

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 23-1064 (consolidated with 23-1074, 23-1077, 23-1129, 23-1130, 23-1137)

NEW JERSEY CONSERVATION FOUNDATION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

PROOF BRIEF OF INTERVENOR FOR RESPONDENT

Patrick F. Nugent
(D.C. Circuit Bar No. 55948)
Sean T. O'Neill
SAUL EWING LLP
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Phone: (215) 972-7134 / -7159
Fax: (215) 972-7725
Patrick.Nugent@saul.com
Sean.Oneill@saul.com

Elizabeth U. Witmer
(D.C. Circuit Bar No. 55961)
SAUL EWING LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087-5569
Phone: (610) 251-5062
Fax: (610) 651-5930
Elizabeth.Witmer@saul.com

Counsel for Intervenor Transcontinental Gas Pipe Line Company, LLC

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenor Transcontinental Gas Pipe Line Company, LLC states the following:

A. Parties and Amici

Except as stated below, all parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

In addition, the following have submitted briefs as amicus curiae in support of Petitioners: (1) the Institute for Policy Integrity at New York University School of Law; and (2) the States of New Jersey, Washington, Connecticut, Maryland, Massachusetts, New York, Oregon, and Vermont.

Intervenor anticipates that the following will submit briefs as amicus curiae in support of Respondent: (1) the American Gas Association; and (2) the Interstate Natural Gas Association of America together with the American Petroleum Institute.

The intervenor supporting Respondent in this action is Transcontinental Gas Pipe Line Company. Intervenor makes the disclosures required by Circuit Rule 26.1 in a Corporate Disclosure Statement immediately following this Certificate.

B. Rulings Under Review

References to the rulings at issue appear in the Rule 28(a)(1) certificate in Petitioners' Opening Brief.

C. Related Cases

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

Transco notes that it is the appellant in an appeal pending before the United States Court of Appeals for the Third Circuit captioned *Transcontinental Gas Pipe Line Company v. Pennsylvania Environmental Hearing Board, et al.* (No. 23-2052). That case is not related within the meaning of Circuit Rule 28(a)(1)(C) because, although it involves some of the same parties (Transco, the Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper) and the same interstate natural gas pipeline project, it does not involve “the same or similar issues.” Circuit Rule 28(a)(1)(C). Instead, the Third Circuit appeal involves the application of the Natural Gas Act’s exclusive review provision, 15 U.S.C. § 717r(d)(1), to the review of permits issued by the Pennsylvania Department of Environmental Protection pursuant to federal law.

Dated: October 24, 2023

/s/ Elizabeth U. Witmer
Elizabeth U. Witmer
Counsel for Intervenor
Transcontinental Gas Pipe Line
Company, LLC

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of the Rules of this Court, Intervenor Transcontinental Gas Pipe Line Company, LLC makes the following disclosures:

Transcontinental Gas Pipe Line Company, LLC is a natural gas pipeline company engaged in the transportation of natural gas in interstate commerce, which owns and operates an interstate natural gas transmission system that extends from Texas, Louisiana and the offshore Gulf of Mexico area to a terminus in the New York City metropolitan area. Its immediate parent company is Williams Partners Operating LLC, which in turn is wholly owned by The Williams Companies, Inc.

Dated: October 24, 2023

/s/ Elizabeth U. Witmer

Elizabeth U. Witmer
Counsel for Intervenor
Transcontinental Gas Pipe Line
Company, LLC

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASESi

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..... iii

TABLE OF AUTHORITIESvi

GLOSSARY.....xi

INTRODUCTION 1

STATEMENT OF ISSUES2

STATUTES AND REGULATIONS.....2

STATEMENT OF THE CASE.....2

I. Transco’s Regional Energy Access Expansion Project.....2

II. FERC’s Thorough Review of the Project.....4

III. Unsuccessful Attempts to Block Project Construction5

SUMMARY OF ARGUMENT6

ARGUMENT8

I. Standards of Review8

 A. Standard of Review for FERC’s Finding of Need Supporting Its
 Public Convenience and Necessity Determination9

 B. Standard of Review for FERC’s Compliance with NEPA10

II. FERC Fully Complied with the Natural Gas Act’s Requirements in
Assessing Need.....10

 A. The Evidence Submitted by Petitioners and Rate Counsel Does
 Not Adequately or Directly Address the Project11

B.	FERC Appropriately Considered the Record Evidence in Finding Need.....	13
C.	Petitioners and Rate Counsel Do Not Meet the Standard for Setting Aside the Certificate Order	15
III.	FERC Fully Complied with NEPA in Assessing GHG Emissions in Potential Climate Change Impacts	17
IV.	FERC Adequately Balanced Public Benefits Under the Natural Gas Act	22
V.	Petitioners Have Failed to Demonstrate That They Are Entitled to Relief, But Even if They Had Done So, Vacatur Would Not Be an Appropriate Remedy Under This Court’s Precedent.....	26
A.	A Showing on Either <i>Allied-Signal</i> Factor Is Sufficient to Decline Vacatur	26
B.	Neither of the <i>Allied-Signal</i> Factors Would Support Vacatur Here ...	28
	CONCLUSION.....	31
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Airmotive Eng'g Corp. v. Fed. Aviation Admin.</i> , 882 F.3d 1157 (D.C. Cir. 2018).....	8, 9
<i>Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission</i> , 988 F.2d 146 (D.C. Cir. 1993).....	8, 26, 27, 28, 30
<i>Am. Farm Bureau Fed'n v. EPA</i> , 559 F.3d 512 (D.C. Cir. 2009).....	27
<i>Ariz. Corp. Comm'n v. FERC</i> , 397 F.3d 952 (D.C. Cir. 2005).....	9
<i>Black Oak Energy, LLC v. FERC</i> , 725 F.3d 230 (D.C. Cir. 2013).....	27
* <i>Ctr. for Biological Diversity v. FERC</i> , 67 F.4th 1176 (D.C. Cir. 2023).....	17
* <i>City of Oberlin, Ohio v. FERC</i> , 937 F.3d 599 (D.C. Cir. 2019).....	16, 23, 30
<i>City of Olmsted Falls, Ohio v. Fed. Aviation Admin.</i> , 292 F.3d 261 (D.C. Cir. 2002).....	10
<i>Coalition on Sensible Transp., Inc. v. Dole</i> , 826 F.2d 60 (D.C. Cir. 1987).....	10
<i>Columbia Gas Transmission Corp. v. FERC</i> , 750 F.2d 105 (D.C. Cir. 1984).....	22, 23
* <i>Del. Riverkeeper Network v. FERC</i> , 45 F.4th 104 (D.C. Cir. 2022).....	10, 16, 17
* <i>Dept. of Tran. v. Public Citizen</i> , 541 U.S. 752 (2004).....	19

* <i>Env. Defense Fund v. FERC</i> , 2 F.4th 953 (D.C. Cir. 2021).....	15, 16
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	8
* <i>Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961).....	23, 26
<i>Fla. Mun. Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	9
<i>Food & Water Watch v. FERC</i> , 28 F.4th 277 (D.C. Cir. 2022).....	27, 28, 29, 30
<i>Fox Television Stations, Inc. v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002), <i>modified on reh’g</i> , 293 F.3d 537 (D.C. Cir. 2002).....	27
<i>FPL Energy Me. Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	9
<i>Fund For Animals v. Hall</i> , 448 F. Supp. 2d 127 (D.D.C. 2006).....	10
<i>Heartland Reg’l Med. Ctr. v. Sebelius</i> , 566 F.3d 193 (D.C. Cir. 2009).....	27
<i>Int’l Union, UMW v. FMSHA</i> , 920 F.2d 960 (D.C. Cir. 1990).....	27
<i>La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.</i> , 336 F.3d 1075 (D.C. Cir. 2003).....	27
<i>Metropolitan Edison Co. v. People Against Nuclear Energy</i> , 460 U.S. 766 (1983).....	19
* <i>Minisink Residents for Envtl. Pres. & Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	9, 16, 21

<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	15
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	16, 23
* <i>NAACP v. Fed. Power Comm’n</i> , 425 U.S. 662 (1976).....	24, 25
<i>North Carolina v. EPA</i> , 550 F.3d 1176 (D.C. Cir. 2008).....	27, 28
<i>Office of Consumers’ Counsel v. FERC</i> , 655 F.2d 1132 (D.C. Cir. 1980).....	24
<i>Radio-Television News Dirs. Ass’n v. FCC</i> , 184 F.3d 872 (D.C. Cir. 1999).....	28
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	21
<i>Shands Jacksonville Med. Ctr. v. Burwell</i> , 139 F. Supp. 3d 240 (D.D.C. 2015).....	28
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	17, 23, 29
<i>U.S. Telecom Ass’n v. FBI</i> , 276 F.3d 620 (D.C. Cir. 2002).....	27
<i>Vecinos para el Bienestar de la Comunidad Costera v. FERC</i> , 6 F.4th 1321 (D.C. Cir. 2021).....	27, 28, 29, 30
<i>WildEarth Guardians v. Jewell</i> , 738 F.3d 298 (D.C. Cir. 2013).....	17
<i>Williston Basin Interstate Pipeline Co. v. FERC</i> , 519 F.3d 497 (D.C. Cir. 2008).....	28

Statutes

5 U.S.C. § 706(2)(A).....8
* 15 U.S.C. § 717f.....9
15 U.S.C. § 717f(e).....22
* 15 U.S.C. § 717r(b).....9
42 U.S.C. § 4332(2)(C).....17

Regulations

40 C.F.R. § 1501.3(a)(2).....22
40 C.F.R. § 1501.5(a).....22
40 C.F.R. § 1502.2(a).....22
40 C.F.R. § 1502.317
40 C.F.R. § 1502.10(a)(6).....18
40 C.F.R. § 1502.16(a)(1)..... 18, 19
40 C.F.R. § 1502.21(a).....22
40 C.F.R. § 1502.21(c).....20
40 C.F.R. § 1502.21(c)(1).....22
* 40 C.F.R. § 1508.1(g) 18, 19, 21
* 40 C.F.R. § 1508.1(aa)..... 18, 21

Other Authorities

* Certificate Policy Statement, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified by* 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified by* 92 FERC ¶ 61,094 (July 28, 2000) 15, 16, 23

Regional Energy Access FAQ, *available at* https://www.williams.com/wp-content/uploads/sites/8/2022/02/Williams_REABrochure-Digital.pdf.....3

Sierra Club v. FERC, Docket No. 16-1329, Order (D.C. Cir. Mar. 7, 2018) .. 29, 30

*Authorities primarily relied upon

GLOSSARY

Certificate Order	Order Issuing Certificate and Approving Abandonment, <i>Transcontinental Gas Pipe Line Co.</i> , 182 FERC ¶ 61,006 (Jan. 11, 2023)
Certificate Rehearing Order	Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, <i>Transcontinental Gas Pipe Line Co.</i> , 182 FERC ¶ 61,148 (March 17, 2023)
Dth/d	Dekatherms per day
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse gas
JA	Joint Appendix
NEPA	National Environmental Policy Act
New Jersey Study	London Econ. Int'l, Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers (Nov. 5, 2021), filed as an attachment to New Jersey Parties' Mot. To Intervene & Lodge, <i>Transcontinental Gas Pipe Line Co.</i> , Doc. Accession No. 20220711-5186, FERC Dkt. No. CP21-94 (July 11, 2022)
Project	Transcontinental Gas Pipe Line Company, LLC's Regional Energy Access Expansion
R.	Record Item Number from Certified Index to the Record
Request for Authorization	Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service on an Interim Basis, Doc. Accession No. 20230919-5118, <i>Transcon. Gas Pipe Line Co.</i> , FERC Dkt. No. CP21-94-000 (Sept. 19, 2023)

Skipping Stone Study	Skipping Stone, Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project (Sept. 8, 2022), filed as Exhibit A to Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, Transcontinental Gas Pipe Line Co., Doc. Accession No. 20220909- 5000, FERC Dkt. No. CP21-94 (Sept. 9, 2022)
Supplement	Supplement to Transco’s Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service on Interim Basis, Doc. Accession No. 20231017-5166, <i>Transcon. Gas Pipe Line Co.</i> , FERC Dkt. No. CP21-94-000 (Oct. 17, 2023)
Transco	Intervenor Transcontinental Gas Pipe Line Company, LLC
Transco Study	Levitan & Assocs., Regional Access Energy Expansion (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, Transcontinental Gas Pipe Line Co., Doc. Accession No. 20220422-5150, FERC Dkt. No. CP21-94 (Apr. 22, 2022)

INTRODUCTION

The Federal Energy Regulatory Commission (“FERC”) authorized Transcontinental Gas Pipe Line Company, LLC (“Transco”) to place certain of the facilities authorized for the Regional Energy Access Expansion Project (the “Project”) into service on October 20, 2023, in order to provide 450,000 dekatherms per day (“Dth/d”) of firm transportation service on an interim basis for the 2023/2024 heating season. The remaining facilities, when complete, will allow the provision of the full 829,400 (Dth/d) of firm transportation capacity under the Project from northeastern Pennsylvania to multiple delivery points in New Jersey, Pennsylvania, and Maryland starting in 2024.¹ Both the interim service and the full capacity of the Project are fully subscribed. Petitioners challenge the market need for the Project, FERC’s assessment of the greenhouse gas (“GHG”) emissions and potential climate change impacts from the Project, and FERC’s balancing of the need versus the benefit for the Project. Contrary to Petitioners’ claims, and as the record in this matter demonstrates, FERC properly authorized the Project and its construction, and there is no basis to sustain Petitioners’ appeal, much less to vacate FERC’s orders.

¹ See Authorization to Commence Partial In-Service of Certain Facilities, Doc. Accession No. 20231020-3031, *Transcon. Gas Pipe Line Co.*, FERC Dkt. No. CP21-94-000 (Oct. 20, 2023).

STATEMENT OF ISSUES

1. Whether, after considering all of the evidence for market need in the record, FERC reasonably found market need for, and public benefits from, the Project, which was 100 percent customer-subscribed and would improve reliability of service;

2. Whether FERC reasonably complied with its environmental responsibilities in providing quantitative and qualitative analysis of emission impacts that were found to be reasonably foreseeable and causally related to the Project through comparison to national, regional, and local figures; and

3. Whether FERC properly weighed the Project's public benefits against its adverse impacts in determining that the Project was required by the public convenience and necessity under the Natural Gas Act.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs and accompanying addenda filed by Petitioners and FERC.

STATEMENT OF THE CASE

I. Transco's Regional Energy Access Expansion Project

The Project will provide up to 829,400 Dth/d of incremental firm transportation capacity (enabling the transportation of enough natural gas supply to

serve approximately three million homes)² to shippers in New Jersey and Maryland, who have subscribed to 100% of such capacity. *See* R.984, Order Issuing Certificate and Approving Abandonment, *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,006 (2023) (“Certificate Order”), ¶¶ 1, 38, JA___, JA___. The Project involves: construction of approximately 36 miles of 30- and 42-inch diameter pipeline loop and horsepower addition to an existing compressor station in Pennsylvania; construction of one new electric motor driven compressor station and horsepower addition at an existing compressor station in New Jersey; and upgrades and modifications to existing compressor stations, regulating stations, delivery meter stations, and ancillary facilities in Pennsylvania, New Jersey, and Maryland.³ *Id.* ¶ 4, JA___. In accordance with Transco’s commitment to emissions reduction, the Project also includes retirement of reciprocating compression units at compressor stations in Pennsylvania and New Jersey. *Id.* ¶ 5, JA___. In New Jersey, retirement of eight legacy reciprocating engines will result in significant reductions (over 97%) in permitted criteria and hazardous air pollutants. *Id.* The Project supports the climate commitment of Transco, its ultimate parent company The Williams Companies, Inc.,

² Regional Energy Access FAQ, at 1, *available at* https://www.williams.com/wp-content/uploads/sites/8/2022/02/Williams_REABrochure-Digital.pdf.

³ A pipeline loop or “looping” is when a segment of pipeline is installed alongside and adjacent to one or more pre-existing pipelines. The loop segment then is connected to the pre-existing pipeline at both ends, allowing increased transportation capacity and/or better system reliability.

and the shippers under the Project, and provides a practical path to reduce emissions, support the viability of renewables, and advance a clean energy economy. *Id.* ¶ 5, JA__.

II. FERC’s Thorough Review of the Project

Following an extensive pre-filing period, which began in June 2020, Transco filed an application with FERC on March 26, 2021 under sections 7(b) and 7(c) of the Natural Gas Act for authorization to construct and operate the Project in Pennsylvania, New Jersey, and Maryland. *Id.* ¶¶ 1, 49 n.106, JA__, JA__. FERC issued its Draft Environmental Impact Statement on March 2, 2022, its Final Environmental Impact Statement on July 29, 2022, and a Certificate of Public Convenience and Necessity to Transco approving the Project on January 11, 2023. *Id.* ¶¶ 1, 50-51, JA__, JA__. FERC issued the Certificate Order after finding that Transco had “demonstrated a need” for the Project, that the Project “will not have adverse economic impacts on existing shippers or other pipelines and their existing customers,” and that the Project’s “benefits will outweigh any adverse economic effects on landowners and surrounding communities.” *Id.* ¶ 82, JA__. The Certificate Order initially contained a stay of construction, but that stay was lifted by FERC after Transco demonstrated that Transco had acquired all property rights necessary for the pipeline construction associated with the Project and had obtained

all required federal authorizations to begin construction. R.1013, Order Lifting Stay, JA__.

More than two hundred individuals and groups – including Petitioners – filed comments with FERC during the administrative review process for the Project. *See* Certificate Order, ¶ 12, JA__. These comments concerned “various issues, including project purpose and need; alternatives; water resources; wetland impacts; fish, wildlife, and protected species; impacts on recreation; visual impacts; air quality; noise; socioeconomic impacts; environmental justice; cumulative impacts; safety; greenhouse gases (GHG); and climate change.” *Id.* FERC addressed these issues in the Final Environmental Impact Statement, the Certificate Order, and the March 17, 2023 Order on Rehearing. *See* R.1152, Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,148 (2023) (“Certificate Rehearing Order”), JA__.

III. Unsuccessful Attempts to Block Project Construction

Petitioners sought to stay construction of the Project before this Court and FERC. Both this Court and FERC denied their stay requests. *See* Order, No. 23-1064, Document No. 1992981 (D.C. Cir. Apr. 3, 2023); R.1192, Order on Rehearing and Stay Requests, *Transcon. Gas Pipe Line*, 183 FERC ¶ 61,071 (May 1, 2023), JA__.

On September 19, 2023, as supplemented on October 17, 2023, Transco requested FERC authorization to place certain Project facilities in service and provide firm transportation service utilizing roughly 54% of the Project’s capacity on an interim basis. *See* Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service on an Interim Basis (“Request for Authorization”), Doc. Accession No. 20230919-5118, *Transcon. Gas Pipe Line Co.*, FERC Dkt. No. CP21-94-000 (Sept. 19, 2023); Supplement to Transco’s Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service on Interim Basis, Doc. Accession No. 202310147-5166, *Transcon. Gas Pipe Line Co.*, FERC Dkt. No. CP21-94-000 (Oct. 17, 2023) (“Supplement”). FERC granted authorization on October 20, 2023 (*see supra* note 1), and the Project is fully subscribed to deliver 450,000 Dth/d of firm transportation on an interim basis to customers for the 2023/2024 heating season. *See* Supplement at 1.

SUMMARY OF ARGUMENT

Intervenor adopts and incorporates by reference all of the arguments set forth in the Brief of Respondent. In this Brief, Intervenor supplements FERC’s discussion regarding its assessment of: (1) the Project’s necessity under the Natural Gas Act; (2) GHG emissions and potential climate change impacts under the NEPA; and (3) public benefits under the Natural Gas Act.

First, Petitioners do not meet the standard for setting aside the Certificate Order based on FERC’s finding of need. FERC fully complied with the Natural Gas Act’s requirements in assessing need by considering all of the record evidence, including the evidence and studies submitted by Petitioners that do not even adequately or directly address the Project. After considering the evidence, FERC reasonably found need to support its public convenience and necessity determination.

Second, FERC fully complied with NEPA in assessing GHG emissions and potential climate change impacts. FERC found the Project’s GHG emissions to be reasonably foreseeable, and, as a result, FERC acted reasonably in discussing the significance of the emissions by contextualizing them in comparison to federal and state GHG emission inventories. Conversely, FERC was not required to address the purported significance of “climate impacts” from the Project because, as FERC appropriately discussed, climate impacts are not “reasonably foreseeable.”

Third, FERC properly weighed the Project’s public benefits against its adverse impacts pursuant to the Natural Gas Act in concluding that the Project was required by the public convenience and necessity. FERC’s balancing of public benefits against adverse impacts under the Natural Gas Act must consider the purposes of the Natural Gas Act, which is intended to ensure adequate supplies of natural gas at reasonable rates. Given FERC’s broad discretion when balancing

public benefits against the adverse impacts, the purpose of the Natural Gas Act, the ample evidence in the record to support public need for the Project, and FERC's consideration of all reasonably foreseeable climate impacts, FERC's determination is adequately supported.

Finally, although Petitioners have failed to demonstrate any entitlement to relief, even if they had done so, vacatur of FERC's orders would not be appropriate under this Court's precedent in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

ARGUMENT

I. Standards of Review

FERC's actions are reviewed under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The Administrative Procedure Act "sets forth the full extent of judicial authority to review executive agency action for procedural correctness" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The Administrative Procedure Act allows courts to set aside agency action, findings, and conclusions, only when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Airmotive Eng'g Corp. v. Fed. Aviation Admin.*, 882 F.3d 1157, 1159 (D.C. Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)). "The scope of review [in an [Administrative Procedure Act case] is narrow and a court is not to substitute its

judgment for that of the agency, provided the agency has examined the data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (cleaned up).

A. Standard of Review for FERC’s Finding of Need Supporting Its Public Convenience and Necessity Determination

Congress determined in its passage of the Natural Gas Act that FERC’s finding as to whether a project is required by the public convenience and necessity – the standard set by Congress in the Natural Gas Act – is “conclusive” and must be upheld “if supported by substantial evidence.” 15 U.S.C. § 717r(b); *see also id.* § 717f. Substantial evidence “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Minisink Residents for Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). The possibility that different conclusions may be drawn from the same evidence does not mean FERC’s findings are not supported by substantial evidence. *See Ariz. Corp. Comm’n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (“[T]he question . . . is not whether record evidence supports [petitioners’] version of events, but whether it supports FERC’s.” (alterations in original) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003))).

B. Standard of Review for FERC’s Compliance with NEPA

Like agency action under the Administrative Procedure Act generally, an agency’s compliance with NEPA is also subject to the “arbitrary and capricious standard.” *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022). Because the NEPA process “involves an almost endless series of judgment calls . . . [t]he line-drawing decisions . . . are vested in the agencies, not the courts.” *Fund For Animals v. Hall*, 448 F. Supp. 2d 127, 132 (D.D.C. 2006) (alterations in original) (citing *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987)). “Therefore, the ‘role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.’” *Id.* (quoting *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.*, 292 F.3d 261, 269 (D.C. Cir. 2002)).

II. FERC Fully Complied with the Natural Gas Act’s Requirements in Assessing Need

The Project is fully subscribed. All of the shippers who signed precedent agreements have signed service contracts, as required by the Certificate Order. R.1019, Response to Notice of Contract Execution, JA___. Transco is now also authorized to provide interim service after partial completion of the Project, and that service is also fully subscribed. *See* Request for Authorization; *see also* Supplement.

Although precedent agreements showing that a project is fully subscribed, alone, are adequate to support FERC’s finding of market need, in this case the

Project shippers *also* submitted statements supporting market need, and Transco submitted the Transco Study – a market study that examines the effect of the Project on the market in the receiving states, including New Jersey, and supports the market need for the Project. As set forth below, FERC considered all of the record evidence regarding market need, and there is no basis for setting aside the Certificate Order on the basis of need. *See* R.711, Levitan & Assocs., Regional Access Energy Expansion (Apr. 20, 2022) (“Transco Study”), filed as Attachment 1D to Transco Submission of Supplemental Information, Doc. Accession No. 20220422-5150, *Transcon. Gas Pipe Line Co.*, FERC Dkt. No. CP21-94 (Apr. 22, 2022), JA__.

A. The Evidence Submitted by Petitioners and Rate Counsel Does Not Adequately or Directly Address the Project

The Petitioners and Intervenor New Jersey Division of Rate Counsel did not submit rebuttal reports to the Transco Study, nor did they submit evidence to rebut the facts in the shippers’ supporting statements. Instead, Petitioners and Rate Counsel submitted an order of the New Jersey Board of Public Utilities dated June 29, 2022, from a proceeding in which no evidence regarding the Project was presented or considered, and in which neither FERC nor Transco were parties. R.916, Decision and Order, *In the Matter of the Exploration of Gas Capacity and Related Issues*, Dkt. Nos. GO19070846 and GO20010033, State of New Jersey Board of Public Utilities (June 29, 2022), filed as an attachment to New Jersey Parties’ Mot. To Intervene & Lodge, *Transcon. Gas Pipe Line Co.*, Doc. Accession

No. 20220711-5186, FERC Dkt. No. CP21-94 (July 11, 2022), JA___. They also submitted the New Jersey Study – a market study solicited by the New Jersey Board of Public Utilities for that same proceeding, which did not consider or address the Project and only considers the natural gas market in New Jersey through 2030 generally. *See* R.916, London Econ. Int’l, Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers (Nov. 5, 2021) (“New Jersey Study”), filed as an attachment to New Jersey Parties’ Mot. To Intervene & Lodge, *Transcon. Gas Pipe Line Co.*, Doc. Accession No. 20220711-5186, FERC Dkt. No. CP21-94 (July 11, 2022), JA___. None of those materials directly address any statement in Transco’s application, the existence of the precedent agreements, the shippers’ supporting statements, or the Transco Study.

In addition, Petitioners submitted the Skipping Stone Study, which was an analysis of gas capacity in New Jersey based on 2018-2019 data but was not a full market study like the Transco Study. *See* R.917, Skipping Stone, Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project (Sept. 8, 2022) (“Skipping Stone Study”), filed as Exhibit A to Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, *Transco. Gas Pipe Line Co.*, Doc. Accession No. 20220909- 5000, FERC Dkt. No. CP21-94 (Sept. 9, 2022), JA___.

B. FERC Appropriately Considered the Record Evidence in Finding Need

FERC considered the record evidence of market need, including the precedent agreements subscribing to 100% of the project's capacity, market studies, and comments. R.1152, Certificate Rehearing Order, ¶ 31, JA__ ; R.984, Certificate Order, ¶¶ 21-34, JA__ . The market studies examined were the Transco Study, the New Jersey Study, the New Jersey Board of Public Utilities Order, and the Skipping Stone Study. R.1152, Certificate Rehearing Order, ¶ 30, JA__ . After examining all of this evidence, FERC found that the project is 100% subscribed and those precedent agreements are not outweighed by other record evidence regarding project need. R.1152, Certificate Rehearing Order, ¶ 34, JA__ .

The two studies which were presented as evidence that there was not market need – the Skipping Stone Study and the New Jersey Study – were both considered but rejected by FERC. FERC explained that it could not rely on the Skipping Stone Study – the only study other than the Transco Study that directly addresses the Project – because it was a limited study of all potentially available natural gas capacity coming into New Jersey but failed to examine the firm transportation capacity available to the gas utilities in New Jersey on a “design day.”⁴ R.1152,

⁴ “Design day demand” means demand on days when firm supply is needed by the local distribution companies so they can serve the public, but supply is constrained by weather or other constraints.

Certificate Rehearing Order, ¶¶ 44-52, JA ___. Instead, the study only compares the demand from the local distribution companies on the highest demand days in 2018-2019 compared to the supply available from four categories of supply, only one of which is firm supply contracted to the local distribution companies, who are the majority of the shippers for the Project. As FERC notes, “[b]y relying on historical peak day demand from 2018-19, the [Skipping Stone Study’s] conclusion that a shortfall does not and will not exist, and that New Jersey has access to a large amount of transportation capacity, fails to account for design day criteria, including the coldest weather historically experienced in the area, existing firm contracts, delivery pressure requirements, and anticipated market conditions.” *Id.* ¶ 50, JA ___. Finally, the Skipping Stone Study only addresses capacity issues in New Jersey, not in the other states served by the Project.

FERC also considered the New Jersey Study, and the associated New Jersey Board of Public Utilities Order – even though the New Jersey Study did not directly address the Project – and declined to rely on them as evidence that there was no market need. It is undisputed that the New Jersey Study: (1) only looks at market capacity in New Jersey, not the other states served by the Project; (2) only looks at gas capacity through 2030 and not for the life of the Project; and (3) rests on the key assumption – in fact a caveat to finding that New Jersey has sufficient gas capacity through 2030 – that the local distribution companies will continue to have access to

off-system gas resources at levels needed to address design day demand through 2030. *See* R.916, New Jersey Study at 2, 8-9 n.107 JA __, __; R.1152, Certificate Rehearing Order, ¶ 33, JA __. As outlined by FERC, each of these factors were outweighed by other evidence in the record, including the precedent agreements, the shippers' statements, and the Transco Study. FERC's Br. at 38-39.

C. Petitioners and Rate Counsel Do Not Meet the Standard for Setting Aside the Certificate Order

Petitioners and Rate Counsel seek to set aside the Certificate Order for lack of market need but cannot meet the standard for such relief. “[A]n action by the Commission may be set aside ‘if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Env. Defense Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). FERC relied on the Certificate Policy Statement, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified by* 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified by* 92 FERC ¶ 61,094 (July 28, 2000), while examining market need, and it considered all relevant factors. As this Court has explained:

Rather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects . . .

The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests. Thus, *projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study . . . Vague assertions of public benefits will not be sufficient.*

Env. Defense Fund, 2 F.4th at 960 (quoting 88 FERC at 61,747-48). Here, FERC considered all of the evidence in the record, even though it was not required to look beyond the precedent agreements. *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 114 (D.C. Cir. 2022) (explaining that FERC “is not ordinarily required ‘to assess a project’s benefits by looking beyond the market need reflected by the applicant’s existing contracts with shippers.’” (quoting *Minisink*, 762 F.3d at 111 n.10)); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015); *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605-06 (D.C. Cir. 2019). Finally, FERC explained its need analysis in detail, with references to

the evidence in the record. Therefore, there is no basis on which the Certificate Order could be set aside due to FERC’s reasonable finding of need.

III. FERC Fully Complied with NEPA in Assessing GHG Emissions in Potential Climate Change Impacts

The Project’s GHG emissions are reasonably foreseeable, and FERC acted reasonably in discussing the significance of the emissions by contextualizing them in comparison to federal and state GHG emission inventories. This Court has routinely affirmed this approach. *See Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1184 (D.C. Cir. 2023); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). However, unlike the GHG emissions, which are “reasonably foreseeable,” FERC reasonably explained why it could not assess the significance of any impacts on climate change associated with the Project. Here, FERC is not required to address the purported significance of “climate impacts” from the Project because, as FERC appropriately discussed, climate impacts are not “reasonably foreseeable.” *See Del. Riverkeeper Network*, 45 F.4th at 109.

The Council on Environmental Quality’s NEPA regulations support FERC’s decision. NEPA requires federal agencies to include an environmental impact statement in “every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. Environmental impact statements must include a

discussion of the “affected environment and environmental consequences” of the proposed action, among other things. 40 C.F.R. § 1502.10(a)(6). In such discussion, an agency should include “the environmental impacts of the proposed action . . . and the significance of those impacts.” 40 C.F.R. § 1502.16(a)(1). The definition of the term “impacts” is important. “Impacts” or “effects” is defined as “changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable*” 40 C.F.R. § 1508.1(g). In turn, “reasonably foreseeable” is defined as “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.” 40 C.F.R. § 1508.1(aa).

FERC estimated the volume of GHG emissions associated with the Project. R.930, Environmental Impact Statement at 4-175, JA___. FERC compared the estimated Project GHG emissions to the total GHG emissions of the United States as a whole and at the state level “to contextualize the projected emissions of the Project.” R.984, Certificate Order ¶¶ 70-71, JA___. FERC also compared the Project’s GHG emissions to the GHG emissions inventories and reduction targets of Delaware, Maryland, New Jersey, New York, and Pennsylvania “to provide additional context.” *Id.* ¶¶ 71-72, JA___. However, in its Environmental Impact Statement, FERC noted how it has:

[N]ot identified a methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project’s incremental contribution to GHGs. Without the ability to determine discrete resource impacts,

Commission staff are unable to assess the Project's contribution to climate change through any objective analysis of physical impact attributable to the Project.

R.930, Environmental Impact Statement at 4-175, JA__.

As a result, FERC concluded that it has “not been able to find an established threshold for determining the Project’s significance when compared to established GHG reduction targets” *Id.* FERC adopted the climate impact analysis in the Environmental Impact Statement into the Certificate Order. R.984, Certificate Order ¶ 73, JA__ ; R.930, Environmental Impact Statement at 4-173 – 4-180, JA__.

FERC’s determination was reasonable and no further analysis is required. For a proposed action to be considered an “effect” or “impact,” there must be a “change[] to the human environment” that is both “reasonably foreseeable” and for which there is “a reasonably close causal relationship” between the proposed action and impact. 40 C.F.R. § 1508.1(g); *Dept. of Tran. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). In this regard, FERC reasonably identified the Project’s impact: the GHG emissions themselves. FERC appropriately addressed “the significance of those impacts” by placing the GHG emissions into context with the total GHG emissions of the United States as a whole and at the state level. 40 C.F.R. § 1502.16(a)(1); R.984, Certificate Order ¶¶ 70-73, JA__. This is all that was required.

Petitioners argue that FERC must go further and determine “the significance of the Project’s climate impacts.” Petitioners’ Br. at 82. However, the relevant NEPA regulations and binding precedent foreclose such an obligation. Although the Project’s estimated GHG emissions are reasonably foreseeable, any associated “climate impacts” from the Project are not. Petitioners seek to use GHG emissions as a stand-in for climate change impacts, but FERC reasonably concluded that it could not determine any measurable link between this Project’s emissions and the effects of climate change. R.930, Environmental Impact Statement, at 4-173 – 4-180, JA___. FERC calculated the Project’s estimated GHG emissions, but reasonably concluded that it could not assess the Project’s contribution to climate change beyond contextualizing “the Project’s GHG emissions in comparison to national and state GHG emission inventories” because of the absence of any “methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project’s incremental contribution to GHGs.” *Id.* at 4-175, JA___. Nothing more is required. 40 C.F.R. § 1502.21(c) (requiring agency to “include within the environmental impact statement . . . a statement that such information is . . . unavailable”).

Petitioners seek to force FERC to speculate about the possible future impact on climate change from the Project. But as FERC reasonably discussed in its climate impact analysis in the Environmental Impact Statement, it is not able “to assess

impacts on climate change associated with the Project” in “combination with past, current, and future emissions from all other sources globally.” R.930, Environmental Impact Statement at 4-175, JA__ ; R.984, Certificate Order ¶ 73, JA__. Imposing such an obligation would violate the “rule of reason” under NEPA. *See Dept. of Tran.*, 541 U.S. at 767-68. Because FERC could not determine whether *climate impacts* (as opposed to the GHG emissions themselves) are “sufficiently likely to occur,” 40 C.F.R. § 1508.1(aa), it has no obligation to determine the purported significance of climate impacts. NEPA does not require agencies to consider impacts that are not “reasonably foreseeable.” 40 C.F.R. § 1508.1(g).

Petitioners’ reading of NEPA would prohibit any FERC decision on the Project until a methodology to their liking is developed to further consider the significance of the Project’s GHG emissions. But this interpretation is wrong for at least two reasons. *First*, it would unlawfully convert NEPA into a law that requires a particular substantive decision. But, NEPA is an information-forcing statute. It imposes no substantive obligations. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Minisink Residents for Env’tl. Preserv. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014). Here, after placing the Project’s GHG emissions into context, FERC reasonably explained why it could not make a significance determination as it pertains to the Project’s climate impacts. R.930, Environmental Impact Statement at 4-173 – 4-180, JA__.

Second, NEPA regulations specifically allow for an agency to do a less detailed Environmental Assessment in those situations where “the significance of the effects is unknown.” 40 C.F.R. § 1501.3(a)(2); 40 C.F.R. § 1501.5(a). Petitioners’ interpretation would contradict these rules and require agencies to prepare more detailed environmental impact statements whenever the significance of a project’s impacts are unknown. Here, the Court can easily dispatch Petitioners’ argument because FERC *prepared* an environmental impact statement and “ma[d]e clear” what information was “unavailable,” 40 C.F.R. § 1502.21(a), (c)(1), *i.e.*, “a methodology to attribute discrete, quantifiable physical effects on the environment resulting from the Project’s incremental contribution to GHGs.” R.930, Environmental Impact Statement at 4-175, JA__ ; R.984, Certificate Order, ¶ 73, JA__ ; *compare* 40 C.F.R. § 1502.2(a) (“Environmental impact statements shall not be encyclopedic.”). The Court should affirm FERC’s decision.

IV. FERC Adequately Balanced Public Benefits Under the Natural Gas Act

FERC likewise properly balanced the Project’s public benefits against its adverse impacts under the Natural Gas Act when concluding that the Project was required by the public convenience and necessity. Section 7(e) of the Natural Gas Act vests FERC with broad discretion to decide whether a proposed natural gas facility “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e); *see also Columbia Gas Transmission Corp. v.*

FERC, 750 F.2d 105, 112 (D.C. Cir. 1984) (recognizing that FERC is “vested with wide discretion to balance competing equities against the backdrop of the public interest”); *see also Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (explaining that FERC is “the guardian of the public interest,” entrusted “with a wide range of discretionary authority” (internal quotations omitted)).

This Project is reviewed under the Commission’s 1999 Certificate Policy Statement, 88 FERC ¶ 61,227, at 61,750 (1999). *See City of Oberlin*, 937 F.3d at 602. Under the Policy Statement, FERC balances a project’s public benefits against its adverse effects. *Id.*; *see also Myersville*, 783 F.3d at 1311 (observing that the balancing of adverse effects and public benefits of a proposed project is primarily “an economic test” under FERC policy (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,745)). After reviewing and considering a project’s potential environmental impacts, FERC will grant a certificate of public convenience and necessity if the benefits outweigh the negative effects. *Sierra Club*, 867 F.3d at 1379.

Petitioners’ claim that FERC failed to balance the public benefits of the Project against its adverse impacts in violation of the Natural Gas Act is based largely on Petitioners’ arguments that there is not a public need for the Project and that FERC did not determine the significance of GHG emissions and climate change impacts (which arguments are addressed above and in FERC’s brief). Petitioners’ Br. at 92-100. But as to the balancing of public interests and adverse impacts that

FERC must perform under the Natural Gas Act, Petitioners fail to acknowledge that FERC must weigh those factors in the context of the Natural Gas Act's purpose.

Congress enacted the Natural Gas Act to ensure there is adequate infrastructure to provide an abundant supply of natural gas. *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976). Accordingly, in the context of the balancing test that FERC performs pursuant to Section 7 of the Natural Gas Act, "public interest" means "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *Id.* Indeed, the Supreme Court has indicated that any public interest analysis undertaken in the course of determining "public necessity and convenience" is constrained by the purposes and limitations of the statute. *Id.* at 669 ("This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."); *see also Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("Any such authority to consider all factors bearing on 'the public interest' must take into account what 'the public interest' means in the context of the Natural Gas Act.").

Petitioners' argument that FERC failed to adequately consider potential environmental impacts of the Project when weighing the public benefits of the Project pursuant to the Natural Gas Act, and that FERC's conclusion that the Project

was “environmentally acceptable” was not supported by the record, is premised entirely on their insistence that there is not a public need for the Project and that FERC failed to make a determination as to the significance of climate change impacts. But as set forth above, the record fully supports FERC’s conclusion that there is a public need for the Project, and FERC’s analysis of GHG and climate change impacts was fully consistent with NEPA based on the impacts that were “reasonably foreseeable.” FERC appropriately weighed all of the potential impacts of the Project – as detailed in the Environmental Impact Statement – and determined that the public interest in the Project outweighed those impacts. That is all that is needed.

Petitioners argue that FERC must weigh all factors weighing on the public interest – and second guess FERC’s determination that the public interest in the Project outweighed its adverse impacts – without recognizing that “public interest” under the Natural Gas Act refers to “a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.” *NAACP*, 425 U.S. at 670. Indeed, Petitioners cite to *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1 (1961), for the proposition that FERC can consider all factors weighing on the public interest, including the end use of the gas being transported. *See* Petitioners’ Br. at 97. But there the Supreme Court was considering end use in the context of FERC’s responsibility to ensure adequate

supply of natural gas at reasonable rates, and allowed FERC to consider whether an end use was “wasteful” of limited gas resources. *See Fed. Power Comm’n*, 365 U.S. at 14. It was not suggesting that FERC needs to consider “how increased resource extraction bears on the public interest.” Petitioners’ Br. at 97. Given FERC’s broad discretion and the Natural Gas Act’s purpose of ensuring adequate supplies of natural gas at reasonable rates, FERC adequately balanced the public benefits of the Project against its adverse impacts when concluding that the Project was required by the public convenience and necessity and was environmentally acceptable.

V. Petitioners Have Failed to Demonstrate That They Are Entitled to Relief, But Even if They Had Done So, Vacatur Would Not Be an Appropriate Remedy Under This Court’s Precedent

The petitions for review should be denied for the reasons set forth above and in FERC’s brief. But even if the Court were to find merit in Petitioners’ claims, the relief that they seek – vacatur and remand of FERC’s orders – is not the appropriate remedy. Under this Court’s decision in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), the appropriate remedy would be a remand to FERC without vacatur.

A. A Showing on Either *Allied-Signal* Factor Is Sufficient to Decline Vacatur

In *Allied-Signal*, this Court established a two-part inquiry for assessing whether vacatur is an appropriate remedy: (1) “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly)”; and

(2) “the disruptive consequences of an interim change that may itself be changed.” *Id.* at 150-51 (quoting *Int’l Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)). This Court does not require the opponent of vacatur to prevail on both factors. *See, e.g., North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002); *U.S. Telecom Ass’n v. FBI*, 276 F.3d 620, 626-27 (D.C. Cir. 2002).

“When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur.” *Heartland Reg’l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009); *see also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009); *La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003). A court must determine whether there is “at least a serious possibility that the [agency] will be able to substantiate its decision on remand,” and whether vacatur will lead to impermissibly disruptive consequences in the interim. *See Allied-Signal*, 988 F.2d at 151; *see also Food & Water Watch v. FERC*, 28 F.4th 277, 292 (D.C. Cir. 2022) (declining to vacate where FERC could arrive at the same finding of no significant impact on remand and that vacatur would be disruptive because project was either mid-construction or operational); *Vecinos para el Bienestar de la Comunidad*

Costera v. FERC, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (declining to vacate where it was reasonably likely that FERC could redress its failure on remand and reach the same result and vacatur would needlessly disrupt completion of the projects); *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when “significant possibility that the [agency] may find an adequate explanation for its actions”).

Even when there are serious deficiencies in an agency’s action, this Court has declined to vacate under the second factor when the disruptive consequences would be significant. *See, e.g., North Carolina*, 550 F.3d at 1177-78; *see also Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270-71 (D.D.C. 2015).

B. Neither of the *Allied-Signal* Factors Would Support Vacatur Here

Petitioners do not even attempt to justify their request for vacatur of the Certificate Order. Nevertheless, the record shows that FERC conducted a thorough and lawful public convenience and necessity and NEPA analysis in full compliance with Circuit precedent. Even if Petitioners had identified some deficiencies in FERC’s finding, they have failed to demonstrate that FERC’s analysis was “so crippled as to be unlawful.” *See Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999).

As to the first factor, in *Food & Water Watch*, this Court determined that FERC inadequately examined downstream effects. FERC’s environmental

assessment produced a finding that the pipeline expansion at issue would have no significant effect on the environment, and on that basis, FERC bypassed NEPA's requirement to perform a more rigorous environmental impact statement. Despite this finding, this Court remanded *without vacating*, finding that, "after adequately accounting for foreseeable downstream greenhouse-gas emissions, [FERC] could arrive at the same finding of no significant impact." 28 F.4th at 292; *see also Vecinos*, 6 F.4th at 1332 (remanding without vacating because it was "reasonably likely" that FERC could redress its failure to explain natural gas export terminals' impact on climate change and environmental justice, as well as public interest and convenience under the Natural Gas Act, while reaching the same result).

So too here. Petitioners make no argument suggesting that FERC would not reach the same conclusion *even if* FERC were required to address some purported gaps in its explanation or analysis.

As to the second factor, this Circuit routinely considers disruption to pipelines and their customers when, as here, a portion of the project is already in service. Thus, although this Court vacated a certificate of public convenience and necessity in *Sierra Club*, 867 F.3d at 1379, when it remanded to FERC for further environmental review, the Court granted FERC's motion to stay the issuance of the mandate to avoid immediate vacatur, which, if not stayed, would have required the pipelines to cease operations. *Sierra Club v. FERC*, Docket No. 16-1329, Order (D.C. Cir. Mar.

7, 2018). This Court also declined to vacate FERC’s orders where vacatur “would be quite disruptive, as the . . . pipeline [at issue] is currently operational.” *City of Oberlin*, 937 F.3d at 611; *see also Food & Water Watch*, 28 F.4th at 292 (holding that vacatur would be disruptive because pipeline project was either mid-construction or operational); *Vecinos*, 6 F.4th at 1332 (holding that vacatur would needlessly disrupt completion of the natural gas terminal projects).

Vacatur in this case would present similarly severe and disruptive consequences because Transco has received authorization from FERC to place certain Project facilities in service and to provide firm transportation service for roughly 54% of the Project’s capacity on an interim basis, and since the interim service is fully subscribed, customers are counting on 450,000 Dth/d for the 2023/2024 heating season. *See* Supplement at 1. In sum, under *Allied-Signal*, vacatur is inappropriate in this case.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

By: /s/ Elizabeth U. Witmer

Patrick F. Nugent
(D.C. Circuit Bar No. 55948)
Sean T. O'Neill
SAUL EWING LLP
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Phone: (215) 972-7134 / -7159
Fax: (215) 972-7725
Patrick.Nugent@saul.com
Sean.Oneill@saul.com

Elizabeth U. Witmer
(D.C. Circuit Bar No. 55961)
SAUL EWING LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087-5569
Phone: (610) 251-5062
Fax: (610) 651-5930
Elizabeth.Witmer@saul.com

Counsel for Intervenor Transcontinental Gas Pipe Line Company, LLC

Dated: October 24, 2023

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced, 14-point typeface (Times New Roman) and is set in a plain, roman style.

2. This brief complies with the type-volume limitations in Circuit Rule 32(e)(2)(B)(i) and the Court's June 6, 2023 Order establishing the briefing format for this proceeding because this brief contains 6,994 words, excluding the parts of the brief exempted by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

Dated: October 24, 2023

/s/ Elizabeth U. Witmer

Elizabeth U. Witmer
Counsel for Intervenor
Transcontinental Gas Pipe Line
Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2023, the foregoing Proof Brief of Intervenor for Respondent was served electronically through the Court's CM/ECF system on counsel for all parties of record.

Dated: October 24, 2023

/s/ Elizabeth U. Witmer

Elizabeth U. Witmer
Counsel for Intervenor
Transcontinental Gas Pipe Line
Company, LLC