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Note

NO DEALS IN THE PIPELINE: THE USE OF PRECEDENT AGREEMENTS TO
DEMONSTRATE DEMAND FOR NEW NATURAL GAS INFRASTRUCTURE AFTER
*ENVIRONMENTAL DEFENSE FUND V. FEDERAL ENERGY
REGULATORY COMMISSION*

CAROLINE KEEFE*

I. THE TERM SHEET: AN INTRODUCTION TO THE NATURAL GAS ACT
AND THE FEDERAL ENERGY REGULATORY COMMISSION

Millions of homes and businesses in the United States use natural gas for heating, and even more use power generated by burning natural gas for all their electricity needs.¹ In fact, natural gas is one of the most prominent energy sources in the United States today.² Not surprisingly, an entire industry has been built around Americans' use of natural gas, with many specialized roles including fracking companies, pipeline construction companies, and natural gas “shippers,” all working together to bring natural gas to end users—you and me.³

In 1938, Congress enacted the Natural Gas Act (NGA) to give the federal government the power to regulate the sale and transportation of natural gas in interstate commerce.⁴ The purpose of the NGA is “‘encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices,’ and ‘protect[ing]

* J.D. Candidate, 2023, Villanova University Charles Widger School of Law; B.A., 2016, Villanova University. This note is dedicated to my grandparents, Roy and Delores Keefe, whose unconditional love and support has always allowed me to follow my dreams. This note would not have materialized without the love and patience of my husband, Sean Campbell, or the endless encouragement of my parents and siblings, Gary, Deirdre, Michael, and Ryan Keefe. I'd also like to thank the members of the *Villanova Law Review* for their diligence and flexibility throughout this process, I could not have done it without you.

¹ See *Natural Gas Explained, Use of Natural Gas*, U.S. ENERGY INFO. ADMIN. (last visited Jan. 27, 2023), <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php> [<https://perma.cc/MA53-HZX3>] (explaining the electric power sector accounted for 37% of natural gas consumption in 2021, and the residential power sector accounted for 15% of total natural gas consumption).

² See *id.* (showing natural gas accounted for 32% of total U.S. energy consumption in 2021).

³ See *Overview of the Oil and Natural Gas Industry*, U.S. ENV'T PROT. AGENCY (last visited Jan. 27, 2023), <https://www.epa.gov/natural-gas-star-program/overview-oil-and-natural-gas-industry> [<https://perma.cc/ET9Z-FVXC>] (describing the natural gas cycle and providing a diagram).

⁴ See Robert Christin, Paul Korman & Michael Pincus, *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 117–18 (2017) (discussing the desire to regulate the sale and transportation of natural gas as Congress's main motivation for passing the NGA). Prior to the passage of the NGA, the market was entirely unregulated because the Supreme Court had held states could not regulate the interstate transportation and sale of natural gas. *Id.* at 117.

consumers against exploitation at the hands of natural gas companies.”⁵ Congress delegated the power to administer the NGA to the Federal Energy Regulatory Commission (FERC or Commission).⁶ Pursuant to that delegation, one of FERC’s primary responsibilities is the approval of new pipeline construction projects and pipeline expansion projects.⁷ In 1999, FERC adopted its current policy outlining what criteria it will use to determine whether a project should be built [the Certificate Policy Statement].⁸ In accordance with the NGA and the Certificate Policy Statement, when FERC approves a new pipeline or pipeline expansion, it evaluates whether the new pipeline or expanded pipeline “is or will be required by the present or future public convenience and necessity.”⁹ If FERC determines a pipeline is “required by the present or future public convenience and necessity,” it issues a Certificate of Public Convenience and Necessity, commonly known by the shorthand “Certificate Order.”¹⁰ Often, FERC issues Certificate Orders after seeing evidence that market demand for a project exists.¹¹

This note examines the Court of Appeals for the District of Columbia’s (D.C. Circuit) conclusion in *Environmental Defense Fund v. FERC*¹² that FERC erred in finding the Spire STL Pipeline was “required by present or future public convenience

⁵ *Minisink Residents for Env’t Pres. and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (alteration in original) (internal citations omitted) (first quoting *NAACP v. Fed. Power Comm’n* 425 U.S. 662, 669–70 (1976) then quoting *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

⁶ *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2252 (2021) (describing how Congress delegated the power to administer the Natural Gas Act to the Federal Power Commission, now known as the Federal Energy Regulatory Commission.)

⁷ *See id.* (detailing FERC’s statutory mandate to approve the construction and expansion of natural gas pipelines). Similarly, FERC has other obligations to address specific issues when approving the construction or expansion of a pipeline, including obligations under the National Environmental Policy Act (NEPA). *See* Christin, Korman & Pincus, *supra* note 4, at 117. NEPA requires FERC to consider the environmental impacts of its decisions and further requires FERC to prepare an Environmental Impact Statement. *See id.* at 130; *see also* SUSAN F. TIERNEY, ANALYSIS GROUP, FERC’S CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES: REVISING THE 1999 POLICY STATEMENT FOR 21ST CENTURY CONDITIONS, 26 (Nov. 2019), https://www.analysisgroup.com/globalassets/content/insights/publishing/revising_ferc_1999_pipeline_certification.pdf [<https://perma.cc/NRF5-XAYM>] (explaining NEPA requires FERC to determine if the environmental impacts of a proposed pipeline project would be significant) [hereinafter TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES].

⁸ *See* Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999).

⁹ *See* 15 U.S.C. § 717f(e) (2018) (stating if FERC does not conclude a project is necessary, FERC should deny the project’s application for a Certificate of Public Convenience and Necessity). Additionally, U.S.C. § 717f(e) gives FERC the power to attach conditions to Certificates of Public Convenience and Necessity. *Id.*

¹⁰ *See* *Env’t Def. Fund v. Fed. Energy Regul. Comm’n*, 2 F.4th 953, 959 (D.C. Cir. 2021) (quoting 15 U.S.C. § 717f(e) (2018)) (explaining FERC’s Order Issuing Certificate is also known as a “Certificate Order” and further summarizing FERC’s findings in the Certificate Order granting Spire STL a Certificate of Public Convenience and Necessity).

¹¹ *See* 88 FERC, ¶ 61,747 (explaining FERC will evaluate all relevant factors to evaluate need, including precedent agreements, demand projections, and evaluation of demand projections compared with the capacity serving the market). In the Certificate Policy Statement, FERC states the point of evaluating numerous factors is “for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects . . .” *See id.*

¹² *Env’t Def. Fund v. Fed. Energy Regul. Comm’n*, 2 F.4th 953 (D.C. Cir. 2021).

and necessity.”¹³ Part II provides context and background necessary to understand *Environmental Defense Fund*. Part III explains the procedural and legal history that led the case to come before the D.C. Circuit in mid 2021, years after the pipeline was constructed. Part IV outlines the D.C. Circuit’s holding and reasoning in *Environmental Defense Fund*. Part V critically analyzes the court’s holding and argues it breaks from past precedent and brings uncertainty into the pipeline approval process that should have the positive impact of fewer pipeline project applications reaching FERC and therefore fewer pipelines being constructed. Lastly, Part VI explores the potential impacts of the court’s decision, arguing that if FERC does not begin to recognize some natural gas pipeline projects are unnecessary, American consumers will be straddled with not only increased costs for natural gas but also costs associated with climate change.

II. DEAL CONTEXT: THE BACKGROUND OF *ENVIRONMENTAL DEFENSE FUND*

Historically, FERC has granted Certificate Orders for new natural gas pipelines so long as the pipeline construction company can show there is market demand for the natural gas the pipeline will transport.¹⁴ This section explains the traditional way pipeline construction companies have demonstrated market demand for a project, and why FERC has historically accepted such showings with few questions. Moreover, this section examines prior approvals of pipeline projects to explain FERC’s rationale for approving the pipeline at issue in *Environmental Defense Fund*.

A. *The Use of Precedent Agreements as Indicators of Market Demand*

Historically, FERC has considered private contracts between pipeline construction companies and companies that want or need to ship natural gas via pipelines as indicators of market demand for new pipeline capacity.¹⁵ Essentially, the companies that want or need to ship natural gas can reserve capacity on the new pipeline via these private contracts, which are known in the industry as precedent agreements.¹⁶ Typically, pipeline construction companies and natural gas shippers enter into precedent agreements prior to the construction of the new pipeline in a period known as an “open season,” which allows pipeline construction companies to know they

¹³ *Id.* at 976 (quoting 15 U.S.C. § 717(f)(e) (2018)) (holding FERC’s decision to grant a Certificate of Public Convenience and Necessity was “arbitrary and capricious”).

¹⁴ See Sue Tierney, *Time to Move Away from Old Precedents in FERC Pipeline Reviews*, UTILITY DIVE (Nov. 19, 2019), <https://www.utilitydive.com/news/time-to-move-away-from-old-precedents-in-ferc-pipeline-reviews/567512/> [<https://perma.cc/X9TU-BEGN>] (explaining FERC views precedent agreements as “decisive” in their decision to approve a pipeline project) [hereinafter Tierney, *Time to Move Away from Old Precedents*].

¹⁵ See Christin, Korman & Pincus, *supra* note 4, at 116 (discussing the 1999 Certificate Policy Statement and how it perpetuated FERC’s historical reliance on precedent agreements as indicative of project need).

¹⁶ See *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015) (citations omitted) (defining a precedent agreement as “a long-term contract subscribing to expanded natural gas capacity.”)

have customers for the pipeline prior to beginning construction.¹⁷ Pipeline construction companies can enter into precedent agreements with shippers who are part of the same company as the pipeline construction company, known as “affiliated” shippers, or with shippers who are separated from the pipeline construction company, known as “non-affiliated” shippers.¹⁸

Precedent agreements with affiliated shippers may raise concerns regarding self-dealing.¹⁹ Essentially, there is a fear that an affiliate of the pipeline construction company will subscribe to capacity on the pipeline the construction company wishes to build, thereby generating what looks like market demand but is in fact self-dealing.²⁰ The motivation for companies to engage in such behavior stems from a high rate of return natural gas companies are entitled to when they invest in infrastructure.²¹ FERC is aware of this conflict of interest, and prior to issuing the Certificate Policy Statement in 1999, FERC solicited comments from stakeholders regarding

¹⁷ See Tierney, *Time to Move Away from Old Precedents*, *supra* note 14 (explaining a “shipper” is “someone who wishes to purchase capacity on the pipeline”); see also Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 MICH. J. ENVTL. & ADMIN. L. 319, 328 (2020) (explaining an open season is a period during which the pipeline construction company advertises its proposed project and solicits precedent agreements for subscribed capacity on the pipeline).

¹⁸ See Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC, ¶ 61,748 (explaining FERC’s policy is to evaluate whether a project will have an impact on rates paid by existing customers). Whether a contract is with an affiliated shipper or a non-affiliated shipper is unlikely to have an impact on the rate existing customers pay, and therefore FERC will not place significance on the affiliation-status of the signatories of a precedent agreement. *Id.*

¹⁹ See TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 22 n.98 (noting FERC acknowledges the potential for self-dealing among affiliates in other contexts but has not extended those concerns to the use of precedent agreements among affiliated shippers).

²⁰ See *id.* at 4 (noting that precedent agreements are ultimately private contracts between two parties and therefore cannot demonstrate a pipeline is needed by the public as a whole).

²¹ See *id.*, at 22 nn. 99, 101 (noting affiliates may enter into precedent agreements to pad their profits, especially given approval of a pipeline project also means the construction company can impose the ultimate cost on ratepayers, essentially ensuring the construction costs are recouped, with an additional return); see also Jennifer Danis, *D.C. Circuit Decision: Pipeline Developers Can’t Self-Deal in the Public Interest*, COLUM. L. SCHOOL: CLIMATE LAW BLOG (June 22 2021), <http://blogs.law.columbia.edu/climatechange/2021/06/22/d-c-circuit-decision-pipeline-developers-cant-self-deal-in-the-public-interest/> [<https://perma.cc/8TFM-ZRCN>] (detailing how “state-regulated utilities got together and created new gas pipeline companies solely for the purpose of building new capacity—on which the average return on equity garnered hovered around 14%” to make the argument that a main motivation for pipeline companies to build pipelines is a high return on equity). Danis also argues that because these new entities are state-regulated utilities they can therefore pass costs on to ratepayers. *Id.*; see also *Env’t Def. Fund v. FERC*, 2 F.4th 953, 964 (D.C. Cir. 2021) (detailing Environmental Defense Fund’s concern with a natural gas industry trend whereby:

Utility holding companies . . . enter[] into affiliate transactions whereby the retail utility affiliate commits to new long term capacity with its pipeline developer affiliate. The essence of this financing structure is to take a cost pass-through for a retail gas or electric distribution utility—a contract for natural gas transportation services—and pay those transportation fees to an affiliated pipeline developer entitled to accrue return on its investment from that same revenue. Thus, ratepayer costs which may not be justified by ratepayer demand are being converted into shareholder return.

Id. (second alteration in original).

provisions the Certificate Policy Statement should include.²² FERC specifically asked for comments regarding the use of precedent agreements to show market need, as well as the use of precedent agreements with affiliated shippers.²³ Ultimately, FERC decided not to distinguish between precedent agreements with affiliated and non-affiliated shippers in the Certificate Policy Statement, a decision that remains unchanged today.²⁴ Consequently, despite signs showing FERC believes precedent agreements are an imperfect proxy for market demand, over time FERC's standard practice evolved such that FERC approves new natural gas pipelines based on precedent agreements—even those with affiliated shippers—so long as there is no evidence of “self-dealing.”²⁵ As a result, precedent agreements, even those with affiliated shippers, are often weighed heavily in favor of approving a pipeline application.²⁶

B. FERC's Analytical Framework for Approving Natural Gas Pipelines

Despite failing to distinguish between precedent agreements with affiliated and non-affiliated shippers, when FERC adopted the 1999 Certificate Policy Statement it did establish an analytical framework through which it would evaluate whether a project is “required by the public convenience and necessity.”²⁷ The threshold question is whether a project can be built without increasing the cost to existing

²² See generally 88 FERC, ¶ 61,227 (summarizing how FERC gathered stakeholder input which informed the Certificate Policy Statement).

²³ *Id.* Of the seven questions FERC sought input on, three related to FERC's use of precedent agreements as indicative of market demand and a fourth related to FERC's evaluation of projects with affiliated shippers. *Id.* ¶ 61,737–38.

²⁴ *Id.* FERC addressed stakeholder concerns regarding the use of precedent agreements as indicators of market demand by announcing a “new focus . . . on the impact of the project on the relevant interests balanced against the benefits to be gained from the project.” *Id.* ¶ 61,748. Additionally, in April 2018 and again in 2021 FERC issued a “Notice of Inquiry” regarding its Certificate Policy Statement, again specifically requesting comments on its use of precedent agreements as indicative of demand for a project. See Certification of New Interstate Nat. Gas Facilities, 163 FERC ¶ 61,042 (2018) (stating FERC issued the 2018 Notice of Inquiry specifically to gather feedback from stakeholders on “its methodology for determining whether there is a need for a proposed project, including the Commission's consideration of precedent agreements and contracts for service as evidence of such need”); see also FERC ISSUES NOTICE OF INQUIRY FOR CERTIFICATION POLICY REVIEW, 37 NO. 4 NAT. GAS TRANSP. INFO. SERV. NEWSL. 14 (explaining despite not acting on comments from the 2018 Notice of Inquiry, FERC issued a new Notice of Inquiry in 2021 due to changes in the natural gas industry). Those changes included “the Council on Environmental Quality's (CEQ) promulgation of updated [National Environmental Policy Act of 1969 (NEPA)] regulations for implementation by all federal agencies [(85 FR 43,304 (2020))] and Executive Order 14008 [(86 FR 7619 (2021))].” *Id.* (alteration in original).

²⁵ See *City of Oberlin v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) (defining self-dealing as agreements that are not the product of “arms-length negotiations”).

²⁶ See Christin, Korman & Pincus, *supra* note 4, at 127 (asserting the 1999 Certificate Policy statement is an extension of a long-standing policy to use precedent agreements as indicators of market demand).

²⁷ See 88 FERC, ¶¶ 61,745–48 (explaining the two-step analytical framework FERC would use to evaluate applications for Certificates of Public Convenience and Necessity). This framework is explained in detail in Section II(B).

customers.²⁸ If a project can be built without subsidies from existing customers, then FERC evaluates if there will be adverse impacts on the pipeline company's existing customers, other pipelines in the area and any customers of those pipelines, and landowners and communities in the pipeline's path.²⁹ Per the Certificate Policy Statement, once FERC has evaluated "all relevant factors," FERC weighs the public benefit against the potential adverse effects and determines whether to grant a Certificate of Public Convenience and Necessity.³⁰ With respect to precedent agreements, the Certificate Policy Statement implies precedent agreements between a pipeline company and multiple shippers are stronger indicators of market demand—and therefore public benefit—than agreements between a pipeline company and a single affiliated shipper.³¹

C. Past Certificate Orders Provide the Foundation for FERC's Approval of the Spire STL Pipeline

Using the Certificate Policy Statement as a guidepost and pursuant to its obligation under the NGA, FERC issues Certificate Orders that grant pipeline projects Certificates of Public Convenience and Necessity.³² In the Certificate Orders, FERC explains why the Commission views a proposed pipeline project as one that "is or will be required by the present or future public convenience and necessity."³³ Consequently, FERC has a robust body of Certificate Orders from which it can draw precedential interpretations of the Certificate Policy Statement and established practices.³⁴ Not surprisingly, prior to the Spire STL Pipeline project, FERC had issued other Certificate Orders which addressed the use of precedent agreements as indicators of market demand.³⁵ These Certificate Orders are important sources of

²⁸ See *Env'tl. Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (stating the threshold question as set forth in the Certificate Policy Statement examines if the project requires existing customers to subsidize the project).

²⁹ *Id.* (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)) (summarizing that the adverse impacts on the specific group of people could be "increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property").

³⁰ *Id.* at 962 (explaining if there are adverse impacts resulting from the pipeline, FERC will weigh the public benefits against the adverse impacts to determine if granting a Certificate of Public Convenience and Necessity is appropriate). This is the policy that was in effect when FERC granted Spire STL a Certificate of Public Convenience and Necessity. *Id.* at 959.

³¹ See *id.* at 962. (describing how a project that has precedent agreements with many new customers may provide a stronger indicator of need than a project with a single precedent agreement with an affiliated shipper).

³² See 88 FERC ¶ 61,743 (explaining under the NGA, a project cannot start without a Certificate of Public Convenience and Necessity granted by FERC).

³³ 15 U.S.C. § 717f(e) (2018); see also *id.* ¶¶ 61,249–50 (explaining FERC will engage in a balancing test and evaluate whether the public benefits outweigh the adverse impacts of a project). The Certificate Policy Statement similarly gives specific examples of how FERC will weigh certain factors, such as a new project's impact on existing customers. See *id.*

³⁴ See *Approved Major Pipeline Projects (1997-Present)*, FED. ENERGY REGULATORY COMM'N (Aug. 30, 2022), <https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-1997-present> [<https://perma.cc/MG7N-DLEP>] (listing the approved pipeline projects from 1997 to present).

³⁵ See *Mountain Valley Pipeline, LLC Equitrans, L.P.*, 161 FERC ¶ 61,043, para. 45 (2017) (addressing whether heightened scrutiny is appropriate for a project with affiliated shippers); see also

context for understanding FERC's decision-making regarding the Spire STL Pipeline as well as the magnitude of the court's ruling in *Environmental Defense Fund*.³⁶

1. *FERC Explains Why it Views Precedent Agreements as Good Indicators of Market Demand, Even When the Precedent Agreements are with Affiliated Shippers.*

FERC has provided a market-centric rationale for why it views precedent agreements as proxies for market demand. Specifically, FERC argues that the willingness of private companies to enter into long-term contracts is a good indicator that market demand for natural gas will continue to exist.³⁷ Relatedly, FERC argued in *Environmental Defense Fund* that it was not willing to “second guess” a business decision made by a private company.³⁸ Implicit in these rationales is the idea that private companies enter into precedent agreements based on market factors, and do not have other justifications for entering into long-term, binding contracts—or at least not justifications that FERC should concern itself with.³⁹

For instance, In *Mountain Valley Pipeline, LLC Equitrans, L.P.*,⁴⁰ FERC granted a Certificate of Public Convenience and Necessity to Mountain Valley Pipeline, LLC despite arguments from opponents that the pipeline was unnecessary because two of the five precedent agreements were with affiliated shippers.⁴¹ In justifying its use of precedent agreements as a valid indicator of market demand in the Mountain Valley Certificate Order, FERC cited to the Certificate Policy Statement and explained precedent agreements are “significant evidence of project need or demand.”⁴² Further, FERC stated that it considered the five shippers’ willingness to enter into long term precedent agreements as an indication of the shippers’ evaluation of future need in the markets the pipelines were to serve, and felt the shippers’

E. Shore Nat. Gas Co., 132 FERC ¶ 61,204, para. 13 (2010) (addressing whether a market study is necessary to show demand or if precedent agreements are sufficient indicators of market demand, even if the precedent agreements are with affiliated shippers).

³⁶ See Brief for Respondent at *30, *Env't Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (No. 20-1016) (citing *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) for the premise that the court is typically deferential to FERC's interpretations of its own precedent).

³⁷ See 161 FERC ¶ 61,043 (articulating FERC's deference to the decisions of private companies regarding whether there is demand for natural gas in a given location).

³⁸ See *Env't Def. Fund*, 2 F.4th at 974 (quoting Rehearing Ord., J.A. at 1155, *Env't Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (No. 20-1016)).

³⁹ See TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 19–21 (summarizing arguments made by proponents of the continued use of precedent agreements as indicators of market demand). Rationales for taking precedent agreements as indicative of market demand include the idea that FERC need not get involved in relations between private parties, as well as the notion that state regulators often do review agreements entered into by natural gas shippers. *Id.* at 21.

⁴⁰ 161 FERC ¶ 61,043 (2017). FERC issued Mountain Valley Pipeline, LLC a Certificate of Public Convenience and Necessity for a project in West Virginia and Virginia. *Id.* paras. 1, 2.

⁴¹ *Id.* paras. 44, 47, 49 (describing six arguments opponents contended challenged the need for the project including the use of precedent agreements with affiliates, existing infrastructure sufficient to meet demand, and an illegitimate open season). The project was fully subscribed when Mountain Valley Pipeline, LLC applied for a Certificate of Public Convenience and Necessity. *Id.* para. 9.

⁴² *Id.* para. 42 (explaining FERC is not in a position to evaluate market need on a regional basis).

evaluation of market need acted as evidence sufficient to demonstrate public necessity.⁴³ FERC also explained that projecting future natural gas demand is filled with uncertainty, which is why FERC “evaluat[es] individual projects based on demonstrated need from specific shippers in the form of precedent agreements.”⁴⁴

Under a similar rationale, FERC approved an eight-mile pipeline in Pennsylvania based on two precedent agreements with affiliated shippers for 80% of the pipeline’s capacity in *Eastern Shore Natural Gas Company*.⁴⁵ Opponents argued Eastern Shore did not adequately show the pipeline was necessary because the record failed to demonstrate market data showing project need or any other benefits of the project, and further argued the project should be subject to scrutiny because two precedent agreements were with affiliated shippers.⁴⁶ FERC asserted that binding, seventeen-year precedent agreements sufficiently showed market need pursuant to the Certificate Policy Statement.⁴⁷ FERC further reiterated it gives equal weight to affiliated and non-affiliated precedent agreements and does not look behind precedent agreements to evaluate whether the customer commitments truly represent market need.⁴⁸

2. *FERC Explains Why Precedent Agreements with Affiliated Shippers Should Not be Subject to a Heightened Level of Scrutiny*

Additionally, FERC has provided two rationales for why precedent agreements with affiliated shippers should not be subject to a heightened level of inquiry, despite clear potential for self-dealing. FERC maintains it does not treat precedent agreements with affiliated shippers any differently than precedent agreements with non-affiliated shippers because the constructed pipelines benefit all shippers by giving them access to new supplies.⁴⁹ Similarly, FERC asserts irrespective of a natural gas shipper’s status as affiliated or non-affiliated, it still must pay for subscribed

⁴³ See *id.* paras. 41–42 (implying the shippers would not enter into precedent agreements if they did not think there would be demand for their product in the region the pipeline was to serve). FERC states “The shippers on the MVP and Equitrans Expansion Projects will supply gas to a variety of end users and those shippers have determined that there is a market for their gas and the MVP and Equitrans Expansion Projects are the preferred means of delivering or receiving that gas.” *Id.*

⁴⁴ See *id.* para. 42 (explaining that various studies, like those cited in this Certificate Order, can make different findings relating to future demand for natural gas and therefore long-term precedent agreements are better indicators of demand).

⁴⁵ See 132 FERC ¶ 61,204, paras. 4, 30 (2010). FERC cites *Eastern Shore* in the Certificate Order granting the Spire STL Pipeline a Certificate of Public Convenience and Necessity. See generally, Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018). The two precedent agreements were with Chesapeake Utilities Corporation-Delaware Division and Chesapeake Utilities Corporation-Maryland Division. See 132 FERC, para. 5. At the time the Certificate Order was granted, Chesapeake Utilities Corporation was the parent company of Eastern Shore, making the “shippers” in this case, both divisions of Chesapeake, affiliates of Eastern Shore. See *id.* para. 5 n.2.

⁴⁶ 132 FERC, para. 28 (summarizing opponents’ arguments that Eastern Shore did not provide information regarding demand for natural gas or viable alternatives to the pipeline project).

⁴⁷ See *id.* para. 30.

⁴⁸ See *id.* para. 31 (noting the fact that precedent agreements are with affiliated shippers does not lessen the shipper’s need for capacity or obligation to pay for it).

⁴⁹ See *id.* para. 33 (finding the pipeline has some unsubscribed capacity and this could benefit other shippers as well, not just those affiliated with the pipeline construction company).

capacity.⁵⁰ Moreover, FERC has stated its primary concern regarding precedent agreements with affiliated shippers is negative consequences to non-affiliated shippers and whether there is uncompetitive behavior.⁵¹

For example, in *Eastern Shore*, FERC denied opponents' arguments that the pipeline was meant to benefit only Eastern Shore's affiliated shippers and instead found the pipeline would benefit all shippers equally by giving them all access to new sources of natural gas supply.⁵² FERC found the project's benefits outweighed any adverse effects and granted it a Certificate of Public Convenience and Necessity.⁵³ Additionally, in *Mountain Valley Pipeline, LLC Equitrans, L.P.*, FERC rejected opponents' argument that market need should be evaluated under a heightened level of scrutiny when precedent agreements are with affiliated shippers and instead explained, "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor."⁵⁴ Moreover, as no allegations of either discrimination against non-affiliated shippers or non-competitive behavior existed with respect to the Mountain Valley Pipeline, FERC granted a Certificate of Public Convenience and Necessity.⁵⁵

D. *Past Legal Precedent Justifies FERC's Belief that Precedent Agreements with Affiliated Shippers are Valid Indicators of Market Demand*

Occasionally, Certificate Orders have been challenged in front of the D.C. Circuit.⁵⁶ Prior to *Environmental Defense Fund*, the D.C. Circuit showed a high level of deference to FERC's decision-making and use of precedent agreements as indicative of market demand and therefore public necessity.⁵⁷ For instance, in *Minisink Residents for Environmental Preservation and Safety v. FERC*⁵⁸ the D.C. Circuit held FERC's approval of a natural gas compressor station was not arbitrary and capricious because FERC sufficiently explained why an alternate site proposed by opponents was

⁵⁰ See *id.* para. 32 (emphasizing the fact that two of the precedent agreements are with affiliates does not mean those affiliates will not have to pay for their capacity, or that they do not really need the capacity to be able to serve their customers).

⁵¹ See *Mountain Valley Pipeline, LLC Equitrans, L.P.*, 161 FERC ¶ 61,043, para. 45 (2017) (implying FERC will evaluate projects under a heightened level of scrutiny if there are allegations of anti-competitive behavior or discrimination against a non-affiliated shipper).

⁵² See 132 FERC, para. 33 (explaining because there is still unsubscribed capacity on the project that a non-affiliated shipper could subscribe to, this project has the potential to benefit more than just Eastern Shore and its affiliates).

⁵³ See *id.* para. 35 (granting a Certificate of Public Convenience and Necessity and denying opponent's requests for further proceedings).

⁵⁴ See 161 FERC para. 45.

⁵⁵ See *id.* para. 64 (concluding the public benefits of the Mountain Valley Pipeline outweigh any adverse impacts and granting a Certificate of Public Convenience and Necessity).

⁵⁶ See, e.g., *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019); *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

⁵⁷ See *Env't Def. Fund v. FERC*, 2 F.4th 953, 974 (D.C. Cir. 2021) (summarizing precedential cases on the issue).

⁵⁸ 762 F.3d 97 (D.C. Cir. 2014).

unsuitable for a natural gas compressor station.⁵⁹ In its reasoning, the court emphasized it would not substitute its judgement for that of FERC's, especially given that the issuing of Certificates of Public Convenience and Necessity is a task that falls squarely in FERC's discretion.⁶⁰ Moreover, the Court used FERC's wide discretion as a justification for its holding, noting FERC is an "expert agency" with "wide discretion to balance competing equities against the backdrop of the public interest."⁶¹

Similarly, when ruling on issues related to the use of precedent agreements as indicators of demand for new natural gas infrastructure, the D.C. Circuit has shown wide discretion to FERC. For instance, in *Myersville Citizens for a Rural Community, Inc. v. FERC*⁶², the D.C. Circuit held FERC's finding of market need for a natural gas compressor station was justified, despite the absence of precedent agreements in the record.⁶³ Again, the court deferred to FERC's decision-making by limiting its review to determining if FERC's findings of market need were supported by "substantial evidence," which the court defined as "more than a scintilla" but "less than a preponderance of the evidence."⁶⁴ Additionally, the D.C. Circuit placed the burden on the opposing party to demonstrate that the project was *not* being built in response to market need and rather was overbuilt, instead of placing the burden on FERC to prove the project *was* being built in response to market need.⁶⁵ Consequently, even in the absence of precedent agreements in the record FERC used evidence of subscribed capacity as indicative of market demand, a decision the D.C. Circuit upheld.⁶⁶

⁵⁹ *See id.* at 107 (rejecting pipeline opponents' arguments that FERC did not consider alternative sites to construct the natural gas compressor station by highlighting FERC found an alternative site unsuitable for the project).

⁶⁰ *See id.* at 106 (explaining FERC's "role is limited" to evaluating whether FERC's decision making was based upon the facts in the record and whether there was an error in FERC's judgement).

⁶¹ *See id.* at 111 (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984)).

⁶² 783 F.3d 1301 (D.C. Cir. 2015).

⁶³ *See id.* at 1310–11 (noting the precedent agreements were not in the record because the natural gas pipeline company abandoned its original pipeline project and then rebranded and re-submitted its application). In the second application, the pipeline company cited to and summarized the same precedent agreements from its original project but failed to provide them in the record. *Id.* at 1310.

⁶⁴ *See id.* at 1308–09, 311 (quoting *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014)) (finding a sworn affidavit stating there were in fact precedent agreements, a motion to intervene filed by two of the project's customers, and customers swearing under oath that they had subscribed to capacity were "substantial evidence" to demonstrate market need and therefore public necessity for the project).

⁶⁵ *See id.* at 1314–15 (summarizing arguments from opponents that the project was "overbuilt" because it was larger and more powerful than it needed to be and designed to add capacity beyond that disclosed in the application submitted to FERC for a Certificate of Public Convenience and Necessity); *See also id.* at 1311–12 (explaining that a project is overbuilt when it is built to carry excess capacity beyond what the market demands).

⁶⁶ *See id.* at 1311 (explaining the record contained evidence of market need, just not in the form of precedent agreements).

Additionally, in *Appalachian Voices v. FERC*⁶⁷, the D.C. Circuit addressed the use of precedent agreements with affiliated shippers as indicative of market need.⁶⁸ In this unpublished opinion, the D.C. Circuit held it was irrelevant that precedent agreements were with affiliated shippers and therefore FERC's reliance on precedent agreements amongst affiliates was not arbitrary and capricious.⁶⁹ Specifically, the court explained that FERC's Certificate Order "reasonably explained that '[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.'"⁷⁰ The court then found FERC's determination of the pipeline's necessity was reasonable and supported by substantial evidence in the record, with the evidence being "long-term precedent agreements for 100[%] of the Project's capacity."⁷¹

Finally, in *City of Oberlin v. FERC*⁷², the D.C. Circuit scrutinized the use of precedent agreements as indicative of demand and public necessity. In this case, a pipeline construction company submitted an application that included precedent agreements with both domestic and foreign affiliated and non-affiliated shippers.⁷³ The Court held FERC was justified in using precedent agreements with both affiliated and non-affiliated domestic shippers as indicative of market need and public necessity, as there was no evidence of "self-dealing" amongst the pipeline company and the affiliated shippers.⁷⁴ With respect to the foreign shippers, however, the court determined FERC was not justified in including those precedent agreements in its evaluation of the public necessity because a foreign public, Canadians, would be served by the pipeline.⁷⁵ Ultimately, the court remanded the case without vacatur to FERC for an explanation of why it may be lawful to credit the capacity foreign

⁶⁷ No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

⁶⁸ See generally *id.* Environmental Groups Appalachian Voices, Chesapeake Climate Action Network, and Sierra Club, among others, challenged the Certificate Order granting Mountain Valley Pipeline, LLC a Certificate of Public Convenience and Necessity before the D.C. Circuit in *Appalachian Voices*. See generally *id.* The groups argued there was no need for the project, among other arguments. See generally *id.*

⁶⁹ See *id.* at *1 (holding FERC's conclusion that there was market need for the project was supported by substantial evidence, namely long-term precedent agreements).

⁷⁰ See *id.* (quoting Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, para. 45 (2017)). By citing to the Certificate Order, the court used FERC's own rationale for why the use of precedent agreements with affiliates is adequate to show market demand as a justification for upholding FERC's decision to allow for construction of the pipeline. *Id.*

⁷¹ See *id.* (asserting opponent's arguments that the project was not meeting any market need with the presence of long-term precedent agreements).

⁷² 937 F.3d 599 (D.C. Cir. 2019).

⁷³ See *id.* at 606. Foreign shippers are shippers that use the pipelines to ship gas that will ultimately serve foreign customers. *Id.* In this case, the foreign shippers are Canadian companies using the pipeline to ship natural gas to Canadian customers. *Id.*

⁷⁴ See *id.* at 605–06 (explaining that the court recognizes it is not FERC's policy to "look behind precedent or service agreements to make judgements about the needs of individual shippers" and that the pipeline company would be disincentivized to self-deal because it bears the risk of unsubscribed capacity (quoting Myersville Citizens for Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1311 (D.C. Cir 2015)).

⁷⁵ See *id.* at 606–07 (determining FERC did not explain why it is lawful to use capacity meant to serve foreign customers as indicative of public necessity, and further that the NGA gives FERC the power to issue Certificates of Public Convenience and Necessity for natural gas being transported in interstate commerce).

shippers have subscribed to towards domestic market demand.⁷⁶ In this case, therefore, the court scrutinized FERC's use of precedent agreements while still showing deference to FERC by remanding the case rather than overruling FERC's Certificate Order.⁷⁷

E. The United States Court of Appeals for the District of Columbia Overturns Years of Industry Practice in Vacating Spire STL's Certificate of Public Convenience and Necessity

In *Environmental Defense Fund* FERC approved the Spire STL Pipeline project based on a single precedent agreement between Spire STL Pipeline, LLC ("Spire STL") and an affiliated shipper, known as Spire Missouri.⁷⁸ Both FERC and Spire STL conceded demand for natural gas was not expected to increase in the geographic area the pipeline was to serve.⁷⁹ Moreover, the precedent agreement Spire STL submitted when seeking approval to construct the pipeline was for 87.5% of the pipeline's capacity, leaving 12.5% of the pipeline's capacity unsubscribed.⁸⁰ Consequently, environmental groups and local homeowners challenged FERC's approval of the pipeline, arguing the pipeline was not being built to serve a need for natural gas and was therefore unnecessary.⁸¹ Instead, opponents of the pipeline, namely the Environmental Defense Fund (EDF), asserted FERC's decision to approve the Spire STL Pipeline was inconsistent with FERC's mandate under the NGA to "protect consumers against exploitation at the hands of natural gas companies."⁸² Specifically, the Environmental Defense Fund argued FERC's approval

⁷⁶ See *id.* at 607 (asking FERC to explain why "under the Act, the Takings Clause, and the precedent of this Court and the Supreme Court—it is lawful to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity").

⁷⁷ See *id.* at 611 (determining remanding without vacatur is the appropriate remedy in this case because there is a chance the deficiencies can be remedied by FERC on remand and vacatur has "disruptive consequences").

⁷⁸ See *Env't Defense Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021) (noting FERC approved the Spire STL project despite the existence of a single precedent agreement with an affiliated shipper).

⁷⁹ See *id.* at 963 (detailing Spire STL Pipeline, LLC's stated reasons for the Spire STL Pipeline in its application to FERC as increased reliability and supply security, reduced reliance on old natural gas pipelines, reduced reliance on a specific production zone, and the elimination of reliance on infrastructure that is only turned on when the demand on the grid is high). Spire STL Pipeline, LLC was explicit in its application that the pipeline project was not being built to serve new demand. *Id.*

⁸⁰ The Spire STL Pipeline had one precedent agreement with an affiliated shipper for less than the pipeline's full capacity. *Id.* at 959.

⁸¹ See *id.* at 963–68 (parties objecting to the pipeline included the Missouri Public Service Commission, Enable MRT, Environmental Defense Fund, and Juli Steck). The Missouri Public Service Commission and Enable MRT objected to the project because it was not needed. *Id.* at 963–64. Enable MRT, a company operating a pipeline that also services the St. Louis area, also argued the project was shielded from a competitive market. *Id.* Environmental Defense Fund opposed the weight given to a single precedent agreement. *Id.* at 964. Finally, Juli Steck opposed findings in the Environmental Assessment completed for the proposed project. *Id.* at 960.

⁸² See *id.* at 960; see also *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (quoting *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)).

of the Spire STL Pipeline was inconsistent with the Certificate Policy Statement, and therefore FERC's decision to approve the Spire STL Pipeline was lacking sound basis.⁸³

Historically, courts have applied a deferential standard of review, looking to see if each FERC decision was "arbitrary and capricious" or otherwise did not demonstrate decision-making that was "reasoned, principled, and based upon the record."⁸⁴ Despite this deferential standard in *Environmental Defense Fund*, the D.C. Circuit held FERC's approval of the Spire STL pipeline was arbitrary and capricious.⁸⁵ Specifically, the court found FERC's " cursory balancing of [the] public benefits and adverse impacts" of the pipeline project, as well as FERC's reliance on one precedent agreement with an affiliate shipper as evidence of market need, did not reflect good decision making.⁸⁶

III. STIPULATED FACTS: THE DETAILS OF *ENVIRONMENTAL DEFENSE FUND*

Environmental Defense Fund involves a natural gas pipeline built to service customers in the St. Louis area.⁸⁷ In 2016, Spire STL announced its intent to build a pipeline and subsequently held an "open season" where natural gas shippers could subscribe to pipeline capacity by entering into precedent agreements with Spire STL.⁸⁸ After an unsuccessful "open season," Spire STL entered into a precedent agreement with its affiliate, Spire Missouri, for 87.5% of the pipeline's projected capacity.⁸⁹ In 2017, Spire STL applied for a Certificate of Public Convenience and Necessity and informed FERC demand was projected to be flat in the St. Louis area, but the pipeline would still benefit customers by increasing reliability and "providing

⁸³ *Env't Def. Fund*, 2 F.4th at 967–68 (explaining EDF's arguments during both the request for rehearing and petition for review by the D.C. Circuit, as well as the standard of review for FERC decisions).

⁸⁴ *See id.* at 967–68 (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015)) (citing *Minisink Residents for Env't Pres. and Safety*, 762 F.3d at 105–06). To explain the arbitrary and capricious standard of review, the court looks to see "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" while at the same time keeping in mind issuing a Certificate of Public Convenience and Necessity is "a matter peculiarly within the discretion of the Commission." *Minisink Residents for Env't Pres. and Safety*, 762 F.3d at 105–06 (D.C. Cir. 2014) (first quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) then quoting *Okla. Nat. Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634, 639 (D.C. Cir. 1958)).

⁸⁵ *Env't Def. Fund.*, 2 F.4th at 960.

⁸⁶ *See id.* at 960–61, 976. (explaining the Certificate Policy Statement requires FERC to look at "all relevant factors" when granting a Certificate of Public Convenience and Necessity and emphasizing the evidence of self-dealing in this transaction increased the level of scrutiny required).

⁸⁷ *See id.* at 959 (explaining Spire STL wanted to construct a new pipeline in the St. Louis metropolitan area).

⁸⁸ *See id.* (explaining the "open season" occurred in August of 2016, but that no shippers subscribed to any capacity on the pipeline).

⁸⁹ *See id.* (describing the precedent agreement between Spire STL and Spire Missouri, previously known as Laclede Gas Company, as a private agreement amongst affiliates).

access to new sources of natural gas supply”⁹⁰ Spire STL produced the precedent agreement with its affiliate as evidence of market need.⁹¹

On August 3, 2018, FERC granted Spire STL a Certificate of Public Convenience and Necessity, allowing Spire STL to build and operate the pipeline.⁹² FERC acknowledged the project would not serve new demand because new demand did not exist in the St. Louis area, but argued it was not going to “second guess” Spire Missouri’s business decision to enter into the precedent agreement with Spire STL.⁹³ Moreover, in applying the two-step analytical framework noted in Section II(B), FERC found because Spire STL was a new entrant and had no existing customers, the threshold test of evaluating if existing customers would subsidize the pipeline did not apply.⁹⁴ Similarly, in addressing arguments from opponents that the project was unnecessary, FERC rejected the contention that a market study evaluating demand should be ordered, and instead found Spire STL adequately demonstrated a need for the project.⁹⁵

FERC further asserted it had no obligation to “look behind the precedent agreement”—despite the nature of the relationship between Spire STL and Spire Missouri—because an affiliated shipper still has an obligation to pay for capacity it subscribes to, an affiliated shipper still needs a way to transport natural gas, and there were no allegations of “undue discrimination against a non-affiliate shipper.”⁹⁶ Similarly, FERC maintained that evaluating the precedent agreement was beyond the scope of its jurisdiction and rather, the Missouri Public Service Commission would evaluate the expenditures of the utility it regulates.⁹⁷ Overall, FERC denied the arguments from pipeline opponents that the aggregation of circumstances in this case

⁹⁰ See *id.* at 960 (summarizing Spire STL’s arguments in favor of the pipeline despite no projected increase in demand for natural gas in the St. Louis area).

⁹¹ See *id.* (explaining Spire STL relied exclusively on the precedent agreement as evidence of market need).

⁹² See *id.* at 965.

⁹³ See *id.* at 974 (explaining FERC’s Certificate Order also acknowledged the project would not serve new demand but emphasized the existence of a Certificate Order as evidence of market need).

⁹⁴ See *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, para. 31 (2018). FERC rejected arguments that Spire Missouri’s customers were also Spire STL’s customers and again asserted the threshold question of whether existing customers would subsidize the construction of the new pipeline was inapplicable in this case. *Id.*

⁹⁵ See *id.* para. 72–73 (explaining Spire Missouri determined the Spire STL pipeline is the best way to deliver natural gas to the end users it serves and the precedent agreement they entered into is sufficient to show market need).

⁹⁶ See *id.* para. 75. FERC clarified that while there were allegations of anti-competitive behavior, those allegations alleged the affiliated shipper engaged in anti-competitive behavior and discriminated against non-affiliated pipelines by not subscribing to capacity on those pipelines. *Id.* As a result, there were no allegations or anti-competitive behavior on behalf of Spire Missouri that would warrant increased scrutiny of the precedent agreement. *Id.*

⁹⁷ See *id.* para. 85 (explaining Spire Missouri is considered a local distribution company and therefore subject to regulation by the Missouri Public Service Commission, including evaluating expenses the utility takes on). Accordingly, the expense of paying for pipeline capacity would, according to FERC, be scrutinized by Missouri state regulators. *Id.* *But see id.* (LaFleur, Comm’r, dissenting) (explaining the Missouri Public Service Commission claims it is unable to review the precedent agreement between Spire Missouri and Spire STL).

warranted a stricter scrutiny of market need.⁹⁸ In November 2019, FERC denied requests for rehearing filed by the Environmental Defense Fund and Juli Steck.⁹⁹ EDF and Juli Steck subsequently sought review of the Certificate Order in the D.C. Circuit.¹⁰⁰

Both the Certificate Order and the Denial for Request for Rehearing spurred dissents.¹⁰¹ Commissioner LaFleur dissented to the Certificate Order and emphasized the Spire STL Pipeline failed to pass the threshold test set forth in the analytical framework described in the Certificate Policy Statement because the record did not show sufficient need for the project.¹⁰² Commissioner LaFleur further questioned the rationales for the pipeline—cost savings and improved reliability.¹⁰³ Similarly, Commissioner LaFleur also faulted the majority for not questioning the precedent agreement and for asserting the agreement would be reviewed by Missouri state regulators, which was not the case.¹⁰⁴

Commissioner Glick echoed the arguments of Commissioner LaFleur, but also focused specifically on the nature of the relationship between Spire STL and Spire Missouri.¹⁰⁵ Commissioner Glick dissented to both the initial Certificate Order and the Denial for Request for Rehearing, and argued FERC could not use the existence of a precedent agreement to ignore the potential other reasons Spire Missouri may have entered into a precedent agreement with Spire STL.¹⁰⁶ The general theme

⁹⁸ See *id.* para. 78 (“The Commission is not persuaded by the protestors’ argument that the aggregation of the facts in this case regarding the precedent agreement and the lack of a prior Commission case on point in all respects renders unreasonable our reliance on existing precedent.”).

⁹⁹ See *Env’t Def. Fund v. FERC*, 2 F.4th 953, 960 (D.C. Cir. 2021).

¹⁰⁰ On appeal, the D.C. Circuit determined petitioner Steck did not have standing to challenge the Certificate Order. *Id.* at 970.

¹⁰¹ Both of the dissents to the original Certificate Order focused on the lack of evidence in the record indicating a need for the Spire STL Pipeline. See 164 FERC ¶ 61085 (LaFleur, Comm’r, dissenting) (Glick, Comm’r, dissenting); see also *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134, ¶ 62,001 (2019) (Glick, Comm’r, dissenting) (“I dissent from today’s order because there is nothing in the record to suggest that this interstate natural gas pipeline is needed.”).

¹⁰² Commissioner LaFleur called for a market study to determine if those rationales were supported by the evidence. See generally 164 FERC ¶ 61085 (LaFleur, Comm’r, dissenting).

¹⁰³ See *id.*

¹⁰⁴ While the majority asserted the Missouri Public Utility Commission has the authority to review the precedent agreement, the court found the agency does not in fact have the authority to review precedent agreements before a pipeline is granted a Certificate of Public Convenience and Necessity by FERC. See *id.* Further, Commissioner LaFleur noted the Missouri Public Utility Commission had also raised concerns about this pipeline project, specifically whether the pipeline was needed and whether ratepayers would bear the costs of the pipeline. *Id.*

¹⁰⁵ *Id.* (Glick, Comm’r, dissenting) (describing the agreement between Spire STL and Spire Missouri as “less probative” of market need because the precedent agreement is not a result of an arms-length transaction). Commissioner Glick further described other reasons Spire STL and Spire Missouri may have entered into the precedent agreement rather than subscribe to capacity on an existing pipeline, such as the 14% return on equity Spire will earn on the pipeline project. *Id.*

¹⁰⁶ See 169 FERC, para. 2 (Glick, Comm’r, dissenting) (“The record suggests that this project—the Spire STL Pipeline Project (Spire Pipeline)—is more likely an effort to enrich the shared corporate parent of the developer, Spire STL Pipeline LLC (Spire STL), and its only customer, Spire Missouri, Inc. (Spire Missouri), than a response to a genuine need for new energy infrastructure.”); See also 164 FERC (Glick, Comm’r, dissenting) (“There are several potential business reasons why Spire’s corporate parent might prefer to own a pipeline . . . such as the prospect of earning a 14 [%] return on equity rather than paying rates to MRT or another pipeline company.”).

among the dissents from both Commissioner LaFleur and Commissioner Glick was that FERC's approval of the Spire STL project was inconsistent with the Certificate Policy Statement because FERC neither sufficiently examined the need for the project nor did it demonstrate an adequate weighing of the costs and benefits of the pipeline.¹⁰⁷ The arguments the dissenters made are consistent with the rationale adopted by the D.C. Circuit in *Environmental Defense Fund*.¹⁰⁸

IV. A DEAL LIKE NO OTHER? A NARRATIVE ANALYSIS OF *ENVIRONMENTAL DEFENSE FUND*

The issue before the D.C. Circuit was whether FERC's reliance on a single precedent agreement with an affiliated shipper established market need and justified granting a Certificate of Public Convenience and Necessity to Spire STL Pipeline, LLC.¹⁰⁹ The court began the opinion by explaining the statutory and regulatory background of the case, highlighting FERC's broad authority to issue Certificates of Public Convenience and Necessity as well as the criteria FERC uses to evaluate Certificate applications.¹¹⁰ The court then explained the two-step analytical process FERC completes to evaluate whether granting a Certificate of Public Convenience and Necessity is warranted.¹¹¹ The court emphasized that FERC's Certificate Policy Statement directs FERC to evaluate all relevant factors reflecting the need for the project and further underscored language from the Certificate Policy Statement mandating that "vague assertions of public benefits will not be sufficient."¹¹² After articulating the facts, the court explained the deferential standard of review applied to FERC decisions, specifically noting the crux of the issue in this case was whether

¹⁰⁷ Commissioner LaFleur emphasized the Commission cannot choose to ignore whether a project's benefits outweigh the project costs. 164 FERC (LaFleur, Comm'r, dissenting). Commissioner Glick went further and declared FERC's decision in this case put the burden on parties opposing the pipeline to prove it was not needed, whereas under Section 7 of the NGA the burden is on the pipeline company to show the project is needed. *See id.* (Glick, Comm'r, dissenting); *See also* 169 FERC, para. 2 (concluding FERC did not meet its mandate to consider all of the factors necessary to determine the need for a project).

¹⁰⁸ *See Env't Def. Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021) (describing the many deficiencies in FERC's decision-making process, including the fact that FERC was presented with arguments that the pipeline was not needed and instead of engaging with those arguments relied on a single precedent with an affiliated shipper as proof of market need).

¹⁰⁹ *See id.* at 972–73.

¹¹⁰ *See id.* at 961 (explaining FERC must issue Certificates of Public Convenience and Necessity after giving proposed pipelines careful consideration, which makes sense because: "A Certificate-holder may exercise eminent domain against any holdouts in acquiring property rights necessary to complete the pipeline").

¹¹¹ The first step is to determine "whether the project can proceed without subsidies from [the applicant's] existing customers." *See id.* at 959 (alteration in original) (quoting Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, ¶ 61,745 (1999)). After that, FERC evaluates then determines "whether there are likely to be adverse impacts on 'existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.'" *See id.* (quoting 88 FERC, ¶ 61,745).

¹¹² *See id.* at 961–62, 972 (quoting 88 FERC, ¶ 61,748) (relying on 88 FERC for the proposition that usually a market study is required to determine need for a project and "vague assertions" are not sufficient).

the “Commission’s decision[-]making [wa]s reasoned, principled, and based upon the record.”¹¹³

Next, having determined the standing of each of the petitioners, the court started its analysis by declaring FERC’s decision-making arbitrary and capricious.¹¹⁴ Specifically, the court noted there is a difference between saying precedent agreements are important to show demand and saying they are sufficient to show demand or that a project is required for the future public convenience and necessity.¹¹⁵ Further, the court found FERC did not engage with arguments that the precedent agreement in this instance was insufficient evidence of market demand and instead relied on the single precedent agreement as “conclusive proof of need.”¹¹⁶ The court held this approach was not supported by the Certificate Policy Statement or judicial precedent.¹¹⁷

To further reiterate FERC failed to adequately determine the “public benefit” of the pipeline project, the court also noted the manner in which “market need” can be manipulated, especially when there is an affiliation between the pipeline company and the shipper.¹¹⁸ The court found FERC did not sufficiently balance the public benefits with any adverse impacts of the pipeline but rather FERC asserted, absent evidence, that the benefits outweighed the impacts.¹¹⁹ The court also found FERC failed to address their opponent’s arguments regarding whether the claimed benefits from the pipeline would actually occur and instead refused to “second guess” the business decisions of Spire Missouri.¹²⁰

¹¹³ *See id.* at 968 (second alteration in original) (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015)).

¹¹⁴ *See id.* at 968–72. The Court concluded petitioner Steck did not have standing but EDF did. *Id.* at 968–71.

¹¹⁵ *See id.* at 972 (“[I]here is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient* to show that construction of a proposed new pipeline ‘is or will be required by the present or future public convenience and necessity.’” (quoting 15 U.S.C. § 717f(e) (2018)).

¹¹⁶ *See id.* at 973 (asserting FERC failed to engage with arguments the single precedent agreement was insufficient to demonstrate market need in this case and instead relied on the precedent agreement as proof of need).

¹¹⁷ *See id.* The Court concluded its analysis of FERC’s reliance on a single precedent by summarizing:

Finally, it is noteworthy that nothing in the Certificate Policy Statement suggests that a precedent agreement is conclusive proof of need in a situation in which there is no new load demand, no Commission finding that a new pipeline would reduce costs, only a single precedent agreement in which the pipeline and shipper are corporate affiliates, the affiliate precedent agreement was entered into privately after no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.

Id.

¹¹⁸ *See id.* (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, ¶ 61,767 (2009)) (explaining that the absence of an arms-length transaction in other contexts has necessitated a higher level of scrutiny as the affiliated partners could shift costs to ratepayers and overall operate in a way that lacks transparency).

¹¹⁹ *See id.* (summarizing the Certificate Order in which FERC asserted the benefits of the pipeline would outweigh any adverse impacts without citing evidence to back the assertion).

¹²⁰ *See id.* at 973–74 (describing FERC’s lack of engagement with the “legitimate claims” of EDF and other pipeline challengers that the benefits of the project were going to occur as evidence of poor decision-making by FERC under the facts of this case).

Next, the court rejected assertions made by Spire and FERC that past cases stand for the proposition that FERC is not required to look behind precedent agreements.¹²¹ The court also rejected the assertion that past cases stand for the proposition that affiliated precedent agreements should almost always be treated the same as non-affiliated precedent agreements.¹²² Rather, the court held the fact that the pipeline was not being built to serve new demand and the lack of evidence that the pipeline would generate cost savings were enough to indicate self-dealing between Spire STL and Spire Missouri, which in turn mandated heightened scrutiny that FERC failed to apply.¹²³ The court concluded that FERC's decision was "arbitrary and capricious" because FERC did not apply any scrutiny to the precedent agreement or effectively weigh the public benefits against the adverse impacts of the pipeline.¹²⁴ The Court vacated FERC's Certificate Order, leading to the de-issuance of Spire STL's Certificate of Public Convenience and Necessity.¹²⁵

In July 2021, Spire STL applied for a temporary certificate that would allow it to operate through the winter of 2021–2022, citing heating needs.¹²⁶ In September

¹²¹ See *id.* at 974–75 (summarizing *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014), *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015), *Appalachian Voices v. FERC*, 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019), and *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), and distinguishing those pipelines from the Spire STL pipeline due to the clear evidence of self-dealing between Spire STL and Spire Missouri).

¹²² See *id.* at 974.

¹²³ See *id.* at 974–75 (finding FERC's approach "ostrich-like" and stating it "flies in the face" of the Certificate Policy Statement). The court also concluded FERC should have "looked behind" the precedent agreements to determine if there was a market need for the project. *Id.* at 975.

¹²⁴ See *id.* at 975–76.

¹²⁵ See *id.* at 976. De-issuance meant the pipeline cannot operate. See Catherine Morehouse, "An unprecedented mess": DC Circuit rejects FERC approval of existing Spire gas pipeline, UTILITY DIVE (June 23, 2021), <https://www.utilitydive.com/news/an-unprecedented-mess-dc-circuit-rejects-ferc-approval-of-existing-spire/602236/> [<https://perma.cc/33TN-H64T>] [hereinafter Morehouse, *Unprecedented Mess*]. After the de-issuance of the Certificate of Public Convenience and Necessity, the legal battle continued as the pipeline had been operational since 2019. See Catherine Morehouse, *FERC Requests More Evidence of Reliability Impacts as Spire STL Pipeline Seeks Temporary Approval*, UTILITY DIVE (Aug. 10, 2021), <https://www.utilitydive.com/news/ferc-requests-more-evidence-of-reliability-impacts-as-spire-stl-pipeline-se/604687/> [<https://perma.cc/8N3J-P2QU>] [hereinafter Morehouse, *More Evidence*]. After the D.C. Circuit ruled in favor of EDF in June 2021, Spire requested FERC grant it a temporary Certificate of Public Convenience and Necessity in July 2021 that would allow it to keep the pipeline operational. See Catherine Morehouse, *Spire STL warns FERC 'Lives at Risk' if Pipeline Not Able to Operate Following DC Circuit Ruling*, UTILITY DIVE (July 29, 2021), <https://www.utilitydive.com/news/spire-stl-warns-ferc-lives-at-risk-if-pipeline-not-able-to-operate-follow/604097/> [<https://perma.cc/5UWE-66SY>] [hereinafter Morehouse, *Lives at Risk*]. FERC responded in August 2021 requesting more information from Spire, including whether the company could fulfill service requirements without the pipeline as well as the pipeline's contributions to regional reliability. See Morehouse, *More Evidence, supra*. In September of 2021, FERC issued a temporary Certificate of Public Convenience and Necessity to Spire STL, allowing the pipeline to resume operations temporarily while FERC evaluates whether to re-issue a Certificate of Public Convenience and Necessity. See Maya Earls, *Spire STL Gets FERC Nod to Keep Missouri Pipeline Running (1)*, BLOOMBERG L. (Sept. 14, 2021, 11:54 AM), <https://news.bloomberglaw.com/environment-and-energy/spire-stl-gets-ferc-approval-to-keep-missouri-pipeline-running> [<https://perma.cc/LP8A-K44B>].

¹²⁶ See *FERC Extends Temporary Operations for Spire STL Pipeline*, FED. ENERGY REGUL. COMM'N (Dec. 3, 2021), <https://www.ferc.gov/news-events/news/ferc-extends-temporary-operations-spire-stl-pipeline> [<https://perma.cc/E97H-EXZ5>].

2021, FERC granted Spire STL a ninety-day Certificate allowing it to operate while FERC considered Spire STL's application so it could temporarily operate over the winter.¹²⁷ On December 3, 2021, FERC issued an order allowing the pipeline to operate over the "winter heating season."¹²⁸ On December 7, 2021, Spire Missouri petitioned the Supreme Court for a writ of certiorari, which was denied without comment on April 18, 2022.¹²⁹

V. THE DEAL FALLS THROUGH: A CRITICAL ANALYSIS OF
ENVIRONMENTAL DEFENSE FUND

The Spire STL Pipeline was one of many pipelines that earned an approval from FERC due to a showing of market demand via precedent agreements with affiliated shippers.¹³⁰ Therefore, despite assertions by the D.C. Circuit to the contrary, the court's decision in *Environmental Defense Fund* is a change from past precedent.¹³¹ The D.C. Circuit's decision not only leaves a gap regarding what criteria FERC can or will use to approve applications for natural gas infrastructure in the future, but also injects a considerable amount of uncertainty into the natural gas industry as a whole.¹³²

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct 1668 (2022). *See also* Barbara Grzincic, *Supreme Court Won't Touch Vacated Permit for Already-Built Spire STL Pipeline*, REUTERS (Apr. 19, 2022, 12:48 PM), <https://www.reuters.com/legal/government/supreme-court-wont-touch-vacated-permit-already-built-spire-stl-pipeline-2022-04-19/> [https://perma.cc/9JSG-QSGB].

¹³⁰ *See supra* notes 37–55 and accompanying text.

¹³¹ Relying on past cases summarized above, Spire STL argues for two broad propositions: "(1) that the Commission generally need not look behind precedent agreements in determining whether there is market demand; and (2) that affiliated precedent agreements should almost always be treated the same as non-affiliated precedent agreements." *See Env't Def. Fund v. FERC*, 2 F.4th 953, 974 (D.C. Cir. 2021). The Court disagreed with these interpretations of prior case law. *Id.*

¹³² *See* Morehouse, *Unprecedented Mess*, *supra* note 125 (noting this is not the first time the D.C. Circuit has de-issued a Certificate of Public Convenience and Necessity for an operational pipeline but distinguishing the Spire STL Pipeline from past instances which ultimately were re-issued Certificates of Public Convenience and Necessity and concluding there is no legal path forward for the Spire STL pipeline). Similarly, this commentator cites an emailed statement from a Spire STL representative lamenting the uncertainty the D.C. Court has introduced into the pipeline approval process. *Id.* The statement declares: "We [Spire STL] have trusted and relied upon the established FERC process and precedent to build and operate the STL Pipeline, but three years after approval was granted by FERC, it appears that reliable and critical energy access to 650,000 homes and businesses throughout the St. Louis region now could be in jeopardy." *Id.*

A. Environmental Defense Fund *Requires FERC to State Criteria it Will Use to Evaluate Project Need*

The D.C. Circuit said it best:

There is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient* to show that construction of a proposed new pipeline ‘is or will be required by the present or future public convenience and necessity.’¹³³

However, in ruling that precedent agreements are insufficient to show a new pipeline will have a public benefit, the court leaves a gap in what criteria FERC should use when evaluating pipeline applications.¹³⁴ Moreover, while the court directs FERC back to the criteria set forth in the Certificate Policy Statement, which mandates FERC to consider “all relevant factors” when approving or rejecting a pipeline application, debate is ongoing regarding what constitutes a “relevant factor.”¹³⁵ FERC’s historical reliance on precedent agreements also means FERC’s administrative orders and any related case law do not provide clarity regarding the factors which might be considered.¹³⁶ Consequently, it is unclear what FERC should consider when evaluating pipeline application projects.¹³⁷

Numerous commentators have weighed in regarding what other factors FERC should consider to determine whether a pipeline is necessary.¹³⁸ Many argue it is time to expand “public convenience or necessity” beyond simply “serving market need.”¹³⁹ These commentators argue that in some instances the public may be better

¹³³ *Env’t Def. Fund*, 2 F.4th at 972 (quoting 15 U.S.C. § 717f(e) (2018)).

¹³⁴ See Danis, *supra* note 21 (highlighting the D.C. Circuit’s mandate that FERC “look behind” precedent agreements is in accordance with how FERC should be independently assessing applications for new pipelines pursuant to the Certificate Policy Statement, but also implying there are many factors FERC could, but does not currently, take into account when approving pipeline infrastructure given FERC is considering changes to the 1999 Certificate Policy Statement).

¹³⁵ See TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 14 (summarizing a view shared among many commentators that FERC should use project need as the threshold for granting a Certificate of Public Convenience and Necessity, not whether the project can be built without subsidies from existing customers).

¹³⁶ See Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENV’T. L. 419, 505 (2020) (arguing FERC typically does not evaluate numerous factors but rather relies on precedent agreements). This commentator also argues FERC’s authority to weigh numerous costs and benefits when evaluating projects is broad. See *id.* at 500–01.

¹³⁷ See TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 4 (suggesting other “relevant factors” FERC could evaluate when determining need for a given pipeline project).

¹³⁸ See Danis, *supra* note 21 (noting FERC is considering policy changes regarding the approval of natural gas infrastructure, and the Sabin Center and the New Jersey Conservation Foundation both submitted various recommendations on what factors FERC should consider in its analysis). See also TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 17 (highlighting that a “common theme” among those urging FERC to revise the 1999 Certificate Policy Statement is requests for FERC to actually evaluate “all relevant factors,” including state energy policies, energy demand projections, and the presence of existing pipelines, among others).

¹³⁹ See Sam Kalen & Shi-Ling Hsu, *Natural Gas Infrastructure: Locking in Emissions*, 34 NAT. RES. & ENV’T 3, 4 (2020) (describing the somewhat controversial statutory basis for requiring an evaluation of greenhouse gas emissions in the pipeline approval process and further noting that many

served if a pipeline is *not* built due to the climate impacts of natural gas production and consumption—known as “upstream” and “downstream” emissions.¹⁴⁰ Other commentators argue factors such as individual states’ greenhouse gas initiatives and carbon neutrality goals should be considered when FERC evaluates a pipeline application.¹⁴¹ Still others argue FERC should consider how much natural gas infrastructure the nation will need as it transitions from fossil-fuel generated power to renewables such as wind and solar.¹⁴² Lastly, those that enjoy the fruits of the status quo argue for a more streamlined and efficient approval process, with clearer timelines and fewer factors taken into consideration.¹⁴³ Regardless, the D.C. Circuit seemingly left FERC to make this decision, simply telling FERC it must “look behind” precedent agreements but providing little guidance beyond that.¹⁴⁴

B. Environmental Defense Fund *Creates Uncertainty in the Natural Gas Industry*

Consequently, *Environmental Defense Fund* injects uncertainty into the pipeline approval process and the natural gas industry as a whole.¹⁴⁵ Not only did the D.C. Circuit upend a common industry practice when finding that precedent agreements do not equate to “market need” and an automatic finding of “public necessity,” but it also took the unusual step of revoking a Certificate Order for an already-built

commentators argue that FERC is statutorily required to evaluate the upstream and downstream greenhouse gas emissions of pipeline projects); *See also* Tierney, *Time to Move Away from Old Precedents*, *supra* note 14 (arguing that FERC’s mandates under NEPA and the NGA make it well-poised to have all of the information necessary to conduct an analysis of the greenhouse gas emissions relating to a natural gas pipeline).

¹⁴⁰ *See* Kalen & Hsu, *supra* note 17, at 352–357 (discussing whether greenhouse gas emissions should be considered under the NGA’s mandate that FERC consider the “public interest” and summarizing the history of FERC’s rulings on the issue to conclude it is likely an analysis of greenhouse gas emissions is required).

¹⁴¹ *See* Kalen & Hsu, *supra* note 139, at 3 (noting at least thirty-seven states have climate action plans or renewable portfolio standards, with others working towards replacing their fossil fuel electricity generation resources with renewable energy resources in the next decades). *See also* TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 6 (arguing FERC should not disregard the environmental goals of states that are impacted by pipeline projects but rather should weigh them as factors).

¹⁴² Kalen & Hsu, *supra* note 139, at 6 (describing the possibility that natural gas infrastructure may be obsolete before the asset’s lifetime ends as an “elephant in FERC’s room”).

¹⁴³ *See* TIERNEY, CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, *supra* note 7, at 1 (noting those who do not believe that FERC should revise the Certificate Policy Statement believe the current review process and reliance on precedent agreements is working well).

¹⁴⁴ *See* Danis, *supra* note 21 (noting the D.C. Circuit “disabused” FERC of the idea it does not need to look behind precedent agreements to evaluate market need and this is timely because FERC is considering changing the 1999 Certificate Policy Statement).

¹⁴⁵ *See* Morehouse, *Unprecedented Mess*, *supra* note 125 (noting this is not the first time the D.C. Circuit has de-issued a Certificate of Public Convenience and Necessity for an operational pipeline, but distinguishing the Spire STL Pipeline from past instances which ultimately were re-issued Certificates of Public Convenience and Necessity and instead seeing no legal path forward for the Spire STL pipeline). Similarly, this commentator cites an emailed statement from a Spire STL representative lamenting the uncertainty the D.C. Court has introduced into the pipeline approval process. *Id.*

pipeline.¹⁴⁶ As a result, the threat of a court invalidating a Certificate of Public Convenience and Necessity must be a factor pipeline companies consider when making the business decision to construct a pipeline.¹⁴⁷

Specifically, the D.C. Circuit did not address the investment Spire STL made in the construction of the pipeline—roughly \$287 million—indicating concerns regarding wasted investments are secondary to a court’s review of FERC’s decision making process.¹⁴⁸ Some commentators feel this is justified and argue Spire STL’s actions led directly to such a massive wasted investment.¹⁴⁹ Others, however, argue FERC’s policy of approving pipeline projects if the developer can produce precedent agreements contributed to the issue, as did FERC’s fleeting evaluation of market need for the Spire STL Pipeline.¹⁵⁰ To put it plainly, these commentators argue that because of FERC’s failure to fulfill its mandate under the Natural Gas Act, Spire’s investment was placed at risk.¹⁵¹ Regardless of who is ultimately at fault for Spire STL’s situation, however, *Environmental Defense Fund* incentivizes pipeline developers to independently ensure they can pass not only FERC’s scrutiny but also the scrutiny of a court.¹⁵² FERC should therefore receive fewer applications for new pipeline

¹⁴⁶ *Id.* (highlighting the rare instances in which a Certificate of Public Convenience and Necessity is revoked for an already-built pipeline and summarizing environmentalist’s view that *Environmental Defense Fund* is a landmark ruling with historic impacts on the natural gas industry).

¹⁴⁷ See Practical Law Finance, *Environmental Defense Fund v. FERC: US Appeals Court Vacates Certificate for Natural Gas Pipeline*, WESTLAW (June 28, 2021), <https://us.practicallaw.thomsonreuters.com/w-031-6432> [<https://perma.cc/ZD4H-36UR>] (“[D]evelopers planning pipeline projects should make sure they can demonstrate market need for the project as the standard of review is likely to be stringent in light of this decision”); see also Tom DiChristopher, *Spire Missouri Chief Says STL Pipeline Closure Would Create Winter Service Risk*, S&P GLOB. MKT. INTEL. (July 23, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/spire-missouri-chief-says-stl-pipeline-closure-would-create-winter-service-risk-65501335> [<https://perma.cc/6YT2-XZZM>] (quoting Spire Missouri’s President and COO as being frustrated with the court’s ruling and stating: “This is reality for me. I don’t sit on extra capacity just in case some court two years later shuts down the operation of a pipeline”).

¹⁴⁸ See *Env’t. Def. Fund v. FERC*, 2 F.4th 953, 963 (D.C. Cir. 2021). In the twenty-four page opinion, the Court addressed the cost of the pipeline only to highlight Spire STL’s potential return on investment. See generally *id.*

¹⁴⁹ See Morehouse, *Lives at Risk*, *supra* note 125 (paraphrasing comments from Natalie Karas, senior director and lead counsel of Environmental Defense Fund’s energy practice, who reiterated EDF’s position that Spire STL took on the risk of building a pipeline while the pipeline was the at the center of a legal battle); see also *id.* (summarizing comments EDF filed with FERC in response to Spire STL’s request for a temporary Certificate of Public Convenience and Necessity).

¹⁵⁰ See *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Glick, Comm’r, dissenting) (criticizing FERC’s assertion that a precedent agreement is sufficient to show demand and overall emphasizing FERC’s granting of a Certificate of Public Convenience and Necessity in this instance is not based in the Certificate Policy Statement or past precedent).

¹⁵¹ See Morehouse, *Unprecedented Mess*, *supra* note 125 (explaining the project cannot legally operate and the legal path forward is murky, and it is doubtful the pipeline will be able to operate in the future).

¹⁵² See Practical Law Finance, *supra* note 147 (describing one impact of this case is that pipeline developers will want to ensure they have a showing of market need that can pass a “stringent” review by a court).

projects, and the ones FERC does receive should have strong showings of market need that will pass both FERC's heightened scrutiny and that of a court.¹⁵³

VI. SLOWING THE FLOW OF DEALS IN THE PIPELINE: THE IMPACT OF
ENVIRONMENTAL DEFENSE FUND

Importantly, the court's ruling in *Environmental Defense Fund* does not mean that the construction of natural gas pipelines will come to a standstill.¹⁵⁴ Rather, pipeline projects that are unnecessary will not be built.¹⁵⁵ This categorization of a pipeline as "unnecessary" is a concept embodied in the Natural Gas Act, but not one FERC has adopted in practice.¹⁵⁶ Conversely, American consumers and environmental groups have ardently adopted the idea that the construction of new natural gas infrastructure may be unnecessary.¹⁵⁷ If FERC were to implement the idea that some natural gas projects may not truly be needed, FERC would fulfill its mandate under the NGA helping the United States transition to a more carbon neutral future.¹⁵⁸

¹⁵³ See Danis, *supra* note 21 (implying this decision ends FERC's practice of approving pipelines that can produce precedent agreements, and this will disincentivize pipeline construction companies from wanting to build new pipelines).

¹⁵⁴ See *id.* (explaining *Environmental Defense Fund* means FERC's "rubber stamping" of pipeline projects is over and it must now evaluate whether there is a public need for more gas) see also Melissa Powers, *Natural Gas Lock-in*, 69 U. KAN. L. REV. 889, 945 (2021) (explaining that while many would like to transition to renewable energy, it must be done intelligently or vulnerable populations that currently depend on gas will suffer the consequences of reduced natural gas supply disproportionately). Powers' larger argument is that natural gas is present in various sectors of the American energy system, including electricity generation, transportation, industrial use, heating, and cooking fuel, and therefore the transition away from gas must be strategic. *Id.* at 892.

¹⁵⁵ See Danis, *supra* note 21 (explaining FERC now must independently evaluate market need rather than relying on precedent agreements).

¹⁵⁶ See 15 U.S.C. § 717f(e) (2018) ("[A] certificate shall be issued to any qualified applicant . . . that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.")

¹⁵⁷ See Natalie Karas, *Warning: Unnecessary Pipelines Could Leave Consumers Holding the Bag*, ENV'T DEF. FUND: ENERGY EXCHANGE (Dec. 7, 2016), <https://blogs.edf.org/energyexchange/2016/12/07/warning-unnecessary-pipelines-could-leave-consumers-holding-the-bag/> [<https://perma.cc/3JFX-XGKV>] (explaining a motivating factor behind pipeline construction is a high return on investment for the utilities and pipeline construction companies); see also Rick Karlin, *Controversial Gas Pipeline Under Hudson River on Hold For Now*, TIMES UNION (Sept. 11, 2020), <https://www.timesunion.com/news/article/Controversial-gas-pipeline-under-Hudson-River-is-15559812.php> [<https://perma.cc/GU8L-KJV5>] (explaining an electric utility in New York, National Grid, put plans to build a controversial pipeline on hold); see also Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/8XJU-VQ83>] (highlighting opposition to the pipeline and showing photos of opponents protesting the pipeline).

¹⁵⁸ See Christin, Korman, & Pincus, *supra* note 4, at 119 (emphasizing under the NGA FERC *must* grant a Certificate of Public Convenience and Necessity to a project if FERC finds the pipeline construction company has demonstrated the project is in the public convenience and necessity while also noting FERC's broad authority to define "public convenience and necessity"); see also Powers, *supra* note 154, at 905–06 (explaining an "electrify everything" model to decarbonization in which the activities traditionally done with fossil fuels are accomplished with electric power that stems from renewable energy sources and highlighting studies that show "electrifying everything" is a feasible way to accomplish America's energy usage needs).

A. FERC has the Tools to Determine Whether a Pipeline Construction Project is Unnecessary

In order to categorize a project as “unnecessary,” FERC must first acknowledge that a pipeline project may be built for reasons other than to serve demand for natural gas in a geographic region. Many commentators have pointed out that pipelines in the past two decades have been constructed to boost corporate profits.¹⁵⁹ FERC’s standard policy of not “looking behind” precedent agreements only compounded the problem.¹⁶⁰ Consequently, “looking behind” precedent agreements to understand why a company wants to build a pipeline is an important component to categorizing the pipeline as necessary or unnecessary.¹⁶¹ This is especially true given “[t]here are several potential business reasons why [a] corporate parent might prefer to own a pipeline rather than simply take service on it.”¹⁶²

Notably, Spire STL did have business reasons for wanting to construct their own pipeline rather than subscribing to capacity on a nearby pipeline.¹⁶³ In fact, one commentator noted it was common that “state-regulated utilities got together and created new gas pipeline companies solely for the purpose of building new capacity—on which the average return on equity garnered hovered around 14%.”¹⁶⁴ Under this model, precedent agreements with affiliated shippers work in favor of the corporate parent because even if capacity on the new pipeline cost more than what it would cost to ship the gas on an existing pipeline, ratepayers would ultimately bear the cost.¹⁶⁵ The D.C. Circuit’s mandate that FERC “look behind” precedent

¹⁵⁹ See Danis, *supra* note 21 (explaining many pipeline companies are motivated by a 14% rate of return on pipeline projects); see also SIERRA CLUB, FRACKED GAS PIPELINES: EXPENSIVE AND UNNECESSARY, https://www.sierraclub.org/sites/www.sierraclub.org/files/program/documents/2225%20ACP-Pipeline_FactSheet_03_low.pdf [<https://perma.cc/YHY7-6T8Z>] (last visited Jan. 4, 2023) (comparing the overall costs of fracking and transporting natural gas with the costs of constructing renewable energy infrastructure); see generally Robert Walton, *High Returns on New Pipelines Spur Unnecessary Capacity, Report Argues*, UTILITY DIVE (Sept. 22, 2017), <https://www.utilitydive.com/news/high-returns-on-new-pipelines-spur-unnecessary-capacity-report-argues/505609/> [<https://perma.cc/E92Z-3HBB>] (explaining FERC allows a 14% return on new pipeline infrastructure despite this threshold being set when interest rates were much higher).

¹⁶⁰ See Spire STL Pipeline LLC, 164 FERC ¶ 61085 (2018) (Glick, Comm’r, dissenting) (explaining precedent agreements can be good indicators of market demand, but they are less valuable when amongst affiliates as there are other reasons affiliates may enter into a precedent agreement, such as the potential for earning a 14% return on equity if they construct and own a pipeline).

¹⁶¹ See Walton, *supra* note 159 (explaining how the Massachusetts Attorney General questioned assessments of the need for a pipeline given the trend to overbuild pipelines because of the high rate of return on the pipeline company’s investment).

¹⁶² 164 FERC, ¶ 61,085 (Glick, Comm’r, dissenting).

¹⁶³ See *id.* (noting the chance of earning a 14% return on the pipeline likely was a driving factor behind the Spire STL Pipeline given demand for natural gas was not expected to increase in the St. Louis area, other pipelines in the area had failed, and Spire did not purchase capacity on a nearby pipeline when it had the chance, but soon after decided to build its own pipeline); see also Env’t. Def. Fund v. FERC, 2 F.4th 953, 963–64 (D.C. Cir. 2021) (explaining a different pipeline in the area objected to the construction of the Spire STL project on the grounds the project was not needed).

¹⁶⁴ See Danis, *supra* note 21.

¹⁶⁵ See *id.* (explaining that this benefits the corporate parent and shareholders at the expense of the environment, ratepayers, and landowners along the route). But see William B. Tye & José Antonio García, *Who Pays, Who Benefits, and Adequate Investment in Natural Gas Infrastructure*, 28 ENERGY L.J. 1, 37–38 (2007) (describing how the existence of adequate transportation and storage facilities for natural gas may reduce price volatility and price spikes for consumers).

agreements requires FERC to evaluate the other factors that may be driving the construction of a pipeline.¹⁶⁶ If FERC allows for the idea that these ulterior corporate motives are insufficient to meet the heightened showing of public convenience and necessity required after *Environmental Defense Fund*, one can begin to see the contours of what an “unnecessary” classification may look like.¹⁶⁷

Additionally, many commentators argue an evaluation of how long the natural gas infrastructure will be used and if it is the best, most cost-effective option for ratepayers both now and in the future should be a key part of determining whether a project is “necessary.”¹⁶⁸ This is especially important given the recent push towards transitioning the United States towards electrification, a push which will significantly reduce the amount of natural gas required to produce electric power and heat homes.¹⁶⁹ In fact, just like natural gas made coal redundant, electrification could also reduce the need for natural gas greatly.¹⁷⁰

The coal industry therefore provides a prescient example of the impact of building “unnecessary” infrastructure projects. The coal industry suffers from what is known as a “stranded asset problem,” where coal-burning power plants are coming off-line years before the return on investment is realized.¹⁷¹ Some argue the natural gas industry is also at risk of creating stranded assets.¹⁷² In fact, the Spire STL Pipeline offers a striking example. Absent re-issuance of a Certificate of Public Convenience and Necessity, Spire STL’s \$287 million pipeline creates a stranded asset because the pipeline cannot operate, meaning Spire’s investment is wasted.¹⁷³

¹⁶⁶ See Danis, *supra* note 21 (noting FERC’s current Certificate Policy Statement requires FERC to look at all relevant factors when approving a pipeline, but highlighting FERC has traditionally looked only to precedent agreements to determine project need).

¹⁶⁷ See 164 FERC, ¶ 61,085 (Glick, Comm’r, dissenting). Commissioner Glick’s dissent makes the point that precedent agreements should not be automatic indicia of market need and that rather, pursuant to the Certificate Policy Statement, FERC should have evaluated other indicia of market need and made an independent assessment of the project’s necessity including demand projections, cost savings to consumers, and an evaluation of the amount of capacity currently available to serve the market. *Id.* See also Morehouse, *Unprecedented Mess*, *supra* note 125 (summarizing a statement from Commissioner Glick explaining that when FERC “cuts corners” with its analysis, “it puts decisions [and] investments made on those decisions, at substantial risk”).

¹⁶⁸ See Powers, *supra* note 154, at 892, 945 (explaining that natural gas will need to be phased out in order to decarbonize, but emphasizing there is no easy way to phase out natural gas). This commentator describes natural gas “lock-in” as one of the key issues that must be resolved before the grid can be decarbonized. *Id.* at 945.

¹⁶⁹ See *id.* at 905–06 (hypothesizing natural gas will be phased out as a fuel source if America succeeds in “electrifying everything”). “Electrifying” involves transitioning power generation, transportation, heating, and cooking to electric power rather than fossil fuel sources. *Id.*

¹⁷⁰ See *id.* at 908 (stating the role of natural gas in the future will be limited).

¹⁷¹ See Kalen, *supra* note 17, at 321 (explaining pipeline projects being built today that have an expected return over many decades may not fully realize their return on investment as a result of a shifting demand for natural gas over the next few decades); see also Kalen & Hsu, *supra* note 139, at 6 (describing the early retirement of a coal-fired power plant in Wisconsin despite having one billion dollars in debt outstanding).

¹⁷² See Kalen, *supra* note 17, at 321 (explaining that liquified natural gas export facilities could follow trends in the coal industry and be obsolete before the end of their useful life); see also Kalen & Hsu, *supra* note 139, at 6 (“[T]he disregarded elephant in the room for FERC’s certificate policy is the fate of natural gas over at least a roughly 30-plus year life span of the asset.”)

¹⁷³ See Morehouse, *Unprecedented Mess*, *supra* note 125 (highlighting the cost of the pipeline and the fact that its future is unclear without a Certificate of Public Convenience and Necessity); see also

Evaluating what exactly makes these coal fired power plants unnecessary—whether it is economics, or lack of demand for the electricity they produce, or some other reason—can help FERC to classify natural gas projects as “unnecessary” as well.¹⁷⁴

B. *The American Public Already Recognizes When Projects are Unnecessary*

The American public, as well as some utilities and some states, have already adopted the concept that natural gas infrastructure projects may be unnecessary.¹⁷⁵ *Environmental Defense Fund* simply asks FERC to catch up. For example, both California and Massachusetts have seen efforts by local municipalities to ban new construction of homes and business that will require natural gas hookups, instead preferring electrification.¹⁷⁶ Similarly, many states have goals to switch their electric generation to renewable energy resources by 2050—a shift that will surely have a significant impact on the natural gas industry given natural gas comprised 39% of U.S. electricity generation in 2019.¹⁷⁷ More on point, utilities have adjusted plans to construct new pipelines as the use of renewable energy resources and energy efficiency programs have increased, which along with the COVID-19 pandemic has lessened overall demand for natural gas.¹⁷⁸ Arguably the most prevalent example is the Keystone XL Pipeline, though it was meant to transport oil, not natural gas.¹⁷⁹

Morehouse, *More Evidence*, *supra* note 125 (describing how FERC could issue a Temporary Certificate to allow the pipeline to continue operating but noting FERC has declined to do so and instead has requested more information regarding the need for the project and further mentioning there is a chance the pipeline is not re-issued a Certificate and remains unused).

¹⁷⁴ See Kalen & Hsu, *supra* note 139, at 3 (describing how the expansion of the natural gas industry created a stranded asset problem in the coal industry). According to this commentator, “[e]xpensive investments, most prominently and recently coal-fired power plants, have found themselves stranded—uneconomical and slated for earlier retirements, because of low natural gas prices, competitive solar and wind generation, and changing electricity markets.” *Id.* This could also happen to the natural gas industry. *Id.*

¹⁷⁵ See *infra* notes 176–77 and accompanying text.

¹⁷⁶ See Tom DiChristopher, *Mass. Building Gas Ban Movement Expands After 2020 Setback*, S&P GLOB. MKT. INTEL. (Jan. 12, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/mass-building-gas-ban-movement-expands-after-2020-setback-62026427> [<https://perma.cc/FS58-8S9B>]; see also Kevin Stark, *California Cities Are Rushing to Ban Gas in New Homes. But the State Is Moving Slower*, KQED (Mar. 7, 2021), <https://www.kqed.org/science/1973279/california-cities-are-rushing-to-ban-gas-in-new-homes-but-the-state-is-moving-slower> [<https://perma.cc/6ANV-C87S>].

¹⁷⁷ See Kalen & Hsu, *supra* note 139, at 3 (explaining many states have goals to get most of their electricity generation from renewable sources by 2040, 2045, or 2050); see also Powers, *supra* note 154, at 896 (explaining the amount of electricity generated with natural gas more than doubled from 2005 to 2019).

¹⁷⁸ See Karlin, *supra* note 157. The National Grid cited the combination of increased renewable energy and energy efficiency programs and reduced demand due to the COVID-19 pandemic for the postponement of pipeline construction. *Id.* Pipeline opponents took this as a positive sign regarding the use of renewables and energy efficiency measures to replace fossil fuel use and its related infrastructure in the future. *Id.*

¹⁷⁹ See Sarah Wheaton, *Pipeline Fight Lifts Environmental Movement*, N.Y. TIMES (Jan. 24, 2014), <https://www.nytimes.com/2014/01/25/us/keystone-xl-pipeline-fight-lifts-environmental-movement.html> [<https://perma.cc/C97C-EDZL>]. While the Keystone XL Pipeline would transport oil, not natural gas, it nonetheless helped to invigorate the environmental movement. *Id.*

Regardless, that pipeline was not given a permit as a result of public criticism of the environmental, public health, and civil rights impacts of the pipeline.¹⁸⁰

Again, this is not to say that all pipeline construction projects should be halted.¹⁸¹ The point is that having a structure in place to classify infrastructure as “necessary” or “unnecessary” is important, as it can have implications for both individual consumer finances and broader climate change related goals.¹⁸²

For instance, the larger the risk that a project will not be approved, the more investors expect to be compensated for the risk they are taking on, which is a cost passed on to consumers via the rates they pay for natural gas or electricity generated via the burning of natural gas.¹⁸³ On the other hand, in locales where the demand for natural gas is higher than the supply that can be transported there due to lack of pipeline capacity, consumers pay a premium for natural gas.¹⁸⁴ This is especially true in the northeast United States, where natural gas infrastructure is limited yet consumers use natural gas to heat their homes and cook.¹⁸⁵ Consequently, it is imperative FERC set forth criteria for evaluating market need, so that necessary pipeline infrastructure can be built.¹⁸⁶

Looking forward, some scholars and environmental groups predict the technological advances and falling costs of renewable energy generation and storage will increase the number of “stranded” natural gas assets in the United States.¹⁸⁷ Specifically, scholars and environmentalists predict natural gas infrastructure which is built

¹⁸⁰ See Melissa Denchak & Courtney Lindwall, *What is the Keystone XL Pipeline?*, NAT. RES. DEF. COUNS. (Mar. 15, 2022), <https://www.nrdc.org/stories/what-keystone-pipeline> [<https://perma.cc/D9U2-3S5Z>] (calling the “takedown” of the Keystone XL Pipeline “one of this generation’s most monumental environmental victories”).

¹⁸¹ See Powers, *supra* note 154, at 947 (highlighting that there are some places where new natural gas infrastructure may be needed but calling for a heightened burden on the pipeline developer to justify any investment).

¹⁸² See James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 265 (2019) (explaining getting an energy transport project, like a natural gas pipeline, to the application stage can cost billions of dollars). This commentator further explains if there is a risk an application will be denied investors will seek a higher return on their initial investment, which is a cost ultimately borne by consumers. *Id.* at 265–66. On the other hand, if investors are unwilling to invest in energy transportation projects, consumers do not have access to that energy and forgo the benefits of cheaper power they may otherwise receive. *Id.*

¹⁸³ See *id.* at 266 (explaining the U.S. energy market needs massive investment in new energy transportation infrastructure but investors are growing skeptical of U.S. energy policy, leading to increased costs for new infrastructure that are ultimately borne by consumers either through higher risk premiums if investors do invest or higher fuel costs due to limited supply if investors do not invest).

¹⁸⁴ See *id.* at 294–95 (explaining New England paid a premium to import Russian gas in January 2018 despite cheap natural gas being produced in the United States due to poor pipeline access in New England).

¹⁸⁵ See *id.* at 294 (analyzing how lack of pipeline infrastructure from Pennsylvania to New England resulted in New England producing high-polluting, expensive electricity during winter cold snaps in December 2017 despite abundant, cheap natural gas in Pennsylvania).

¹⁸⁶ See Danis, *supra* note 21 (describing the impacts of *Envtl. Def. Fund* as “potentially enormous” because it gives FERC some guidance as it re-evaluates the 1999 Certificate Policy Statement).

¹⁸⁷ See Kalen & Hsu, *supra* note 139, at 6 (“Lower cost renewables and emerging battery technology coupled with modern computing power and new business innovation services have the potential to alter the electric grid, and possibly how we heat our homes, businesses, and factories.”).

now will be obsolete before its useful life is over due to advances in renewable energy.¹⁸⁸ Just like the coal industry, “stranded” natural gas assets have the potential to increase costs to rate payers.¹⁸⁹

Conversely, some scholars and commentators predict that continuing to construct natural gas infrastructure will create an unwanted dependency on natural gas because the presence of existing infrastructure makes the use of natural gas the obvious choice for end uses.¹⁹⁰ The general idea is, once natural gas infrastructure is built, it doesn’t make sense to shift away from natural gas for heating, cooking, or electricity generation.¹⁹¹ According to these scholars, this dependency will lead to more greenhouse gas emissions than would be emitted if alternative fuel sources, such as renewable energy, were constructed instead.¹⁹² In turn, this increase in greenhouse gas emissions contributes to global warming, the costs of which are unknown but expected to be astronomical.¹⁹³

Regardless of the future status of natural gas infrastructure, it is clear that FERC’s ability to “encourag[e] the orderly development of plentiful supplies of . . .

¹⁸⁸ See *id.* at 3 (explaining while natural gas lock-in is a threat, it is more likely that natural gas infrastructure will become stranded assets); see also Powers, *supra* note 154, at 937 (explaining that despite persistent lock-in as it relates to natural gas, the momentum of the clean energy industry will likely lead to stranded assets).

¹⁸⁹ See Powers, *supra* note 154, at 908–09 (describing fears from environmental groups that the build out of natural gas infrastructure today will lead to stranded natural gas assets in the future as the world decarbonizes). Powers also notes the various ways states deal with stranded assets, including allowing the utility to recover fully from ratepayers, allowing the utility to recover costs but no returns, and forcing the utility to eat the cost of the stranded assets. *Id.* at 920; see also Kalen & Hsu, *supra* note 139, at 6 (noting consumers may be burdened with the capital cost of stranded assets).

¹⁹⁰ See Powers, *supra* note 154, at 894, 913 (explaining how once infrastructure is put in place, it is replaced with infrastructure of the same type when retired and also depended on by end users because it already exists); see also Kalen & Hsu, *supra* note 139, at 3 (explaining that once the large investment in natural gas infrastructure is undertaken, it is economically difficult to justify not utilizing the pipeline given the upfront capital costs and marginal cost of using the natural gas that can be transported via the pipeline).

¹⁹¹ See Powers, *supra* note 154, at 891 (explaining the concept of natural gas “lock-in” and defining it as “the tendency for fossil fuel infrastructure to persist and create new path dependencies that could extend its use and lock out renewable resources”). This scholar argues that physical infrastructure is “self-reinforcing” in that it leads to dependency on the physical infrastructure. *Id.* at 909; see also Kari Lydersen, *Spire Pipeline Flap in Missouri Reveals Deeper Questions About Natural Gas*, ENERGY NEWS NETWORK (Nov. 22, 2021), <https://energynews.us/2021/11/22/spire-pipeline-flap-in-missouri-reveals-deeper-questions-about-natural-gas/> [https://perma.cc/HQP7-43HQ] (detailing Spire STL’s marketing efforts to encourage customers to rely on natural gas and concluding it is premised on a broader strategy of fostering reliance on natural gas for the future).

¹⁹² Powers, *supra* note 154, at 889–90 (explaining how transitioning from fossil fuel sources of energy to renewable sources of energy is necessary to prevent climate change but also brings a variety of positive benefits, mostly due to a reduction in greenhouse gas emissions); see also Kalen & Hsu, *supra* note 139, at 3 (explaining the construction of pipelines leads to a “fossil fuel bias” that may persist for decades).

¹⁹³ See Christopher Flavelle, *Climate Change Could Cut World Economy by \$23 Trillion in 2050, Insurance Giant Warns*, N.Y. TIMES, (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/climate/climate-change-economy.html> [https://perma.cc/9NGY-3KCT]; see also Powers, *supra* note 154, at 947 (describing a variety of economic impacts that could result if American’s transition away from natural gas is not done in a cohesive manner).

natural gas at reasonable prices” is being tested.¹⁹⁴ It is almost impossible for FERC to evaluate whether a new pipeline “is or will be required by the present or future public convenience and necessity” without considering the long-term costs—both tangible and intangible—of constructing new natural gas infrastructure.¹⁹⁵ A strict evaluation of the current and future necessity of natural gas infrastructure such as pipelines is therefore crucial to ensuring American consumers are not excessively burdened by the costs associated with the use of natural gas—including the costs associated with a shift away from natural gas.¹⁹⁶ *Environmental Defense Fund* is an important milestone in ensuring FERC and individual pipeline companies undertake strict evaluations of project need and therefore represents a shift in industry norms that should benefit all Americans.¹⁹⁷

¹⁹⁴ *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (quoting *NAACP v. Fed. Power Comm'm*, 425 U.S. 662, 669–70 (1976)).

¹⁹⁵ See 15 U.S.C. § 717f(e) (2018).

¹⁹⁶ See Powers, *supra* note 154, at 937–38 (describing the costs associated with a decline in demand for natural gas). This commentator also calls on FERC to apply more scrutiny to natural gas pipelines. *Id.* at 947.

¹⁹⁷ See Danis, *supra* note 21 (describing the impacts of *Environmental Defense Fund* as “potentially enormous” because it gives FERC some guidance as it re-evaluates the 1999 Certificate Policy Statement); see also Powers, *supra* note 154, at 920 (explaining the return on investment utilities receive for capital investments and the regulation of rates charged to consumers contributes to carbon lock in).