

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Transcontinental Gas Pipe Line)	Docket No. CP21-94-000
Company, LLC)	
)	
)	

**REQUEST FOR REHEARING AND MOTION FOR STAY ON BEHALF OF NEW
JERSEY CONSERVATION FOUNDATION, NEW JERSEY LEAGUE OF
CONSERVATION VOTERS, AQUASHICOLA POHOPOCO WATERSHED
CONSERVANCY, AND AFFECTED LANDOWNER CATHERINE FOLIO**

Pursuant to Section 19(a) of the Natural Gas Act (“NGA” or the “Gas Act”),¹ Rule 713, and Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),² New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Conservancy, and Catherine Folio (collectively “Intervenors”) request rehearing and vacatur of the Commission’s “Order Issuing Certificate and Approving Abandonment” in the above-captioned matters, issued January 11, 2023.³ Intervenors also request rehearing of FERC’s denial of the motion for an evidentiary hearing,⁴ and hereby request a stay of this Order, pursuant to 5 U.S.C. § 705.

FERC granted the Intervenors’ respective motions to intervene in this proceeding.⁵ Thus, the Intervenors are “parties” to this proceeding,⁶ and have standing to file this request for

¹ 15 U.S.C. § 717r(a).

² 18 C.F.R. § 385.713; 18 C.F.R. § 385.212.

³ *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (Jan. 11, 2023) (“Order” or “REAE Order”).

⁴ Order at P 14.

⁵ Order at P 11.

⁶ 18 C.F.R. § 385.214(c).

rehearing and motion for a stay. This request is timely, having been filed within 30 days of the Commission’s Certificate Order.⁷

The Project includes constructing approximately 22.3 miles of 30-inch-diameter lateral pipeline (the Regional Energy Lateral) in Luzerne, Pennsylvania and 13.8 miles of 42-inch-diameter loop pipeline (the Effort Loop) in Monroe County, Pennsylvania,⁸ along with associated compressor stations and upgrades, and other appurtenant facilities. The completed Project would transport about 829,400 Dth/d of Marcellus gas daily, primarily to shippers in New Jersey, with a projected in-service date of December 1, 2023.⁹ Intervenors seek rehearing and vacatur of the Order because: (1) FERC’s grant of a certificate to REAE is arbitrary, capricious, a violation of section 7 of the Natural Gas Act, and otherwise contrary to law because REAE is not required by the public convenience and necessity;¹⁰ and (2) FERC’s grant of a certificate is legally infirm because it rests on an Final Environmental Impact Statement¹¹ that is wholly deficient, as it failed to meet the requirements of the National Environmental Policy Act (“NEPA”) and its implementing regulations, as confirmed by the CEQ’s Interim Greenhouse Gas Guidance (“GHG Guidance”), and is thus arbitrary and capricious.¹² If FERC does not grant

⁷ 15 U.S.C. § 717r(a).

⁸ Order at PP 1 and 4.

⁹ Application for Certificate of Public Convenience and Necessity and Order Approving and Permitting Abandonment of Facilities, *Transcontinental Pipe Line Co. LLC*, FERC Docket No. CP21-94, Accession No. 20210326-5274, p. 2 (March 26, 2021) (“REAE Application”). This in-service date appears to have been overly optimistic, as a more recent filing indicates Transco’s projected in-service date for REAE is Q4 2024. Transcontinental Gas Pipe Line Company, LLC submits response to the May 6, 2022 Environmental Information Request for REAE, *Transcontinental Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94, Accession No. 20220516-5243, Attachment 11A, Attachment A, p. 3.

¹⁰ 15 U.S.C. §§ 717 *et seq.*; *see* Part III(A) *infra*.

¹¹ Fed. Energy Regulatory Comm’n, *Transcontinental Gas Co. Pipeline Project—Final Environmental Impact Statement*, FERC Docket No. CP21-94, Accession No. 20220729-3005 (Jul. 29, 2022) (“FEIS”).

¹² 5 U.S.C. § 706; 42 U.S.C. §§ 4321 *et seq.*; 40 C.F.R. §§1500–08; National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) (“2023 NEPA Guidance”). *See* Part III(B), *infra*.

Intervenors' request for rehearing, Intervenors also hereby move for a stay of the Order pursuant to 5 U.S.C. § 705 pending the outcome of judicial review.

I. Concise Statement of Alleged Errors¹³

- A. FERC's grant of a certificate to REAE is arbitrary, capricious, a violation of section 7 of the Natural Gas Act, and otherwise contrary to law.¹⁴
1. FERC's grant of a certificate to REAE was not supported by substantial evidence and is not the product of reasoned decision-making, and FERC failed to properly engage with or analyze the significant evidence of a lack of need or benefits of the proposed Project.¹⁵
 - a) FERC improperly discounted the New Jersey Board of Public Utilities' ("NJBPU") independent study's relevance by understating New Jersey's portion of the gas capacity.¹⁶
 - b) Compounding this initial error, FERC's failure to properly consider the predicate and scope of the Skipping Stone independent studies showing REAE is not needed render its decision legally infirm.¹⁷
 - c) Significant amounts of stranded capacity are available and FERC's failure to engage with this capacity's availability and current usage makes its finding of need fatally flawed.¹⁸
 - d) Relying on bald LDC assertions about supply reliability during design days and gas availability for their unsubscribed friends does not meet the

¹³ As per 18 C.F.R. § 713(c), each issue on rehearing is concisely listed herein, with further explication in Part III, *infra*.

¹⁴ See 15 U.S.C. § 717f(e); 15 U.S.C. § 717r(b); *Env't Def. Fund v. FERC*, 2 F.4th 953, 968 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct. 1668 (2022); 5 U.S.C. § 706(2)(A); Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy, 88 FERC ¶ 61,227 (1999), *modified by* 89 FERC ¶ 61,040 (1999), Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 (1999), Order Further Clarifying Statement of Policy, 92 FERC ¶ 61,094 (2000) ("Certificate Policy Statement").

¹⁵ See *id.*; under the Administrative Procedure Act, an agency cannot ignore substantial evidence bearing on the agency decision. See 5 U.S.C. § 706; see also, e.g., *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency decision is arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem") (*Motor Vehicles Mfrs. Ass'n*).

¹⁶ See 15 U.S.C. § 717f(e).

¹⁷ See 15 U.S.C. § 717f(e); 5 U.S.C. § 706; *Env't Def. Fund v. FERC* at 968.

¹⁸ See *id.*

Gas Act prohibition on authorizing only projects that are required to meet public need.¹⁹

- e) FERC's Order failed to probe plausible record evidence indicating self-dealing.²⁰
 - f) New Jersey's REAE-subscribed LDCs are subject to New Jersey laws requiring them to provide safe and reliable service, and requiring demand reduction, not, as FERC's dismissive characterization suggests, just policies and suggestions of considering irrelevant non-pipeline alternatives ("NPAs").²¹
 - g) FERC's denial of Intervenor's Motion for an Evidentiary Hearing obviated its ability to discern the errors set out above prior to issuing Its Order.²²
2. FERC's Order is arbitrary, capricious, and not the product of reasoned decision-making because it failed to adequately balance the adverse impacts and public benefits of the Project.²³
 3. FERC failed to weigh the significant climate impacts from REAE's greenhouse gas emissions in its Gas Act public interest inquiry.²⁴

¹⁹ See *Env't Def. Fund v. FERC* at 968.

²⁰ See *id.*

²¹ See Certificate Policy Statement; *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 391 (1959) ("*Atl. Refining Co.*"), affirmed in *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) ("*Transcon.*") (FERC's holistic public convenience and necessity test requires it to consider all factors bearing on the public interest).

²² See *Cajun Elec. Power Co-op., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994); *S. Cal. Edison Co.*, 40 FERC ¶ 61,106, 61,291 (1987).

²³ See Order on Rehearing and Reissuing Certificates, *Guardian Pipeline, LLC*, 94 FERC ¶ 61,269, 61,948 (2001) (FERC acknowledges that its public interest balancing "includes factors as diverse as considerations of clean air and other environmental benefits. . . ."); *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) ("*City of Clarksville*") (identifying "conservation, environmental, and antitrust" issues as being among the purposes of the NGA).

²⁴ See Certificate Policy Statement; *Atl. Refining Co.* at 391, affirmed in *Transcon.* at 8 (FERC's holistic public convenience and necessity test requires it to consider all factors bearing on the public interest); Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 40 (2019) ("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 NGA and the National Environmental Policy Act").

- B. FERC’s Order violates NEPA because it rests on an FEIS that is wholly deficient.²⁵
1. FERC violated NEPA by defining project purpose and need unduly narrowly.²⁶
 2. As a result of the impermissibly narrow purpose and need statement, the FEIS failed to conduct a rigorous evaluation of the no action alternative, as required by NEPA.²⁷
 3. FERC violated NEPA by failing to meaningfully evaluate the project’s environmental impacts, including failure to appropriately account for and contextualize GHG emissions and climate change impacts.²⁸
 4. FERC violated NEPA’s public participation requirements. By refusing to engage with project purpose and need in its EIS process, the public was unable to scrutinize the proposed project and meaningfully comment on it.²⁹

II. Background

On March 26, 2021, Transco submitted an application to FERC for a Section 7 certificate seeking approval to construct and operate the REAE Project, with a proposed in-service date of December 1, 2023.³⁰ As a major federal action significantly affecting the environment, FERC’s consideration of Transco’s application triggered the requirement that FERC prepare an

²⁵ See *Diné Citizens Against Ruining Our Env’t v. Haaland*, 2023 WL 1430620, *1, 20 (Feb. 1, 2023) (in which the 10th Cir. ruled that BLM violated NEPA by failing to appropriately analyze and contextualize the environmental impacts from GHG emissions and hazardous air pollutants).

²⁶ See *Protect Our Cmty’s Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (federal agencies have “the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.”) (internal citation omitted); *Nat’l Wildlife Refuge Ass’n v. Rural Utilities Serv.*, 580 F. Supp. 3d 588, 611-612 (W.D. Wis. 2022). See also *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

²⁷ See *id.*

²⁸ See *Sierra Club v. FERC*, 867 F. 3d 1357, 1371-1375 (D.C. Cir. 2017) (“*Sabal Trail*”).

²⁹ See 40 C.F.R. § 1500.1(b); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Oregon Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016) (“*Jewell*”); *Oregon Nat. Desert Ass’n v. Zinke*, 250 F. Supp. 3d 773, 774 (D. Or. 2017) (“*Zinke*”) (“NEPA’s second purpose is to insure meaningful public participation” and it guarantees “citizens access to information and the ability to comment, [and] provides for citizen input with respect to the procedures used—i.e., input on the *methods* and not just the *results*.”) (emphasis in original).

³⁰ Abbreviated Application for Certificate of Public Convenience and Necessity and for Order Permitting Abandonment of Facilities, *Transcontinental Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94, Accession No. 20210326-5274 (Mar. 26, 2021) (“REAE Application”).

environmental impact statement (“EIS”) under NEPA in order to evaluate the project’s environmental impacts as part of its decision making process on that application.³¹ On March 2, 2022, FERC issued a Draft EIS that discussed some anticipated environmental impacts of the Project.³² On July 29, 2022, FERC released its FEIS for the REAE Project. And on January 11, 2023, FERC issued its Order finding that the REAE Project satisfied the NGA’s standard that the project be required by the public convenience and necessity. As outlined further below and in previous filings, FERC’s Order finding project need is rife with reversible errors, including misstatements about data and analyses comprising the administrative record of this proceeding, and its NEPA analysis underpinning its Order is equally deficient.

A. New Jersey Gas Capacity Proceedings Finding No Need for Any Additional Gas Capacity

In July 2019, Levitan & Associates filed a report in a New Jersey Natural Gas (“NJNG”)³³ proceeding before the New Jersey Board of Public Utilities (“NJBPU”), in which NJNG claimed it needed additional gas capacity.³⁴ In October 2019, the Environmental Defense Fund (“EDF”) and New Jersey Conservation Foundation (“NJCF”) submitted an affidavit by Greg Lander of Skipping Stone in that NJNG proceeding, demonstrating why that was unequivocally untrue.³⁵ Given the issues raised therein, NJBPU opened a specific proceeding to investigate gas capacity available to New Jersey local distribution companies (“LDCs”),³⁶ and

³¹ See 42 U.S.C. § 4332(C); 18 C.F.R. § 380.6(a).

³² Fed. Energy Regulatory Comm’n, Transcontinental Gas Co. Pipeline Project —Draft Environmental Impact Statement, *Transcontinental Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94, Accession No. 20220302-3021 (Mar. 2, 2022) (“DEIS”).

³³ NJNG is the REAE subscriber holding the largest percentage of capacity. Order at P 7.

³⁴ See Motion to Lodge of the New Jersey Conservation Foundation, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220722-5109 (Jul. 22, 2022) (“NJCF Motion to Lodge”), Attachment A, Exhibit A, p. 2.

³⁵ See *id.* at n. 5.

³⁶ NJBPU is the jurisdictional regulator of New Jersey utilities, including the REAE LDCs, and is charged with ensuring that LDCs provide safe and reliable service, in a manner that conserves the environment. N.J.S.A. 48:2-13; N.J.S.A. 48:2-23.

commissioned an independent expert study by London Economics International Group (“LEI”) to assess this critical and foundational question.³⁷ NJBPU’s independent expert found that sufficient capacity exists and is available to New Jersey’s LDCs.³⁸ On Feb. 8, 2022, NJCF along with EDF and Columbia Law School’s Sabin Center for Climate Change Law filed comments with the NJBPU confirming that New Jersey LDCs have sufficient gas supply out to 2030 to meet system demand without adding pipeline capacity to their supply portfolios.³⁹ All of this should have put any questions regarding the need for new capacity to rest.⁴⁰

³⁷ See NJBPU Docket Nos. GO1907084 and GO20010033. As the state LDC’s jurisdictional regulator in charge of ensuring reliability and ability to serve, as well as being responsible for complying with the state’s clean energy and greenhouse gas reduction laws, the NJBPU recognized how crucial it was to engage in a data-driven proceeding to assess existing gas capacity available to its LDCs.

³⁸ See Motion to Intervene Out of Time and to Lodge of the New Jersey Parties, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (Jul. 11, 2022) (“NJ Parties’ Motion to Lodge”), lodging Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers, London Economics International LLC, prepared Nov. 5, 2021, In the Matter of the Exploration of Gas Capacity and Related Issues, NJBPU Docket No. GO1907084 (posted Dec. 16, 2021) (“LEI Study”) (determining LDCs had sufficient capacity and did not need additional infrastructure). The Order refers to the LEI Study as the NJ Agencies Study. See Order at P 22.

³⁹ See NJCF Motion to Lodge at Attachment A.

⁴⁰ On June 29, 2022, the NJBPU formally adopted the LEI Study’s conclusions finding that New Jersey LDC shippers do not require any additional natural gas pipeline capacity, issuing a Board Order that also found its LDCs did not need the kind of interstate gas capacity the ill-fated PennEast Pipeline offered. NJ Parties’ Motion to Lodge, lodging Agenda Item 9A, In the Matter of the Exploration of Gas Capacity and Related Issues, NJBPU Docket Nos. GO1907864 and GO2001033 (Jun. 29, 2022) (“Board Order”). *Accord* Winter Reliability Study (Showing that PennEast was not needed to meet peak winter demand, not even for a single day, even during extreme weather events.”). While FERC did not consider this critical study in its administrative record in its PennEast order denying rehearing, excluding it due to the timing of its submission, it is certainly part of this instant proceeding, providing critical substantive evidence with which FERC ought to have engaged. See *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (2018) (refusing to address the Winter Reliability Study even though it was predicated on data unavailable at the time of the initial order).

B. Transco’s Belated Levitan Report Alleging “Need” for REAE

But it didn’t. On April 22, 2022, *more than one year after submitting its FERC application predicated on nothing more than precedent agreements, and five months after* NJBPU’s outside expert had already determined that New Jersey LDCs did not need any additional gas capacity,⁴¹ Transco submitted to FERC a newly minted report by Levitan & Associates, Inc. (“Levitan Report”) (the same consultant whose findings NJBPU’s independent expert debunked, *see supra* n. 38). Neither Transco nor its shippers apprised the Commission of NJBPU’s LEI Study or its conclusion that REAE New Jersey LDC shippers did not need new gas capacity. Rather, Transco’s new Levitan Report again contended that New Jersey LDCs need additional pipeline capacity to serve demand for natural gas, or that, with the extra gas capacity, the LDCs could sell that gas (or capacity) to others that could use it.⁴²

C. New Jersey Board of Public Utilities and New Jersey Rate Counsel Intervene in FERC REAE Proceedings Lodging Evidence Demonstrating Transco’s Levitan Report is Erroneous

Given that Transco’s application shows that 73.5% of REAE’s subscribed capacity would purportedly serve New Jersey,⁴³ NJBPU and New Jersey Rate Counsel⁴⁴ moved to intervene in

⁴¹ *Supra*, n. 38 (NJ Agencies’ LEI Study finding no additional gas capacity posted on NJBPU Docket No. GO1907084 (Dec. 16, 2021)).

⁴² Transco’s Apr. 22, 2022 Supplemental Filing, Attachment 1D, Resource Report 1 – Additional Information, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (April 22, 2022). The Levitan Report found “that the project’s capacity is needed to remedy shortfalls in capacity to meet design day requirements and to alleviate constraints in meeting natural gas-fired generation demand during extreme cold events.” Order at P 21.

⁴³ New Jersey LDCs hold 56.4% of REAE’s total capacity; the amount of capacity Transco’s affiliate, Williams marketing, has designated for New Jersey markets represents 10.3% of REAE’s total capacity; and the amount of capacity South Jersey Resources, a marketing affiliate of South Jersey Gas, has designated for New Jersey markets represents 6.8% of REAE’s total capacity. Order at P 7. This totals 73.5% of subscribed capacity purportedly designed for New Jersey load. *Accord*, Order (Clements, Comm’r, dissenting, n. 9).

⁴⁴ New Jersey Rate Counsel is an independent state agency charged with protecting New Jersey ratepayers and protecting the public interest. N.J.S.A. 52:27EE-48.

this docket, and lodged the LEI Study showing that new gas capacity is not needed to meet state current or future demand.⁴⁵ Transco opposed New Jersey’s submission, presumably because it demonstrates that the “need” (i.e. additional pipeline capacity to serve peak demand) did not and does not exist, making its project unnecessary, and concomitantly would benefit only private parties at ratepayers’ expense. Intervenors then lodged NJCF’s additional relevant data and analyses supporting the conclusions of New Jersey’s gas capacity study (and finding that even New Jersey’s study underestimated available capacity) in this docket on July 22, 2022, along with supporting materials showing that New Jersey LDCs: (1) did not need additional capacity at the time of the proposed PennEast Pipeline⁴⁶ to which these same LDC shippers subscribed; (2) do not need it now; and (3) will not need new gas capacity in the future.⁴⁷

D. Motion for an Evidentiary Hearing on Need

In light of the above, Intervenor NJCF moved for an evidentiary hearing in order to give the Commission and parties the opportunity to conduct discovery, and to ask the right questions that could test the veracity and premises of Transco’s Levitan Report, as well as its conclusions. Shortly thereafter, NJCF also filed a project-specific study on need for the REAE Project, prepared by Greg Lander of Skipping Stone (“Skipping Stone Study”).⁴⁸ While the LEI Study was an appropriate foundational analysis of regional gas capacity available to meet New Jersey LDCs’ needs, as well as quantifying interruptible user needs, Transco argued that FERC should

⁴⁵ See NJ Parties’ Motion to Lodge. This is the study that Transco and its shippers neglected to proffer to FERC.

⁴⁶ NJ Parties’ Motion to Lodge, Attachment A, p. 11 (“As such, and on balance, LEI’s analysis supports the argument against the need for additional interstate pipeline capacity, including projects like PennEast.”); NJ Parties Motion to Lodge, Attachment B, 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)* (“Winter Reliability Study”).

⁴⁷ NJCF Motion to Lodge at pp. 4-5.

⁴⁸ Comments on Behalf of NJCF, et al. Submitting Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022) (“Skipping Stone Study”).

disregard it because it was not project-specific, examining the capacity REAE proposed.⁴⁹ This was both true and irrelevant, because one would only entertain the question of whether a particular proposed project (REAE) would meet a particular gas capacity need if *any capacity was needed in the first place*. However, Intervenors addressed any topics the LEI Study may not have focused upon in the Skipping Stone Study, which specifically looked at the additional, unnecessary capacity that REAE proffers. This, together with the Winter Reliability Study, provided additional data and analyses directly upending the probative value of the Levitan Report and the precedent agreements, and which ought to have prompted the Commission to grant the motion for an evidentiary hearing to assess project need. The Commission took no action on the Motion for Evidentiary Hearing.⁵⁰

E. New Jersey’s Ratepayer Advocate Responds to New Jersey LDCs’ Post Application Claims of Need and Claims of Winter Reliability Issues

On November 21, 2022, New Jersey Rate Counsel, the New Jersey body, “statutorily mandated to represent and protect the interests of utility consumers, as a class” with respect to regulated LDCs like those who hold the majority of REAE capacity, took further steps “to represent the public interest in federal proceedings pursuant to N.J.S.A. 52:27EE-55.”⁵¹

Responding to NJNG and South Jersey Resources, LLC’s claims that “there are ‘limited power generation supplies in some regions that hinder the ability to respond to extreme winter events’⁵² and the REAE Project is necessary to ‘ensure deliverability of plentiful gas supplies to New

⁴⁹ See Answer of Transcontinental Gas Pipe Line Co., LLC to New Jersey Agencies’ Motion to Intervene and Motion to Lodge, *Transcontinental Gas Pipe Line Co. LLC*, FERC Docket No. CP21-94, Accession No. 20220726-5122, pp. 1, 12 (Jul. 26, 2022).

⁵⁰ FERC flatly denied it four months later, in one scant paragraph of its REAE Order, never having even posed any additional questions regarding the record evidence demonstrating self-dealing motives for the project as well as undermining the probative value of Transco’s Levitan Report. Order at P 14.

⁵¹ Comments of New Jersey Division of Rate Counsel, FERC Docket No. CP21-94, Accession No. 20221121-5157, p. 1 (November 21, 2022) (“NJ Rate Counsel Comments”).

⁵² SJRG Letter FERC Docket No. CP21-94, Accession No. 20221109-5084, p. 1 (Nov 9, 2022).

Jersey,”⁵³ Rate Counsel plainly reiterated that “this is simply not the case.”⁵⁴ Rate Counsel warned that REAE would “impose additional unnecessary costs onto New Jersey ratepayers.”⁵⁵ Finally, this New Jersey ratepayer advocate reiterated the bottom line from New Jersey’s gas capacity analysis: “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.”⁵⁶

F. FERC Grants the REAE Project Authorization Under Section 7

Despite all of the foregoing, on January 11, 2023, FERC granted Transco an Order Issuing Certificate and Approving Abandonment, finding that, “the construction and operation of the project will provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.”⁵⁷ It did so without any data or analyses of supply diversity or system reliability failures, crediting the project proponent’s bald assertions and its Levitan Report while misrepresenting and/or misunderstanding both New Jersey’s LEI Study finding that such capacity was unnecessary and the Skipping Stone Study demonstrating that existing capacity easily meets winter peak demand – or providing an evidentiary hearing in which the project proponent’s unverified (and debunked) assertions could be tested. Moreover, its “Certificate Policy Statement Conclusion” asserts that the project being fully subscribed enables them to proclaim, “[a]ccordingly, we find that Transco has demonstrated a need for the project,”⁵⁸ and that “the public convenience and necessity requires approval of”⁵⁹ REAE.

⁵³ NJNG Letter FERC Docket No. CP21-94, Accession No. 20221109-5041, p. 1 (Nov. 9, 2022).

⁵⁴ NJ Rate Counsel Comments, p. 1.

⁵⁵ *Id.* at p. 2.

⁵⁶ NJ Rate Counsel Comments, p. 2, citing LEI Study at pp. 2, 51 (emphasis added).

⁵⁷ Order at P 34.

⁵⁸ *Id.* at P 38. This makes unclear whether the Commission rested its NGA finding on anything other than precedent agreements, or how Commission staff conducted its economic analysis or found substantial evidence showing project benefits.

⁵⁹ *Id.* at P 82.

III. Argument⁶⁰

A. FERC's grant of a certificate to REAE is arbitrary, capricious, a violation of section 7 of the Natural Gas Act, and otherwise contrary to law.

FERC predicated its Section 7 authorization on a public convenience and necessity determination that: (1) found project need based on undefined and unproven vague assertions of capacity shortfall for design days, "supply diversity," "flexibility," and generating extra capacity for interruptible load users that did not subscribe to REAE; and (2) failed to weigh these unsubstantiated project benefits against substantiated adverse impacts.⁶¹

1. FERC's grant of a certificate to REAE was not supported by substantial evidence and is not the product of reasoned decision-making, and FERC failed to properly engage with or analyze the significant evidence of a lack of need or benefits of the proposed Project.

Despite data and analyses from independent experts demonstrating there is no need for this Project's proposed new gas capacity, as well as probative evidence that the project is driven by self-dealing, the Commission once again buried its head in the sand.⁶² Thus, once again, we are compelled to remind the Commission that **private contracts are not a proxy for public need**. Just because Transco wants to earn a significant ROE for building gas infrastructure, and LDCs want to enrich their shareholders by obtaining capacity to be paid for by their ratepayers and then offloading excess capacity by means of off-system sales and capacity release, does not mean that this project serves the public interest or meets Section 7's legal standard. The Commission is utterly failing its mandate of only certifying fossil gas infrastructure required to serve the public;⁶³ and it is both hamstringing states that do the difficult and resource-intensive

⁶⁰ In Part III, we provide a more robust explanation of each issue we raise on rehearing, with each subsection corresponding to the concise statement provided in Part I.

⁶¹ Order at P 31, 34.

⁶² See *Env't Def. Fund v. FERC* at 975 (finding that, "FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement").

⁶³ 15 U.S.C. 717f(e).

work of analyzing whether or not such infrastructure is needed to serve load, plus riding roughshod over state orders governing utilities in the process. So much for asking state public utility commissions to weigh into FERC proceedings.⁶⁴

Specifically, the Commission: (a) failed to properly weigh and consequently misapprehended the import of NJBPU's LEI Study, noting that it was relevant "*only for* the 56% of project capacity subscribed by New Jersey LDCs," when in fact 73.5% of subscribed capacity is designed for New Jersey load;⁶⁵ (b) wrongfully discredited independent studies by noting that they excluded design day and other demand (like electric generation) when this was patently untrue;⁶⁶ (c) ignored data on available stranded capacity available (and used by or delivered to markets of) subscribers;⁶⁷ (d) erroneously accepted Transco's and NJNG's self-serving and unsubstantiated assumptions regarding design day, 1 in 90 events, outage scenarios, delivered-service peaking resources, and others, without testing them or eliciting additional data;⁶⁸ (e) continually failed to test evidence veracity despite plausible evidence of

⁶⁴ See Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,107, PP 55-58, 70 (2022), amended from final to draft by Order on Draft Policy Statements, 178 FERC ¶ 61,197 (Mar. 24, 2022) ("Updated Certificate Policy Statement") (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 will be particularly useful.").

⁶⁵ Order at P 28 (emphasis added) (ignoring the 17.1% REAE capacity held by marketers and designated for New Jersey markets, comprising 10.3% and 6.8% of total capacity held by Williams and South Jersey Resources, respectively. See n. 43 *supra*).

⁶⁶ Order at P 33.

⁶⁷ Order at P 32. This same mistake forms the root of FERC's NEPA violation, in which its EIS fails to consider the existence of stranded capacity—*which capacity was used to serve NJ load based upon actual flows to NJ locations*. The record contains analysis demonstrating this, which was predicated on pipeline postings of *actually scheduled flow*. In particular, the Skipping Stone Study used actual winter of 2018-2019 flows to NJ, which, at peak, were over 7.2 Bcfd. Skipping Stone Study at pp. 18-19. This evidence of *existing and used* stranded capacity is irrefutable evidence that FERC should have seriously considered a no action alternative, in addition to any other meaningful other no action analysis. See Part III(B)(2), *infra*.

⁶⁸ Order at P 29, 34.

self-dealing undermining any probative value of project proponent claims; (f) dismissed controlling New Jersey law governing REAE-subscribed LDCs;⁶⁹ and (g) compounded these errors by denying Intervenors' motion for an evidentiary hearing on Project need when significant questions regarding the veracity of Applicant's assertions and evidence purporting to support need were unable to be appropriately addressed on the written record.

a) FERC improperly discounted the NJBPU independent study's relevance by understating New Jersey's portion of the gas capacity.

Having mischaracterized NJBPU's data driven analysis as relevant "only" for 56%⁷⁰ of project capacity, the Commission then readily disregards its importance. In stating the analysis only applies to 56% of REAE's capacity, FERC factors in only the percentage of REAE's capacity held by New Jersey LDCs and ignores the 10.3% and 6.8% of REAE's total capacity designated for New Jersey markets that is subscribed by Williams and South Jersey Resources, respectively. As Commissioner Clements noted, "the bulk of the marketers' business is in New Jersey. If the New Jersey-related capacity were taken out of the equation, I doubt we could find that Transco had met its burden of establishing the REAE project is needed."⁷¹

⁶⁹ NJ BPU, *Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs* (Docket Nos. QO19010040, QO19060748, and QO17091004) (June 10, 2020); LEI Study at 48 (summarizing controlling NJBPU demand reduction mandates); N.J.S.A. 48:2-23.

⁷⁰ Order at P 28 ("We note that the NJ Agencies Study is relevant only for the 56% of project capacity subscribed by New Jersey LDCs, and is not reflective of the shipper need for the remaining 44% of the project capacity.").

⁷¹ Order (Clements, Comm'r, concurring at n.9) (internal citations omitted).

And that point is well-taken. According to FERC itself,⁷² *in fact, 73.5% of REAE's total subscribed capacity is purportedly for New Jersey:*

	Total Capacity on REAE	Dth/d Capacity on REAE Going to NJ	Percentage of Total REAE Capacity Designated for NJ Markets
New Jersey LDCs	468,000	468,000	56.4%
Williams	150,000	85,500	10.3%
South Jersey Resources	71,400	56,406	6.8%
REAE Total	829,400	609,906	73.5%

This is critically important to recognize, because, in conjunction with FERC's other factual errors, such as reporting that the Skipping Stone Study did not include all New Jersey load (it did), it reveals that FERC's errors related to not just half (which is enough by itself to disrupt any finding of need), but almost three-quarters of purported project purpose.

When FERC considers the matter on rehearing, it should take a fresh look at the Skipping Stone Study in light of the Commission errors in examining that evidence the first time around (set out in detail, *infra*). Commissioner Clements' concern that "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 Board of Public Utilities (NJ BPU) that no additional pipeline capacity is needed in New Jersey"⁷³ is also well-founded. FERC arbitrarily and capriciously discounted and misinterpreted the independent, state-sponsored study from *where over 73% of the gas is set to flow*.⁷⁴

⁷² Order at PP 7-8 (providing chart listing respective shippers, and capacity designation).

⁷³ Order (Clements, Comm'r, concurring at P 4).

⁷⁴ See *Env't Def. Fund v. FERC* at 972; 5 U.S.C. § 706(2)(A).

b) Compounding this initial error, FERC’s failure to properly consider the predicate and scope of the Skipping Stone Study and other data showing REAE is not needed renders its decision legally infirm.

The Commission credits Transco’s Levitan Report and, in turn, discounts the probative value of the Skipping Stone Study because of FERC’s erroneous determination that Levitan “more accurately reflects overall future demand for natural gas in the study area than a study focused only on LDC demand.”⁷⁵ If this were a correct presentation of record evidence, it could provide a valid distinction between the probative value of the reports. But it is demonstrably wrong. The Skipping Stone Study did not focus only on LDC demand. Thus while the Commission is correct on a shortcoming of the Levitan Report – that it failed to account for existing, used, firm capacity – FERC misread the Skipping Stone Study. For example, FERC incorrectly read the Skipping Stone Study as not taking into account demand from electric generators and industrials, as well as incorrectly found that the Study did not examine supply options during times of system constraint⁷⁶—both of which are simply incorrect readings of the Study and its analyses. First, the Skipping Stone Study plotted load duration curves for New Jersey deliveries “*to all load types (i.e., including Power generators and interruptible loads)*”⁷⁷ against contracted capacities available to New Jersey locations. (This analysis excluded on-system liquefied natural gas (“LNG”) and propane supplies,

⁷⁵ Order at P 27 (emphasizing that this distinction “is important,” and therefore outweighs the Levitan Report’s limitation of failing to account for firm capacity actually available and being used by New Jersey LDCs). The Commission put a great deal of weight on this as a basis to credit the Levitan Report and discredit independent studies in the record. *See* Order at P 31 (resting dismissal of the LEI Study on its omission of interruptible generator and industrial demand). But as set out in detail in Part III(A)(1)(d), *infra*, if one were to increase New Jersey LDCs’ projected design days by this 3% of interruptible load, in 2032-33, by Skipping Stone’s conservatively escalated year over year design day growth, this 3% would add 155.8 MMDth to its 5,193 MMDth single day projection, which still leaves over 1,800 MMDth of existing stranded and merchant in-path capacity unused after meeting such project design day plus interruptible NJ LDC demand.

⁷⁶ *See* Order at P 33.

⁷⁷ Skipping Stone Study at p. 16.

which would have reflected *additional* supply, if included.) On the following page, Skipping Stone emphasized this point, noting that “a second key observation is that” its analysis represented:

all load demands in New Jersey, not just Firm LDC 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 LDCs are comprised of interruptible loads, such as those of most power generators. Thus, those loads are currently being met, with a large supply of available capacity *without Transco’s proposed REAE*.⁷⁸

So contrary to FERC’s findings that the Study focused only on LDC demand, the Skipping Stone Study reflects *all* New Jersey demand in its load duration curves for Winter 2018-19 through 2021-22, plotting it against all available firm gas delivery capacity available to New Jersey homes and businesses.

Moreover, the Commission found the Skipping Stone Study “unhelpful in determining project need,” asserting that it “ignored ‘design day’ planning principles.”⁷⁹ Again, this is patently false. Skipping Stone *began* with “New Jersey LDCs’ currently projected 2024-’25 Design Day figures and escalate[d] such amounts by an annual 1.2% growth rate,”⁸⁰ not only using LDCs’ *own* design day figures but also conservatively escalating them by an annual growth rate that *exceeded* the one from Transco’s Levitan Report *by 15%*.⁸¹ In doing so, it also conservatively excluded New Jersey’s Board Order governing these LDCs, which would preclude Skipping Stone’s estimated escalation from materializing.⁸²

⁷⁸ *Id.* at p. 17 (internal cross-reference omitted) (emphasis in original). *See id.* at p. 18 (“delivered capacity greatly exceed[s] even the less than 2% load duration factor of *total deliveries to all loads*”) (emphasis added).

⁷⁹ Order at P 33.

⁸⁰ Skipping Stone Study at p. 18.

⁸¹ *Id.* at n. 11.

⁸² *Id.* at pp. 18-19.

Finally, FERC's Order entirely neglected to address the Winter Reliability Study, lodged by Intervenor NJCF.⁸³ This study provided data and analysis showing why PennEast was not needed to meet peak winter demand, not even for a single day, even during extreme weather events, and serves as a model of what kind of study provides substantial evidence underpinning a reliability analysis - as opposed to vague assertions.⁸⁴ Thus the bases on which FERC purportedly found that the independent expert reports (at least the ones it mentioned) were of less probative value than the project proponent's are controverted by the record, and FERC's failure to properly consider or analyze these studies that offer clear evidence of a lack of need constitutes reversible error, as there is not sufficient evidence to demonstrate that this Project "is or will be required by the present or future public convenience and necessity."⁸⁵

c) Significant amounts of stranded capacity are available and FERC's failure to engage with this capacity's availability and current usage makes its finding of need fatally flawed.

In its Order, FERC completely failed to address the stranded capacity issues raised in the Skipping Stone Study by Intervenor—namely, that in reality New Jersey LDCs currently use stranded capacity and do "rely on it."⁸⁶ FERC arbitrarily dismissed and failed to engage with the Skipping Stone stranded capacity findings, based on the unrelated notion that "if the downstream firm capacity customers exercise their rights to the capacity, then New Jersey LDCs will not be able to rely on it."⁸⁷ FERC misses the point, because any such rights exercised would be drawn from the In Path LSE Capacity reflected in Table 10 of the

⁸³ NJCF Motion to Lodge, Attachment B.

⁸⁴ *Id.*

⁸⁵ *See Env't Def. Fund v. FERC* at 972 (citing 15 U.S.C. § 717f(e)).

⁸⁶ Order at P 32 (arbitrarily dismissing the Skipping Stone Study's stranded capacity arguments).

⁸⁷ *Id.*

Skipping Stone Study, *leaving the stranded capacity untouched and available.*⁸⁸

Theoretically, if the downstream shippers decided to forgo nominating their primary capacity, and instead, took capacity from shippers holding stranded capacity on a secondary basis, then the downstream shippers' primary capacity would be readily available to New Jersey markets on a secondary basis. The In Path LSE capacity available to New Jersey is 3,060,033 Dth/d, and any downstream firm capacity customers exercising their rights to that basket of available capacity would have zero impact on New Jersey LDCs' ability to use the 3,723,543 Dth/d of Direct Capacity, 893,140 Dth/d of Stranded Capacity, and 2,111,837 Dth/d of In-Path Merchant Capacity, *totalling 6,728,520⁸⁹ Dth/d (~6.7 Bcfd)* of capacity available to New Jersey, and not subject to downstream firm exercise.⁹⁰

Moreover, this 6.7 Bcfd of direct, stranded, and merchant in-path capacity is greater than conservatively estimated 2032-2033 Design Day demand of 5.18 Bcfd. This 6.7 Bcfd of available capacity leaves ~1.5 Bcfd available, on a design day, in winter 2032-2033 for non-firm loads. The point of presenting the category of LSE In-path capacity held by Downstream customers in the Report was to show that at least some of this capacity had to have been utilized in winter 2018-2019 given the magnitude of the peak day deliveries to New Jersey in that winter. For FERC to assert that the full utilization of the LSE In-Path capacity – (i.e., the capacity of 3,060,033 Dth/d) would impact the 1.5 Bcfd of existing capacity in excess of 2032-2033 NJ LDC design day *is either mistaken or arbitrary*. One (i.e., LSE in-path capacity) has nothing to do with the other (i.e., direct, stranded and merchant in-path capacity).

⁸⁸ Skipping Stone Study at p. 12, Table 10.

⁸⁹ The Skipping Stone Study stated the aggregated available capacity to be 6,728,519 Dth/d. *Id.* This figure undercounted available aggregated by 1 Dth/d.

⁹⁰ Skipping Stone Study at p. 12, Table 10.

In fact, Intervenors did not ask the Commission to consider *hypothetically* available capacity to meet over 73% of purported project “need.” Rather, Intervenors submitted an expert report based on data culled from pipeline postings of *actual*, scheduled gas flow.⁹¹ The Skipping Stone Study detailed *how much capacity was used to serve NJ load based upon actual flows to New Jersey locations*. In particular, the Skipping Stone Study used actual winter 2018-2019 flows to New Jersey, which, at peak, were over 7.2 Bcfd.⁹² This represents incontrovertible evidence of *existing* stranded capacity that was not just hypothetically available, but actually *used* by (or to markets of) the same LDC shippers (like NJNG) who are now asserting that people will go cold in the winter because they need more gas capacity.⁹³ And it is not a small amount. The existing capacity that is stranded (893,140 Dth/d)⁹⁴ and available to serve New Jersey load *today*, with not a single infrastructure upgrade or modification, is 63,740 Dth/d more than the entire REAE Project, and 283,234 Dth/d more than the 73.5% of the Project size to serve New Jersey loads.

Moreover, the 7,260 MMDth/d (approximately 7.2 Bcfd) of used capacity is more than 2,070,000 Dth/d *greater* than all New Jersey LDCs’ design day need based *on their own*

⁹¹ *Id.* at p. 18-19.

⁹² Skipping Stone Study at pp. 18-19.

⁹³ Supplementary Comments in Support of NJNG, FERC Docket CP21-94, Accession No. 20220726-5056, p. 3 (July 25, 2022) (relying on a “catastrophic” outage scenario to assert that REAE is needed to keep residential customers warm in the winter). This scenario was debunked in Skipping Stone’s Analysis of the Southern Reliability Link as a Response to Single Point of Failure Concern, which is part of the record in this proceeding. Motion to Lodge of NJCF, Attachment A, Exhibit B, Skipping Stone Analysis of the Southern Reliability Link as a Response to Single Point of Failure Concern, p. 6. *See infra*, at Part III(A)(1)(d). Moreover, NJNG already has access to delivered supply on multiple pipelines.

⁹⁴ Skipping Stone Study at p. 12.

design day figures,⁹⁵ *conservatively*⁹⁶ escalating those current (i.e., 2024-2025) design day figures by an annual 1.2% growth rate – and even *excluding* controlling law in the form of the NJBPU Board Order governing those utilities, which mandates they reduce demand by 1.10% by 2026.⁹⁷ Nowhere in FERC’s Order does it acknowledge this stranded, available and used capacity that is substantiated in the record,⁹⁸ much less grapple with how this capacity provides substantial evidence that the purported need for REAE could be nothing more than profiteering.⁹⁹ This is plain error.¹⁰⁰

d) Relying on bald LDC assertions about supply reliability during design days and gas availability for their unsubscribed friends as supporting approval of this Project violates the NGA and APA.

Resting its Order on generalized assertions of project benefits composed of “supply diversity,” reliability,¹⁰¹ and having extra gas capacity that someone might want for electric generation,¹⁰² FERC failed to point to a *single* piece of record evidence indicating supporting these undefined benefits. While completely duplicating a pipeline network would provide maximum reliability or redundancy, nobody would argue that we should do so. Here, predicating pipeline approval on ‘supply diversity,’ ‘flexibility’ or ‘reliability’ without record evidence showing *how* this project would increase supply diversity and flexibility, or improve reliability, or demonstrating that if the project would, in fact, yield those results, that this

⁹⁵ Design day figures were taken from New Jersey LDCs’ Basic Gas Supply Service (“BGSS”) filings, except for NJNG, which neglected to publicly file its working paper. NJNG’s design day figures were instead taken from the Levitan Report. Skipping Stone Study at p. 18, n.10.

⁹⁶ Skipping Stone’s modeled annual growth rate for demand exceeded the 1.02% annual growth rate used by the Levitan Report by 15%. Skipping Stone Study at p. 18, n.11.

⁹⁷ *Id.*, Chart 1, p. 16 and Chart 2, p. 19.

⁹⁸ *Id.*

⁹⁹ *See infra* Part III(A)(1)(e) (discussing evidence of self-dealing).

¹⁰⁰ *Env’t Def. Fund v. FERC* at 968.

¹⁰¹ Order at P 25 (“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.”)

¹⁰² *Id.* at P 31.

“benefit” would be greater than continuing to access delivered supply as shippers and others are currently doing on an as delivered basis. In fact, the Commission does not quantify or value such assertions of “supply diversity” or “flexibility;” it merely restates them as “indeed the project’s purpose is to diversify fuel supply access.”¹⁰³

Supply diversity can either provide *geographic* or *economic* benefits. Here, the record contains no data or analysis substantiating the former, and the only data or analysis regarding the latter were provided by the Skipping Stone Study, which showed the unit cost of using REAE *capacity* to meet a demand level without any reliance on Load Serving Entity capacity passing through NJ would be an exorbitant¹⁰⁴ “\$63.49” *per Dth, not including gas cost.*¹⁰⁵ The Commission failed to elicit any data or analysis regarding alternative delivered supply currently being used, so that it could rest its decision on substantial evidence, as required by the Gas Act, rather than these vague assertions of cost benefits.¹⁰⁶

Moreover, just because profiteering New Jersey jurisdictional utilities “state that the REAE project is needed to ensure supply during a ‘design day’ to gas heating loads in the

¹⁰³ *Id.* at P 68.

¹⁰⁴ See Skipping Stone Study at p. 17 (presenting analysis demonstrating how to model the per Dth used cost of capacity, based on conservative assumptions regarding days used, drawn from 2018-19 figures).

¹⁰⁵ Compare *id.* at p. 17 (providing a model to compare cost to “firm-up” demand) with Order at P 35 (“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). Commissioner Danly reiterates these 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. . . .” Order (Danly, Comm’r, dissenting, at P 5).

¹⁰⁶ Certificate Policy Statement at 61748 (“If one of the benefits of a proposed project would be to lower gas or electric rates for consumers, then the Applicant's market study would need to explain the basis for that projection. ***Vague assertions of public benefits will not be sufficient.***”) (emphasis added). Finding that FERC ran afoul of this very provision, the D.C. Circuit vacated its certification partially predicated thereon for the Spire pipeline. See *Env't Def. Fund v. FERC* at 962, citing Certificate Policy Statement.

multi-state area, and potentially to generators what would provide power for electric heating loads in the same area,”¹⁰⁷ does not mean that there is *sufficient* record evidence supporting these statements, let alone *substantial* evidence. Quite the opposite is true here. First, the record is rife with evidence that during design days there is more gas capacity than needed to serve these markets, even if one *were* to consider non-subscribers’ needs as valid to support this project authorization.¹⁰⁸

Second, FERC here appears to be determining that the REAE LDCs should take account of interruptible loads, despite their controlling state laws that determine interruptible is interruptible. FERC is simply wrong. NJBPU’s study does not assume that Third Party natural gas suppliers are interruptible load.¹⁰⁹ Even if one were to increase New Jersey LDCs’ projected design days by this 3% of interruptible load, in 2032-33, by Skipping Stone’s conservatively escalated year over year design day growth,¹¹⁰ this 3% would add 155.8 MMDth to its 5,193 MMDth single day projection, which still leaves over 1,800 MMDth of existing stranded and merchant in-path capacity unused after meeting such project design day plus interruptible NJ LDC demand. It therefore does not provide a basis for discrediting or discounting the study’s findings.

Having ignored (in some places) and misrepresented or misunderstood (in other instances) record data showing that demand and design day forecasts are readily met without

¹⁰⁷ Order at P 31.

¹⁰⁸ Skipping Stone Study, p. 19, Chart 2 (showing all demand, including electric generation).

¹⁰⁹ *Compare* Order at P 31 citing LEI Study at pp. 28-30 (incorrectly stating that the the LEI Study “focused on firm demand and thus omits from its analysis interruptible natural gas generator and industrial demand”), *with* LEI Study at 28-30, which has a table breaking down the total demand for each LDC averaged across five peak days for three winters (2017-2020), listing the portion of the demand attributable to interruptible customers: “[o]n average, interruptible customers accounted for around 3% of demand served by GDCs, a small share of the customer base.” LEI Study at 29.

¹¹⁰ *See supra* at Part III(A)(1)(b) (discussing FERC’s failure to properly consider the predicate and scope of the Skipping Stone Study).

REAE capacity, FERC then appears to unquestioningly rely on statements from the project proponent (Transco, who profits by building whether the project serves public need or not) and project shippers (who profit from offloading excess capacity during system constraint while ratepayers shoulder costs for capacity they will not require the use of). In doing so, FERC did not develop a record with sufficient evidence supporting its determination, much less substantial evidence as required by the Gas Act.¹¹¹ It failed to elicit tariff provisions supporting assertions of reduced impact from the only potential basis for need – an extreme outage scenario that happens during a one-in-ninety event, on a design day. It likewise did not test any outage scenario to determine whether existing supply and/or capacity (either delivered, contracted in advance, or on-system peaking) would still be available to meet demand without REAE capacity. New Jersey LDCs have tried this same ruse before NJBPU.¹¹² But there, with significant expenditure of expert time and resources, it came to light that LDC assertions of failure scenarios along TETCO, for example, would not result in *any* supply loss to firm shippers.¹¹³ Skipping Stone Analysis of the Southern Reliability Link as a Response to Single Point of Failure Concern actually analyzed such a failure scenario and found:

In the event of a complete failure at any point along the TETCO mainline, Skipping Stone's analysis showed that NJNG would still be able to receive between 96% and 100% of its contracted supplies because of the high level of reliability that already exists in the TETCO supply system due to its bidirectional flow characteristics near the NJNG interconnect with TETCO. Analysis of the worst-case failure of the TETCO mainline, the complete loss of one TETCO pipeline to the southwest of its connection to NJNG's network, found that re-routing supplies and taking advantage of underutilized capacity would replace all disrupted capacity. With the loss

¹¹¹ 15 U.S.C. 717r(b).

¹¹² *See, e.g.*, Motion to Lodge of NJCF, Attachment A, Comments of EDF, NJCF, and Sabin at pp. 9-10 (reviewing and debunking NJNG's and PSE&G's attempts to use TETCO failure scenarios as justification for building new pipeline capacity).

¹¹³ *Id.*

of a pipeline, NJNG would continue to receive 96% of its contracted amount on TETCO. In addition, underutilized capacity on the Transco system could supply at least 0.138 Bcf/d of additional capacity to NJNG, an amount far in excess of the 0.023 Bcf/d lost by the failure. The BPU's findings regarding NJNG's available capacity on Transco supports this conclusion.¹¹⁴

FERC skipped this type of process, rather choosing to credit interested parties' assessments over independent studies without holding an evidentiary hearing.

Likewise, FERC credited NJNG's unsupported and self-serving assertions that, despite historically contracting for an average of 200,000 Dth/d of off-system delivered gas peaking resources, NJNG now projects to use zero.¹¹⁵ FERC failed to elicit any rationale supporting this new projection, which the record demonstrates marks a significant departure from NJNG's past practice, or test its veracity, much less require Transco to have NJNG to delineate why it was not a simply self-serving assertion based upon NJNG's subscription to REAE (with resulting ability to profiteer from offloading capacity unneeded to serve native load). Nevertheless, given the substantial evidence in the record demonstrating that off-system delivered gas peaking resources are more economic, available, and being used, FERC's decision to rest on bald shipper assertions that are both inconsistent with past practice and also controverted by data and analyses is the very definition of arbitrary and capricious decision making.¹¹⁶

e) FERC's Order failed to probe record evidence indicating self-dealing.

Self-dealing comes in many flavors, some immediately recognizable and some more subtle. PennEast, for example, was driven by self-dealing primarily amongst affiliated

¹¹⁴ Motion to Lodge of NJCF, Attachment A, Exhibit B, Skipping Stone Analysis of the Southern Reliability Link as a Response to Single Point of Failure Concern, p. 6. *See* n. 91, *supra*.

¹¹⁵ Order at P 29.

¹¹⁶ *See Env't Def. Fund v. FERC* at 968.

shippers and project owners, without public need.¹¹⁷ In the case of Spire, the D.C. Circuit found on the FERC record of “plausible evidence of self-dealing,” including, as here, that the pipeline was not intended to serve new demand.¹¹⁸ The court found that because FERC did not engage with this evidence, the Commission’s decision making was not reasoned and its action in approving the pipeline was arbitrary and capricious.¹¹⁹ While the legerdemain in REAE is a bit more nuanced, it was clearly raised in the record, including: (1) internal LDC self-dealing, enriching shareholders at ratepayers’ expense; and (2) affiliate transactions picking up subscription slack.¹²⁰ In such an instance, where there is evidence of self-dealing on the record calling into question the need for a project, FERC should have taken steps to sufficiently evaluate the evidence before it to reach a reasoned and principled decision and ensure that consumers are protected,¹²¹ as doing so is a core part of FERC’s mandate.¹²² What is missing from FERC’s Order and its conclusory findings is a fact-based demonstration of genuine public need or any modicum of serving the public interest. Rather, with REAE, FERC appears to have arrived at a point where it considers the applicant simply saying: (1) we (and the shippers) would like extra gas for our (and their) friends who have not subscribed for it; and (2) having that extra gas capacity will increase reliability by improving undefined

¹¹⁷ See, e.g., Board Order at p. 11.

¹¹⁸ See *Env’t Def. Fund v. FERC* at 975.

¹¹⁹ *Id.* at 976.

¹²⁰ See NJCF et al.’s Motion for Evidentiary Hearing, FERC Docket No. CP21-94, Accession No. 20220906-5099, p. 3 (Sept. 6, 2022); Skipping Stone Study at pp. 19-20 (delving into the “significant questions with respect to the interaction between state-level LDC business operations and incentives that may accompany pipeline expansion proposals, which raise red flags undermining the probative value of the REAE precedent agreements.”) As in *Env’t Def. Fund*, when there is no evidence showing need, and self-dealing provides a plausible motivation driving the project, FERC must grapple with that.

¹²¹ See *Env’t Def. Fund* at 964.

¹²² *City of Clarksville* at 479 (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669-670 (1976) (“*NAACP*”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944) (“*Hope*”) (a “principal aim” of the NGA was to “protect[ing] consumers against exploitation at the hands of natural gas companies”) (internal quotation marks omitted)).

and unsubstantiated “flexibility” and “supply diversity,”¹²³ to be sufficient grounds for project approval.

The Commission abdicated its Gas Act duties by simply adopting this self-serving, shallow and vague definition of project need, and it completely failed to even respond to Intervenors’ motion for an evidentiary hearing to test data and analyses underlying Transco’s vague assertions for over 4 months, until summarily denying it in its Order. And only in its final Order does it rest on the above-listed unsubstantiated grounds. Nor did the Commission seek to elicit any data or evidence to ensure that “flexibility” or “supply diversity” were anything other than undefined, vague assertions, much less predicates supported by substantial evidence, in the face of allegations of self-dealing and mounting, credible evidence contradicting Transco’s assertions on the record.¹²⁴

In light of these Commission errors with respect to investigating how REAE provides unneeded capacity given the documented availability of existing excess capacity to serve New Jersey, it is perhaps unsurprising that FERC also failed to engage with record evidence demonstrating why REAE’s subscribers would sign contracts for this unneeded capacity. As

¹²³ The assertions that this project has “potential beneficial impacts on air quality by virtue of the fact that natural gas is a clean burning fuel in comparison to other fossil fuels,” REAE Application at p. 21, or that it is beneficial because the project “is adaptable to both green hydrogen and RNG blending, thereby providing the necessary and critical infrastructure needed to meet clean energy demand for generations to come,” *id.*, are beyond the pale. As there is no data or analysis supporting these assertions, and because the Order did not address or rest on these as alleged “clean energy” justifications supporting its Section 7 finding, we will not address them beyond noting that the foundation of the Order’s Section 7 conclusion on need had no greater support than these alleged “clean energy” assertions in the record.

¹²⁴ See Comment on Behalf of New Jersey Conservation Foundation et al., Submitting Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220909-5000, p. 2 (Sep. 9, 2022) (“The load duration curves reveal that if the project were put in service, it would serve as mere excess capacity that would only serve to benefit LDCs and hurt NJ ratepayers. Because the project wouldn’t serve any unmet ratepayer demand, LDCs can sell that excess capacity and reap the economic benefits while ratepayers are left to pay for the unneeded subscribed capacity.”); Skipping Stone Study at 19-20.

described above and in the record in the Skipping Stone Study, REAE’s self-dealing arises out of LDCs subscribing to capacity in excess of firm market need, because they can use that excess capacity to make off-system sales and/or capacity releases benefiting those subscribers’ shareholders, while the cost of such excess is paid for by the subscribers’ ratepayers.¹²⁵ FERC’s Order does not even acknowledge this record allegation of LDCs profiteering on ratepayers’ backs, much less meaningfully engage with it as a factor undermining the probative value of Transco’s Levitan Report.¹²⁶ This type of subscription accounts for the majority of REAE’s subscribed capacity, with Transco’s marketer-affiliate, Williams, holding an additional 18.1%. In all, 73.5% of REAE’s capacity purports to serve New Jersey – and New Jersey *does not need it*.¹²⁷

The Gas Act requires FERC to protect consumers against corporate abuse,¹²⁸ and to encourage the orderly development of gas infrastructure.¹²⁹ Here, where there is significant evidence undermining the probative value of Transco’s assertions of project need and

¹²⁵ See Comment on Behalf of New Jersey Conservation Foundation et al., Submitting Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20220909-5000, p.2 (Sep. 9, 2022) (“The load duration curves reveal that if the project were put in service, it would serve as mere excess capacity that would only serve to benefit New Jersey LDCs and hurt NJ ratepayers. Because the project wouldn’t serve any unmet ratepayer demand, LDCs can sell that excess capacity and reap the economic benefits while ratepayers are left to pay for the unneeded subscribed capacity.”); Skipping Stone Study at pp. 3-4.

¹²⁶ See *Env’t Def. Fund v. FERC* at 975 (finding FERC’s decision making arbitrary and capricious where it failed to engage with “plausible evidence of self-dealing. This evidence includes 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 Certificate Policy Statement at 61,747 (“[r]ather 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.”).

¹²⁷ See NJ Rate Counsel Comments at pp. 1-2.

¹²⁸ See *City of Clarksville* at 479 (citing *NAACP* at 669-670 and *Hope* at 610).

¹²⁹ See *NAACP* at 669-70; accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015).

showing self-dealing project purposes, FERC failed to take steps to ensure that customers are protected. Overbuilding is anything but orderly;¹³⁰ and relying on private contracts that enrich shareholders while ratepayers alone bear their costs is not protection against corporate abuse.¹³¹ Parties who do *not* stand to profit from REAE have submitted extensive evidence into the record of this proceeding demonstrating that the project does not serve a public need, including data and analyses entered by NJBPU, the jurisdictional regulator of REAE's shipper-LDCs—and the regulatory body responsible for ensuring that those LDCs provide safe and reliable service to New Jersey residents. Indeed, not only has FERC failed its own mandate to protect against corporate abuse and protect the public interest, but in doing so, it also ignored New Jersey Rate Counsel's attempt to do just that, failing to appropriately weigh its submissions showing that REAE is not needed and would harm New Jersey ratepayers. Given that, FERC's ostrich-like¹³² REAE approval in the face of record evidence detailing the impetus for this Project that is not designed to meet unmet firm demand, serve firm load growth, or provide some other public benefit, is the very definition of arbitrary and capricious decision making.¹³³

¹³⁰ Updated Certificate Policy Statement at P 69 (“Ensuring the orderly development of natural gas supplies includes preventing overbuilding.”).

¹³¹ 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 (2017) (Bay, Comm'r, concurring at p. 3).

¹³² *Env't Def. Fund v. FERC* at 975.

¹³³ *Id.* at 968.

- f) New Jersey’s REAE-subscribed LDCs are subject to New Jersey laws requiring them to provide safe and reliable service, and requiring demand reduction, not, as FERC’s dismissive characterization suggests, just policies and suggestions of considering irrelevant non-pipeline alternatives (“NPAs”).**

Having misread the evidentiary record with respect to Skipping Stone’s Study and New Jersey’s LEI Study, FERC makes the statement that “there is no requirement under New Jersey law that LDCs adopt non-pipeline alternatives” so that “the record does not support the conclusion that sufficient non-pipeline alternatives will necessarily be in place to eliminate the need for REAE,”¹³⁴ and proceeds to characterize the LEI Study as “relying . . . on the achievement of future actions on energy efficiency and non-pipeline alternatives.”¹³⁵ Substantial record evidence shows that FERC’s focus on NPAs and whether they are legally mandated is nothing more than a strawman. First, FERC mischaracterizes renewable natural gas (RNG) and hydrogen as NPAs. They are not.¹³⁶ NPAs include energy efficiency improvements, electrification, LDC-based supplemental LNG, and compressed natural gas peak shaving.¹³⁷ In addition, continued New Jersey LDC purchasing of peak period delivered gas service from merchants holding existing firm capacity – which LDCs do today – addresses any residual peak period LDC demand without building additional year-round capacity.¹³⁸

¹³⁴ Order at P 31. Notably, the Commission then proceeds to describe renewable natural gas and green hydrogen as non-pipeline alternatives, which is both wrong and irrelevant, as any questions of needing actual NPAs could only even arise in a design day with a 1 in 90 event – not, as the Commission states for “meeting peak-day demand.” *Id.*

¹³⁵ Order at P 34.

¹³⁶ At least in the sense that Transco in passing asserts that its proposed new pipeline can someday carry RNG or hydrogen. RNG and green hydrogen could be considered supply-side NPAs if they can be injected into the existing pipeline system to meet customer demand. LEI Study at p. 13.

¹³⁷ LEI Study at p. 56-57.

¹³⁸ Skipping Stone Study at pp. 16-17.

Further, during any potential “perfect storm” scenario, in which during the one to three days of peak, there was simultaneously an emergency reduction in delivered supply from a pipeline outage, there are existing, economic ways to protect against even such a low likelihood, high risk event. For example, LDCs could construct increased vaporization at an on-system LNG facility; or could contract in advance for additional delivered supply accessing currently available capacity on pipeline “X” on a delivered basis in the event of a failure on pipeline “Y” (and vice-versa), at the cost of a simple reservation charge(s). If the LDC 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 REAE.

LDCs are required to provide safe and reliable service¹³⁹—they do not need a Board Order specifying that they deploy NPAs for such unlikely emergencies, because they are already legally obligated to plan for how to serve firm load during such times.¹⁴⁰ Asserting that its subscription to new interstate gas pipeline capacity is needed for this planning purpose (when the record demonstrates such capacity would be additive to an existing significant surplus available with zero system modifications) does not pass the straight face test. Finally, REAE-subscribed LDCs are legally required to reduce demand by 1.10% by

¹³⁹ N.J.S.A. 48:2-23.

¹⁴⁰ Under N.J.S.A. 48:2-23, they are required to provide such 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.” As detailed at Part III(A)(3), *infra*, FERC’s authorization of REAE would lock those LDCs (over their jurisdictional regulator’s objection) into a FERC-tariffed project that would alone increase New Jersey GHG emissions by almost 12%.

2026,¹⁴¹ and the significant delta between available firm capacity and customer demand will only increase year over year.¹⁴²

g) FERC’s denial of Intervenor’s Motion for an Evidentiary Hearing obviated its ability to discern the errors set out above prior to issuing its Order.

As Commissioner Clements realized, “by denying an evidentiary hearing and relying only on the paper record, we have left important questions unanswered.”¹⁴³ As delineated above, not only have questions regarding self-dealing been left untouched, but also clear errors and misrepresentations laced through FERC’s Order belie any suggestion that the Commission meaningfully engaged with evidence undermining the project proponent’s assertions and limitations of the belated market study submitted to bolster them. Perhaps because FERC failed to engage with the Skipping Stone Study, and misconstrued LEI’s inquiry, it asked no additional questions of Transco, nor attempted to reconcile the very different conclusions those analyses reached. This is precisely what an evidentiary hearing is for: testing the veracity and validity of data and analyses. It is not too late for the Commission to give itself the opportunity to adhere to the Gas Act’s Section 7 requirement of only certifying projects required by the public convenience and necessity, and which serve the public interest. On rehearing, the Commission should revisit its eleventh-hour denial of Intervenor’s

¹⁴¹ NJ BPU, *Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs*, p. 16 (Docket Nos. QO19010040, QO19060748, and QO17091004) (June 10, 2020); LEI Study at 48 (summarizing controlling NJBPU demand reduction mandates).

¹⁴² Additionally, “the natural gas reductions in the New Jersey Energy Master Plan would result in a *decrease* in natural gas demand of 2.4% per year from 2020 to 2030.” NJ Rate Counsel Comments, p. 2 (emphasis in original).

¹⁴³ Order (Clements, Comm’r, concurring, P 3).

motion for an evidentiary hearing,¹⁴⁴ and hear expert testimony on the salient question of project need.

2. FERC’s Order is arbitrary, capricious, and not the product of reasoned decision-making because it failed to adequately balance the adverse impacts and public benefits of the Project.

Even if FERC had shown that Applicant’s vague and ill-defined assertions of public benefit (such as “supply diversity” or providing extra gas for unsubscribed parties) somehow did benefit the public, FERC is required to weigh those highly speculative benefits against the many concrete harms that will arise from construction and operation of the Project.¹⁴⁵ FERC has completely failed to do so, violating the NGA and the Commission’s 1999 Certificate Policy Statement. Section 7’s public convenience and necessity test commands that “FERC must consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the NGA.”¹⁴⁶

The “public interest” encompassed by the NGA includes impacts on landowners and the environment.¹⁴⁷ FERC must consider these factors in making a public interest determination and cannot limit itself to solely considering private contracts or vague allegations of public benefit.¹⁴⁸ The Commission’s Certificate Policy Statement lays out the framework that FERC will use to implement the NGA’s Section 7 holistic public convenience and necessity determination, and thus decide whether to authorize any proposed Section 7 gas

¹⁴⁴ Order at P 14.

¹⁴⁵ Certificate Policy Statement at 61,743 (“In reaching a final determination on whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process during which it weighs the factors presented in a particular application. Among the factors that the Commission considers in the balancing process are the proposal’s market support, economic, operational, and competitive benefits, and environmental impact.”).

¹⁴⁶ *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010).

¹⁴⁷ See *NAACP* at n.6; Order at P 18.

¹⁴⁸ *Atl. Refining Co.* at 391; *Office of Consumers’ Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980).

infrastructure.¹⁴⁹ It provides that, after FERC has met its threshold requirement of determining a project will not rely on subsidization from existing customers and has “made efforts to eliminate or minimize any adverse effects the project might have,” the Commission will balance anticipated public benefits against any residual adverse effects of a proposed project.¹⁵⁰ The Commission gives consideration to “the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.”¹⁵¹

Here, FERC failed to properly apply this test. FERC deemed the Applicant’s highly speculative, unsubstantiated (and credibly contested) alleged need for this project to be synonymous with substantial evidence of public benefits.¹⁵² Under FERC’s REAE Order and the underlying record, Transco’s bid to build a pipeline serving an area where there is no demonstrated evidence of public need—and in fact, there is evidence of quite the opposite (excess capacity) – vague assertions of “supply diversity” and “reliability”¹⁵³ are sufficient for a finding of a “public benefit.” This is at odds with FERC’s own interpretation of its obligations under the NGA, as reflected in its 1999 Certificate Policy Statement.

¹⁴⁹ Order at PP 18, 19.

¹⁵⁰ Order at P 38, n.85 (citing Certificate Policy Statement at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis)). An agency’s “failure to respond meaning-fully” to objections raised by a party renders its decision arbitrary and capricious. *Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005).

¹⁵¹ Order at P 18.

¹⁵² See *supra* at Part III(A)(1). (analyses of how FERC failed to properly engage with or analyze the significant evidence of a lack of need or benefits of the proposed Project); see, e.g. Order at P 38 (finding Transco “has demonstrated a need for the project”).

¹⁵³ See *supra* at Part II(F); III(A)(1)(d).

Just as in *Env't Def. Fund*, here the “Commission’s balancing of costs and benefits consisted largely of its *ipse dixit*,”¹⁵⁴ finding that “the construction and operation of the project will provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.”¹⁵⁵ It did so without any data or analyses of supply diversity or system reliability failures, crediting the project proponent’s bald assertions and its Levitan Report while misrepresenting and/or misunderstanding both New Jersey’s LEI Study finding that such capacity was unnecessary and the Skipping Stone Study demonstrating that existing capacity easily meets winter peak demand – or providing an evidentiary hearing in which the project proponent’s unverified (and debunked) assertions could be tested. In short, FERC made this finding despite a lack of evidence that any of the Applicant’s speculative, unsubstantiated alleged benefits of need¹⁵⁶ (and FERC’s adoption of it) provides benefits to the public.

And if anything, FERC’s approval of this project would *actively harm* the public.¹⁵⁷ As the New Jersey Rate Counsel warned, REAE would “impose additional unnecessary costs onto New Jersey ratepayers.”¹⁵⁸ Moreover, FERC failed to properly take into account and weigh the adverse permanent impacts to landowners like Catherine Folio and their properties, including tree clearing, ground disturbance, and the potential for an operational gas pipeline on their land—which inevitably would have an adverse impact on the value of their properties.¹⁵⁹ The 1999 Certificate Policy Statement specifically contemplates some of the

¹⁵⁴ *Env't Def. Fund v. FERC* at 973.

¹⁵⁵ Order at P 34.

¹⁵⁶ *Supra* at Part III(A)(1); Order at P 38.

¹⁵⁷ *Supra* at III(A)(1)(d)-(f) (discussing how this Project will be saddled on ratepayers’ backs).

¹⁵⁸ NJ Rate Counsel Comments, p. 2.

¹⁵⁹ Aside from plain common sense which dictates that an operational gas pipeline would diminish a property’s value, preliminary findings from an in-progress study being conducted by Virginia Tech sociologist Shannon Bell and Longwood University economist Thomas PlaHovinsak call into question the common assertion made in Environmental Impact Statements

adverse impacts at play here: “[t]he interest of these groups is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way.”¹⁶⁰ FERC failed to provide an explanation as to why the highly speculative benefits of the project outweigh such adverse impacts,¹⁶¹ arbitrarily dismissing these concrete and irreversible harms without explanation.¹⁶²

3. FERC failed to weigh the significant climate impacts from REAE’s greenhouse gas emissions in its Gas Act public interest inquiry.

Section 7’s public convenience and necessity inquiry does not end there, however. FERC must determine that the project serves the public interest. “Deciding whether a project is in the public interest requires a careful balancing of the need for the project and its environmental impacts.”¹⁶³ And “it is hard to imagine a consideration more relevant to the ‘public interest’ than the existential threat posed by climate change.”¹⁶⁴ FERC acknowledges that emissions from this one project alone would constitute 47.8% of New Jersey’s greenhouse gas emission levels allowable under state law by 2050.¹⁶⁵ It further recounts how for new pipeline projects that natural gas pipelines do not negatively affect property values. Their statistical analysis of tax assessment data among land parcels in the Virginia counties of Montgomery and Giles before the announcement of the Mountain Valley Pipeline (“MVP”) and after the approval of the MVP reveal that properties with an easement for the MVP saw a statistically significant drop in assessed land value after the pipeline was approved compared to properties in the same towns without an easement for the MVP.

¹⁶⁰ 1999 Certificate Policy Statement at 61,748.

¹⁶¹ Under the Administrative Procedure Act, an agency cannot ignore substantial evidence bearing on the agency decision. *See* 5 U.S.C. § 706; *see also, e.g., Motor Vehicles Mfrs. Ass’n* at 43 (holding that an agency decision is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem”).

¹⁶² Order at P 38 (“[T]he project will not have adverse economic impacts on existing shippers of other pipelines and their existing customers and will have minimal impacts on the interests of landowners and surrounding communities.”).

¹⁶³ *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm’r, dissenting, p. 1).

¹⁶⁴ Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 6 (2019).

¹⁶⁵ FEIS at 4-176. This horrifying figure was notably omitted from the Order, which instead vaguely alluded to FERC disclosing such figures in its FEIS and adopting the FEIS in this Order. *See* Order at P 72.

approving this new gas pipeline will *increase* state emissions (from 2019 levels) by about 12%.¹⁶⁶ It neglects to consider that by 2030, this project alone will comprise almost 20% (19.12%, to be precise) of New Jersey’s allowable greenhouse gas emissions – a mere seven years from now – far less than the length of the LDCs’ REAE contracts.¹⁶⁷ Finally, FERC calculates that the project will cost the public \$46 billion from the societal costs of its greenhouse gas emissions.¹⁶⁸ Yet the sum total of FERC’s public convenience and necessity weighing of this adverse impact is that, “the Commission is not herein characterizing these emissions as significant or insignificant.”¹⁶⁹ This is a staggering dereliction of its duty to weigh a project’s substantiated public benefits (none quantifiable, or quantified here) against its substantiated public harms (ranging from derailing New Jersey’s ability to meet its legal obligations under its climate laws, to contributing \$46 billion dollars in social costs we will

¹⁶⁶ 11.8%, to be precise. Order at P 71. This figure appears to reflect the Commission’s understanding that, in fact, New Jersey markets/uses constitute 73.5% of REAE’s capacity – not the simple 56% presented in the Order at P 28.

¹⁶⁷ See An Order Advancing Climate Action to Secure New Jersey's Clean Energy Future, Executive Order 274, p. 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).

¹⁶⁸ FEIS at 4-180. Again, any mention of this social cost was entirely omitted from FERC’s Order. For the 73.5% of project capacity designed to serve New Jersey – which record evidence shows New Jersey does not need – the project’s social cost driven by New Jersey LDCs seeking profit from this excess capacity is approximately \$34 billion. Again, it bears reiterating that New Jersey ratepayers would be footing the cost for this unneeded infrastructure, New Jersey LDC private shareholders would be reaping the profits from it, and society would be bearing the full \$46 billion in social costs as the climate destruction project price tag. Notably, even this staggering figure is only the cost of twenty operational years of REAE, while such pipelines themselves are considered 40+ year assets (or designed to have a useful life of 50 years). See, e.g.

<http://www.lancasterpipeline.org/pipeline-lifetime#:~:text=Natural%20gas%20pipelines%20are%20typically,life%20of%20about%2050%20years> (Transco states that, “[n]atural gas pipelines are typically designed to have a useful life of about 50 years.”). See also, Reconsidering the Economics of Gas Pipelines,

<https://www.nrdc.org/experts/gillian-giannetti/reconsidering-economics-gas-pipelines> (noting that these will become costly, stranded assets well in advance of the end of their useful life).

¹⁶⁹ Order at P 73.

all bear from this project's contribution to climate change).¹⁷⁰ This is about as far afield from reasoned decision making, grounded in record evidence, that FERC can get. Its finding that this project nonetheless serves the public interest, or meets the holistic public convenience and necessity standard is predicated on nothing more than its say so.

B. FERC's Order violates the National Environmental Policy Act ("NEPA") because it rests on an FEIS that is Wholly Deficient.

Since 1970, NEPA has required FERC to consider the environmental and local community consequences of proposed projects in its decision making process and to facilitate meaningful public participation, especially from the people and communities who would be directly burdened by FERC-regulated projects.¹⁷¹ NEPA created the Council on Environmental Quality (CEQ) to oversee NEPA's implementation of its procedural requirements by issuing guidance and interpreting regulations that carry through NEPA's procedural requirements.¹⁷² CEQ's recently issued guidance firmly asserts that federal agencies, including FERC, are required to rigorously consider climate impacts for the proposed project, no action alternative, and other project alternatives.¹⁷³ FERC must seriously assess the need for the proposed project in order to competently consider alternatives to the project. FERC must also appropriately account for GHG emissions from the Project. And

¹⁷⁰ Certificate Policy Statement at 61,747; *Atl. Refining Co.* at 391, *affirmed in Transcon.* at 8 (FERC's holistic public convenience and necessity test requires it to consider all factors bearing on the public interest); Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 40 (2019) ("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 NGA and the National Environmental Policy Act (NEPA).").

¹⁷¹ *See* 42 U.S.C. § 4332(C). *See also* A Citizen's Guide to NEPA, *Council on Environmental Quality Executive Office of the President*, p. 5 (Jan. 2021).

¹⁷² *See id.*, 42 U.S.C. § 4342. *See also* A Citizen's Guide to NEPA, p. 5.

¹⁷³ 2023 NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change at p. 1198.

FERC must provide for meaningful public participation along the way. For multiple reasons laid out below, FERC violated NEPA.

1. FERC violated NEPA by defining project purpose and need unduly narrowly.

Developing a sound statement of project purpose and need is “in many ways the most important chapter of an environmental impact statement (EIS).”¹⁷⁴ When revising its NEPA implementing regulations just last year to ensure that agencies did not simply parrot private applicant’s goals for their EIS statement of purpose and need, CEQ emphasized this point, stating, “Developing a statement of the purpose and need is a vital early step in the NEPA process that is foundational to other elements of an EIS,” and cited “removing the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority”¹⁷⁵ as a key reason for the rule revision.

Yet here, the Commission’s EIS did just what CEQ explained that NEPA precludes decision makers from doing. It predicated its entire EIS on an unduly narrow definition of purpose that merely parroted the private Applicant’s goals, and entirely refused to engage with or develop its own statement of project need.¹⁷⁶ FERC’s 2022 FEIS proffered Tranco’s description in lieu of a reasoned delineation of project purpose as need:

As described by Transco, the REAE Project would allow Transco to provide an incremental 829,400 dekatherms per day (Dth/d) of year-round firm transportation capacity from the Marcellus Shale production area in

¹⁷⁴ The Importance of Purpose and Need in Environmental Documents, *Environmental Review Toolkit of the U.S. Department of Transportation Federal Highway Administration* (Sept. 18, 1990), available at https://www.environment.fhwa.dot.gov/legislation/nepa/guidance_purpose_need.aspx (“DOT Guidance”).

¹⁷⁵ National Environmental Policy Act Implementing Regulations Revisions, Council on Environmental Quality, 87 Fed. Reg. 23453, 23457 (Apr. 20, 2022) (“2022 NEPA Regulations”).

¹⁷⁶ *Nat'l Parks & Conservation Ass'n* at 1070 (“Requiring agencies to consider private objectives, however, is a far cry from mandating that those private interests define the scope of the proposed project.”).

northeastern Pennsylvania to delivery points in New Jersey, Pennsylvania, and Maryland. . . . **Transco asserts** that the Project would provide enhanced access to Marcellus Shale supplies, support diversification of energy infrastructure along the Atlantic coast, and promote competitive natural gas markets.¹⁷⁷

The FEIS's description of purpose and need thus impermissibly defers entirely to private parties' desired goals: Transco's assertions of project purpose and need comprise the foundation of FERC's FEIS. FERC's project goal/purpose/need inquiry were conflated and began and ended with:

We note that the Project purpose is to transport natural gas from northeastern Pennsylvania to local distribution company customer delivery points in New Jersey, Pennsylvania, and Maryland.¹⁷⁸

FERC's NEPA analysis boils down to the following legally unsustainable circularity: (1) private applicant asserts purpose of building a pipeline from point A to point B, with specific offtakes;¹⁷⁹ (2) Commission refuses to engage with whether project is needed;¹⁸⁰ (3) Commission will not examine no action alternatives because they would not achieve the applicant's purpose of building a pipeline or fulfill a need that shall be presumed to exist;¹⁸¹ and (4) Commission only considers action alternatives that will move gas through a pipeline from point A to point B, with specific offtakes for the presumed need;¹⁸² (5) all those other pipeline alternatives are just as harmful or none are more so than the applicant's preferred one;¹⁸³ and (6) Commission checks the NEPA box and later finds need under the Gas Act in its final Order, based on Project proponent and proponent's customers' assertions of need

¹⁷⁷ FEIS at 1-2 (emphasis added).

¹⁷⁸ *Id.* at 3-3 (emphasis added).

¹⁷⁹ *Id.* at 1-2.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 3-3.

¹⁸² *Id.* at 3-3 to 3-5.

¹⁸³ *Id.*

balanced against its NEPA determination that found no less harmful alternatives.¹⁸⁴ Sadly, the preceding list neatly sums up FERC’s formulaic approach to tens of thousands of pages of FERC Section 7 EISs.

The Commission should *especially* scrutinize an applicant’s statement of purpose and need when the statement’s narrow focus appears to be tailored to the project under consideration, which effectively removes all alternatives from contention. 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.”¹⁸⁵ The Commission may not “adopt[] [an applicant’s] interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval.”¹⁸⁶ Likewise, the Council on Environmental Quality has cautioned that “[a]lways 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.”¹⁸⁷ Finally, EPA raised this same red flag: EPA asked that FERC in its EIS “consider including discussion of *current supply* and whether the gas demand being addressed by the

¹⁸⁴ *Id.* at 1-2; Order at PP 21, 31, 34, 81.

¹⁸⁵ *Nat’l Wildlife Refuge Ass’n v. Rural Utilities 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)).

¹⁸⁶ *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (“*Nat’l Parks & Conservation Ass’n*”).

¹⁸⁷ 2022 NEPA Regulations at 23459. FERC appears to read its statutory authority so narrowly as to obviate the need for a Section 7 approval process altogether: “FERC is tasked with authorizing infrastructure to be used for the transportation of natural gas, not the consumption of natural Gas.” FEIS at 3-3. But the Gas Act and controlling judicial interpretation says otherwise. FERC is to authorize *only that infrastructure that is required* by the public need, and to deny certification unless the substantial evidence in the record supports such a finding. *See* 15 U.S.C. § 717f(e). In doing so, FERC is to encourage the *orderly* development of such infrastructure, protect consumers against corporate abuse, and make sure it is not doing more harm than good when approving a project. *See NAACP* at 669-70; *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015); Updated Certificate Policy Statement at P 69.

project could be otherwise met by other proposed pipeline expansion projects in the region, *existing infrastructure*, or alternative sources of energy.”¹⁸⁸ Where, as here, the agency defines the project’s purpose and need too narrowly, the alternatives analysis that flows from this predicate is rendered meaningless. A purpose and need statement “will fail if it unreasonably narrows the agency’s consideration of alternatives so that the outcome is preordained”¹⁸⁹ – the preordained outcome being approval without a real consideration of no action and other alternatives to meet the description of project purpose and need that the Commission develops based on the record before it.

The REAE EIS, based on “wholesale acceptance of [the project applicant’s] definition of purpose,” ought not survive judicial review.¹⁹⁰ A court “will reject an ‘unreasonably narrow’ definition of objectives that compels the selection of a particular alternative.”¹⁹¹ Here, the connection between this unduly narrow definition of project purpose and such definition’s use as a rationale for ending all inquiries into no action alternatives is especially clear:

We note that the Project purpose is to transport natural gas from northeastern Pennsylvania to local distribution company customer delivery points in New Jersey, Pennsylvania, and Maryland. FERC is tasked with authorizing infrastructure to be used for the transportation of natural gas, not the consumption of natural gas. The consumption of natural gas for activities such as building heating and electricity generation may be the proposed action of the downstream entities; however, alternatives that do not also facilitate the transportation of natural gas cannot be a function surrogate.¹⁹²

¹⁸⁸ EPA Region 3 Scoping Comments on REAE Environmental Assessment, *Transcontinental Gas Pipe Line Co. LLC*, FERC Docket No. CP21-94, Accession No. 20210430-5433, Enclosure p. 1 (Apr. 30, 2021) (emphasis added).

¹⁸⁹ *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); see also *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

¹⁹⁰ *Simmons v. U.S. Army Corps of Eng’rs* at 669.

¹⁹¹ *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011).

¹⁹² FEIS at 3-3.

Nor can FERC's belated articulation and conclusion of project need, which it only reveals in its post-NEPA Order, resuscitate its FEIS. In its Order, FERC concludes that purpose and need for the project as defined in Section 7 is evident in shippers' representations that REAE is needed to ensure safety and reliability on a design day.¹⁹³ The DEIS mentions no such purported justification – nor could it, as these justifications were not entered into the record until more than a year after Transco's application, and a month after FERC published its DEIS.¹⁹⁴ Consistent with FERC's theory of NEPA, and its self-granted exception from grappling with project need in its EIS process, the FEIS reiterated that, "The need for the Project will be assessed by the Commission in its orders rather than in Commission staff's NEPA analysis."¹⁹⁵

The LDCs appear to have fabricated this urgency *post hoc* in an attempt to bolster the Applicant's narrowly defined and unsubstantiated statement of project purpose and need, which was parroted by the Commission in its FEIS. FERC's approach to project purpose and need under NEPA assumes that its final certificate orders proclamations of need are sufficient. While the Commission has chosen to run its process this way, and flatly rejects the idea that it must grapple with need under NEPA as the essential predicate of alternatives analysis *separately* from its holistic NGA assessment of and weighing of public convenience

¹⁹³ See Order at P 27 (noting that the Levitan Report assumes the accuracy of the LDCs' design day demand forecasts), P 31 (adopting the LDCs' statement that REAE is needed to ensure supply during a design day), and Clements, concurring, P 5 (noting that the Levitan Report and the Commission take the LDCs' design day demand forecasts at face value).

¹⁹⁴ FERC released its draft EIS in March 2022, while Transco did not submit its Levitan Report until April 2022. FERC's FEIS, dated July 2022, did briefly mention the Levitan Report but did engage with it in the least.

¹⁹⁵ FEIS at 1-2; *see also* FEIS at 5-18 ("The Commission decision, *in its Order*, would review the need for the Project.") (emphasis added).

and necessity,¹⁹⁶ this proceeding demonstrates how that refusal results in its decision making running afoul of *both* statutory mandates.

2. As a result of the impermissibly narrow purpose and need statement, the FEIS failed to conduct a rigorous evaluation of the no action alternative, as required by NEPA.

In order for its FEIS to be legally sufficient, NEPA required FERC to consider the scenario in which it did not approve the proposed action: i.e., the no action alternative.¹⁹⁷ But compounding the legal errors flowing from its refusal to independently develop a statement of project purpose and need, FERC also consistently refuses to seriously consider no action alternatives.¹⁹⁸ FERC's REAE FEIS was no different. FERC guidance describes what should be its process for assessing the no action alternative in environmental impact statements:

In addition to avoiding the impacts directly associated with the construction of the project (e.g., disturbance of wetlands, air quality impacts, clearing of vegetation) the no-action alternative discussion should discuss *what other options may be pursued by customers of the proposed project to satisfy the need for the proposed project*. For example, if the proposed project were not constructed, describe the alternatives to meet the project objectives and, if known, the likely environmental effects and costs of pursuing these options. These options should include the use of other natural gas systems, non-gas energy alternatives, and/or energy conservation or efficiency, as applicable.¹⁹⁹

Yet the REAE FEIS states that “an alternative that does not meet the Project’s *purpose* cannot be considered a viable alternative.”²⁰⁰ There is a fundamental difference between the project’s

¹⁹⁶ *Tennessee Gas Pipeline Co., LLC*, 181 FERC ¶ 61051, PP 20-21.

¹⁹⁷ Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act, FERC Office of Energy Projects, 4-135 to 4-136 (Feb. 2017) (“FERC NEPA Guidance”); 40 C.F.R. § 1502.14(c) (directing agencies to consider the no action alternative).

¹⁹⁸ *See, e.g.*, Final Environmental Impact Statement, *PennEast Pipeline Company LLC*, FERC Docket No. CP15-558, Accession No. 20170407-4001, p. 3-3 (Apr. 7, 2017) (stating that if the proposed project were not built, “construction of new pipelines or other energy infrastructure [necessary to replace it] would result in environmental impacts that could be equal to or greater than those of the Project. For these reasons, the No Action Alternative would not be preferable to or provide a significant environmental advantage over the Project.”).

¹⁹⁹ FERC NEPA Guidance at 4-135 to 4-136 (emphasis added).

²⁰⁰ FEIS at 3-1 (emphasis added).

purpose, which includes Transco’s goal of building this particular pipeline, and the public’s *need* for the project, in which FERC cannot escape examining: (1) whether the project is needed; and (2) whether the LDCs and marketers need this additional capacity to serve load and markets, respectively. Absent New Jersey LDCs having put out a request for proposal for capacity to serve unmet demand or projected customer load growth that failed to return any bids, or some showing that the marketers need additional capacity to serve growing demand from their customers and they were not able to secure this gas elsewhere, the only record evidence in this proceeding shows that a no action alternative would *entail the Project’s customers pursuing documented, existing available capacity “to satisfy the need for the proposed project.”*²⁰¹ FERC’s own guidance and regulations direct it to look at existing gas systems in its NEPA no action alternatives review. One need look no further than FERC’s legal errors in contending that it is exempt from establishing a reasonable statement of project purpose and need to understand why FERC’s erroneous treatment of NEPA’s requisite no action alternative is the inescapable second legal error that necessarily flows from its first.

And that’s precisely what happened here. FERC’s analysis of alternatives predictably found that no alternative to REAE achieved the project’s objectives, since the narrowly parroted project purpose and need made it a foregone conclusion that only REAE could fit the bill.²⁰² Specifically, FERC summarily jettisons any real no action alternative analysis by stating that it “ha[s] not identified any non-gas energy alternatives or other non-project

²⁰¹ FERC NEPA Guidance, p. 4-135 (emphasis added); *see also* 18 C.F.R. § 380.12(I)(1). Again, as set out at length in Part III(A)(1), no such “need” exists.

²⁰² *See supra* Part III(B)(1); FEIS at 3-3.

alternatives that *satisfy the need*²⁰³ for the Project,²⁰⁴ while ignoring: (1) the fact that no such need determination had yet happened; (2) that the structure of FERC’s process yields no public opportunity to vet the Commission’s need determination; and (3) the New Jersey Agencies’ LEI Study identified several alternatives to building the pipeline.²⁰⁵

Assuming for the sake of argument that REAE’s purpose is in fact to transport gas in a pipeline from point A to B – a purpose which only REAE or a comparable pipeline can fulfill – there are existing pipelines that transport gas from this same area which have stranded capacity.²⁰⁶ The Applicant has not argued that the pipeline is intended to serve unmet demand, and studies submitted to the record indicate that the state of New Jersey does not need the pipeline in order to meet demand.²⁰⁷ Since there is no need for the project, there is also no purpose – REAE cannot serve demand that does not exist, and thus it lacks justification. A properly conducted no action alternative would have illuminated the lack of need for the project. Since this project is LDC-driven, upon rehearing, FERC should consider no action alternatives such as securing capacity directly from existing pipeline shippers to meet identified demand, as well as securing contracts for multi-year peak period delivered services, which could be structured to have staggered maturities so that LDCs have the assurance of capacity service to meet identified demand well into the future. A “no action

²⁰³ Recall that FERC only determines need in its Order – i.e., *after* its flawed NEPA process. *See* FEIS at 5-18 (“The Commission decision, in its Order, would review the need for the Project. Because the Commission will ultimately determine Project need, and because staff has not identified a significant impact associated with the proposed action, we do not recommend the no-action alternative.”).

²⁰⁴ FEIS at 3-3 (emphasis added).

²⁰⁵ *See, e.g.*, LEI Study p. 104-113 (identifying non-pipeline alternatives).

²⁰⁶ *See supra* Part III(A)(1)(c); FEIS at 3-3 (extremely limited discussion of ‘System Alternatives’, which fails to acknowledge or address stranded capacity).

²⁰⁷ *See* LEI Study and Skipping Stone Study.

alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action.”²⁰⁸

3. FERC violated NEPA by failing to meaningfully evaluate the project’s environmental impacts, including failure to appropriately account for and contextualize GHG emissions and climate change impacts.

In its NEPA analysis, FERC failed to appropriately account for and contextualize GHG emissions and climate change impacts. The Council on Environmental Quality’s (“CEQ”) recently issued guidance serves as a reminder to FERC that agencies must consider greenhouse gas emissions from projects in conducting NEPA analyses, and meaningfully evaluate alternatives to a proposed project – including clean energy alternatives – that would minimize GHG emissions. Although it is an interim policy, “CEQ is issuing this guidance as interim guidance so that agencies may make use of it immediately while CEQ seeks public comment on the guidance.”²⁰⁹

The D.C. Circuit has held that FERC must consider indirect effects of environmental effects from a project in conducting its environmental analysis:

An agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration. Indirect effects are those that are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. The phrase “reasonably foreseeable” is the key here. Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision.²¹⁰

Transco claims as a justification for project purpose and need that the REAE will increase supply diversity specifically by connecting New Jersey customers to Marcellus Shale sources in northeastern Pennsylvania. Yet in its environmental analysis, FERC concluded that

²⁰⁸ *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010).

²⁰⁹ 2023 NEPA Guidance at 1196.

²¹⁰ *Sabal Trail* at 1371 (citing 40 C.F.R. § 1502.16(b) and § 1508.8(b)) (emphasis in original; internal quotation marks and citations omitted).

upstream wellhead emissions resulting from the project could not be considered in its calculus, as those emissions were too uncertain:

To date, the Commission has not found upstream emissions to be an effect of any proposed project, primarily because of the following unknown factors: the location of the supply source; whether transported gas would come from new or existing production; and whether there would be any potential associated development activities, and if so, its location.²¹¹

The location of the supply source is in fact known to FERC, as Transco's statements attempting to justify the project based on the need for supply diversity plainly identify the geographically specific source of the gas. As for the second and third factors, in support of its failure to consider these upstream emissions, the Commission cites an instance in which the D.C. Circuit held that FERC "appropriately did not consider upstream emissions a project effect because the record did not contain any information establishing a causal relationship between the proposed project and upstream development."²¹² But the Commission's passing reference to *Birckhead* as justification is unavailing here. In fact, *Birckhead* court noted the Commission's own concession that, "there may well be instances in which upstream gas production is both reasonably foreseeable and sufficiently causally connected to a pipeline project to qualify as an indirect effect."²¹³

And where, as here, parties have identified with a degree of specificity the source of the gas, there is no sound rationale for failing to account for upstream emissions in some manner. Whether this gas would come from new or existing wells in the identified specific geographic region – there will still be associated emissions regardless – and the Commission's failure to grapple with them is plain error under NEPA.²¹⁴ *Birckhead* itself

²¹¹ FEIS at 4-178. *Contra Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019) ("*Birckhead*").

²¹² FEIS at fn. 85, citing *Birckhead* at 517.

²¹³ *Birckhead* at 517.

²¹⁴ As set out in Part III(A)(3), this failure also is a dereliction of FERC's NGA obligation to weigh climate change impacts in its public interest analysis.

cautioned the Commission that, “we are dubious of the Commission’s assertion that asking Tennessee Gas to provide additional information about the origin of the gas would be futile,” but noted that petitioners, “nowhere claim that the Commission’s failure to seek out additional information constitutes a violation of its obligations under NEPA.”²¹⁵ Here, lest there be any question, Intervenors are squarely raising the argument that the Commission should have developed the record on upstream GHG emissions sufficiently to calculate them, used the Social Cost of Carbon to monetize them as they did with downstream and operational emissions, and added those emissions to its final finding that the Project would cost society \$46 billion in climate damage (which is an undercounting given FERC’s exclusion of upstream emissions).

The Commission cannot have it both ways – it cannot rest project benefit finding on vague assertions that the project increases supply diversity and simultaneously assert that it cannot identify the supply source of the gas Transco proposes to transport. Moreover, given the record evidence demonstrating that this gas is not needed, in the absence of project authorization, these upstream emissions would not simply be accrued by a replacement project. Finally, even if they were generated by some other similar project to be proposed in the future, that runs to whether they would be incurred in a no action alternative. Not only has that idea been disabused at great length above, but it also does not relieve the Commission of its obligation to assess upstream emissions associated with this Project, in this proceeding.

²¹⁵ *Birckhead* at 518; see also Order Denying Rehearing, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018) (LaFleur, Comm’r, dissenting, at p. 5) (“[A] key reason the Commission lacks the specificity of information to determine causation and reasonable foreseeability is because we have not asked applicants to provide this sort of detail in their pipeline applications.”); *Food & Water Watch and Berkshire Environmental Action Team v. FERC*, 28 F.4th 277, 286 (D.C. Cir. 2022) (“NEPA also requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities,” citing *Birckhead*).

4. FERC violated NEPA’s public participation requirements. By refusing to engage with project purpose and need in its EIS process, the public was unable to scrutinize the proposed project and meaningfully comment on it.

One of NEPA’s critical roles is ensuring that the public has the opportunity to meaningfully participate in agency decision making.²¹⁶ Because “[t]he purpose and need section is in many ways the most important chapter of an environmental impact statement,”²¹⁷ FERC’s ongoing refusal to do anything other than parrot Applicant’s statement of project purpose and eschew a need analysis in its EIS forecloses all meaningful public participation with its actual analysis of project need.²¹⁸ “Developing a statement of the purpose and need is a vital early step in the NEPA process that is foundational to other elements of an EIS.”²¹⁹ But FERC has given itself a pass on doing so. Rather, FERC insists that it does not need to abide by CEQ’s requirement that it develop a meaningful assessment of project need – a foundational prerequisite to alternatives and all other EIS analyses – and instead only reveals its project need analysis in its Order, which represents *the conclusion* of its decision making. By refusing to engage with project purpose and need in its EIS process, FERC denied the public the opportunity to engage with the Commission’s formulation of project need, thereby

²¹⁶ See 40 C.F.R. § 1506.6 (“[a]gencies shall [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures”); 40 C.F.R. § 1500.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Jewell* at 570; *Zinke* at 774 (“NEPA’s second purpose is to insure meaningful public participation” and it guarantees “citizens access to information and the ability to comment, provides for citizen input with respect to the procedures used—i.e., input on the *methods* and not just the *results*.”) (emphasis in original) .

²¹⁷ DOT Guidance.

²¹⁸ See *Tennessee Gas Pipeline Co., LLC*, 181 FERC ¶ 61051, P 21 (“The Final EIS appropriately explained that it was not a ‘decision document,’ and that, under NGA section 7(c), the final determination of the need for the projects lies with the Commission. Neither NEPA nor the NGA requires the Commission to make its determination of whether the project is required by the public convenience and necessity in the Final EIS before that final determination.”).

²¹⁹ 2022 NEPA Regulations at 23457.

hobbling the public's ability to participate in shaping this foundational predicate of FERC's decision making.

IV. Intervenor's Motion for a Stay

In addition to its request for rehearing and vacatur, Intervenor also move the Commission for a stay of the Certificate Order until the conclusion of judicial review.²²⁰ The Commission has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."²²¹ In determining whether to issue a stay, the Commission's policy is to consider (1) whether the party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.²²²

A. Commencement of the Project Will Cause Irreparable Injury to Intervenor, Their Members, and the Environment.

1. Construction Activities Will Cause Irreparable Injury to Intervenor Landowner Catherine Folio.

If FERC does not grant a stay, Intervenor Landowner Catherine Folio's land will be absolutely and irreparably injured. While the presumptive stay²²³ offers some temporary protection, without the more robust stay requested here through the conclusion of judicial review, REAE will irreversibly damage Landowner Folio's property before she has had a judicial determination on the questions discussed *supra* on whether FERC failed to do its job in approving this project, and properly examine and take into account—among other things—the significant evidence before it on a lack of need. The risk Landowner Folio, as

²²⁰ This request is beyond the presumptive Order 871-B stay reasonably issued in the Certificate Order, which was granted pending resolution of any landowner requests for rehearing. Order at P 85.

²²¹ 5 U.S.C. § 705.

²²² *Tennessee Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,263, P 4 (2016).

²²³ Order at P 85.

well as other impacted landowners generally along the route, face is something that affected landowners along the Spire²²⁴ and Atlantic Coast²²⁵ pipelines are all too familiar with—the irreversible, permanent destruction of their land for a project that never should have been approved by FERC. A stay is necessary to preserve the status quo and ensure such unnecessary destruction does not occur while judicial review is pending.

As outlined in Landowner Folio’s filings before the Commission, if no stay is in place and the Project begins construction, her land will suffer from significant, irreversible damage, including, but not limited to: increased, exacerbated flooding; contamination of her creek, shallow water table, and well; and adverse impacts to her storage sheds.²²⁶ If the more robust stay is not put into place by FERC, Transco will be able to cut all of the trees and vegetation, and “grade, install temporary fencing, berms, and erosion and sedimentation controls, and use for any other construction activity necessary to construct the pipelines and facilities . . . and on exercise of the option a perpetual easement for ingress and egress over and across the Property by means of roads or other access areas utilized by Grantor.”²²⁷ Construction would also adversely impact and interfere with Landowner Folio’s conservation efforts, general use,

²²⁴ See, e.g., Order Reissuing Certificates, *Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022) (Glick, Chair, concurring, P 6) (noting that three years after the pipeline entered service, “several landowners’ properties still ha[d] not been adequately restored, notwithstanding a Commission order and efforts by Commission staff to ensure that Spire fulfills its obligations to remediate the land affected by the pipeline.”); Impacted Landowners’ Motion for Order to Show Cause, *Spire ST Pipeline LLC*, FERC Docket CP17-40, Accession No. 20221213-5195, pp. 5-7 (Dec. 13, 2022) (describing years of extensive ongoing damage to properties impacted by the Spire pipeline, including erosion, litter and construction debris, soil compaction, and ponding, which continue to this day).

²²⁵ Along the canceled Atlantic Coast Pipeline (“ACP”), ACP installed approximately 31.4 miles of pipe, completed an additional 82.7 miles of clearing and grading, and felled trees in 222.5 miles of the pipeline right-of-way before canceling the project. Order on Rehearing and Directing Compliance, *Atlantic Coast Pipeline, LLC*, 180 FERC ¶ 61,059, P 4 (2022).

²²⁶ Amended Catherine Folio and the Niskanen Center’s Motion for Leave to File a Reply, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94, Accession No. 20221117-5094, Ex. 1 at P 14 (Nov. 17, 2022).

²²⁷ *Id.* at P 11 (internal citations and quotes omitted).

and enjoyment of the land.²²⁸ Additionally, given that the relevant terms in the easement agreement are quite vague, Transco could potentially try to move the easement more onto Ms. Folio's land at some point in the future, and it is unclear what remedies would be available to her.²²⁹ Ms. Folio's easement includes a right for Transco to make adjustments to the easement area in the future "based upon issues that may arise during permitting for the pipelines and facilities, including, but not limited to, design issues, regulatory requirements, constructability issues, and/or field conditions."²³⁰

2. Environmental Harm Will Cause Irreparable Injury to Intervenors.

A stay is also necessary to ensure REAE does not proceed with any activities that will cause or lead to irreparable environmental harm. As noted above, the construction of this Project, as conditionally authorized by the Order, would cause impacts to surface waters, wetlands, vegetation and forests, environmental justice communities, air quality and climate change, and noise,²³¹ on 36.1 miles along the proposed pipeline route.²³² Any construction activities or permanent alteration of the land that Transco begins while challenges to the Commission's Order are pending will cause irreparable harm to the environment. For example, construction of the pipeline will cause impacts on 16.7 acres of wetlands, including "permanent conversion of previously forested and scrub-shrub wetland areas to emergent wetland areas. The conversion from one vegetation cover type to another could result in changes in wetland functions and values by altering the amount of sunlight or other

²²⁸ *Id.* at P 15.

²²⁹ *Id.* at P 12.

²³⁰ *Id.*

²³¹ FEIS at ES-3 to ES-10.

²³² Order at P 4. The Order is conditioned on Transco obtaining outstanding federal authorizations and other enumerated pre-construction conditions. See *id.* at P 83. It is unclear from its face and from the record when Transco will fulfill those conditions and secure those approvals.

environmental conditions in the wetland, affecting wildlife habitat.”²³³ “Clearing and grading would remove trees, shrubs, brush, roots, and large rocks from the construction work area and would level the right-of-way surface to allow operation of construction equipment. Vegetation would generally be cut or scraped flush with the surface of the ground, leaving rootstock in place where possible.”²³⁴ Construction of the Project would adversely impact 603.1 acres of vegetation, including trees, forests, and wetlands, *or the equivalent of over 456 American football fields*.²³⁵ The construction of the pipeline will result in “thousands of acres of wildlife habitat including forested habitat...[some of which] would be converted to herbaceous or shrub-scrub habitat.”²³⁶ The total area of wildlife that would be affected is 2,065 acres.²³⁷

Intervenor Aquashicola Pohopoco Watershed Conservancy (“APWC”), a 501(c)(3) citizen-based, volunteer non-profit organization, has worked tirelessly over the years to protect the watersheds in Monroe County, Pennsylvania.²³⁸ REAE will run through Monroe County and significantly impact the areas that APWC exists to protect, including Poplar Creek (a tributary to Pohopoco Creek), Pohopoco Creek, Sugar Hollow Creek, and Princess Run (“the Watershed”).²³⁹ REAE’s construction will *irreversibly* impact the Watershed.²⁴⁰ REAE will create soil and general land disturbances that are an open invitation for invasive plants to move in.²⁴¹ Companies

²³³ FEIS at 4-38; *see also id.* at 4-204.

²³⁴ *Id.* at 2-16.

²³⁵ *Id.* at 4-44.

²³⁶ *Id.* at 4-205.

²³⁷ *Id.*

²³⁸ Declaration of Jim Vogt, President of Aquashicola-Pohopoco Watershed Conservancy, P 2 (“Jim Vogt Declaration”) (Feb. 10, 2023).

²³⁹ The FEIS lists at least three waterbodies in that APWC protects: Unnamed Tributary to Poplar Creek, Unnamed Tributary to Pohopoco Creek, and Sugar Hollow Creek. FEIS at Table C-4, C-52. *See also* Jim Vogt Declaration at P 3.

²⁴⁰ Jim Vogt Declaration at P 4.

²⁴¹ *Id.*

like REAE commonly use non-native plants for restoration, including Crown Vetch, that do not genuinely restore the land.²⁴²

To date, the Watershed is in extremely good condition and the streams are classed as High Quality Cold Water Fishery (HQ-CWF).²⁴³ Native Brook Trout populate the Watershed; the pristine water quality can be attributed in large part to the lack of industrial activity in the area.²⁴⁴

REAE will cut across the Watershed's drainage patterns and create ground disturbances and runoffs that will adversely impact the Watershed's water quality and the wildlife that depend on it to thrive.²⁴⁵

The native trees surrounding the streams include oaks, maples, and pines.²⁴⁶ REAE's tree felling activities along the Watershed will result in significant habitat loss.²⁴⁷ When trees are cleared for construction projects like REAE, they are usually grubbed (and according to the FEIS, they will be here),²⁴⁸ which means that the trees and roots are entirely removed.²⁴⁹ This would cause soil erosion during a rain event.²⁵⁰

FERC has both failed to properly disclose and address these harms, and other environmental impacts under NEPA and the NGA.²⁵¹ The Supreme Court has explained that injury to the environment is often irreparable because, "by its nature, [it] can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."²⁵² The Court has also stated that "[p]art of the harm NEPA attempts to

²⁴² *Id.*

²⁴³ *Id.* at P 5.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at P 6.

²⁴⁷ *Id.*

²⁴⁸ FEIS at 2-16.

²⁴⁹ Jim Vogt Declaration at P 6.

²⁵⁰ *Id.*

²⁵¹ *See supra* at Part III(A)(3); III(B).

²⁵² *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("*Gambell*").

prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.”²⁵³ The NEPA process is especially crucial when an agency is considering an activity with unknown or uncertain effects on the environment.²⁵⁴ And, reflecting the importance of NEPA review, the Ninth Circuit has explained “[i]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of major federal action.”²⁵⁵

B. Any Harm to the Applicant from a Stay Would be Temporary, Reparable, and Outweighed by Imminent, Irreparable Harm to Intervenor.

A stay will not significantly harm the Applicant. As outlined in Intervenor’s Answer to REAE’s Motion to Lift Stay, under 18 C.F.R. § 157.23, the earliest Transco could begin construction activities (including tree felling) is well outside of Transco’s alleged drop-dead date to start cutting of March 3, 2023.²⁵⁶ As indicated *supra*, public need does not exist for this Project.²⁵⁷ New Jersey has met its gas capacity needs up until now without this Project, and data shows it will continue to do so for the foreseeable future.²⁵⁸ Risk associated with this Project, including denial, has already long been internalized by Applicant. Any harm associated with a stay would be minimal, redressable, and purely economic.²⁵⁹ Meanwhile, as outlined above, harm to Intervenor, affected landowners, and the environment would be irreversible and extraordinary.²⁶⁰ A balancing of hardships offers no serious comparison in this instance, where the environment and privately owned land will be permanently damaged and

²⁵³ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008).

²⁵⁴ *See Monsanto v. Geertson Farms*, 561 U.S. 139, 177 (2010) (Stevens, J. dissenting).

²⁵⁵ *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004).

²⁵⁶ Accession No. 20230126-5063 at p. 2 (Jan. 26, 2023).

²⁵⁷ At Part III(A)(1).

²⁵⁸ *Id.*

²⁵⁹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“[M]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.”).

²⁶⁰ *Supra* at Part IV(A)(1)-(2).

altered for a proposed pipeline wherein there is no demonstrated need—and consequently, may never be built.

Moreover, as the Supreme Court has found, where injury to the environment is at stake, “the balance of harms will usually favor the issuance of an injunction to protect the environment.”²⁶¹ For that reason, the Ninth Circuit has explained that issuing an injunction when balancing a defendant’s potential financial harm against potentially irreparable environmental harm is a “classic, and quite proper, examination of the relative hardships in an environmental case.”²⁶² Consequently, given the potential long-term, permanent impacts to landowners’ properties and the environment—and the negligible impact to the Applicant—the singular conclusion is that the balance of harms tips towards granting the requested stay.

C. A Stay is in the Public Interest Given the Significant Independent, and State-Sponsored Evidence Demonstrating There is No Need for this Project.

There is a fundamental public interest in granting a stay in a proceeding of first impression wherein there are significant, substantiated, and state-sponsored challenges to project need.²⁶³ This case raises an important question of first impression, regarding the weight accorded to an independent, state-sponsored study before the Commission finding that there is no need for the capacity of a proposed project.²⁶⁴ As discussed *supra*, the Commission did not conduct the proper public need analysis before issuing the Order. Without a stay, the construction and operation of this Project would *actively harm the public*, as New Jersey ratepayers would be footing the cost for this unneeded infrastructure as FERC jurisdictional

²⁶¹ *Gambell* at 545.

²⁶² *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005).

²⁶³ *See supra* at Part III(A)(1).

²⁶⁴ *See* Order (Clements, concurring, at P 4) (“Perhaps 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 Board of Public Utilities (NJ BPU) that no additional pipeline capacity is needed in New Jersey.”).

tariffs must be passed through to them, New Jersey LDC private shareholders would be reaping the profits from it, and society would be bearing the full \$46 billion in social costs as the climate destruction project price tag.²⁶⁵

The Project will also cause or contribute to increased upstream gas production and locking in existing wells' usage through hydraulic-fracking and infrastructure development, including all adverse environmental impacts associated therewith, and result in major adverse downstream environmental impacts from combustion of the gas. Both the NGA and NEPA require the Commission to consider those adverse impacts, including the effects of burning gas that will produce tons of greenhouse gas emissions ("GHGs"), nitrogen oxides ("NOx"), volatile organic compounds ("VOCs"), and hazardous air pollutants ("HAPs"). The pollutants that result from combusting gas are known to cause serious adverse health effects, and the GHGs are well-understood to contribute significantly to adverse climate change impacts. Thus, there is a strong interest in protecting the public from those effects, particularly when there is substantial record evidence showing FERC's authorization violated the NGA, NEPA and Administrative Procedure Act ("APA").

FERC should thus ensure that a stay remains in place for as long as permitted under the law. If it fails to do so, the nightmare scenario outlined by then-Chairman Glick in the Spire Order on remand could play out, as "[b]y the time the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) hear[s] argument on the Commission's order[], the pipeline [will be] operating and . . . [REAE shippers will begin] taking actions that would

²⁶⁵ *Supra* at III(A)(1)(d)-(f) (discussing how this Project will be saddled on ratepayers' backs); III(A)(3) (discussing how FERC failed to weigh the significant climate impacts from REAE's greenhouse gas emissions in its Gas Act public interest inquiry).

have the effect of establishing a need for the pipeline that simply did not exist at the time the Commission issued its certificate.”²⁶⁶

This is not a theoretical problem, and FERC should prevent against the equally awful scenario wherein FERC authorizes a project to irreversibly destroy land, which in turn is never built, *e.g.* ACP.²⁶⁷ Here, given the significant issues underlying the justification for the authorization of this project, FERC should grant the stay, and not lift the stay or grant any construction-related authorizations until well past when the record has been filed with the relevant court of appeals, or until the conclusion of judicial review.

V. Conclusion

For the foregoing reasons, Intervenors respectfully request that the Commission:

1. Grant Intervenors’ request for rehearing;
2. Given the lack of substantial evidence to demonstrate need for the Project, grant Intervenors’ request for rehearing on the Commission’s denial of the motion for an evidentiary hearing, and hold an evidentiary hearing on alleged need for the Project;
3. Grant Intervenors’ motion for stay with its authority under 5 U.S.C. § 705, and immediately stay Applicant and its contractors from taking any action authorized

²⁶⁶ Order on Remand and Reissuing Certificates, *Spire STL Pipeline Co., LLC*, 181 FERC ¶ 61,232 (2022) (“Spire Order”) (Glick, concurring, P 2). FERC arbitrarily authorized the Spire pipeline, and the D.C. Circuit vacated this authorization because its need determination was unsupported (*Env’t Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021)), but significant destruction of property and environmental resources occurred while the case was pending. *See* Spire Order (Glick, concurring, P 6) (in the “over three years after [the pipeline] first entered service[,], several landowners’ properties still have not been adequately restored”).

²⁶⁷ Along the canceled Atlantic Coast Pipeline (“ACP”), ACP installed approximately 31.4 miles of pipe, completed an additional 82.7 miles of clearing and grading, and felled trees in 222.5 of the pipeline right-of-way before canceling the project. Order on Rehearing and Directing Compliance, *Atlantic Coast Pipeline, LLC*, 180 FERC ¶ 61,059, P 4 (2022).

by the Certificate Order pending final disposition of rehearing process and judicial review;

4. On completion of the rehearing process, rescind the Certificate Order; and
5. Grant any and all other relief to which Intervenors are entitled.

Respectfully submitted,

Dated: February 10, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served or caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: February 10, 2023

/s/ Jennifer Danis
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