

ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1064

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

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

NEW JERSEY CONSERVATION FOUNDATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC,
Intervenor for Respondent.

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

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GLOSSARY

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

Skipping Stone Study	Skipping Stone, <i>Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project</i> (Sept. 8, 2022), filed as Exhibit A to Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, <i>Transcontinental Gas Pipe Line Co.</i> , Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022)
Transco	Transcontinental Gas Pipe Line Company, LLC
Transco Study	Levitan & Assocs., <i>Regional Access Energy Expansion</i> (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, <i>Transcontinental Gas Pipe Line Co.</i> , Docket No. CP21-94, Accession No. 20220422-5150 (Apr. 22, 2022)

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the addenda submitted with Petitioners' opening brief and this reply brief.

SUMMARY OF ARGUMENT

The Regional Energy Access Expansion Project (“Project”) is not required by the public convenience and necessity. Its capacity is unneeded, its benefits illusory, and its public and environmental harms significant and utterly unnecessary. Rather than take seriously evidence demonstrating that the Project is inconsistent with the Natural Gas Act’s (“Gas Act”) command to protect the public from the harms of unnecessary gas buildout, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) pulled out all the stops to approve the Project by ignoring and minimizing evidence that the Project is unnecessary and harmful.

FERC’s lopsided approach is evident at each step of its review of the Project. FERC erroneously insisted that precedent agreements are virtually dispositive evidence of market need, but precedent agreements alone cannot justify a pipeline where the record contains substantial evidence undermining their probative value. Evidence in the record from state and other experts demonstrates a lack of market need for over half the Project’s capacity and showing that these agreements are

an opportunity for distribution companies to profit at the expense of their captive ratepayers, which FERC arbitrarily discounted.

FERC assessed the Project's alleged benefits and harms with the same one-sided view of the record. FERC's findings of Project "benefits"—meeting unmet demand, enhancing reliability and supply diversity, and serving power plants—are vague, unquantified, and unsupported. FERC's claims of unmet demand inexplicably ignore plentiful, reliable gas supplies distribution companies routinely use to address shortfalls. FERC fails to explain how the Project would provide any meaningful reliability or supply improvement over ample existing capacity, and provides no evidence that power plants have contracted for Project capacity.

Simultaneously, FERC ignored or minimized Project harms. The Commission failed to analyze the enormous costs the Project's unnecessary capacity will impose on ratepayers. FERC minimized the Project's environmental harms, violating the National Environmental Policy Act ("NEPA"), by adopting an impermissibly narrow view of the Project's purpose and need, failing to consider reasonable alternatives, and refusing to consider the Project's climate harms and contributions

to downstream air pollution. Without an accurate understanding of the Project's significant and long-term harms, FERC's balancing under the Gas Act is arbitrary.

The Gas Act does not permit FERC to place its thumb so heavily on the scale in favor of any project. In doing so, the Commission lost sight of its duty to protect consumers and ensure the orderly development of gas infrastructure. FERC's decision to approve the Project, therefore, is unlawful, arbitrary, and capricious and must be remanded and vacated.

ARGUMENT

Under the Gas Act, FERC may approve a project only when it meets the stringent standard of being “required by the present or future public convenience and necessity.” 15 U.S.C. §717f(c). This determination hinges upon a showing of genuine market need and a careful balancing where public benefits must clearly outweigh adverse effects. *See* Cert. of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,750 (1999), *clarified* 90 FERC ¶ 61,128 (2000), *further clarified* 92 FERC ¶ 61,094 (2000) (“Certificate Policy Statement”). Here, the Commission's approval of the Project must be set

aside because FERC failed to establish a bona fide market need and did not accurately evaluate or weigh the Project's harms or benefits. *See Env't Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct. 1668 (2022) ("*Spire*"). Each individual deficiency, let alone in combination, transformed what Congress intended to be a reasoned, independent assessment to protect the public interest into a "meaningless check-the-box exercise," in violation of FERC's responsibilities under federal law. *See* Reh'g Order, *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019), Comm'r Glick's Dissent, P 1. The Court must, therefore, vacate and remand FERC's Orders.

I. FERC CANNOT RELY ON PRECEDENT AGREEMENTS TO ESTABLISH MARKET NEED AND IGNORE CREDIBLE EVIDENCE UNDERMINING THE PROBATIVE VALUE OF THOSE AGREEMENTS.

Contrary to FERC's position, *see* FERC Br. 23–26, precedent agreements are not dispositive evidence of market demand, especially where the record contains state agency investigations and findings, bolstered by other credible expert study findings, concluding that there is no real public need for more than half of the Project's capacity. *See Spire*, 2 F.4th at 972.

FERC is simply wrong that precedent agreements with unaffiliated entities always constitute “ample evidence of demand and public benefit.” FERC Br. 26; *see also* Transco Br. 10–11, 16. In *Spire*, this Court held that the mere existence of precedent agreements did not allow FERC to disregard contradictory evidence demonstrating that there was no market need for a project. 2 F.4th at 972 (although precedent agreements may establish market need “in some cases,” . . . “there is a difference between saying that precedent agreements are always *important* versus saying they are always *sufficient* to show” market need) (emphasis in original).

The other authorities FERC cites do not contradict *Spire*’s holding or support FERC’s erroneous claim that the mere existence of precedent agreement is dispositive. *See* FERC Br. 23–26; *see also* Transco Br. 16. In *Delaware Riverkeeper Network v. FERC*, the “crucial” fact was that the project was “merely changing ownership” and there were only “speculative reports regarding overbuilding and future demand relied on by petitioners.” 45 F.4th 104, 114 (D.C. Cir. 2022). The Court held that “in that context, the Commission could reasonably conclude that precedent agreements were especially good evidence of demand for the

pipeline's capacity." *Id.*; see also *Minisink Residents for Env't Preservation and Safety v. FERC*, 762 F.3d 97, 108–11 (D.C. Cir. 2014) (rejecting petitioners' challenge where a central piece of supporting evidence was "an ambiguous reference in one PowerPoint slide that Petitioners uncovered through an internet search"). In contrast, the Project goes well beyond "merely" changing ownership, and the Board Order, state-sponsored study, and other record evidence are neither "speculative" nor "ambiguous."

While precedent agreements might be sufficient to demonstrate market need in some circumstances, in this case they were not, given the overriding record evidence undermining the probative value of the precedent agreements and demonstrating that the Project's capacity is not needed. In its own Certificate Policy Statement, FERC noted that the amount of capacity under contract via precedent agreements "is not a sufficient indicator by itself" of project need, "because the industry has been moving to a practice of relying on short-term contracts, and pipeline capacity is often managed by an entity that is not the actual purchaser of the gas [shippers]." Certificate Policy Statement at 61,744. Here, it is undisputed that a vast majority of the gas—72.5%—is bound

for New Jersey markets, Order Issuing Certificate and Approving Abandonment ¶ 4, 182 FERC ¶ 61,006, JA____ (“Certificate Order”); Order on Reh’g, Granting Clarification, Den. Stay, and Dismissing Waiver, 182 FERC ¶ 61,148 (2023) PP 32–33, JA____–____; the record contains a state Board Order and expert studies showing that New Jersey’s existing capacity was more than adequate to meet need even in an extreme event or future design day, Order, *In re Exploration of Gas Capacity and Related Issues*, New Jersey Board of Public Utilities Docket Nos. GO19070846 & GO20010033, 11 (Jun. 29, 2022) (“Board Order”), JA____; London Econ. Int’l, *Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers*, 2, 25 (Nov. 5, 2021) (“NJ Agencies Study”), JA____, ____; and the relevant gas utilities have a substantial financial incentive to enter into agreements for unneeded capacity, Skipping Stone, *Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project*, 1–4, 19–20 (Sept. 8, 2022) (“Skipping Stone Study”), JA____–____, ____–____. On this record, FERC could not rest primarily on the conclusion that precedent agreements reflect a “business decision that need exists” that warrants deference from both FERC and this Court. *See* FERC Br. 23.

The Commission failed to consider undisputed evidence presented by Petitioners that the so-called “business decision” by the Project’s New Jersey local distribution companies (“LDC”) to enter into precedent agreements is the product of perverse financial incentives. Skipping Stone Study at 1–4, 19–20, JA__–__, __–__; *see also* New Jersey Parties’ Mot. to Intervene & Lodge, *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94, Accession No. 20220711-5186, 2 (July 11, 2022), JA__ (intervening on behalf of New Jersey consumers “who do not need to be burdened with unneeded natural gas capacity”). Far from reflecting market need, the precedent agreements are opportunities for these LDCs to contract for capacity they do not need, pass that excess capacity’s cost on to their captive ratepayers, and profit by selling the excess capacity on the secondary market. Skipping Stone Study at 3–4, JA__–__. The LDCs’ decision to sign precedent agreements for Project capacity is a lucrative, risk-free investment akin to the problematic arrangement that FERC ignored—and this Court struck down—in *Spire*. *See* 2 F.4th at 973 (citing concern that precedent agreement “could shift costs to captive ratepayers of the affiliate and subsidize the . . . project inappropriately”) (quoting *Chinook Power Transmission*,

LLC, 126 FERC ¶ 61,134, 61,767 (2009)).

FERC barely responds to this evidence, implying it does not understand how this arrangement constitutes “profiteering” or how the LDC shippers could “somehow remarket [unneeded capacity at ratepayer expense] for shareholder benefit.” FERC Br. 24; *see also*, Transco Br. 23–24 (failing to address evidence of shippers’ financial incentive). This reality, however, is one FERC appears elsewhere to fully understand, noting that the Transco-affiliated marketer Williams (which contracted for 18% of Project capacity) “is a wholesale energy marketer, not a *local distribution company able to pass through costs to captive customers*, and is *accordingly at risk for recovering the costs of the capacity contract*.” FERC Br. 25 (emphasis added).

FERC also wrongly attempts to claim that the evidence before it on profiteering motives is “inconsistent” with evidence “that Project capacity is unneeded because there is already ample capacity in New Jersey.” *Id.* at 26. This argument, however, demonstrates a fundamental misunderstanding of the gas market forces at play—namely how hidden subsidies by ratepayers can alter competitive dynamics. To illustrate how this works, consider an example where the

government provides subsidies to a subset of corn farmers who lease their land to cover the cost of renting farmland. The subsidies allow the farmers to price their corn more competitively because they have a guaranteed return on their fixed land costs and do not have to include the land rental cost in the price they charge. Thus, these certain farmers can undercut the market, because even if there is already an abundant supply of corn available, the subsidized farmers can profit by selling their corn at cheaper prices than non-subsidized farmers. The same is true here, where the LDCs signing precedent agreements are assured recovery of their fixed pipeline infrastructure costs through pipeline reservation charges to captive ratepayers and can undercut the price of gas using other available capacity. FERC misses the point by assuming that if there is a glut of gas capacity in the market, the LDCs' lower-cost gas capacity should find no takers. The advantage held by LDCs with Project capacity is not in fulfilling some unmet need for capacity, but in competing for sales of capacity, with their fixed costs covered, and undercutting the price of other available capacity. The arrangement essentially provides guaranteed free money to shareholders because ratepayers are paying for the LDCs' fixed costs.

With all the above on the record, FERC erroneously found that the precedent agreements and corresponding comments from the subsidized shippers were significant evidence of need. *Id.* at 23–26, 49–53; Order on Reh’g PP 20, 59, JA____, __. It was arbitrary and capricious for the Commission to rely so heavily on precedent agreements and ignore evidence calling into question whether the agreements demonstrated a true market need. *See Spire*, 2 F.4th at 973; *see also* Cert. of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,107, P 54 *modified* 178 FERC ¶ 61,197 (2022) (“Draft Updated Policy Statement”) (“While precedent agreements may indicate one or more shipper’s willingness to contract for new capacity, such willingness may not in all circumstances be sufficient to sustain a finding of need—*e.g.*, in the face of contrary evidence or where there is reason to discount the probative value of those precedent agreements.”).

II. THE RECORD DOES NOT SUPPORT FERC’S FINDINGS OF PROJECT BENEFITS.

In addition to unduly relying on the existence of precedent agreements and refusing to consider evidence that those agreements could not be treated as a proxy for actual market need, the Commission arbitrarily concluded the Project would provide public benefits by

serving an unmet demand for gas, enhancing reliability and supply diversity, and serving interruptible demand. The record, however, does not support the existence of any of these undefined benefits or FERC's conclusion to approve the Project. *See Spire*, 2 F.4th at 972–74 (“[v]ague assertions of public benefits will not be sufficient” to justify approval under Section 7 of the Gas Act) (quoting 88 FERC at 61,748).

A. FERC's Findings that the Project Would Serve Unmet Public Demand Are Based on Unsupported Assumptions About the Market's Capacity.

Petitioners and Intervenors' briefs discussed in detail how the Commission's decision to unquestioningly adopt the Transco Study and reject findings by New Jersey and other experts that there is no need for the Project was arbitrary and capricious. Pet'rs Br. 36–51; Rate Counsel Br. 13–26. Chief among those errors was FERC's unsupported decision to ignore the availability of significant off-system peaking resources to meet design day demand identified in both the New Jersey and Skipping Stone studies. NJ Agencies Study at 90, JA___; Skipping Stone Study at 6, JA___ (893,140 Dekatherms per day (“Dth/d”) of net stranded capacity available). FERC concluded that New Jersey needs more gas capacity based on its unreasonable acceptance of Transco's

disregard for historical data showing that New Jersey has ample off-system peak supplies. *See* Order on Reh’g P 38, JA___ (noting such off-peaking resources as “uncertain”); *compare with* NJ Agencies Study at 99–100, JA___–___ (“This analysis shows that sufficient firm capacity exists to meet firm demand from customers in New Jersey under a Normal Winter Day, a Historical Peak Day, and even on a Winter Design Day.”). FERC acknowledged this as a “limitation” of the Transco Study, but utterly failed to explain why it rested its approval of the Project on a study with such a fundamental flaw. *See* Order on Reh’g P 40, JA___ (criticizing Transco Study for, among other things, “discount[ing] the availability of any firm capacity held” with delivery points downstream of New Jersey, as this capacity “has been available to New Jersey shippers in the past through short-term peaking contracts, and may be available in the future on the same short-term basis”); NJCF Reh’g Req. 25, JA___ (criticizing FERC for resting on bald shipper assertions that are both inconsistent with past practice and controverted by data and analyses); *see also* Rate Counsel Br. 18–22.

Critically, nowhere does FERC explain how a market need can be established by ignoring the massive volumes of available gas that

distribution companies have historically used to meet design day needs, or why, how, or *even if* such off-peaking supplies would become unavailable in the future. Commissioner Clements specifically noted FERC's failure to offer any explanation for why this capacity would suddenly disappear. Order on Reh'g, Comm'r Clements Concurring In Part, P 3, JA____. FERC's repeated characterization of the Transco Study as "more persuasive," *see, e.g.*, Order on Reh'g P 41, JA__, does not make it so—the Commission is required, at the very least, to explain its conclusions. Indeed, this Court has long held "that, when the data relied on by [an agency] in reaching its decision is not included in the administrative record and is not disclosed to the court[,] it cannot "determine whether the final agency decision reflects the rational outcome of the agency's consideration of all relevant factors[.]" *Flyers Rts. Educ. Fund, Inc. v. Fed. Aviation Admin.*, 864 F.3d 738, 746 (D.C. Cir. 2017) (alterations in original) (quoting *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 533 (D.C. Cir. 1978) (footnote omitted)). This Court will not defer "to a declaration of fact that is 'capable of exact proof' but is unsupported by any evidence." *Id.* (quoting *McDonnell*

Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1190 n.4 (D.C. Cir. 2004) (citation omitted)).

FERC's failure to justify ignoring these historically-used off-system resources is all the more arbitrary because their amount is quite large. Available off-system peaking resources total, conservatively, at least a whopping 619 million Dth/d,¹ NJ Agencies Study at 98, JA__. If capacity stranded in New Jersey is included, that number reaches 893,140 Dth/d, more than the entire Project's capacity. Skipping Stone Study at 6, JA__. FERC's unexplained refusal to consider available off-system resources defies logic.

FERC's further attempts to justify rejecting the NJ Agencies and Skipping Stone Studies' findings that plentiful additional capacity exists, obviating Project need, are similarly unavailing. The Commission ignored that one of the NJ Agencies Study's overly conservative scenarios, "Scenario 1a" adopted the LDCs' own inflated growth rate forecast of 1.02%, assuming that energy efficiency gains would not offset gas use, and *still* found surplus available capacity

¹ Projection for off-peaking resources was based on the LDCs' own numbers.

through 2030 without the Project. *Id.* FERC attempts to dismiss the scenario's findings of excess capacity, pointing to the NJ Agencies Study's recommendation to not use Scenario 1a in its Shortfall Risk Assessment. FERC Br. 38–39. However, the NJ Agencies Study opted against using Scenario 1a because of its overly inflated *demand* growth projection² and not its findings on supply availability. NJ Agencies Study at 56, JA____. The Commission's invocation of Scenario 1a neither undermines the existence of substantial off-system resources nor cures the fatal flaw in FERC's Orders that the Commission had no real basis to doubt the NJ Agencies Study's findings.

FERC and Transco also repeat FERC's defective reasoning for dismissing the Skipping Stone Study's findings, *see* FERC Br. 41–44, Transco Br. 13–14, without meaningfully engaging in most of the arguments Petitioners made in their opening brief and below. Pet'rs Br. 44–59. The Commission failed to grapple with evidence that the more

² NJ Agencies Study found this growth rate to be too high “for several reasons,” including that it was not grounded in historical trends or facts, and that some LDCs illogically assumed no efficiency improvements, while others assumed customers switching from oil to gas, even though that practice is likely to slow. *See* NJ Agencies Study at 11, JA____.

than 800,000 Dth/d of “stranded capacity” in New Jersey that FERC refuses to count as available supply cannot be taken to out-of-state markets without significant expansion of the existing transmission system. *See* Skipping Stone Study at 6, JA___. As there is no evidence in the record that this will happen—and such an expansion would be subject to FERC review under the Gas Act—the Commission cannot assume this huge volume of gas will flow out of the New Jersey LDCs’ reach.

FERC also arbitrarily refused to address the fact that the 2018–2019 peak load of actual, used capacity the Skipping Stone analysis uses is more than 2,070,000 Dth/d greater than all the LDCs’ design day needs based on the LDCs’ own design day figures. Skipping Stone Study at 18–19, JA__–__. In other words, the amount of gas LDCs sourced five seasons ago—without the Project’s additional capacity—is far greater than LDCs’ own projected future need. Without any evidence that off-system peaking resources may become unavailable or scarcer, FERC’s decision to ignore this consistently reliable, available capacity

resource and conclude that the Project is needed and would provide public benefits by addressing that need is arbitrary and capricious.³

B. FERC’S Findings of “Reliability” and “Supply Diversity” Benefits Are Unsupported and Vague.

Refusing to grapple with evidence that the Project will not address any real shortfall in gas capacity availability, the Commission resorts to unsubstantiated claims that the Project is needed to ensure the vague benefit of “reliability.” *See* FERC Br. 2, 21–22, 88. These claims, however, suffer from same problems discussed in the preceding section—there is no evidence showing any real risk that off-system peaking resources would become inexplicably unavailable to meet design day demand. As Petitioners’ opening brief discussed, Pet’rs Br. 39–40, it is undisputed that LDCs have used off-system peaking resources to meet peak demand for decades, and neither FERC nor

³ FERC also fails to address another glaring defect in its analysis—the conclusion that the Skipping Stone Study did not “properly apply design day planning principles.” *See* FERC Br. 31; *see also* Transco Br. 13–14. As discussed in detail in Pet’rs Br. 50–51, Skipping Stone used the same design day figures as those used in the LDCs’ Basic Gas Supply Service filings used in the Transco Report. *See, e.g.*, Skipping Stone Study at 19, Chart 2, JA__ ; *id.* at 18, JA__ (using design day figures from New Jersey utilities’ 2022 state filings, except where unavailable, in which case using figures from the Transco Study).

Transco cite any evidence showing that those resources may no longer be available in the future, or that the Project provides any true saving or benefit. NJ Agencies Study at 99–100, JA__–__.⁴ Moreover, FERC’s argument that the Project will save LDCs and their customers money, because ensuring “reliable” service “in constrained conditions can be very costly,” is utterly unsupported. *See* FERC Br. 48–49. FERC makes no attempt to explain how any such cost savings might occur, or how these savings might compare to the Project’s immense cost and harms.⁵ The Commission’s attempts to frame its analysis as adopting the Transco Study’s lower “risk tolerance,” therefore, have no basis in objective reality, let alone the record before FERC.

In addition, FERC’s suggestion that “potential extreme weather events” affecting reliable access to such capacity justify the Project, FERC Br. 33, is also fundamentally flawed. Nothing in the record

⁴ FERC itself states that “[LDCs] often supplement their storage and pipeline transportation entitlements with such third-party supplies purchased under short-term contracts.” FERC Br. 32.

⁵ The Shippers’ self-serving comments alleging that the Project will provide various, undefined benefits, including improving “reliability,” similarly provide no credible analysis or facts from which they draw this vague conclusion. *See* FERC Br. 50–51.

supports the conclusion that pipeline capacity is needed to support demand during “extreme winter events.” For example, FERC’s Order on Rehearing invoked Winter Storm Elliot as a reason to doubt that downstream supplies would be available during extreme weather events. Order on Reh’g P 55, JA___. However, when FERC investigated what actually happened during Winter Storm Elliot, “it discovered that the major causes of infrastructure reliability issues were production infrastructure and equipment freezing and process facility operating issues.” *FERC-NERC-Regional Entity Joint Inquiry Into Winter Storm Elliot* 10–16 (Sept. 21, 2023); *Winter Storm Elliot Report: Inquiry into Bulk-Power System Operations During December 2022* (Oct. 2023) (finding 96% of all outages, derates, and failures to start were attributed to three causes: Freezing Issues (31 percent), Fuel Issues (24 percent) and Mechanical/Electrical Issues (41 percent)).⁶ Nothing in the

⁶ Available at: <https://www.ferc.gov/news-events/news/presentation-ferc-nerc-regional-entity-joint-inquiry-winter-storm-elliott>; and <https://www.ferc.gov/media/winter-storm-elliott-report-inquiry-bulk-power-system-operations-during-december-2022>. Petitioners request that the Court take judicial notice of this report and its key findings. The facts contained therein “can be accurately and

key findings or recommendations of FERC's own study supports the conclusion that there was any issue with pipeline capacity. *See id.*

Simply adding more pipeline capacity would not address the reliability problems the study found, *i.e.*, the absence of weatherized natural gas production processing units. *See id.* The Commission cannot use unsupported references to vague concepts like "reliability" as a basis for approving a project under the Gas Act.

Similarly, FERC's continued invocation of the Project's undefined and unsubstantiated "supply diversity" benefit does not support the Commission's decision. *See* FERC Br. 47. Critically, FERC's orders do not identify or analyze the ways in which the Project would improve supply diversity or what effect it would have on ratepayer costs.

Certificate Order P 68, JA __. As outlined in Petitioners' opening brief, duplication of any existing pipeline network always provides some abstract improvement in "supply diversity," and by that logic FERC

readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts "must take judicial notice if a party requests it and the court is supplied with the necessary information," Fed. R. Evid. 201(c)(2), and "may take judicial notice at any stage in the proceeding." Fed. R. Evid. 201(d).

could rubber stamp any proposed pipeline. Pet’rs Br. 59–60. Here, FERC’s own studies also undermine FERC’s conclusion of Project benefits, because the gas provided by the Project would come from regions where, according to FERC itself, production has historically failed during cold weather. *See Joint Inquiry Into Winter Storm Elliot* at 4 (“Gas production experienced the greatest declines in the Marcellus and Utica Shale formations, where it dropped by 23–54% during [an extreme cold weather event].”); *see also* Final EIS, *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94, Accession No. 20220729-3005, 1-2 (Jul. 29, 2022), JA__ (explaining that the Project would transport gas “from the Marcellus Shale production area in northeastern Pennsylvania”). Thus, the Project’s contributions to supply diversity would not solve the real problems plaguing the gas system during cold or extreme weather events, further demonstrating the arbitrariness of FERC’s assessment of the Project’s benefits.

C. There Is No Credible Evidence that the Project Will Serve Interruptible Demand.

FERC’s claim that the Project will improve service to gas-fired power plants, FERC Br. 45, suffers from glaring defects: (1) there is no evidence that any electric generator signed up for the Project’s capacity,

and (2) FERC completely failed to explain why or how such interruptible demand should be considered in its need analysis, other than merely stating that it “can consider [interruptible gas generation demand], regardless of whether LDCs may do so in their planning.” Order on Reh’g P 63, JA____. The record reflects that most of the Project’s capacity is destined for New Jersey LDCs and the remainder is contracted to independent shippers. Certificate Order P 7, JA____. None of the gas-fired generators connected to the LDCs’ distribution systems are firm customers of the LDCs, *see* NJ Agencies Study at 9, 23, 39, 84, JA____, __, __, __,⁷ so there is no evidence that the LDC Shippers’ contracted gas will ever serve gas-fired generators. There is also no evidence that independent shippers that contracted for Project capacity will deliver Project gas to power generators.⁸ Because the record does

⁷ To the extent that some New Jersey LDCs might sell excess capacity to gas-fired generators on the spot market, that is not a benefit that would justify Project approval. It is not the responsibility of LDCs’ captive ratepayers to pay for firm pipeline capacity so that an LDC can serve electric generators, keep the profits, then bill those same ratepayers for that capacity.

⁸ Two independent shippers provided Transco with *estimates* indicating they *might* deliver gas for power generation. *See* Certificate

not support FERC's claim that the Project will provide gas to power plants, this speculative benefit is entitled to no weight.

Because the Commission failed, at each step of its analysis, to engage in the reasoned and principled decision-making required by the Gas Act, its decision to approve the Project must be remanded and vacated. *See Spire*, 2 F.4th at 974, 976.

III. FERC ARBITRARILY IGNORED AND DISCOUNTED THE PROJECT'S HARMS.

On the other side of the scale, the Commission ignored the harms the Project will cause to landowners and ratepayers. FERC wrongfully implies that Petitioners waived a challenge to FERC's failure to consider "adverse economic impacts" and "impacts on the interests of landowners and surrounding communities." *See* FERC Br. 54. That is demonstrably false. Pet'rs Br. 95 ("[T]he Project's many substantiated and significant concrete harms are clear and include imposing

Order P 7, JA___ (including a chart provided to FERC by Transco in Transco's Resp. to Env't Information Req., *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94, Accession No. 20211210-5136), 45–46 (Dec. 10, 2021)). These estimates are entirely speculative and, even if relevant, the shippers estimated that only 76,400 Dth/d, roughly 9% of Project capacity, would be delivered to generators. *Id.*

unnecessary costs on New Jersey ratepayers, and adversely impacting landowners like Petitioner Catherine Folio through tree clearing, ground disturbance, imposition of a gas pipeline on their land, and lowered property values.”) (citing Folio Decl.); *id.* at 25–26, 37, 63–66 (ratepayer harms). Further, the Commission’s failure to conduct the review required by NEPA and, therefore, to accurately assess the extent of the Project’s environmental harms, violated NEPA and caused FERC to significantly undervalue the Project’s harms when conducting the weighing required by the Gas Act.

A. FERC Arbitrarily Ignored the Project’s Economic Harms.

FERC’s failure to consider or analyze the costs to New Jersey ratepayers is textbook arbitrary and capricious decision-making. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983) (under substantial evidence standard, agency decision will be reversed where agency “entirely failed to consider ... important aspect[s] of the problem”). The record reflects, and Petitioners’ opening brief emphasized, that “New Jersey ratepayers would bear the entire cost of infrastructure not designed to meet or serve their demand.” Pet’rs Br. 19 (quoting Skipping Stone Study at 4, JA __). New Jersey’s

Rate Counsel further emphasized the Project's unnecessarily increasing costs to New Jersey ratepayers. Comments of NJ Div. of Rate Counsel, *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94, Accession No. 20221121-5157, 2 (Nov. 21, 2022), JA_____.

FERC did not dispute these documented Project harms; it simply ignored them. FERC's failure to analyze how its approval of the Project would impact New Jersey ratepayers, unquestionably "an important aspect of the problem," is grounds for reversal. *See State Farm*, 463 U.S. at 43.

FERC's failure to consider ratepayer costs is exacerbated because FERC's directive under the Gas Act is to protect *consumers* against unreasonable rate increases caused by corporate profiteering. *Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 666–68 (1976); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 612 (1944) (the certificate authority was "plainly designed to protect consumer interests against exploitation at the hands of private natural gas companies"). In direct dereliction of that duty, FERC's entire discussion of Project costs was focused on cost savings *to corporate shippers* and ignored the cost impact *to consumers*. FERC Br.

47–49 (“Project capacity will allow [Transco’s] local distribution company customers to lower their costs . . .”). FERC did not consider whether, and to what extent, cost savings to shippers would be passed on to the shippers’ captive ratepayers, or critically, whether any cost savings passed on to ratepayers would offset the Project costs to be borne by those ratepayers.

FERC impermissibly vaguely invoked “reliability” and “supply diversity” as purported Project benefits, but it failed to answer whether those alleged marginal improvements would justify both the costs to be borne by New Jersey ratepayers and the other harms raised. *See* 88 FERC at 61,748 (“[v]ague assertions of public benefits will not be sufficient” to justify approval under Section 7 of Natural Gas Act). In fact, the record shows that forcing ratepayers to contract for 365 days per year of pipeline capacity to meet a few days of peak demand is an extremely inefficient decision that LDCs can only financially bear because it is subsidized by ratepayers. *See* Skipping Stone Study at 17–18, JA__–__ (discussing how the Project’s capacity is an entirely uneconomic way to “firm-up” pipeline capacity for the approximate potential 5 days of extreme weather-driven demand).

No record evidence supports the conclusion that the Project will meaningfully improve supply diversity in any way that will benefit consumers. *See Spire*, 2 F.4th at 972–74 (vacating FERC’s approval of pipeline based on similarly conclusory assertions of project benefits).

B. FERC Violated NEPA and the Gas Act by Arbitrarily Minimizing and Ignoring the Project’s Environmental Harms.

1. FERC Adopted an Unlawfully Narrow Purpose and Need that Excluded Reasonable Alternatives.

Despite FERC’s claims that the Final Environmental Impact Statement (“EIS”) considered “a reasonable range of alternatives” based on its statement of purpose and need, the Final EIS’s definition of the Project’s purpose and need remains too narrow to comply with NEPA and the Gas Act. By only reflecting the Project applicant’s narrow goal in the Final EIS, FERC made its approval of the Project—and its rejection of any reasonable alternative—a foregone conclusion in violation of NEPA and the Gas Act.

While agencies may consider an applicant’s goal when determining purpose and need, FERC erred here by using the applicant’s goal as its only consideration. “[B]lindly adopting the

applicant's goals is a 'losing proposition' because it does not allow for the full range of alternatives required by NEPA." *Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676, 683 (7th Cir. 2006) (quoting *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997)). The preamble to the Council on Environmental Quality's 2022 revisions to its NEPA regulations states 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." *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453, 23,459 (Apr. 20, 2022). Moreover, "court decisions have deferred to agencies' purpose and need statements . . . that put weight on multiple factors rather than just an applicant's goals, recognizing those factors as appropriately within the scope of the agency's consideration." *Id.* (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

The Council on Environmental Quality has concluded that "prioritiz[ing] an applicant's goals above or to the exclusion of other

relevant factors...[is] inconsistent with fully informed decision making and sound environmental analysis.” 87 Fed. Reg. at 23,458.

FERC’s attempts to justify its failure to consider any factors beyond Transco’s objectives are unavailing. FERC cannot import the applicant’s project purpose into a NEPA purpose and need statement wholesale without considering whether that statement allows for consideration of “a wide range of alternatives.” *See Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598–99 (4th Cir. 2018) (holding that NEPA purpose and need statement cannot be so narrow that “only one environmentally benign alternative is allowed”), *see also Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004).

For example, in *Fuel Safe Washington*, while the court allowed FERC to adopt the applicant’s project purpose, it did so because FERC did a robust analysis of multiple non-gas alternatives as part of its analysis of the no-action alternative. *See Fuel Safe Washington*, 389 F.3d at 1324. This evaluation of the no-action alternative included alternative fuels, clean-coal technology, solar power, wind-powered electricity, small-scale hydroelectric generation, wave energy, and generating the needed electricity elsewhere and upgrading the

transmission cables. *Id.* Here, FERC did no such analysis; it merely stated that no non-gas or non-project alternatives “satisfy the need for the Project.” Final EIS at 3-3, JA ___. This falls far short of the wide-ranging alternatives analysis required, regardless of what FERC uses as the statement of purpose and need.⁹

Additionally, while FERC is not required to reject a project in favor of non-gas alternatives that are “purely hypothetical and speculative,” *Fuel Safe Washington*, 389 F.3d at 1324, the non-gas alternatives in this case were not purely speculative or hypothetical—New Jersey has studies showing that it does not need the Project’s gas, and the state has binding greenhouse gas emissions (“GHG”) reduction targets, including a mandate for LDCs to reduce gas use, *see* N.J.S.A. § 48:3-87.9(a). It is not purely speculative to assume that New Jersey would comply with its own laws, reduce its emissions, and obviate the

⁹ Because Petitioners challenge FERC’s statement of purpose and need, the court’s decision in *Center for Biological Diversity* is not applicable here. *See Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1182 (D.C. Cir. 2023) (holding that because the project’s purpose was uncontested, it was accurately characterized, and FERC reasonably rejected alternatives).

need for the Project, even without a plan from the state detailing the precise steps it will take to comply with its targets.

It is also not the responsibility of commentors on an agency proceeding to provide FERC with specific non-gas proposals that could be plugged into an analysis of the no-action alternative. FERC argues that because Petitioners did not identify any specific non-gas proposals by agencies willing to pursue them, such alternatives were too speculative for FERC to consider. FERC Br. 64. But Petitioners and Intervenors submitted non-speculative evidence that New Jersey did not need more gas, which FERC should have used to consider the no-action alternative and fulfill the *Commission's* responsibility to comply with NEPA and consider a reasonable range of alternatives.

On the other side of the coin, FERC cannot justify its failure to do a reasonable alternatives analysis by pointing at an unlawfully narrow statement of purpose and claiming that no alternative satisfies it. It reasonably follows that a too narrow statement of purpose and need taints the entire alternatives analysis. NEPA requires that agencies take a “hard look” at alternatives and that the EIS be more than a “foreordained formality.” *See Webster v. U.S. Dep’t of Agric.*, 685 F.3d

411, 422 (4th Cir. 2012) (citing *Citizens Against Burlington*, 938 F.2d at 196). This is impossible when the statement of purpose and need is so narrow that the alternatives analysis that follows only produces one feasible alternative—the project as proposed. FERC’s defense of its alternatives analysis does not hold up if the statement of purpose and need it relies on is impermissibly narrow.

The Commission’s refusal to engage in any critical evaluation of Transco’s purpose and need has resulted in a determination that fails to consider any meaningful alternative other than the Project as proposed, turns environmental review into a box-checking exercise, and thus renders the Commission’s decision-making under the Gas Act ill-informed and unreasonable.

2. The Commission’s Decision Not to Consider the Project’s Climate Change Impacts Violated NEPA.

Despite recognizing that the Project would emit GHGs and contribute to climate change, the Commission chose not to evaluate the

significance of those impacts. See Final EIS at 4-175, JA__.¹⁰ This error resulted in a fundamentally inadequate EIS, because despite acknowledging environmental impacts, the Commission did not evaluate their significance, use the information to evaluate alternatives, or consider ways to mitigate the impacts. The Commission inaccurately claims it “quantif[ied] and consider[ed]” the Project’s emissions, when it expressly declined to consider the impacts of the Project’s GHG emissions. See FERC Brief 67.

¹⁰ Transco’s Response Brief somewhat creatively attempts to sever GHG emissions from the well-known and well-understood environmental impact *caused* by GHG emissions known as climate change. Compare Transco Br. 20 with *Sierra Club v. FERC*, 867 F.3d 1357, 1371–72 (GHG emissions that contribute to climate change are a reasonably foreseeable effect of authorizing a pipeline). This justification for FERC’s action directly contradicts the Commission’s own statements that the Project’s climate change impacts (caused by its GHG emissions) are reasonably foreseeable. See Final EIS at 4-161, JA__ (describing how GHG emissions contribute to climate change), *id.* at 4-175, JA__ (recognizing that the Project’s GHG emissions will contribute to climate change impacts). As Transco’s proposed distinction was not supplied by FERC in support of its decision, this Court should reject it outright. See *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1092 (D.C. Cir. 2009) (declining to accept “appellate counsel’s post-hoc rationalizations for agency action” (quoting *State Farm*, 463 U.S. at 50)).

The Commission's cited "lack of methodology" to assess the significance of the Project's GHG emissions is, in truth, a lack of a *preferred* methodology. The Commission already determined it is able to assess the significance of GHG emissions, and many other agencies regularly do so in NEPA analyses. *See* N. Nat. Gas Co., 174 FERC ¶ 61,189 P 29 (2021). There is nothing special or unique about this Project's emissions that makes them particularly inscrutable.

Petitioners identified several workable methods the Commission could use to assess the significance of the Project's climate change impacts. *See* Delaware Riverkeeper Network Req. for Reh'g, *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94, Accession No. 20230210-5211, 41–44 (Feb. 10, 2023), JA__–__; Food & Water Watch and Sierra Club Req. for Reh'g, Accession No. 20230210-5214, 21–24 (Feb. 10, 2023), JA__–__; NJCF et al. Req. for Reh'g and Mot. for Stay, Accession No. 20230210-5215, 37 (Feb. 10, 2023), JA___. Nevertheless, the Commission cannot "place[] the burden of analyzing the data on the public" when it is the *agency's* responsibility to comply with NEPA. *See WildEarth Guardians v. Zinke*, 368 F. Supp.3d 41, 69 (D.D.C. 2019) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013)). It

is not necessary to establish a specific, quantifiable, and universally-applicable threshold to determine whether a project's climate change impacts are significant. The Council on Environmental Quality Guidance explains that the social cost of GHG is a method to “evaluate the significance of an action's climate change effects, and better understand the tradeoffs associated with an action and its alternatives.” *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1198 (Jan. 9, 2023).¹¹

Even if mere quantification of GHG emissions was a “reasonable proxy” for assessing climate impacts, which Petitioners—and the Environmental Protection Agency (“EPA”)—dispute, the Commission

¹¹ Petitioners do not argue that the Commission was required to implement the 2023 Council on Environmental Quality Guidance merely because it was published before the Certificate Order was issued. Rather, assuming FERC was truly stumped in its attempt to comply with NEPA's requirement to discuss significance, *see* 40 C.F.R. § 1502.16(a)(1), the Commission should have recognized that its NEPA analysis was fatally deficient due to its failure to evaluate climate change impacts. Because the Council on Environmental Quality Guidance was available before the Commission's decision, FERC should have utilized the Guidance in a supplemental EIS. *See* Pet'rs Br. 84–85.

cannot explain why that reasonable proxy did not carry through to its alternatives analysis and consideration of mitigation. In *WildEarth Guardians v. Jewell*, the Bureau of Land Management followed a 2010 Draft Council on Environmental Quality Guidance directing agencies to quantify emissions “as a reasonable proxy for assessing potential climate change impacts[] and provide decision makers and the public with *useful information for a reasoned choice among alternatives.*” 738 F.3d at 309 (emphasis added) (quoting Memorandum from Council on Env’t Quality, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions at 3 (Feb. 18, 2010)). Even the 2019 Draft Council on Environmental Quality Guidance instructed agencies to quantify GHG emissions and to “compar[e] alternatives based on potential effects due to GHG emissions . . . [to] help agencies differentiate among alternatives.” *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019). As it stands, the Commission’s quantification of GHG emissions is useless information since it was not used to compare alternatives or to evaluate the mitigation of emissions. See Final EIS at 3-1 to -32, 4-179, JA__—__,

__. Although NEPA does not require mitigation measures to be implemented, it *does* require the agency to “include appropriate mitigation measures not already included in the proposed action or alternatives” in the alternatives analysis. 40 C.F.R. § 1502.14(e).

This Court should not defer to the Commission’s decision to abdicate its responsibility under NEPA merely because the required analysis is “technical” or “scientific.” *See Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (deference to an agency determination is not due where the agency acts outside of its technical expertise). *See also Citizens Against Rails-To-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001) (“Because NEPA’s mandate is addressed to all federal agencies,” federal agencies are “not entitled to the deference that courts must accord to an agency’s interpretation of its governing statute.”). The issue of a project’s climate change impacts is not uniquely within the Commission’s “technical and scientific expertise.” *Cf. Sierra Club v. FERC*, 38 F.4th 220, 235 (D.C. Cir. 2022) (discussing environmental analyses of turbidity in streams caused by pipeline construction). The Commission’s persistent refusal to analyze gas projects’ climate change

impacts results in a lack of experience in this realm. *See, e.g., Gas Transmission Northwest, LLC*, 185 FERC ¶ 61,035 P 72 (2023); *Equitrans, L.P.*, 185 FERC ¶ 61,040 P 30 (2023); *N. Nat. Gas. Co.*, 184 FERC ¶ 61,186 P 65 (2023).

To the extent that this Court has previously deferred to the Commission's on climate change, it should decline to do so in this case. Instead, it should defer to the technical expertise of the agencies charged with administering NEPA and controlling air pollution—the Council on Environmental Quality and EPA. The Council on Environmental Quality's Guidance makes clear that it is indeed possible to both quantify and evaluate a Project's climate change impacts and that there are multiple methods to do so. *See* 88 Fed. Reg. at 1202–03. EPA's comment on the Commission's draft EIS described the social cost of GHG tool as “reflect[ing] the best available science” and recommended using the metric “to assess climate impacts and help weigh their significance.” *See* Comments of U.S. Env't Prot. Agency on the Draft Environmental Impact Statement, *Transcontinental Gas Pipe Line Co.*, Docket No. CP21-94-000, Accession No. 20220425-5217, 7 (Apr. 25, 2022) (“EPA Draft EIS Comment”), JA___. The views of these

agencies should be afforded greater weight than those of the Commission when determining whether an agency is able to assess the significance of a project's GHG emissions in its NEPA analysis.

Specifically concerning the Project's long-term impacts in the context of a changing climate, the Commission states, without explaining why, that it is "unable to determine how individual projects will affect . . . greenhouse gas reduction targets." FERC Br. 74. As explained in the Council on Environmental Quality Guidance, comparing Project emissions to GHG reduction goals is useful when the Project "will expand or perpetuate reliance on GHG-emitting energy sources." 88 Fed. Reg. at 1203. Tallying the GHG emissions is not enough—"[a]gencies also should discuss whether and to what extent the proposal's reasonably foreseeable GHG emissions are consistent with GHG reduction goals." *Id.* In addition, acknowledging the "lock-in" effect means coming to terms with the fact that the Project will increase and perpetuate reliance on GHG-emitting fossil fuels. *See, e.g.,* EPA Draft EIS Comment at 8–9, JA__–__ (recommending that EIS address the "increasing conflict over the anticipated project lifetime between continued project-level emissions and state and national reduction

goals”). The Commission fails to address this reality, instead stating merely that GHG emissions cumulatively exacerbate climate change. *See* FERC Br. 74–75. Considering the Project’s impacts on the ability to achieve various reduction goals, as well as considering the lock-in effect of approving long-term fossil fuel infrastructure, would allow the Commission to evaluate the significance of the Project’s impacts and significance of any alternatives, or whether the significance of the Project’s impacts could be reduced through mitigation.

3. FERC Failed to Analyze Reasonably Foreseeable Upstream Impacts.

The Commission complains that it is up to Petitioners to prove that the Project would spur additional production of natural gas. FERC Br. 76. Not so. Rather, the Commission must account for the Project’s “reasonably foreseeable” impacts—those that are “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Food & Water Watch v. FERC*, 28 F.4th 277, 285 (D.C. Cir. 2022) (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016)). The Commission’s baffling explanation as to why the Project would not spur additional production is that “the Project would add only a small amount of incremental capacity on Transco’s existing

10,000-mile interstate pipeline system.” FERC Br. 76. While the amount of capacity affects the amount of additional production, a comparison of the Project’s capacity to the length of the pipeline has no bearing on the likelihood of that production—and has dubious informational value for any purpose at all.

The record contains much better evidence pertaining to the likelihood that the Commission’s approval of the Project will cause additional gas production, including that the Project is meant to serve allegedly increasing demand for consumption of gas. *See* Transco Application, *Transcontinental Gas Pipe Line Co.*, Docket CP21-94, Accession No. 20210326-5274, 7 (Mar. 26, 2021), JA__. As the Council on Environmental Quality has explained, increased use or conveyance of a resource is causally connected to the increased consumption of that resource, and often can be quantified. *See* 88 Fed. Reg. at 1204. Contrary to the Commission’s understanding, the concepts of likelihood, causation, and reasonable foreseeability do not depend on increasingly-specific project information such as the identity of gas drillers or exact coordinates of each new well that will be drilled to support the demand served by the pipeline over the next twenty years. Based on the

information in the record, and a common-sense understanding of how supply and demand interact, the Commission erred by concluding that upstream impacts were not reasonably foreseeable indirect effects of the Project's approval. *See Mid States Coal. For Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (“[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, . . . the agency may not simply ignore the effect.”) (emphasis in original).

When it comes to the discussion and analysis of these reasonably foreseeable indirect impacts, the Commission refused to engage. This refusal does not make the impacts unforeseeable. By setting a high informational standard that the *public* must meet before the Commission even considers an environmental impact, FERC flips NEPA and the Gas Act on their heads. Under NEPA, it is the federal agency's responsibility to “make[] a good faith effort to describe the reasonably foreseeable environmental impact” of its action. *Scientists' Institute for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The difficulty of identifying certain data points also does not render increased production unforeseeable. This Court should continue to reject “any attempt by agencies to shirk their

responsibilities under NEPA by labeling . . . discussion of future environmental effects as ‘crystal ball inquiry,’” *id.*, especially in this circumstance, where EPA provided a specific estimate of the Project’s upstream emissions, *see* EPA Draft EIS Comment at 9–12, JA__–__, and other pipeline companies have included estimates of upstream impacts in previous proceedings. *See* Delaware River Network Reh’g Req. at 35–36, JA__–__. “In the pipeline-approval context, as elsewhere, reasonable forecasting requires information. But an initial lack of information does not afford an agency *carte blanche* to disregard indirect effects.” *Food & Water Watch*, 28 F.4th at 286.

The Commission’s brief inaccurately states that the source area of the gas is so broad that it covers multiple states. *See* FERC Br. 77–78. In fact, the Certificate Order states that the Project will receive gas from large gathering systems in Northeastern Pennsylvania. Certificate Order P 68, JA__; Order on Reh’g P 95, JA__. These gathering systems do not extend beyond Pennsylvania’s borders, as evidenced by Transco’s response that they are “existing non-jurisdictional facilities” regulated by Pennsylvania agencies. *See* Transco Resp. to May 26, 2021 Environmental Information Request, *Transcontinental Gas Pipe Line*

Co., Docket No. CP21-4, Accession No. 20210615-5073, 1 (June 15, 2021), JA___. *See also* Final EIS at 1-2, JA___ (explaining that the Project would transport gas “from the Marcellus Shale production area in northeastern Pennsylvania”). The Commission fails to explain why it cannot include a full and fair discussion about the amount of new production needed to supply the increased demand served by the Project over its decades of operation and the impacts of increased production on northeastern Pennsylvania, particularly the production areas near the gathering systems.

Readily available data to consider these impacts includes the amount of gas to be transported, which can be converted to the pipeline’s average volumetric transmission capacity, and drilling productivity figures. *See* Delaware Riverkeeper Network Comments on Draft EIS at 12–14, JA___–___; Delaware Riverkeeper Network Reh’g Req. at 36–37, JA___–___. Because both the location of, and the number of, new gas wells needed to serve the Project are both foreseeable and estimable, the Commission erred by neglecting to include any discussion of upstream impacts caused by the Project, let alone GHG emissions associated with upstream production, which do not

necessarily depend on a well's location. *See* EPA Draft EIS Comments at 9, JA__ (“EPA reiterates that even in cases where the source of gas is not known, upstream emissions are still reasonably foreseeable and must be included.”). EPA included, in its comment on the Commission's Draft EIS, an estimate that the Project would cause emissions of an additional 2.5 million metric tons of CO₂-equivalent per year. *See id.* at 9–12. The Commission has no answer as to why this figure could not have been included in its consideration of reasonably foreseeable indirect impacts.

4. FERC Inadequately Analyzed Downstream Emissions.

“The mere fact that the *magnitude* of [an effect] is uncertain is no justification for *disregarding* the effect entirely.” *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (alteration in original). Yet FERC arbitrarily considered only direct construction and operational emissions when analyzing air quality impacts and entirely ignored how downstream emissions from gas combustion would increase ozone levels in areas already violating the National Ambient Air Quality Standards (“NAAQS”), claiming ozone impacts are so difficult to precisely calculate that they were

unforeseeable. Certificate Order P 64, JA ___; *see also* Final EIS at 4-157 to 4-158, JA __–__.

FERC’s argument that because ozone impacts cannot be estimated “using relatively straight-forward arithmetic,” FERC Br. 83, they are unlike downstream GHG emissions this Court found foreseeable in *Food & Water Watch*, 28 F.4th at 288–89, fails because FERC’s NEPA obligations are not limited to using elementary school math. “NEPA analysis necessarily involves some ‘reasonable forecasting’ and [] agencies may sometimes need to make educated assumptions about an uncertain future.” *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Downstream emissions from gas combustion are foreseeable even when their precise quantity “depends on several uncertain variables.” *Id.* FERC does not dispute that modeling precursor emissions and resulting ozone levels is possible, even if it involves making some assumptions. FERC Br. 84–85.

Even if FERC’s failure to model ozone levels was reasonable in *WildEarth Guardians v. Jewell*, where the area affected neither violated the ozone NAAQS nor was expected to because of the project’s precursor emissions, 738 F.3d at 311–12, it was not reasonable here,

where FERC admits that the Project would increase ozone levels, Order on Reh'g P 118, JA__, in areas already violating the ozone NAAQS. Final EIS at 4-162, JA__. This Court should not defer to FERC's unreasonable "judgment call" that any estimate of ozone levels would either result in too large a range to be useful or involve so many assumptions as to fall outside the scope of reasonably foreseeable effects, *see* FERC Br. 85.

IV. VACATUR IS REQUIRED.

Vacatur of the Certificate Order is appropriate in this case, where both the Order and the EIS were riddled with serious deficiencies, and it is entirely unclear on what basis FERC could substantiate its decisions on remand. *See Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). "[U]nsupported agency action normally warrants vacatur." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). In addition, vacatur would not result in consequences disruptive enough to warrant the continued effectiveness of an unlawful Certificate Order.

In this case, the Order's deficiencies go to the core of the Commission's finding that the Project is required by the public

convenience and necessity. On remand, the Commission would need to revisit both the Project's alleged benefits and its adverse effects, and it is unlikely that the Commission, acting in full compliance with its legal duties, will reach the same conclusions it did in the Certificate Order. Without proper consideration of the need for the Project, or a full understanding of the Project's environmental harms, it is seriously doubtful that the Commission "chose correctly" when it decided to authorize the Project. *See Allied-Signal*, 988 F.2d at 150.

Vacatur is the normal remedy when a court is "faced with unsustainable agency action." *Spire*, 2 F.4th at 976 (citation omitted). This Court has previously declined to remand without vacatur where doing so would "give the Commission incentive to allow 'building first and conducting comprehensive reviews later,'" particularly considering "the significant powers that accompany a certificate of public convenience and necessity." *Id.* (quoting *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021)).

As explained above, the Commission's Order lacked evidentiary support, ignored adverse impacts, and defied legal requirements in its Gas Act determination. However, the fact that the Commission failed to

comply with NEPA is alone a sufficient basis to vacate the Order.

“[B]ecause NEPA is a ‘purely procedural statute,’ where an agency’s NEPA review suffers from ‘a significant deficiency,’ refusing to vacate the corresponding agency action would ‘vitiating’ the statute.” *Standing Rock Sioux Tribe*, 985 F.3d at 1052 (quoting *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm’n*, 896 F.3d 520, 536 (D.C. Cir. 2018)).

Whatever disruption vacatur would cause to Transco’s business operations is significantly outweighed by the fundamental errors in the Commission’s order. As Transco correctly notes, a party challenging agency action need not prevail on both *Allied-Signal* factors to warrant vacatur. *See Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015).

Although the Project is partially operating, disruption that would be caused by vacatur is “weighty only insofar as the agency may be able to rehabilitate its rationale.” *Spire*, 2 F.4th at 976 (quoting *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009)). Where a seriously deficient agency action is remanded, only in rare instances do the disruptive consequences alone determine whether the order is vacated. *Cf. North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008)

(remanding without vacatur where vacatur would cause environmental harm in the interim). Decisions on review of Certificate Orders for gas pipeline projects are often rendered a year or more after pipeline construction begins. *See, e.g., Spire*, 2 F.4th at 976 (Certificate Order issued August 2018, opinion issued June 2021); *Vecinos Para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1326–27 (D.C. Cir. 2021) (Certificate Orders issued November 2019, opinion issued August 2021); *Food & Water Watch*, 28 F.4th at 282–83 (Certificate Order issued December 2019, opinion issued March 2022). Thus, it is hard to imagine a scenario in which a gas company has *not* engaged in construction activities or begun service by the time a reviewing court concludes that the approval was in error. FERC’s unlawful authorization of this Project in the face of such substantial evidence from the state most impacted cannot become the basis for denying relief to prevailing challengers.

CONCLUSION

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

DATED: November 14, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and this Court's order setting the briefing schedule and type-volume limits, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,984 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word for Windows Office 365 in 14 point Century Schoolbook.

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ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1064

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

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

NEW JERSEY CONSERVATION FOUNDATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC,
Intervenor for Respondent.

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

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Addendum Table of Contents

New Jersey Statutes

N.J.S.A 48:3-87.9	AD125
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3. a. No later than one year after the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.), the Board of Public Utilities shall require each electric public utility and gas public utility to reduce the use of electricity, or natural gas, as appropriate, within its territory, by its customers, below what would have otherwise been used. For the purposes of this section, a gas public utility shall reduce the use of natural gas for residential, commercial, and industrial uses, but shall not be required to include a reduction in natural gas used for distributed energy resources such as combined heat and power.

Each electric public utility shall be required to achieve annual reductions in the use of electricity of two percent of the average annual usage in the prior three years within five years of implementation of its electric energy efficiency program. Each natural gas public utility shall be required to achieve annual reductions in the use of natural gas of 0.75 percent of the average annual usage in the prior three years within five years of implementation of its gas energy efficiency program. The amount of reduction mandated by the board that exceeds two percent of the average annual usage for electricity and 0.75 percent of the average annual usage for natural gas for the prior three years shall be determined pursuant to the study conducted pursuant to subsection b. of this section until the reduction in energy usage reaches the full economic, cost-effective potential in each service territory, as determined by the board.

b. No later than one year after the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.), the board shall conduct and complete a study to determine the energy savings targets for full economic, cost-effective potential for electricity usage reduction and natural gas usage reduction as well as the potential for peak demand reduction by the customers of each electric public utility and gas public utility and the timeframe for achieving the reductions. The energy savings targets for each electric public utility and gas public utility shall be reviewed every three years to determine if the targets should be adjusted. The board, in conducting the study, shall accept comments and suggestions from interested parties.

c. No later than one year after the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.), the board shall adopt quantitative performance indicators pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) for each electric public utility and gas public utility, which shall establish reasonably achievable targets for energy usage reductions and peak demand reductions and take into account the public utility's energy efficiency measures and other non-utility energy efficiency measures including measures to support the development and implementation of building code changes, appliance efficiency standards, the Clean Energy program, any other State-sponsored energy efficiency or peak reduction programs, and public utility energy efficiency programs that exist on the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.). In establishing quantitative performance indicators, the board shall use a methodology that incorporates weather, economic factors, customer growth, outage-adjusted efficiency factors, and any other appropriate factors to ensure that the public utility's incentives or penalties determined pursuant to subsection e. of this section and section 13 of P.L.2007, c.340 (C.48:3-98.1) are based upon performance, and take into account the growth in the use of electric vehicles, microgrids, and distributed energy resources. In establishing quantitative performance indicators, the board shall also consider each public utility's customer class mix and potential for adoption by each of those customer classes of energy efficiency programs offered by the public utility or that are otherwise available. The board shall review each quantitative performance indicator every three years. A public utility may apply all energy savings attributable to programs available to its customers, including demand side management programs, other measures implemented by the public utility, non-utility programs, including those available under energy efficiency programs in existence on the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.), building codes, and other efficiency standards in effect, to achieve the targets established in this section.

d. (1) Each electric public utility and gas public utility shall establish energy efficiency programs and peak demand reduction programs to be approved by the board no later than 30 days prior to the start of the energy year in order to comply with the requirements of this section. The energy efficiency programs and peak demand reduction programs adopted by each public utility shall comply with quantitative performance indicators adopted by the board pursuant to subsection c. of this section.

(2) The energy efficiency programs and peak demand reduction programs shall have a benefit-to-cost ratio

greater than or equal to 1.0 at the portfolio level, considering both economic and environmental factors, and shall be subject to review during the stakeholder process established by the board pursuant to subsection f. of this section. The methodology, assumptions, and data used to perform the benefit-to-cost analysis shall be based upon publicly available sources and shall be subject to stakeholder review and comment. A program may have a benefit-to-cost ratio of less than 1.0 but may be appropriate to include within the portfolio if implementation of the program is in the public interest, including, but not limited to, benefitting low-income customers or promoting emerging energy efficiency technologies.

(3) Each electric public utility and gas public utility shall file with the board implementation and reporting plans as well as evaluation, measurement, and verification strategies to determine the energy usage reductions and peak demand reductions achieved by the energy efficiency programs and peak demand reduction programs approved pursuant to this section. The filings shall include details of expenditures made by the public utility and the resultant reduction in energy usage and peak demand. The board shall determine the appropriate level of reasonable and prudent costs for each energy efficiency program and peak demand reduction program.

e. (1) Each electric public utility and gas public utility shall file an annual petition with the board to demonstrate compliance with the energy efficiency and peak demand reduction programs, compliance with the targets established pursuant to the quantitative performance indicators, and for cost recovery of the programs, including any performance incentives or penalties, pursuant to section 13 of P.L.2007, c.340 (C.48:3-98.1). Each electric public utility and gas public utility shall file annually with the board a petition to recover on a full and current basis through a surcharge all reasonable and prudent costs incurred as a result of energy efficiency programs and peak demand reduction programs required pursuant to this section, including but not limited to recovery of and on capital investment, and the revenue impact of sales losses resulting from implementation of the energy efficiency and peak demand reduction schedules, which shall be determined by the board pursuant to section 13 of P.L. 2007, c. 340 (C.48:3-98.1).

(2) If an electric public utility or gas public utility achieves the performance targets established in the quantitative performance indicators, the public utility shall receive an incentive as determined by the board through an accounting mechanism established pursuant to section 13 of P.L.2007, c.340 (C.48:3-98.1) for its energy efficiency measures and peak demand reduction measures for the following year. The incentive shall scale in a linear fashion to a maximum established by the board that reflects the extra value of achieving greater savings.

(3) If an electric public utility or gas public utility fails to achieve the reductions in its performance target established in the quantitative performance indicators, the public utility shall be assessed a penalty as determined by the board through an accounting mechanism established pursuant to section 13 of P.L.2007, c.340 (C.48:3-98.1) for its energy efficiency measures and peak demand reduction measures for the following year. The penalty shall scale in a linear fashion to a maximum established by the board that reflects the extent of the failure to achieve the required savings.

(4) The adjustments made pursuant to this subsection may be made through adjustments of the electric public utility's or gas public utility's return on equity related to the energy efficiency or peak demand reduction programs only, or a specified dollar amount, reflecting the incentive structure as established in this subsection. The adjustments shall not be included in a revenue or cost in any base rate filing and shall be adopted by the board pursuant to the "Administrative Procedure Act."

f. (1) The board shall establish a stakeholder process to evaluate the economically achievable energy efficiency and peak demand reduction requirements, rate adjustments, quantitative performance indicators, and the process for evaluating, measuring, and verifying energy usage reductions and peak demand reductions by the public utilities. As part of the stakeholder process, the board shall establish an independent advisory group to study the evaluation, measurement, and verification process for energy efficiency and peak demand reduction programs, which shall include representatives from the public utilities, the Division of Rate Counsel, and environmental and consumer organizations, to provide recommendations to the board for improvements to the programs.

(2) Each electric public utility and gas public utility shall conduct a demographic analysis as part of the stakeholder process to determine if all of its customers are able to participate fully in implementing energy efficiency measures, to identify market barriers that prevent such participation, and to make recommendations for measures to overcome such barriers. The public utility shall be entitled to full and timely recovery of the costs associated with this analysis.

g. For the purposes of this section, the board shall only consider usage for which public utility energy efficiency programs are applicable.

L.2018, c.17, s.3.