

**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 23-1064**

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

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

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NEW JERSEY CONSERVATION FOUNDATION, ET AL.,

*PETITIONERS,*

v.

FEDERAL ENERGY REGULATORY COMMISSION

*RESPONDENT*

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

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**OPENING BRIEF OF NEW JERSEY DIVISION OF RATE COUNSEL AS  
INTERVENOR FOR PETITIONERS**

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August 9, 2023

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties in This Court:

Except for the following, all parties, intervenors, and amici appearing before the Federal Energy Regulatory Commission and this Court are listed in the Opening Brief of Petitioners. Since the filing of that brief, notices of intention to participate as *amicus curiae* were filed by the Institute for Policy Integrity at New York University School of Law on July 26, 2023, and by the State of New Jersey and the State of Washington on August 1, 2023.

### B. Rulings Under Review

References to the rulings at issue appear in the Opening Brief of Petitioners.

### C. Related Cases

The six consolidated cases have not previously been before this Court or any other court.

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

New Jersey Division of Rate Counsel is an administrative agency of the State of New Jersey and does not issue any stock, thus it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

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## GLOSSARY

<b>Board</b>	New Jersey Board of Public Utilities
<b>Board Order</b>	Motion to Intervene Out of Time and Lodge of the New Jersey Parties (July 11, 2022) (R.916), Attach.: Decision and Order, <i>In the Matter of the Exploration of Gas Capacity and Related Issues</i> , Docket No. GO19070846 (N.J. Bd. Pub. Utils. June 29, 2022)
<b>Certificate Order</b>	<i>Transcontinental Gas Pipe Line Co.</i> , 182 FERC ¶ 61,006 (2023) (R.984)
<b>CEA</b>	New Jersey Clean Energy Act of 2018
<b>Draft Updated Policy Statement</b>	<i>Certification of New Interstate Natural Gas Facilities</i> , 178 FERC ¶ 61,107, <i>modified</i> , 178 FERC ¶ 61,197 (2022)
<b>Dth/d</b>	dekatherm per day
<b>EIS</b>	Environmental Impact Statement
<b>FERC or the Commission</b>	Federal Energy Regulatory Commission
<b>GHG</b>	greenhouse gas
<b>LDC</b>	Local Distribution Companies or Gas Distribution Companies
<b>LEI</b>	London Economic International LLC
<b>MDth/d</b>	1,000 dekatherms per day
<b>NGA</b>	Natural Gas Act
<b>NJ Agencies' Motion for Clarification</b>	Motion for Clarification of the New Jersey Board of Public Utilities and the New Jersey Division of Rate Counsel (Feb. 10, 2023) (R.1010)

<b>NJ Study</b>	Motion to Intervene Out of Time and Lodge of the New Jersey Parties (July 11, 2022) (R.916), Attach.: London Econ. Int'l, <i>Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers</i> (Nov. 5, 2021)
<b>NJCF</b>	Petitioner New Jersey Conservation Foundation, et al.
<b>NJCF Rehearing Request</b>	Request for Rehearing and Motion for Stay on Behalf of New Jersey Conservation Foundation, et al. (Feb. 10, 2023) (R.1007)
<b>P</b>	Denotes a paragraph number in a FERC order
<b>Policy Statement</b>	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)
<b>Project</b>	Regional Energy Access Expansion (or REAE) Project
<b>Rate Counsel</b>	New Jersey Division of Rate Counsel
<b>Rehearing Order</b>	<i>Transcontinental Gas Pipe Line Co., LLC</i> , 182 FERC ¶ 61,148 (2023) (R.1152)
<b>Transco</b>	Transcontinental Gas Pipe Line Company, LLC
<b>Transco Study</b>	Transco, Supplemental Information regarding Regional Energy Access Expansion Project, Attach. 1D: Resource Report 1 – Additional Information (Apr. 22, 2022) (R. 711)

## STATUTORY AND REGULATORY AUTHORITIES

All applicable statutory and regulatory authorities appear in the addenda to the Opening Brief of Petitioners, except for N.J STAT. ANN. § 48:3-87.9, which is included in an Addendum to this brief.

## STATEMENT OF THE CASE

Petitioners challenge FERC’s approval of Transcontinental Gas Pipe Line Company, LLC’s (Transco’s) proposed gas pipeline project, the “Regional Energy Access Expansion” (REAE or the Project). New Jersey has a particular interest in the Project. Almost 75% of its capacity is contracted to entities serving New Jersey even though state laws aim to reduce gas use and greenhouse gas (GHG) emissions and even though the New Jersey Board of Public Utilities (Board) concluded, after extensive study, that New Jersey’s utilities can provide reliable service without new pipeline capacity. We review here the structure of New Jersey’s gas industry, the state policies whose objectives may be compromised if the Project is built, and the state’s effort to assess the need for the Project.

### *A. Interstate Natural Gas Pipelines in and into New Jersey*

New Jersey imports its natural gas from supplies in Pennsylvania and New York via a web of five interstate gas transmission pipelines.<sup>1</sup> The two largest

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<sup>1</sup> Motion to Intervene Out of Time and Lodge of the New Jersey Parties (July 11, 2022) (R.916), Attach.: London Econ. Int’l, *Final Report: Analysis of Natural Gas*

pipelines, owned by Transco and Texas Eastern Transmission Company, account for over three quarters of the total capacity flowing into or out of the state, NJ Study at 131, JA\_\_\_, but multiple interconnections among the five pipelines create significant flexibility and redundancy. *Id.* at 135, JA \_\_\_.

***B. Local Distribution Companies (LDCs) and Design Day Planning***

Four major local gas distribution companies (LDCs) deliver gas to the state’s residential, commercial, and industrial customers.<sup>2</sup> New Jersey’s LDCs are regulated by the Board and must provide safe, adequate, and proper gas service at reasonable rates. N.J. STAT. ANN. § 48:2-23. To meet these obligations, the LDCs need infrastructure and supplies that are adequate to serve potential peak demand levels. New Jersey’s peak demand is driven by residential heating which usually peaks in January or February.<sup>3</sup>

LDCs use econometric models and inputs, including historical peak use, to estimate the capacity they will need to meet “design day” requirements. Design day demand reflects “the highest gas demand an LDC expects to be obligated to serve

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*Capacity to Serve New Jersey Firm Customers* (Nov. 5, 2021) (NJ Study), JA\_\_\_.

<sup>2</sup> NJ Study at 27, JA\_\_\_ . LDCs are sometimes referred to in the record as Gas Distribution Companies or GDCs. We use “LDC” in this brief.

<sup>3</sup> Motion to Intervene Out of Time and Lodge of the New Jersey Parties (July 11, 2022) (R.916), Attach.: Decision and Order at 6, JA\_\_\_, *In the Matter of the Exploration of Gas Capacity and Related Issues*, Docket No. GO19070846 (N.J. Bd. Pub. Utils. June 29, 2022) (Board Order).

on an extremely cold winter day.” *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,006, P 21 n.41 (2023) (Certificate Order) (R. 984), JA\_\_\_\_. While each LDC uses its own criteria to define a design day, planning for the coldest day in 30 years is a common approach. *Id.* at n.40, JA\_\_\_\_. Design day demand typically is about 35% higher than historical peak demand, or double normal (non-peak) demand. NJ Study at 16, JA\_\_\_\_. New Jersey LDCs make annual filings with state regulators that include five-year forecasts of design day demand. *Id.* at 27, JA\_\_\_\_.

To serve customers reliably, LDCs assemble “a portfolio of firm pipeline transportation and storage entitlements, firm natural gas supply, and peak shaving that will provide the gas supplies required by their firm customers in design day conditions.” *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,148, P 25 n.79 (2023) (Rehearing Order) (R.1152), JA\_\_\_\_. Firm transportation service is the highest quality service and ensures gas delivery under almost all operating conditions. *Id.* P 47 & n.145, JA\_\_\_\_. LDCs hold nearly 90% of the firm capacity available on the region’s interstate pipelines.<sup>4</sup>

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<sup>4</sup> Transco, Supplemental Information regarding Regional Energy Access Expansion Project (R.711), Attach. 1D: Resource Report 1 – Additional Information at 30 (Apr. 22, 2022) (Transco Study), JA\_\_\_\_.

Pipelines also serve non-firm (or interruptible) customers, who pay lower rates,<sup>5</sup> receive gas only if transportation capacity is available, and are subject to curtailment or interruption if the capacity is needed to serve firm customers. While the gas system is designed to meet peak firm demand, NJ Study at 39, JA\_\_\_\_, interruptible customers help to balance supply and demand during peak times. *Id.* at 84, JA\_\_\_\_.

### ***C. New Jersey Laws, Energy and Climate Policy***

New Jersey aims to achieve 100% clean energy by 2050.<sup>6</sup> To that end and among other steps, New Jersey’s Clean Energy Act of 2018 (CEA), Pub. L. 2018, c. 17, requires the state’s gas utilities to reduce gas use by adopting energy efficiency programs and peak demand reduction programs.<sup>7</sup> The CEA efficiency programs must be designed to reduce consumption by 0.75% of the average annual use over the prior three years,<sup>8</sup> beyond the reductions achieved through previous programs.

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<sup>5</sup> For example, firm customers pay a monthly reservation charge regardless of whether they use their capacity. NJ Study at 28, JA\_\_\_\_.

<sup>6</sup> State of New Jersey, *2019 New Jersey Energy Master Plan Pathway to 2050*, [https://www.nj.gov/emp/docs/pdf/2020\\_NJBPU\\_EMP.pdf](https://www.nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf).

<sup>7</sup> N.J. STAT. ANN. § 48:3-87.9(d)(1) (“Each . . . gas public utility shall establish energy efficiency programs and peak demand reduction programs to be approved by the board . . .”).

<sup>8</sup> *Id.*; see also N.J. STAT. ANN. § 48:3-87.9(a) (“Each natural gas public utility shall be required to achieve annual reductions in the use of natural gas of 0.75 percent of the average annual usage in the prior three years within five years of implementation of its gas energy efficiency program.”).

Together, the existing and new efficiency programs must reduce demand by about 1.1% by 2026. NJ Study at 48, JA\_\_\_\_. All the programs are subject to review and approval by the Board. N.J. STAT. ANN. § 48:3-87.9(d)(1).

***D. The Board’s investigation of the sufficiency of New Jersey’s pipeline capacity***

New Jersey law charges the Board with “general supervision and regulation” of the state’s utilities, including natural gas LDCs and competitive gas suppliers. N.J. STAT. ANN. § 48:2-13(a). The Board “maintain[s] the necessary jurisdiction . . . to assure the reliability of . . . gas supply to retail customers in the State.” N.J. STAT. ANN. § 48:2-13(d).

In 2019, before Transco filed its FERC certificate application, the Board opened an investigation to determine whether the LDCs and competitive suppliers had secured sufficient pipeline capacity to serve their customers’ design day needs. Board Order at 1, JA\_\_\_\_. The process produced conflicting expert reports. One, produced by Levitan & Associates, Inc. (2019 Levitan Report) and submitted by an LDC, concluded that New Jersey’s LDCs will be short of design day capacity requirements by 2022/2023. Another, submitted as an affidavit by Skipping Stone President, Greg Lander (2019 Skipping Stone Report) and sponsored by environmental groups, concluded that New Jersey has substantial excess gas transportation capacity. Board Order at 1, JA\_\_\_\_.

To resolve the conflict, the Board commissioned an independent study (NJ Study) by London Economics International LLC (LEI). The Board directed LEI to review the prior reports, independently examine the “capability of current and future natural gas transmission capacity to serve gas demand from New Jersey’s local gas distribution companies,” and determine whether the capacity supplied by existing pipeline and non-pipeline sources would be “sufficient to ensure uninterrupted supply to all firm customers in the State through 2030.” NJ Study at 2, 8, JA\_\_\_\_, \_\_\_\_\_. LEI reviewed the two reports plus: existing gas infrastructure; projections of peak and design-day demand; the market structure, including gas contracting options for interruptible customers; gas demand forecasts; the availability of non-pipeline alternatives; stakeholder comments; LDC regulatory filings; Energy Information Administration reports; and other data. *Id.* at 8-9, 145-54, JA\_\_\_\_, \_\_\_\_\_.

Based on this review, LEI produced a 154-page report. It concluded that “through 2030, firm gas capacity can easily meet firm demand under normal winter weather conditions, in cases of colder-than-normal weather on a scale experienced in the past, and even in the case of a design day.” NJ Study at 2, 100, JA\_\_\_\_, \_\_\_\_\_. LEI further concluded that, absent a major supply disruption (e.g., a 900 MDth/d pipeline outage), existing pipelines and non-pipeline alternatives could handle even more extreme demand, such as might be expected to occur once in 90 years. *Id.* LEI also recommended best practices and a playbook of non-pipeline alternatives that



could mitigate the risk of very low probability events at less cost than adding pipeline capacity. *Id.* at 95, JA \_\_\_\_.

LEI issued its study in November 2021. During the next seven months, the Board evaluated comments on the study by interested stakeholders, including the four major New Jersey LDCs, Rate Counsel, and consumer, industry, and environmental groups. Board Order at 6-10, JA \_\_\_\_ - \_\_\_\_.

On June 29, 2022, the Board issued an order adopting LEI’s major conclusions (Board Order). *See, supra* note 3. It found “that, through 2030, New Jersey’s firm gas capacity can meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal weather on a scale experienced in the past, and 3) in the case of a design day.” Board Order at 11, JA \_\_\_\_ . And absent a “major catastrophic event” affecting a primary path on a major interstate pipeline, it found that New Jersey is “well positioned with available interstate supply beyond 2030.” *Id.* The Board thus determined that “LEI’s analysis supports the argument against the need for additional interstate pipeline capacity” and “reaffirms the need for greater scrutiny” of interstate pipeline certification applications to FERC. *Id.*

***E. Transco’s application for a certificate of public convenience and necessity***

In March 2019, shortly after the Board opened its “need” investigation, Transco initiated the first of multiple open seasons soliciting commitments to buy firm Project capacity. Rehearing Order P 5, JA \_\_\_\_ . Ultimately, and before the Board

concluded its investigation, Transco secured commitments (called precedent agreements) from all four major New Jersey LDCs amounting to 56% of the Project's capacity. *Id.* Marketers serving New Jersey subscribed to another 17.5%. *Id.* P 33, JA \_\_\_\_\_. Thus, in total, nearly three quarters of Project capacity is contracted to serve New Jersey consumers. *Id.* P 34, JA \_\_\_\_\_.

On March 26, 2021, Transco applied to FERC for a certificate of public convenience and necessity under Natural Gas Act (NGA) section 7, 15 U.S.C. § 717f. Transco said that the Project would enable it to provide an additional 829,000 dekatherms per day (829 MDth/d)<sup>9</sup> of firm transportation service, Certificate Order P 1, JA \_\_\_\_\_, at a cost of more than \$950 million. *Id.* P 39, JA \_\_\_\_\_.

A year later, Transco submitted to FERC another study by Levitan & Associates, Inc. (Transco Study),<sup>10</sup> which assessed the pipeline capacity available to the six LDC shippers in New Jersey, Pennsylvania, and Maryland that had entered into precedent agreements for the Project. The study compared each LDC's forecasted design-day demand to the existing pipeline capacity and on-system resources but did not consider the likely availability of off-system peaking supply

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<sup>9</sup> A dekatherm (Dth) is a metric system measurement that is roughly equivalent to the energy content in 1,000 cubic feet of gas. A thousand dekatherms is abbreviated as "MDth."

<sup>10</sup> *See, supra* note 4. The study performed by Levitan in 2022 (Transco Study) is distinct from the 2019 Levitan Study that was submitted to the Board.

contracts—agreements that LDCs typically enter into on a short-term basis to supplement their long-term supplies. Rehearing Order PP 40, 65, JA\_\_\_\_, \_\_\_\_.

Contrary to the NJ Study, the Transco Study concluded that LDCs in New Jersey and Southeast Pennsylvania need additional pipeline capacity to serve projected design day gas demand. Transco Study at 1, JA\_\_\_\_.

Shortly after the Board adopted the LEI report’s conclusions, the Board and Rate Counsel moved to intervene in the FERC proceeding and to lodge the Board Order and the NJ Study.<sup>11</sup> The agencies intervened on behalf of New Jersey consumers, “who do not need to be burdened with unneeded natural gas capacity.”

*Id.*

Over the objections of petitioners and the New Jersey agencies, FERC found that Transco demonstrated a need for the Project and granted it a certificate of public convenience and necessity. Certificate Order P 38, JA\_\_\_\_. Petitioners New Jersey Conservation Foundation, et al. (NJCF) sought rehearing,<sup>12</sup> which Rate Counsel supported.<sup>13</sup> Petitioners’ rehearing request was denied by operation of law on

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<sup>11</sup> Motion to Intervene Out of Time and Lodge of the New Jersey Parties at 2 (July 11, 2022) (R.916), JA \_\_\_\_\_. For clarity and because the Board adopted its conclusions, we refer to the LEI report as the NJ Study.

<sup>12</sup> Request for Rehearing and Motion for Stay on Behalf of New Jersey Conservation Foundation, et al. (Feb. 10, 2023) (NJCF Rehearing Request) (R.1007), JA\_\_\_\_.

<sup>13</sup> Comments of New Jersey Division of Rate Counsel Joining in Environmental Intervenors’ Request for Rehearing for the REAE (Feb. 10, 2023) (R.1011), JA\_\_\_\_. (continued on next page)

March 13, 2023, after which FERC issued a substantive order addressing Petitioners' arguments. Rehearing Order, JA \_\_\_\_.

Rate Counsel and the Board also asked FERC to clarify that the Certificate Order did not interfere with the Board's authority to determine whether the New Jersey LDCs acted imprudently in subscribing to the Project.<sup>14</sup> Granting the request, FERC reiterated its prior holdings that "oversight of the procurement decisions of [LDCs] is best left to state regulators," who may "undertak[e] an after-the-fact prudence review of any purchase agreement by an LDC." Rehearing Order P 28, JA \_\_\_\_.

### **SUMMARY OF THE ARGUMENT**

FERC must deny a pipeline certificate application unless it finds the proposed project to be "required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In making this determination, FERC must "evaluate all factors bearing on the public interest," *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959), and decide whether "a balance of all the circumstances weighs against certification." *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961).

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FERC rejected this filing "to the extent it purports to join [Petitioners'] request for rehearing because it does not satisfy the applicable pleading standards." Rehearing Order P 8, JA \_\_\_\_.

<sup>14</sup> Motion for Clarification of the New Jersey Board of Public Utilities and the New Jersey Division of Rate Counsel (Feb. 10, 2023) (NJ Agencies' Motion for Clarification) (R.1010), JA \_\_\_\_.

Doing so requires weighing a proposed project’s “public benefits” against its “adverse impacts,” with each part of that analysis supported by substantial evidence and reasoned decision making. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 973-74 (D.C. Cir. 2021), *cert. denied sub nom. Spire Mo. Inc. v. Env’t Def. Fund*, 142 S. Ct. 1668 (2022) (*Spire*). Given the magnitude of the matters at issue, the inquiry should be detailed and well-documented. *Ipse dixit* will not suffice. *Id.*

The Court should vacate FERC’s orders because it erred in conducting both sides of the analysis. FERC’s findings on Project need (that is, public benefits) “run[] counter to the evidence before the agency,” while its assessment of adverse impacts “entirely failed to consider . . . important aspect[s] of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (*State Farm*).

New Jersey studied the situation and determined that it does not need the Project because existing infrastructure can handle anticipated demands and the state has decided to reduce gas consumption. FERC’s contrary determination rested on fundamental misunderstandings of the studies and relied excessively on Project precedent agreements—even as FERC recognized that the Board may find them imprudent.

FERC first misconstrued the NJ Study as relying on lower demand estimates, overlooking a sensitivity analysis that used the same estimates as the Transco Study

and still found no need for additional capacity. On clarification, FERC corrected that mistake but did not recognize its significance. Without demand differences, only one issue drove the two studies' diverging views of meeting New Jersey design-day needs: their expectations about the availability of off-system peaking supplies. On that issue, FERC criticized both studies—the NJ Study for including too much, the Transco Study too little—but reached no conclusion itself about how much off-system peaking supplies to include or its effect on the need analysis. FERC thus erred in crediting the Transco Study's finding of need and discounting the NJ Study's finding that there was none.

FERC also wrongly looked to the precedent agreements without discounting them to reflect the Board's findings and the shadow of potential prudence investigations. FERC need not reject a project simply on a state's say-so, but state commission findings that new capacity is unneeded and that LDC contracts may be imprudent should diminish the contracts' probative value in proving need. FERC's failure to address this was particularly significant as the Board's findings cast a shadow over contracts for 56% of Project capacity.

Meanwhile, FERC failed to weigh the Project's supposed benefits against its significant harms, which go far beyond ratepayer dollars and cents. FERC's environmental impact statement (EIS) finds that the Project, if fully used, could increase New Jersey GHG emissions by 12% over 2019 levels and account for nearly

48% of the state’s 2050 GHG emissions. That means the Project and state law will be on a collision course. Either the Project will go unused—in which case, building it is wasteful—or it will contribute an ever-larger share of New Jersey’s GHG emission budget, harming the climate and New Jersey’s citizens and forcing the state to look elsewhere for more difficult or expensive reductions.

FERC policy is clear that “[t]he more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.”<sup>15</sup> Yet FERC did not consider how the Project’s adverse impacts affected the required showing of need and benefit—much less act on its policy to require a more rigorous showing.

The petition should be granted and the orders vacated.

## ARGUMENT

### **I. FERC’S MARKET NEED FINDING WAS ARBITRARY AND CAPRICIOUS.**

The evidence before FERC included three market studies assessing whether additional pipeline capacity was needed. While the Transco-sponsored study unsurprisingly found a need for the Project, the other two—including an independent

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<sup>15</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,749 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Policy Statement).

study commissioned by the Board—found none. The independent NJ Study by LEI found that New Jersey ratepayers did not need to finance a \$1 billion pipeline expansion to meet anticipated gas demand. But FERC declared that the Transco Study had the “fewest relevant methodological deficiencies” and was “more persuasive.” Rehearing Order P 41, JA \_\_\_\_.

FERC’s decision to credit the Transco Study over the NJ Study was not the product of reasoned decision-making. FERC sought to undermine the NJ Study by contending that its conclusions depended on “specific assumptions as to how successfully or quickly the State will achieve its energy efficiency and electrification goals.” Rehearing Order P 39, JA \_\_\_\_\_. But any study’s conclusions depend on its underlying assumptions. Here, FERC critiqued the assumptions underlying both the NJ Study and Transco Study without reaching conclusions about which assumptions were more reasonable: FERC questioned New Jersey’s assumption that state-mandated demand-reduction programs would reduce gas use,<sup>16</sup> and at the same time questioned the Transco Study for discounting them. Rehearing Order P 40, JA \_\_\_\_\_. Similarly, FERC criticized New Jersey’s assumed availability of off-system peaking supplies, *Id.* P 38, JA \_\_\_\_, while simultaneously criticizing the Transco Study for *not*

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<sup>16</sup> Certificate Order P 28, JA \_\_\_\_; Rehearing Order P 37, JA \_\_\_\_\_. As explained below, FERC’s criticism mischaracterized the NJ Study and failed to address its sensitivity analysis showing that, even using the most conservative assumptions, new pipeline capacity is unneeded through 2030.



considering them. *Id.* P 40, JA \_\_\_\_\_. Taken together, these contradictions—along with the errors discussed below—show that FERC’s orders lack a reasoned basis, supported by substantial evidence, for adopting Transco’s need conclusion and rejecting New Jersey’s.

***A. FERC’s critique of the NJ Study was contrary to the evidence and its discussion of the Transco Study’s flaws.***

FERC’s criticisms of the NJ Study were essential to its decision to approve the Project, but they shifted over time and clashed with the record. The Certificate Order’s critique of the NJ Study mistook its demand assumptions. And though the Rehearing Order pulled back from those criticisms, it failed either to assign the NJ Study more weight or justify continuing to downplay it. FERC’s decision was therefore unsupported and “cannot be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

1. FERC wrongly dismissed the NJ Study’s conclusions even though its sensitivity analyses addressed any concerns about demand projections.

The Certificate Order questioned the NJ Study’s “base scenario” assumptions but ignored its alternative scenarios, which, using more conservative assumptions, likewise showed no need for additional capacity. FERC said the NJ Study assumed an unreasonable level of future demand for gas because it projected “higher energy efficiency gains and fewer oil-to-natural gas conversions for heating purposes” than the LDCs assumed. Certificate Order P 28, JA \_\_\_\_\_. But that ignored the NJ Study’s

“Scenario 1a,” which took at face value the New Jersey LDCs’ 1.02% annual growth forecast and extended it out to 2030. *See* NJ Agencies’ Motion for Clarification at 6, JA\_\_\_\_.<sup>17</sup> Rather than assuming the LDCs would achieve additional efficiency gains, Scenario 1a assumed “zero net effect from energy efficiency requirements other than what is already built into the GDC outlooks.”<sup>18</sup> With these assumptions, Scenario 1a conservatively projected 2030 design-day demand of 5,580 thousand dekatherms per day (MDth/d). NJ Study at 54, JA\_\_\_\_ (Fig. 28).

Scenario 1a’s assumption of fewer efficiency gains made no difference in the result. It too showed that existing, conventional sources of firm capacity were more than adequate to meet the full range of demands. As the Board and Rate Counsel explained, “conventional sources of firm capacity available to New Jersey LDCs would exceed the design-day needs *the LDCs themselves identified* by at least 163 MDth/d through 2030[,]” without any new pipeline capacity. NJ Agencies’ Motion for Clarification at 6, JA\_\_\_\_.<sup>19</sup> And contrary to FERC’s assertion, Certificate Order

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<sup>17</sup> To be sure, the NJ Study criticized this growth rate as too high because, among other things, it departs from historical trends and assumes greater oil to natural gas conversions despite public policy encouraging electrification rather than switching to natural gas heating. NJ Study at 56, JA\_\_\_\_. Notwithstanding this criticism, the NJ Study used Scenario 1a to illustrate an “upper bound” of design-day demand. *Id.* at 54, JA\_\_\_\_.

<sup>18</sup> NJ Study at 54, JA\_\_\_\_; NJ Agencies’ Motion for Clarification at 5, JA\_\_\_\_.

<sup>19</sup> The NJ Study compared design-day demand to supplies consisting of firm pipeline transportation and storage, on-system peaking resources, off-system peaking resources, and third-party supplies. NJ Study at 98-99, JA\_\_\_\_.

P 31, JA\_\_\_, the NJ Study showed that existing supplies could satisfy even conservatively estimated design-day demand without any non-pipeline alternatives beyond the efficiency programs the LDCs already included. NJ Agencies' Motion for Clarification at 5-6, JA\_\_\_.

The New Jersey agencies' clarification request highlighted FERC's misreading and contradicted its speculation that the NJ Study reflected a greater "risk tolerance" than the Transco Study, Certificate Order P 34, JA\_\_\_. To the contrary, the agencies explained that the study's sensitivity analysis was a "key reason" why they had "confidence in the LEI Report's 'finding that, through 2030, New Jersey's firm gas capacity can meet firm demand . . . [even] in the case of a design day,' involving a "a level of gas demand approximately 35% higher than historical peaks." NJ Agencies' Motion for Clarification at 6-7, JA\_\_\_.

FERC responded by acknowledging the study's conclusion that

sufficient capacity already exists to serve the state's LDCs, and that the existing capacity will continue to be sufficient, if . . . (1) the gains in energy efficiency projected by the New Jersey LDCs that have subscribed service on the project come to pass; (2) the New Jersey LDCs have accurately forecast the rate of growth of design day demand; and (3) [] the New Jersey LDCs will be able, in the future, to reliably continue to obtain 619 MDth/d of off-system peaking resources (rights to downstream capacity).

Rehearing Order P 25, JA\_\_\_\_.<sup>20</sup> But FERC did not recognize the significance of its clarification. The first two assumptions were the same as those used in the Transco Study, which FERC said could *overstate* demand<sup>21</sup> but otherwise gave no reason to doubt. The Rehearing Order’s criticism of the NJ Study thus turned on the third assumption, the availability of off-system peaking resources. Yet on that issue, FERC criticized both studies and failed to make findings of its own.

2. FERC’s questions about off-system peaking supplies did not justify finding that the Project is needed.

As part of the supply available to meet design-day demand, the NJ Study included 619 MDth/d of off-system peaking supplies, which the LDCs had accessed before and typically obtain on a short-term basis. NJ Study at 98, JA\_\_\_\_. FERC questioned the NJ Study for including that amount when the resources are “not contracted for on a long-term firm basis” and future availability is “uncertain.” Rehearing Order P 38, JA\_\_\_\_. But the record and FERC’s own critique of the Transco Study undermine its objection.

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<sup>20</sup> This clarification obviated the Certificate Order’s ill-defined suggestion (at footnote 73) that “there may be additional uncertainties” with the study’s treatment of interruptible demand. It also obviated the Rehearing Order’s continued criticism of scenarios in the sensitivity analysis that projected less demand than Scenario 1a. *See* Rehearing Order PP 37, 39, JA\_\_\_\_, \_\_\_\_.

<sup>21</sup> Rehearing Order P 40, JA\_\_\_\_ (The Transco Study “potentially overstated future demand because it did not examine the degree to which the demand forecasts reflected New Jersey’s Energy Master Plan and other energy efficiency and energy policy targets.”) (cleaned up).

The NJ Study's projection was based on the LDCs' own numbers. All but one LDC projected non-zero off-system resources through 2024/25, and the NJ Study used those amounts. NJ Study at 98-99, JA\_\_\_\_. New Jersey Natural Gas Company included declining amounts through 2021-22 and zero thereafter, but that apparent decline reflected the short-term nature of the contracts, which need to be renewed or replaced annually. *Id.* at 98, JA\_\_\_\_. The NJ Study assumed that New Jersey Natural Gas Company would follow past practice and contract for 200 MDth/d going forward. *Id.* The study held off-system peaking supplies constant at 619 MDth/d for 2025-26 and later. *Id.* at 99, JA\_\_\_\_.

While FERC criticized the study's inclusion of 619 MDth/d in out years, it did not question inclusion of similar amounts in earlier years. And though FERC can make predictions about the markets it regulates, Rehearing Order P 65 & n.193, JA\_\_\_\_, it made no prediction here. FERC never said that off-system peaking supplies would become unavailable. To the contrary, it criticized the Transco Study for making that very assumption and "discount[ing] the availability" of "'downstream' capacity [that] has been available to New Jersey shippers in the past through short-term peaking contracts, and may be available in the future on the same short-term basis.'" *Id.* P 40, JA\_\_\_\_.<sup>22</sup> FERC cannot have it both ways.

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<sup>22</sup> New Jersey Natural Gas Company's data did not necessarily suggest the expectation that supplies would be unavailable. *See* Rehearing Order (Clements,

FERC mused about “circumstances, such as . . . extreme weather events,” that could render off-system supplies less available. Rehearing Order P 65, JA \_\_\_. But it is also possible that other circumstances, like downstream states’ efforts to reduce gas use,<sup>23</sup> or increasing use of renewable energy sources instead of natural gas to generate electricity,<sup>24</sup> could make downstream capacity *more* available. FERC took no position on the likelihood of such extreme weather events or other events, or their effects on the year-to-year availability of off-system supplies, much less one based on “actual evidence” or “special knowledge based upon its experience.” *McDonnell Douglas Corp. v. U.S. Dep’t Air Force*, 375 F.3d 1182, 1190 (D.C. Cir. 2004). FERC’s “rather casual observation[.]” that extreme weather is possible falls “far short of asserting (let alone substantiating) that it [is] ‘likely’” that off-system peaking supplies would become unavailable. *Id.*

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Comm’r concurring) P3, JA \_\_\_ (“It is entirely possible that the LDC did not believe it would need the off-system peaking resources, in which its “projection would undercut the need case for the REAE Project.”). And FERC did not examine the basis for the New Jersey Natural Gas Company data.

<sup>23</sup> See Rehearing Order P70, JA \_\_\_; Certificate Order (Clements, Comm’r concurring) n.225, JA \_\_\_ (citing *See Alexandra B. Klass, Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 Yale J. on Reg. 658, 675 (2022) (listing state and local enactments and programs, including in New York and New England)); Emily Pontecorvo, *New York rejects two new gas power plans as ‘inconsistent’ with climate law*, *Grist* (Nov. 2, 2021), <https://grist.org/energy/new-york-rejects-two-new-gas-power-plants-as-inconsistent-with-climate-law/>.

<sup>24</sup> Transco Study at 95, JA \_\_\_ (Fig. 3-7, showing percentage of gas-fired generation declining from 39.6% of generation mix in 2020 to 28.6% in 2035).

This Court can uphold a decision of less-than-ideal clarity, but only where FERC's path may reasonably be discerned. *Epsilon Elecs., Inc. v. U.S. Dep't Treasury*, 857 F.3d 913, 924 (D.C. Cir. 2017). That is impossible here because FERC, while faulting "key assumptions" about off-system peaking supplies in both the NJ Study (619 MDth/d) and the Transco Study (0 MDth/d), made no finding about what resources would reasonably be available. The gap in FERC's reasoning is significant, as 619 MDth/d of off-system supply represents roughly 75% of the Project's 829-MDth/d capacity and more than the entire amount contracted by the New Jersey LDCs.

***B. FERC acknowledged but failed to grapple with the significance of the Transco Study's shortcomings.***

While the NJ Study included a sensitivity analysis based on the LDCs' demand projections, the Transco Study took those demand projections at face value and used them as its base case. But those projections do not represent the most likely design-day requirements because they fail to reflect fully the effects of state-mandated efficiency and peak-reduction programs.

The NJ Study explained that New Jersey has adopted efficiency programs that require a total reduction by 2026 of 1.1% of annual gas consumed. NJ Study, at 48, JA\_\_\_\_. This includes a CEA requirement to reduce gas use by 0.75% beyond the reductions achieved through existing state efficiency program requirements. *Id.* The CEA also allows the Board to mandate further reductions "until the reduction in

energy usage reaches the full economic, cost-effective potential in each service territory, as determined by the Board.” *Id.* at 50, JA\_\_\_\_. The Board order implementing the CEA mandate explains that the reductions will be measured against a baseline estimate of what would have otherwise been used. *See id.* at 11 & n.7, JA\_\_\_\_. Despite these existing and potential new requirements, two LDCs’ demand projections assumed that efficiency would not improve in the future relative to the past. *Id.* at 11, JA\_\_\_\_.<sup>25</sup>

When confronted with evidence about these requirements, FERC acknowledged that the Transco Study “potentially overstated future demand because it did not examine the degree to which the demand forecasts reflected New Jersey’s Energy Master Plan and other energy efficiency and energy policy targets.” Rehearing Order P 40, JA\_\_\_\_; Certificate Order P 27, JA\_\_\_\_. Yet FERC neither estimated the degree of overstatement nor assessed how it might affect the analysis of need. Thus, much like FERC’s treatment of off-system peaking supplies, FERC called strikes against both studies (for mirror-image reasons) but then let Transco circle the bases.

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<sup>25</sup> Two LDCs also predicted that customers switching from oil to natural gas heating would drive demand growth, despite policies encouraging use of electric heating instead of natural gas. NJ Study at 11, JA\_\_\_\_; Certificate Order P 28, JA\_\_\_\_.



Worse, FERC added here that “consistent with the Commission’s recent orders,” it could simply ignore the New Jersey laws mandating gas-use reduction. Rehearing Order P 70 & n.206, JA\_\_\_\_. In the cited orders, FERC held that it need not consider how GHG reduction mandates affect the need for new gas infrastructure capacity. *Id.* At least some of those orders are pending review by this Court.<sup>26</sup>

Yet even if those orders are affirmed, the precedent is not dispositive here. The state laws in those cases called for GHG reductions, which could come from many sources. Absent “prescribed methods for achieving those targets”, Rehearing Order P 70, JA\_\_\_\_, general GHG-reduction laws may not require burning less gas. But a separate New Jersey law, the CEA, specifically requires LDCs to reduce gas use by roughly 1% below what it would have been. *See, supra* note 8. Unlike general GHG-reduction laws, these mandated gas-use reductions necessarily affect the demand predictions at the heart of FERC’s need analysis.<sup>27</sup> FERC thus erred in disregarding such reductions and in relying on its GHG-reduction precedent “without recognition of the substantial differences between” those cases and this one. *Cal. Pub. Utils. Comm’n v. FERC*, 20 F.4th 795, 801 (D.C. Cir. 2021).

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<sup>26</sup> *Food & Water Watch v. FERC*, No. 22-1315 (D.C. Cir. filed Aug. 19, 2022), on review of *Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041, *on reh’g*, 181 FERC ¶ 61,051 (2022).

<sup>27</sup> The NJ Study translated the energy efficiency targets to expected reductions in peak demand. NJ Study at 48, JA\_\_\_\_. FERC did not take issue with those calculations.

***C. FERC erred to the extent its need finding is based, in unspecified ways, on considering interruptible demand.***

FERC also states that it gave more weight to the Transco Study than the NJ Study because the latter “focused on firm demand and thus omits from its analysis interruptible natural gas generator and industrial demand,” which the former included. Certificate Order P 31, JA\_\_\_. On rehearing, FERC added that it “can consider such important sectors of demand, regardless of whether LDCs may do so in their planning.” Rehearing Order P 63, JA\_\_\_. But FERC never explained why or how interruptible customers should be part of a need analysis.

Transco did not rely on interruptible demand—it sought to justify the Project as needed to supply additional “firm transportation service for its shippers,” Certificate Order P1, JA\_\_\_—and FERC makes no finding that the Project is needed to serve interruptible customers. Nor would it make sense to do so. By definition, interruptible customers have decided that they do not need new capacity enough to justify buying it on a firm basis. Instead, FERC resorts to vague claims about interruptible demand to patch gaps in the analysis of firm customers’ needs. But the gambit cannot work because FERC has failed to make the necessary factual findings or to articulate a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

FERC fails to rationalize its invocation of interruptible demand with its focus on design-day planning. As FERC explained, “[t]he ‘design day’ is the basis for

planning gas capacity requirements,” and reflects “the highest gas demand an LDC expects to be obligated to serve on an extremely cold winter day.” Certificate Order P 21 & n.41, JA\_\_\_\_. To ensure reliability, design day planning “necessarily entails” a focus on firm demand and transmission capacity. Rehearing Order P 47, JA\_\_\_\_. And because “customers with firm capacity rights can exercise [them] . . . at any time, it is not reasonable to assume” that interruptible customers could access Project capacity on a design day. *Id.* P 57, JA\_\_\_\_. By FERC’s own lights, “design days are extreme events where it cannot be assumed that interruptible transmission or capacity release will be available to meet demand.” *Id.* n.79, JA\_\_\_\_. FERC does not explain how the Project can be justified by interruptible customers’ needs when they are likely to be curtailed when those needs presumably are the greatest.

To be sure, the NJ Study shows that New Jersey’s LDCs do *not* need the Project’s additional capacity to meet firm demand, even on a design day. But that means FERC should have found the Project unneeded rather than look to unspecified and uncertain amounts of “potential[.]” interruptible demand (e.g., Certificate Order P 31, JA\_\_\_\_) as a reason to certificate it. As FERC knows, gas and electric infrastructure is planned to meet the peak demands of firm customers who pay for the facilities.<sup>28</sup> Sizing facilities to meet firm customers’ design-day demands

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<sup>28</sup> E.g., Certificate Order n.41, JA\_\_\_\_ (“The ‘design day’ is the basis for planning gas capacity requirements,” and “reflects the highest gas demand an LDC expects to

necessarily means excess capacity will be available for interruptible use at non-peak (and many peak) times.<sup>29</sup> But it would be inappropriate to size gas pipelines to meet the design-day needs of firm *and* non-firm users, as doing so would afford near-firm-quality service to interruptible users who neither contracted for firm service nor agreed to pay for such service. Further, and as explained below, FERC makes no effort to weigh any potential public benefits of that approach against the Project’s harms.

***D. FERC’s need determination relied too heavily on precedent agreements questioned by the LDCs’ regulator.***

FERC’s policy statement requires FERC to consider all relevant evidence weighing on need. Policy Statement at 61,747. The record here includes three extensive market studies, two of which found no need for the Project. Yet FERC found the Project needed nonetheless because it treated the precedent agreements as

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be obligated to serve.”); *Mun. Light Bds. v. Bos. Edison Co.*, Op. No. 729, 53 F.P.C. 1545, 1562 (The “peak . . . demands of the firm customers . . . are the loads [] which the power supply system was designed to meet.”), *modified*, Op. No. 729-A, 54 F.P.C. 440, *stay denied*, 54 F.P.C. 1312 (1975), *affirmed sub nom. Towns of Norwood v. F.P.C.*, 546 F.2d 1036 (D.C. Cir. 1976); Eastern Interconnection Planning Collaborative, Phase 2 Report: *Interregional Transmission Development and Analysis for Three Stakeholder Selected Scenarios and Gas-Electric System Interface Study*, vol. 1 at CR-21 (2015) (“Pipeline and storage infrastructure capacity is sized to meet the contractual demand of firm customers during peak demand conditions, with little or no reserve capacity.”), <https://www.capitaliq.spglobal.com/apisv3/docviewer/documents?mid=35188401>.

<sup>29</sup> Recall that design-day demand typically exceeds historical peak use by 35%. NJ Study at 16, JA \_\_\_\_.

prima facie evidence that was “not outweighed by other record evidence.” Rehearing Order P 34, JA\_\_\_\_. While FERC often treats precedent agreements as important evidence of need, it erred in not considering important factors that undermined their probative value here.

FERC should have accorded less weight to the New Jersey LDC agreements to reflect the two market studies and the New Jersey Board order finding that the LDCs already had adequate capacity.<sup>30</sup> Indeed, FERC should have given the Board’s finding special weight, as the Board has jurisdiction over gas service reliability in the state and regulates the New Jersey LDCs who subscribed to 56% of the Project’s capacity. The New Jersey agencies explained that the Board Order and the underlying study represent the “unique and considered perspective of a state utility commission . . . reached after a rigorous stakeholder process,” going to “whether there is a demonstrated need for the proposed project.”<sup>31</sup> Later, they told FERC—even more pointedly—that they “anticipate that the Board may need to exercise its authority to review the prudence of the New Jersey [LDCs’] capacity subscriptions

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<sup>30</sup> *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, P 54, *modified*, 178 FERC ¶ 61,197 (2022) (Draft Updated Policy Statement) (“While precedent agreements may indicate one or more shipper’s willingness to contract for new capacity, such willingness may not in all circumstances be sufficient to sustain a finding of need—e.g., in the face of contrary evidence or where there is reason to discount the probative value of those precedent agreements.”).

<sup>31</sup> Motion to Intervene Out of Time and Lodge of the New Jersey Parties at 5 (July 11, 2022) (R.916), JA\_\_\_\_.

to the REAE project, should the project be constructed.” NJ Agencies’ Motion for Clarification at 2, JA\_\_\_\_.

FERC has observed that statements by state commissions can be relevant evidence bearing on the existence (or not) of market need, Draft Updated Policy Statement P 70, and it has held that “oversight of the procurement decisions of [LDCs] is best left to state regulators.” Rehearing Order P 28, JA\_\_\_\_. Here, the relevant state commission investigated capacity adequacy in New Jersey, considered perspectives from all sides of the issue—including studies funded by pipeline opponents and proponents, and one conducted independent of the parties—and concluded that additional interstate pipeline capacity is not needed.<sup>32</sup>

On this record, FERC erred by accepting the New Jersey LDC agreements as evidence of need without at least discounting the weight of that evidence to reflect the Board’s conclusions and anticipated prudence reviews. That failure was particularly consequential given the amount of Project capacity subscribed by the New Jersey LDCs. *See* Certificate Order (Clements, Comm’r, concurring) at n.9,

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<sup>32</sup> FERC also has said that the timing of open seasons or preapprovals by state regulators can be relevant to the Commission’s need assessment. Draft Updated Policy Statement P 54. Here, the LDCs did not solicit additional capacity; Transco proposed it. It then took two years and two separate open seasons for the applicant to secure full subscription. Certificate Order P7, JA\_\_\_\_. And instead of pre-authorizing its LDCs to subscribe to this project, the Board explicitly reserved judgement on the issue of whether the LDCs prudently entered into these agreements.

JA\_\_\_ (“If the New Jersey-related capacity were taken out of the equation, I doubt we could find that Transco had met its burden of establishing the REAE project is needed.”).

## **II. FERC’S BALANCING OF BENEFITS AND HARMS WAS ARBITRARY AND CAPRICIOUS.**

Even if FERC finds a market need for a proposed project, that does not mean automatic approval. Under the NGA, FERC must balance a project’s likely benefits against any adverse effects that cannot be mitigated. Policy Statement at 61,747. Here, FERC’s need finding was infirm. But even if it could survive review, FERC’s balancing of benefits and harms cannot.

The reason is simple: FERC did not engage in a weighing of benefits and costs; it merely recited the factors it considered. But “a passing reference to relevant factors . . . is not sufficient to satisfy the Commission’s obligation to carry out ‘reasoned’ and ‘principled’ decisionmaking.” *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). And FERC overlooked some key harms altogether—an omission that by itself renders its decision arbitrary and capricious. *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

### ***A. FERC’s “benefit” findings were vague and unsupported by substantial evidence.***

This Court will not uphold a certificate order where FERC’s balancing of costs and benefits consists of unsupported conclusions that vaguely identified benefits

outweigh adverse effects. In *Spire*, this Court vacated a FERC decision because its “balancing of costs and benefits consisted largely of its *ipse dixit* ‘that the benefits [the proposed project] will provide to the market, including enhanced access to diverse supply sources . . . outweigh the potential adverse effects . . . .’” 2 F.4th at 973. As in *Spire*, so too here.

FERC found that the Project would “provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.” Certificate Order P34, JA\_\_\_\_. Even if true, those vague and unsupported assertions are insufficient. The public convenience and necessity standard requires FERC to determine *by how much* reliability and supply diversity will improve if a project is certificated and whether those benefits are worth the project’s costs (monetary and otherwise). FERC did not even try to answer those questions.

FERC says that the Project will increase reliability. But that “finding” is vacuous where, as explained above, FERC neither adopted any study’s supply and demand projections nor made its own. Without those findings, it is impossible to tell how much FERC believes the Project will increase reliability or whether comparable benefits could be achieved by less costly means.<sup>33</sup> FERC likewise says that

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<sup>33</sup> The Board has directed the New Jersey LDCs to consider the non-pipeline alternatives identified in the NJ Study as potentially more cost-effective ways to prepare for and respond to scenarios of extreme weather and the possibility of a large gas supply disruption or capacity shortfall. Board Order at 11, JA\_\_\_\_.



customers will realize savings from increased “supply diversity.” Certificate Order P 24, JA \_\_\_; Rehearing Order P30, JA \_\_\_. But FERC makes no attempt to quantify predicted savings or compare them to the Project’s billion-dollar construction cost. There is no way to determine on this record whether customers will see real savings—or even whether FERC thinks so. Such inadequately-supported findings cannot outweigh the burdens and environmental harms that this Project will inflict.

FERC responded to these objections by observing that it “may rely on qualitative benefits, as it does here.” Rehearing Order P 59, JA \_\_\_. But claims of customer cost savings are inherently quantitative even if FERC did not quantify them. And relying on “qualitative benefits” does not absolve FERC of responsibility to make specific findings supported by substantial evidence and to explain why the Project’s purported benefits outweigh its monetary and other costs. Here, FERC simply recited the Project applicant’s claimed benefits and asserted that they were “corroborated in the Transco Levitan Study,” while citing a page that discusses almost none of them. Rehearing Order P59, JA \_\_\_ (citing Transco Study at 5).<sup>34</sup>

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<sup>34</sup> Insofar as the cited portion of the Transco Study discusses natural gas customer savings, it asserts that the Project will reduce price spikes on days when current capacity would be used fully but acknowledges that it cannot predict how often such spikes otherwise would occur or how long they would last. Transco Study at 5-6, JA \_\_\_.

That constitutes neither substantial evidence nor reasoned decision-making. Transco's *ipse dixit* is no more persuasive than FERC's.

**B. FERC overlooked important harms.**

To decide whether a project is required by the public convenience and necessity, FERC must consider its effects “on all the affected interests,” including those of “surrounding communities,” which “may be represented by state or local agencies,” Policy Statement at 61,748, and “environmental interests,” *id.* at 61,747. FERC's balancing here ignored the damage that the Project's GHG and other emissions will do to New Jersey's environment, its citizens' public health, and the state's policy to reduce emissions.

1. FERC failed to weigh the Project's environmental harms against its supposed benefits.

“The harms associated with climate change are serious and well recognized.” *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). As the EPA has explained, GHG emissions and resulting climate change impacts risk

increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other “extreme weather events” that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially “significant disruptions” of food production.

*Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 417 (2011). “That these climate-change risks are ‘widely shared’ does not minimize [a state’s] interest” in reducing them. *Massachusetts v. EPA*, 549 U.S. at 522.

Completion of the Project will increase these harms. As this Court has recognized, “[a]ll the natural gas that will travel through these pipelines will be going somewhere,” to be burned for heat or to generate electricity, which produces carbon dioxide—“the primary contributing factor’ in global climate change.” *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017). FERC’s EIS for the Project estimated that, assuming 100% use, the Project could increase GHG emissions by 16 million metric tons per year, which represents 0.32% of the total GHG emissions of the United States. Certificate Order PP 69, 70, JA\_\_\_, \_\_\_. At the state level, FERC acknowledged that the Project could increase New Jersey GHG emissions by 11.8% over 2019 levels, *id.* P 71, JA\_\_\_, contrary to state law requiring an 80% *reduction* (from 2006 levels) by 2050.<sup>35</sup>

Although FERC disclosed these harms in its EIS, it never weighed them against the Project’s purported benefits for purposes of deciding whether the Project is required by the public convenience and necessity. In a pipeline certificate case, an

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<sup>35</sup> See New Jersey Global Warming Response Act, N.J. STAT. ANN. 26:2C-37; New Jersey Governor Exec. Order No. 274 (Nov. 10, 2021); State of New Jersey, *2019 New Jersey Energy Master Plan Pathway to 2050*, [https://nj.gov/emp/docs/pdf/2020\\_NJBPU\\_EMP.pdf](https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf)).

EIS serves two purposes. It fulfills the National Environmental Protection Act’s procedural requirements, and it informs FERC’s “distinct” NGA obligation, Rehearing Order P 101, JA\_\_\_, to “decide whether and under what terms to authorize the construction of major new pipeline facilities.” *Id.* P 133, JA\_\_\_. Yet FERC was mute when parties argued that FERC’s NGA review “should balance the need for the project with the environmental impacts from climate change and GHG emissions” *Id.* P 132, JA\_\_\_. FERC simply asserted that “the Commission balanced the concerns of all interested parties,” and then discussed Transco’s efforts to mitigate environmental harms *other than* GHG emissions and climate change. *Id.* Such misdirection does not suffice. *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) (“It is well established that the Commission must respond meaningfully to the arguments raised before it.”) (cleaned up).

FERC also contended that it need not consider “upstream” GHG impacts as part of its NGA analysis, because it lacks jurisdiction over upstream activities such as exploration, production and gathering. Rehearing Order P 101, JA\_\_\_. But FERC never makes a parallel claim about downstream emissions, which are far greater. And FERC never explains why a lack of jurisdiction over upstream or downstream activities prevents it from considering foreseeable emission increases when making jurisdictional certification decisions. To the contrary, when making those decisions, FERC “must ‘evaluate *all* factors bearing on the public interest.’” *Spire*, 2 F.4th at

961 (quoting *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959)).

2. FERC glossed over harm to New Jersey's ability to achieve its policy goals.

In our federal system, states “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.” *Alden v. Maine*, 527 U.S. 706, 715 (1999). In the proper exercise of its police powers, New Jersey has enacted laws requiring it to reduce GHG emissions 50% by 2030 and 80% by 2050.<sup>36</sup> The Project, however, goes in the other direction. According to FERC's EIS, the Project's operation could increase New Jersey GHG emissions by 12% over 2019 levels. Certificate Order P 71, JA\_\_\_\_. And by 2050, “[d]irect GHG emissions from the operation of the Project and downstream end use would represent 47.8 percent [of] New Jersey's 2050 GHG emission levels.”<sup>37</sup>

In other words, the Project and state law are on a collision course. Either the Project will not be used fully—in which case, building it is wasteful—or it will contribute an ever larger share of New Jersey's GHG emission budget, forcing the state to look elsewhere for more difficult or expensive reductions. And the same is

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<sup>36</sup> *See, supra* note 35.

<sup>37</sup> Final Environmental Impact Statement for Transcontinental Gas Pipe Line Company, LLC's Regional Energy Access Expansion Project at 4-176 (July 29, 2022) (Final EIS) (R.930), JA\_\_\_\_.

true of the state-law-mandated gas-use reductions. As explained above, by reducing gas demand, the required efficiency programs diminish any need for the Project. But if the Project is built anyway, FERC predicts that it will increase supply diversity and lower costs—which, if so, will increase consumption and make it harder to achieve the mandated reductions.

In her concurrence to the Certificate Order (at P 4, JA\_\_\_), Commissioner Clements stated that the “most glaring omission in the Commission’s need analysis is any discussion of the weight the Commission should accord to the finding of the New Jersey Board . . . that no additional pipeline capacity is needed in New Jersey.” The Board reached its conclusion after assessing New Jersey LDC demand in the context of the state’s requirements to reduce GHG emissions and gas use. In contrast, and despite its obligation to weigh the Project’s benefits and harms, FERC sidestepped considering how the Project will affect New Jersey’s ability to achieve its policy goals. Petitioner NJCF flagged the omission and explained how “[c]ertifying the REAE would conflict with...New Jersey’s climate and energy efficiency policies and goals.” NCJF Rehearing Request, Attach.: NJCF, Motion for an Evidentiary Hearing (June 6, 2022) at 2, 11 (Intervenors’ RFR 322, 331), JA\_\_\_, \_\_\_\_. Yet on rehearing FERC failed to confront this clear harm to New Jersey’s interests and thereby “failed to consider an important aspect of the problem.” *See State Farm*, 463 U.S. at 43.

\* \* \*

FERC has held that “the more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required.” Policy Statement at 61,749. Far from applying a heightened standard, FERC simply failed to weigh against the Project’s purported benefits the significant and adverse impacts the Project will have on state policy, the environment, and public health. This failure renders FERC’s decision arbitrary and capricious.

## CONCLUSION

The Court should grant the Petitions, vacate the orders, and remand to FERC for further proceedings.

Respectfully submitted,

*/s/ Scott H. Strauss*

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August 9, 2023



## ORAL ARGUMENT NOT YET SCHEDULED

### CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A), excluding the items exempted by Fed. R. App. P. 32(f). The brief contains 8,914 words.

2. I certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word using a proportionally spaced typeface, Times New Roman 14-point font.

*/s/ Jeffrey A. Schwarz*

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August 9, 2023

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# Addendum

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

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

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NEW JERSEY CONSERVATION FOUNDATION, ET AL.,

*PETITIONERS,*

v.

FEDERAL ENERGY REGULATORY COMMISSION

*RESPONDENT*

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

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**ADDENDUM TO OPENING BRIEF OF NEW JERSEY DIVISION OF  
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**48:3-87.9 Public utility to reduce use of electricity, natural gas in territory.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of August, 2023, caused this document to be served electronically through the Court's CM/ECF system.

*/s/ Jeffrey A. Schwarz*

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