegation of utilities profiteering on ratepayers’ backs, much less meaningfully engage with it as a reason to question the weight it accords to the precedent agreements between Transco and its shippers. FERC’s “ostrich-like approach” to approval of the Project—ignoring record evidence demonstrating that this Project is not designed to fulfill unmet demand or provide some other public benefit, but to boost corporate profits—is the very definition of arbitrary and capricious decision-making. *See Spire*, 2 F.4th at 975 (finding FERC’s decision arbitrary and capricious for failing to engage with “plausible evidence of self-dealing...[including] that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings”); *see also* 88 FERC ¶ 61,227, 61,747 (“Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a

comparison of projected demand with the amount of capacity currently serving the market.”).

E. FERC’s Dismissive and Incorrect Characterization of New Jersey Laws is Arbitrary and Capricious.

New Jersey gas utilities are required to provide safe and reliable service, N.J.S.A. § 48:2-23, and adhere to New Jersey’s greenhouse gas reduction requirements. New Jersey Board of Public Utilities’ Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs. In addition, under N.J.S.A. § 48:2-23, utilities are required to provide service “in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State.” FERC, nevertheless, treated these binding obligations as a nullity absent a “prescribed method” of compliance. *See* Order on Reh’g P 70, JA___. Instead, FERC assumed that these reductions would not be achieved—an assumption that easily becomes a self-fulfilling prophecy when FERC refuses to consider how binding GHG reduction requirements factor into the public need for a project. As detailed in Section III.C, *infra*, FERC’s authorization of the Project would lock New Jersey’s gas utilities into a project that would ultimately increase annual New Jersey GHG emissions by almost 12%.

Certificate Order P 71, JA___. As Commissioner Clements noted, FERC failed to grapple with this reality, “dismiss[ing] the totality of New Jersey’s efforts” to reduce reliance on gas. *Id.*, Clements, Comm’r concurring P 6, JA___. The Commission cannot treat New Jersey’s legally-binding climate reduction requirements as if they do not exist.

III. FERC Violated NEPA by Failing to Take a Hard Look at the Project’s Environmental Impacts.

FERC’s decision to approve the Project also is arbitrary, capricious, and contrary to law because it is based on a fundamentally inadequate review of the Project’s environmental harms under NEPA. The Commission violated NEPA in numerous ways, including by conducting its review in a manner that directly contravenes the Council on Environmental Quality’s regulations on how federal agencies must implement NEPA. FERC defined the Project’s purpose and need too narrowly and, therefore, impermissibly eliminated reasonable alternatives. FERC also disregarded the Project’s most severe environmental impacts, including how the Project will increase upstream gas drilling, exacerbate climate change, and increase downstream pollution in areas already overburdened by poor air quality. By avoiding consideration of these impacts, FERC avoided a

careful evaluation of less environmentally damaging alternatives to the Project, as well as opportunities to mitigate the harms it would cause. FERC's failure to collect information about and analyze these impacts in the manner required by federal law violated NEPA. Moreover, basing approval of the Project on an unlawfully deficient NEPA analysis also invalidates the Commission's determination under the Natural Gas Act.

A. FERC Violated NEPA and the Natural Gas Act by Defining the Project's Purpose and Need Unduly Narrowly and by Arbitrarily Restricting the Alternatives It Evaluated.

The Final EIS's definition of the Project's purpose and need remains too narrow to comply with NEPA and the Natural Gas Act because it restricts FERC from considering the full range of reasonable alternatives to the Project, including the no action alternative. A "reasonable" purpose and need statement cannot be so narrow that only one alternative will fulfill it. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). By only reflecting the narrow goal of the Project applicant in the Final EIS, FERC made its approval of the Project—and its rejection of any reasonable alternative—a foregone conclusion in violation of NEPA and the Natural Gas Act.

FERC failed to articulate a sufficiently broad statement of purpose and need that would satisfy NEPA. In contravention of NEPA caselaw and Council on Environmental Quality regulations, FERC accepted Transco's narrow definition of the Project's purpose and need at face value, adopting the extremely specific goal to provide "an incremental 829,400 dekatherms per day (Dth/d) of year-round firm transportation capacity from the Marcellus Shale production area in northeastern Pennsylvania to delivery points in Pennsylvania, New Jersey, and Maryland." See Final EIS at 1–2, JA__–__. Although FERC is required to consider Transco's goals, FERC cannot adopt such a narrow statement of purpose and need and "prioritize [the] applicant's goals above or to the exclusion of other relevant factors," which include "effectively carrying out the agency's policies and programs or the public interest." See *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453, 23,458 (Apr. 20, 2022). Instead, FERC did the exact opposite of what the Council on Environmental Quality's regulations say is required under NEPA and accepted Transco's formulation that narrows the Project's purpose and

need down to the last dekatherm. Doing so “is inconsistent with fully informed decision making and sound environmental analysis.” *See id.*

Selecting an overly narrow purpose and need that impermissibly considers only Transco’s desired goals enabled FERC to select an arbitrarily narrow range of alternatives and unlawfully dismiss all of those alternatives, including the no action alternative. The Commission cannot use such a narrow statement of purpose and need that only the Project, as proposed, will fulfill it. *See Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011); *see also Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598–99 (4th Cir. 2018) (holding that a purpose and need statement is unreasonable where “the agency defines it so narrowly as to allow only one alternative from among the environmentally benign ones in the agency’s power, such that the EIS becomes essentially a foreordained formality”) (quoting *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012)). In fact, FERC has a “duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.” *Nat’l Wildlife Refuge Ass’n v. Rural Utils. Serv.*, 580 F. Supp. 3d 588, 613 (W.D. Wis. 2022) (citing *Simmons v. U.S. Army Corps of Eng’rs*, 120

F.3d 664, 669 (7th Cir. 1997)); *see also* 87 Fed. Reg. at 23,459 (“Always tailoring the purpose and need to an applicant’s goals . . . could prevent an agency from considering alternatives that do not meet an applicant’s stated goals, but better meet the policies and requirements set forth in NEPA and the agency’s statutory authority and goals.”). FERC’s own regulations require it to consider “any alternative to the proposed action that would have a less severe environmental impact or impacts.” *See* 18 C.F.R. § 380.7(b). Yet here FERC rejected any non-gas alternatives, including the no-action alternative, and only seriously considered alternatives that were marginally different from the proposed Project, such as favoring either looping or compression, alternate routes for the pipeline, and alternate placement of compressor stations. *See* Final EIS at 3-3-3-32, JA__-__.

By ruling out any alternatives other than those that fulfilled Transco’s narrowly stated need—that is, building a gas pipeline project from point A to point B along the proposed route—including all non-gas energy alternatives, FERC declined to take a “hard look” and all but rubber-stamped the Project in violation of NEPA. While the Commission may not have the authority under the Natural Gas Act to

order alternatives that fall outside its jurisdiction, it is nevertheless required under NEPA to consider whether those reasonable alternatives that would cause fewer environmental impacts nevertheless still satisfy the statutory goals of the Natural Gas Act. *See, e.g., Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 834–36 (D.C. Cir. 1972) (holding that the agency’s environmental impact statement violated NEPA because it failed to consider alternatives outside of the Department of the Interior’s jurisdiction); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974) (“The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide... .”); *see also* 87 Fed. Reg. at 23,459 (environmental review can and should include “alternatives—other than the no action alternative—that are beyond the goals of the applicant or outside the agency’s jurisdiction because the agency concludes that they are useful for the agency decision maker and the public to make an informed decision.”).¹⁸ Moreover, given the wealth of

¹⁸ There are even far more economic, existing ways to ensure gas service, even during the worst-case scenario where days of peak demand

evidence showing the lack of need for the Project, a meaningful assessment of the no action alternative should have at least included consideration of the less environmentally-damaging options of satisfying demand using existing capacity, as gas utilities have done in the past. *See supra*, Section II.B.2.

FERC's view that the question of need is determined under the Natural Gas Act, and that it therefore does not have to consider the underlying public need for the Project in its NEPA analysis, confuses the Commission's role under each statute. *See* Order on Reh'g P 80, JA__; Final EIS at 1–2, JA__–__. While the Final EIS may not be the place for a detailed market analysis, the Commission has a well-

coincide with an emergency reduction in delivered supply from a pipeline outage that FERC worries about. For example, at the cost of a simple reservation charge(s), gas utilities could shore up supply by contracting in advance for additional currently available capacity on pipeline “X” to account for a potential a failure on pipeline “Y” (and vice-versa). Gas utilities also could construct increased vaporization at an on-system LNG facility. If the utility needed to call on that delivery, it would be paying for a few days of peak rather than saddling its ratepayers with the cost of 365-day capacity from the Project. *See* Skipping Stone Study at 17–18, JA__–__ (discussing how the Project's proffered capacity is an entirely uneconomic way to “firm-up” pipeline capacity for the approximate potential 5 days needed during extreme weather-driven demand).

articulated responsibility under NEPA to look critically at Transco's assertions and ensure that it adopts a statement of purpose and need that allows consideration of a reasonable range of alternatives that are consistent with its authority under the Natural Gas Act. That the Natural Gas Act requires that the Commission determine "need" does not change the fact that NEPA prohibits FERC from "restrict[ing] its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *See Simmons*, 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)).

Adopting such a narrow statement of purpose and need is also inconsistent with the Natural Gas Act, which requires that the Commission determine that the Project is required by the public convenience and necessity in order to approve it. *See* 15 U.S.C. § 717f. Whether a project fulfills a public need requires evaluation of its costs and benefits, including its environmental harms, and must include consideration of whether the Commission should exercise its "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable term and conditions as the public convenience and necessity may require." *See id.* at § 717f(e). FERC's

NEPA review, therefore, informs the Commission's decision-making under the Natural Gas Act, *see* 87 Fed. Reg. at 23,458, critically by providing the Commission with the information needed to determine whether to issue a certificate and to analyze the full range of reasonable alternatives to decide whether to order modifications or mitigations. The Commission's exercise of its statutory power will not be adequately informed if it adopts a statement of purpose and need so narrowly tailored that it amounts to an exact description of the Project as proposed. The Commission's refusal to engage in any critical evaluation of Transco's purpose and need has resulted in a determination that undercuts NEPA's important informational role, turns environmental review into a box-checking exercise, and thus renders the Commission's decision-making under the Natural Gas Act ill-informed and unreasonable.

B. Upstream GHG Emissions Are Reasonably Foreseeable Indirect Effects of the Project's Approval and Should be Calculated in FERC's NEPA Analysis.

FERC declined to calculate upstream GHG emissions in its Final EIS, primarily on the basis that it could not identify the location of the supply source. Final EIS at 4-178, JA____. In the Certificate Order,

FERC narrowed the issue to the lack of information about the specific identity of the gas suppliers, Certificate Order P 68, JA___, and doubled down on its refusal to use available information to estimate the emissions on rehearing. Order on Reh'g P 95, JA___.

The effects or impacts to be discussed in an EIS include “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable,” including “indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” 40 C.F.R. § 1508.1(g). The Council on Environmental Quality recently explained that “[i]ndirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action.” *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023). In the case of a pipeline project conveying natural gas, “[i]ndirect emissions are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves *use or conveyance* of a commodity or resource, and changes relating to the *production or*

consumption of that resource.” *Id.* The Council on Environmental Quality uses natural gas pipelines as an example: “natural gas pipeline infrastructure creates the economic conditions for additional natural gas consumption and production, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change.” *Id.* at n.84.

Beyond direct GHG emissions associated with the construction and operation of the Project facilities themselves, the Project’s reasonably foreseeable indirect GHG emissions include upstream and downstream emissions, including emissions from extraction, processing, refining, and end-use of the natural gas. *See* 88 Fed. Reg. at 1204; *see also Sabal Trail*, 867 F.3d at 1372.

Despite NEPA’s requirement to analyze indirect impacts in an EIS, FERC refused to estimate reasonably foreseeable upstream emissions of the Project. Petitioners and the U.S. Environmental Protection Agency identified prior instances where the upstream impacts of increased natural gas transportation capacity were estimated based on readily available data points. Delaware Riverkeeper

Network Comments on Draft EIS at 12–14, JA___–___; Delaware Riverkeeper Network Reh’g Req. at 36–37, JA__–___; Env’t Prot. Agency Comments on Draft EIS, JA___. at 36–37, JA__–___). However, the Commission still refused to analyze upstream emissions with those data points, claiming that it could not do so without identifying the specific gas producers for the Project—information that FERC did not have. *See* Order on Reh’g PP 93–94, JA__–___). This explanation fails to respond to Petitioners’ argument. FERC has, in the past, estimated upstream emissions caused by a specific project, even without the information FERC now claims is required. *See* 178 FERC ¶ 61,108, PP 10–14 (summarizing FERC’s prior treatment of indirect effects, including use of these tools); *see also, e.g., Atl. Coast Pipeline*, 161 FERC ¶ 61,042, P 293 (2017) (estimating upstream greenhouse gas emissions associated with an individual pipeline); and *Nat’l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 PP 185, 189 (2017) (same).

The Commission can, and is statutorily required to, estimate the reasonably foreseeable upstream indirect impacts of issuing a certificate, even without specific identified natural gas producers. Contrary to the Commission’s assertion, the record contained sufficient

information “available to permit meaningful consideration” of the Project’s indirect upstream impacts. *Cf. N. Plains Res. Council Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (quoting *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)). The Commission erred by not using this information to “reasonably forecast” the upstream effects of approving the Project. *See N. Plains Res. Council*, 668 F.3d at 1079 (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)).

Regardless of what additional information FERC believes it needs, analysis of the Project’s upstream impacts is required under NEPA. The Council on Environmental Quality’s regulations explicitly acknowledge that information gaps may exist when evaluating reasonably foreseeable significant adverse effects such as climate change. 40 C.F.R. § 1502.21. If information “cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement” a statement of the relevance of the missing information, as well as a summary of existing relevant evidence and an evaluation of impacts based on methods generally accepted in the scientific

community. *Id.* at § 15.02.21(c). Thus, the Commission should have acknowledged that the particular location and identity of upstream producers has low relevance to estimating GHG emissions and used “reliable existing data and resources” as required by Council on Environmental Quality regulations, *id.* at § 1502.23, to discuss and analyze the Project’s upstream GHG impacts.

“[R]easonably foreseeable” means “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.” *Id.* at § 1508.1(aa). Neither the identity nor the location of specific gas producers and suppliers affects the likelihood that the gas will be produced, supplied, transported, and, during this process, ultimately emitted or combusted due to FERC’s approval of the Project. Especially regarding climate change effects, which the Commission recognizes in its EIS has “fundamentally global impacts” that occur regardless of a project’s location, supplier and producer information is irrelevant. *Contra* Final EIS at 4-173, JA____. In light of the global nature of these impacts, the Commission fails to explain why the location of gas wells or the identity of producers is necessary to evaluate upstream GHG emissions.

C. FERC's Failure to Discuss and Evaluate the Significance of Climate Impacts Violates NEPA.

FERC did not determine the significance of the Project's climate impacts, even though NEPA requires an agency to determine which effects are significant. FERC claimed that it did not do so despite having enough data to make that determination because it is "conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward." *Id.* at 4-175, JA___; Certificate Order P 73, JA___; Order on Reh'g P 106, JA___.

Simply because FERC is evaluating different methods by which it intends to comply with NEPA as a matter of policy does not excuse compliance with NEPA in individual cases pending that policy's formation. Each time NEPA is triggered, it must be followed. *See* 42 U.S.C. § 4332(2)(C) (requiring a "detailed statement" for every major Federal action). FERC provides no explanation as to why it is prohibited from evaluating the significance of the Project's contribution to climate change in the absence of a broadly applicable proceeding. Indeed, agencies are "not precluded from announcing new principles in an adjudicative proceeding." *ITServe All., Inc. v. U.S. Dep't of Homeland*

Sec., 71 F.4th 1028, 1035 (D.C. Cir. 2023) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

Existing law requires FERC to evaluate the significance of the Project's GHG emissions and methods to avoid those impacts. An EIS must "provide full and fair discussion of significant environmental impacts" and "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. An EIS must also discuss the environmental consequences of a proposed action, including the "environmental impacts of the proposed action and reasonable alternatives to the proposed action *and the significance of those impacts.*" *Id.* at § 1502.16(a)(1) (emphasis added). The Commission also previously concluded that it has the ability to "assess the significance of a project's GHG emissions and those emissions' contribution to climate change." *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 P 29 (2021). For the Project, FERC estimated the volume of direct emissions and a portion of indirect emissions associated with the Project, Final EIS at 4-175, JA___, *id.* at App. C, JA___, and compared those emissions to current state and nationwide emissions, *id.* at 4-176,

JA___, and to future emissions reduction goals. *Id.* at 4-176–77, JA___–___ . The Commission even used the social cost of greenhouse gases tool to determine that the Project would result in a social cost between \$4 billion and \$46 billion. *Id.* at 4-179–80, JA___–___ . FERC, therefore, lacks any rational basis for failing to determine the significance of the Project’s GHG emissions. Because the Commission is able to determine significance, and because doing so is required by law, the Commission erred by failing to do so for this Project.

This error is especially egregious in light of the Council on Environmental Quality’s recent guidance document, published two days prior to the issuance of the Certificate Order. 88 Fed. Reg. at 1204. The purpose of Council on Environmental Quality’s GHG guidance is to “assist Federal agencies in their consideration of the effects of [GHG] emissions and climate change” and to “facilitate compliance with existing NEPA requirements.” *Id.* at 1197. The guidance “applies longstanding NEPA principles to the analysis of climate change effects, which are a well-recognized category of effects on the human environment *requiring* consideration under NEPA.” *Id.* at 1198 (emphasis added). While FERC was already required to make a finding

of the significance of the Project's GHG emissions, the recent Council on Environmental Quality guidance specifically highlighted that requirement and demonstrated even more clearly that FERC's claim that it does not know how to evaluate the significance of this Project's GHG emissions is irrational. Even though FERC did not have the benefit of the Council on Environmental Quality's guidance at the time it drafted the Final EIS, it was arbitrary and capricious for the Commission to issue the Certificate Order without conducting a supplemental EIS labeling the GHG impacts as either significant or not significant given longstanding NEPA regulations and the newly available Council on Environmental Quality guidance. This Court should not "automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989).

Assessing the Project's significance is not a meaningless designation. Although it is true that NEPA is an information-forcing

statute, NEPA is also clear on how that information is to be presented. An EIS goes beyond mere acknowledgment of environmental impacts, and in fact uses the information generated about those impacts to evaluate alternatives and mitigation measures, and to discuss an action's impacts over time. The so-called "disclosure" of GHG emissions and social cost calculations, by itself, is insufficient because it "places the burden of analyzing the data on the public" without explaining how that data factors into FERC's decision-making process. 40 C.F.R. §§ 1501.9(e)(2), 1502.14(e).

In the Certificate Order, the Commission abstains from "characterizing [the Project's GHG] emissions as significant or insignificant," and accordingly accepts that "Transco has *not indicated any mitigation* for GHG emissions." Certificate Order PP 73–74, JA__–__ (emphasis added). NEPA requires agencies to include in an EIS "a detailed discussion of possible mitigation measures." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52 (1989) (citing 42 U.S.C. § 4332(C)(ii)). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" and prevents the Commission and the public from

“properly evaluat[ing] the severity of the adverse effects.” *Id.* at 352. An EIS must discuss “[e]nergy requirements and conservation potential of various alternatives and mitigation measures,” “[n]atural or depletable resource requirements and conservation potential of various alternatives and mitigation measures,” and “[m]eans to mitigate adverse environmental impacts” 40 C.F.R. §§ 1502.16(a)(6), (7), (9). Council on Environmental Quality regulations make clear that an EIS must include “alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).” *Id.* at §§ 1501.9(e)(2), 1502.14(e). The Commission’s failure to evaluate GHG mitigation completely undermines the action-forcing purpose of NEPA, and ultimately means that the Commission declined to use its statutory authority to minimize one of the most environmentally damaging effects of the Project. *See Sabal Trail*, 867 F.3d at 1374 (“As we have noted, greenhouse-gas emissions are an indirect effect of authorizing [a] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.” (citing 15 U.S.C. § 717f(e))).

FERC also failed to grasp how approving the Project will have environmental impacts for decades. Not only did it ignore the significance of approving a project that will emit 47.8% of New Jersey's GHG emissions in 2050, it ignored the carbon "lock-in" effect of approving natural gas infrastructure at a time when there is broad social and political agreement that our country must decarbonize as fast as possible to avoid the worst impacts of climate change. The Commission failed to acknowledge the significance of the fact that its Project approval locks in ever-increasing fractions of state and federal GHG emissions, and failed to explain why, for example, it is "required by the present or future public convenience and necessity," 15 U.S.C. § 717f(e), for this Project to operate in 2050, consuming nearly 50% of the New Jersey's emission target merely to "provide more reliable service on peak winter days" and to "provide cost benefits by increasing supply diversity." Certificate Order P 34, JA__.

FERC's analysis fell far short of NEPA's requirements in this case. Despite calculating the social cost of greenhouse gases, FERC did not use that information to determine the significance of the Project's impacts, evaluate alternatives with lesser or greater impacts, or

identify mitigation measures. The Commission's presentation of various calculations, including the social cost of greenhouse gases, has little to no function in the NEPA analysis if it is not used to determine significance and inform the Commission's comparison of alternatives, including the no-action alternative, and consideration of mitigation. An evaluation of the significance of the Project's climate change impacts is also necessary to inform FERC's decisionmaking when determining whether the Project is required by the public convenience and necessity. *See* 15 U.S.C. § 717f(e).

D. FERC Failed to Adequately Consider Downstream Criteria Pollution.

FERC's failure to consider foreseeable indirect downstream pollution violates NEPA. Gas combustion emits "criteria" pollutants—health-harming pollutants regulated by the National Ambient Air Quality Standards—including ozone precursors, nitrogen oxides, and particulate matter. Final EIS at 4-170, JA__. The Final EIS, however, analyzes only criteria pollution from construction and from operating compressor stations, entirely omitting from consideration any criteria pollution from combustion of gas carried by the pipeline. *Id* at 4-168–4-180, JA__–__.

Emissions from combusting gas the pipeline carries are “reasonably foreseeable” indirect effects FERC must consider in its NEPA review. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004); see 40 C.F.R. § 1508.1(g). When the end use of gas by a local distribution company can be reasonably ascertained, as is the case here, FERC must calculate downstream emissions. *Food & Water Watch v. FERC*, 28 F.4th 277, 288–89 (D.C. Cir. 2022). Indirect downstream emissions are reasonably foreseeable even where analysis “depend[s] on several uncertain variables.” *Sabal Trail*, 867 F.3d at 1374. Over 97% of gas is burned,¹⁹ and residential and commercial end use causes significant localized air pollution that harms respiratory health.²⁰ The

¹⁹ FERC, Order Den. Reh’g and Stay, *Tennessee Gas Pipeline L.L.C.*, 170 FERC ¶ 61,142 (Feb. 21, 2020), Comm’r Glick dissenting, at P 8, citing U.S. Energy Info. Admin., September 2019 Monthly Energy Review 22, 97 (2019) (reporting that, in 2018, 778 billion cubic feet of natural gas had a non-combustion use compared to 29,956 billion cubic feet of total consumption).

²⁰ Food & Water Watch, Reh’g Req. at 20, JA__ (citing Zhu, Y, et al., *Effects of Residential Gas Appliances on Indoor and Outdoor Air Quality and Public Health in California*, UCLA Fielding School of Public Health (April 2020), <https://ucla.app.box.com/s/xyzt8jclixnetiv0269qe704wu0ihif7>; Dichter, N., & Aboud, A., *Analysis of Greenhouse Gas Emissions from*

Commission can easily calculate²¹ this Project's downstream emissions based on the known gas volumes subscribed by distribution companies. Final EIS at 4-175, JA___ (listing local distribution companies and calculating GHG emissions from downstream combustion). This is therefore not like cases in which this Court found emissions from gas bound for "an unknown destination and for an unknown end use" were not reasonably foreseeable emissions FERC was required to calculate. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 110 (D.C. Cir. 2022).

FERC's decision to entirely ignore downstream criteria pollution is especially egregious because the pipeline's distribution territory includes ozone nonattainment areas, Final EIS at 4-162, JA___, containing cities with overburdened neighborhoods, including

Residential Heating Technologies in the USA, UC Davis Western Cooling Efficiency Center (2020), <https://wcec.ucdavis.edu/wp-content/uploads/GHG-Emissions-from-Residential-Heating-Technologies-091520.pdf>).

²¹ Government of Canada, Natural Gas Emissions Calculator, <https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/report/sector-specific-tools-calculate-emissions/request-natural-gas-combustion-calculator.html>.

Baltimore, Philadelphia, Trenton, and Camden. FERC therefore fell short of its recognized obligation to consider environmental justice impacts of its decisions. *Id.* at 4-129, JA__ (citing Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629, 7632 (Feb. 11, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629 (Jan. 27, 2021)).

Additionally, FERC unreasonably assumed that fugitive methane emissions (*i.e.*, unintentional leaks)—which also contain volatile organic compounds that harm human health and contribute to ozone formation—would be *de minimis* by relying on existing estimates, *Id.* at 4-170, JA__; *Id.*, App. C at C-104–C-106, Tbl.C-15, JA__–__, JA__, that have been shown to drastically undercount real world emissions. Food & Water Watch Reh’g Req. at 21, JA__ (citing Josh Saul & Naureen Malik, *As Gas Prices Soar, Nobody Knows How Much Methane Is Leaking*, Bloomberg (May 3, 2022), <https://www.bloomberg.com/features/2022-methane-leaks-natural-gas-energy-emissions-data/?sref=qm26bHqj>).

IV. FERC Failed to Balance the Public Benefits and Adverse Impacts of the Project in Violation of the Natural Gas Act.

The Natural Gas Act requires the Commission to weigh the benefits and harms, including environmental harms, from the construction and

operation of the proposed Project when deciding whether it “is or will be required by the present or future public convenience and necessity.” See 15 U.S.C. § 717f(e). Section 7’s public convenience and necessity test obligates FERC to “consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the [Natural Gas Act].” *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010). The Commission’s Certificate Policy Statement further specifies that FERC must balance a “proposal’s market support, economic, operational, and competitive benefits, and environmental impact.” 88 FERC ¶ 61,227, 61,743. FERC’s duty under Section 7 of the Gas Act is to “issue a certificate of public convenience and necessity only if a project’s public benefits (such as meeting unserved market demand) outweigh its adverse effects (such as deleterious environmental impact on the surrounding community).” *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (citing *Certification of New Interstate Pipeline Facilities*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *clarified*, 92 FERC ¶ 61,094 (July 28, 2000)); *see also Sabal Trail*, 867 F.3d at 1379 (“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.”). “The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests.” 88 FERC ¶ 61,227, 61,748. Thus, as recognized by former Commissioner LaFleur, “[i]n cases where adverse effects are present . . . the amount of evidence necessary to establish need increases.” *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (LaFleur, Comm’r, dissenting at 4) (citing 88 FERC ¶ 61,227, 61,748). The Commission has the authority under the Natural Gas Act to deny an application for a Section 7 certificate “on the ground that the pipeline would be too harmful to the environment.” *Sabal Trail*, 867 F.3d at 1373. It also has the authority to condition a certificate to mitigate a project’s adverse impacts. 88 FERC ¶ 61,227, 61,749 (“The objective is for the applicant to develop whatever record is necessary, *and for the Commission to impose whatever conditions are necessary*, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests.” (emphasis added)).

Here, the “Commission’s balancing of costs and benefits consisted largely of its *ipse dixit*,” *see Spire*, 2 F.4th at 973, in which FERC accepted the Project’s highly speculative benefits on the basis of its proponents’ unsubstantiated assertions, *see* Section II *supra*, while essentially ignoring the numerous ways in which the Project would harm the public. It did so without any data or analyses of supply diversity or system reliability failures, crediting Transco’s bald assertions and the Transco Study, while misrepresenting and/or misunderstanding both the NJ Agencies Study finding that the Project’s capacity was unnecessary and the Skipping Stone Study demonstrating that existing capacity easily meets winter peak demand. Instead, it accepted vague assertions of “supply diversity” and “reliability” as sufficient evidence of the existence of a “public benefit,” *see, e.g.*, Certificate Order P 38, JA__.

Further, the Project’s many substantiated and significant concrete harms are clear and include imposing unnecessary costs on New Jersey ratepayers, and adversely impacting landowners like Petitioner Catherine Folio through tree clearing, ground disturbance, imposition of a gas pipeline on their land, and lowered property values. *See* Folio

Decl. A decision that a project is required by the public convenience and necessity also involves consideration of adverse environmental effects of a project. *Minisink Residents for Env't Preservation & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (“Along with [the Natural Gas Act’s] main objectives, there are also several ‘subsidiary purposes’ . . . ‘including conservation, environmental, and antitrust’ issues.” (cleaned up) (first quoting *Hope*, 320 U.S. at 610, then quoting *Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990)). FERC entirely failed to consider the significance of the Project’s environmental impacts, particularly those from contributions to climate change, in its weighing, despite the fact that “it is hard to imagine a consideration more relevant to the ‘public interest’ than the existential threat posed by climate change.”²²

The idea that the Commission must consider indirect environmental effects such as climate change within the scope of its Section 7 proceedings is not radical. The Supreme Court held in 1961 that the term “public convenience and necessity” is broad enough to

²² Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 6 (2019).

encompass “all factors bearing on the public interest,” including the end use of gas being transported. *Fed. Power Comm’n v. Transco*, 365 U.S. 1, 7–8 (1961) (quoting *Atl. Refining Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391 (1959)). *See also Spire*, 2 F.4th at 961. In 1967, the D.C. Circuit emphasized that “market demand is not the only relevant factor” and that *conservation* of natural gas was relevant to public convenience and necessity. *Pub. Serv. Comm’n of State of N.Y. v. Fed. Power Comm’n*, 373 F.2d 816, 821 (D.C. Cir. 1967) (citing *Transco*, 365 U.S. at 8). The conservation of natural gas speaks directly to upstream production and requires the Commission to look at how increased resource extraction bears on the public interest.

FERC’s failure to discuss and evaluate the significance of the Project’s climate impacts renders its conclusion in the Certificate Order that the Project is “environmentally acceptable” arbitrary, capricious, and contrary to the Natural Gas Act. Without this discussion, a “rational connection between the facts found and the choices made” is lacking. *See Billings Clinic v. Azar*, 901 F.3d 301, 312–13 (D.C. Cir. 2018) (quoting *State Farm*, 463 U.S. at 43).

The record is replete with information about the Project's climate impacts, as well as the existential threat of climate change, yet FERC treats these concerns as a nullity when deciding to approve the Project as necessary in the public interest. The Order fails to substantively engage with the fact that the Project would and will *increase* New Jersey's GHG emissions approximately 12% above 2019 levels, Certificate Order P 71, JA__,²³ emit almost 20% of New Jersey's GHG emissions allowable under state law by 2030,²⁴ and emit 47.8% of the allowable total by 2050. Final EIS at 4-176, JA__. The Project's GHG emissions will create \$46 billion in societal costs. *Id.* at 4-180, JA__. FERC's decision to not "characteriz[e] these emissions as significant or insignificant," Certificate Order P 73, JA__, is a staggering dereliction of its duty to weigh a project's substantiated public benefits

²³ This figure appears to reflect the Commission's understanding that, in fact, New Jersey markets/uses constitute 73.5% of the Project's capacity—not the simple 56% presented in the Certificate Order at P 28, JA__.

²⁴ See New Jersey Exec. Order 274, An Order Advancing Climate Action to Secure New Jersey's Clean Energy Future, at 4, Ordering Paragraph 1 (2021) (mandating a 50% reduction from 2006 GHG emissions levels by 2030 as an interim target essential to achieving the 80x50 Global Warming Response Act requirement).

(nonquantifiable or quantified here) against its substantiated public harms. 88 FERC ¶ 61,227, 61,747; *Atl. Refining Co.*, 360 U.S. at 391, *affirmed in Transcon.*, 365 U.S. at 8 (FERC’s holistic public convenience and necessity test requires it to consider all factors bearing on the public interest).²⁵

As former Chairman Glick once recognized, FERC’s prior practice of claiming that a project has no significant environmental impacts while “refusing to assess the significance of the project’s impact on the most important environmental issue of our time is not reasoned decisionmaking.” *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2020) (Glick, Comm’r, dissenting in part, P 2). Equally, here where FERC has prepared a deficient EIS rather than concluding the Project has “no significant impact,” the effect is the same, and its failure to adequately analyze GHG emissions undermines the rationality of its decision-making under the Natural Gas Act.

²⁵ See also Glick & Christiansen, *supra*, note 22, at 40 (“because the environmental impacts of a potential pipeline must factor into the Commission’s section 7 determination, the Commission must analyze those effects under both the [Natural Gas Act] and [NEPA]”).

FERC's conclusion that the Project is "environmentally acceptable" lacks factual basis in the record, and "runs counter to the evidence before the agency." *See State Farm*, 463 U.S. at 43. The Commission's decision not to factor climate change into its decision, as a result of its failure to comply with NEPA, resulted in a "fail[ure] to consider an important aspect of the problem." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

CONCLUSION

For the reasons explained above, Petitioners request that this Court vacate and remand FERC's orders granting a certificate of public convenience and necessity for the Project.

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Respectfully submitted,

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