UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC Application for A Temporary Emergency Certificate, or, in the Alternative, Limited-Term Certificate	)))))	Docket No. CP17-40-007

Protest of/Comment on Spire STL Pipeline LLC's Application For a Temporary Emergency Certification, or, in the Alternative, Limited-Term Certificate of Sierra Club, New Jersey Conservation Foundation, The Sustainable FERC Project, Natural Resources Defense Council

Sierra Club, New Jersey Conservation Foundation and Natural Resources Defense Council (collectively, "Protestors")[1] submit this protest pursuant to Rule 211(a), 18 C.F.R. § 385.211 (2019), of Spire STL Pipeline LLC's "Application For a Temporary Emergency Certification, or, in the Alternative, Limited-Term Certificate," (hereinafter, "Application") filed before the Commission on July 26, 2021, in FERC Docket No. CP17-40. On August 6, 2021, FERC issued a Notice of Application and Establishing Intervention Deadline, establishing September 7,

[1] Protestors timely moved to intervene in this proceeding. See Motion to Intervene of Sierra Club and New Jersey Conservation Foundation Regarding Spire STL Pipeline LLC's Application For a Temporary Emergency Certification, or, in the Alternative, Limited-Term Certificate, FERC Docket # CP17-40, Accession # 20210806-5216 (Aug. 6, 2021); Motion To Intervene of The Natural Resources Defense Council And The Sustainable FERC Project, FERC Docket #CP17-40-007, Accession #20210806-5187 (Aug. 6, 2021).

2021 as the deadline for motions to intervene in Docket CP17-40-007, and for comments on the above referenced application.[2] Protestors submit this as both a protest and as a comment, timely filed in accordance with FERC's Notice, to assist the Commission in evaluating Spire STL's application.

I. Introduction

Spire STL Pipeline now asks the Commission to relieve Spire of its own poor choice to build its pipeline prior to having certainty over its legal right to do so. In its application, Spire gives the Commission a menu of options ranging from arbitrary and capricious to legally suspect. Having built its pipeline at its own risk, it now cries that the Commission should either flatly ignore the D.C. Circuit's mandate or directly contravene the court's factual and legal conclusions by issuing a "limited-term" certificate or emergency authorization. As set out below, the Commission should not accede to Spire's requests, as a matter of fact, law, or policy.

Spire begins with the premise that it was entitled to rely on FERC's Certificate Order, because challenges to such orders do not act as a stay. See Application at 2. This theory directly contravenes both courts' and the Commission's well-worn basis for refusing such stay requests: *that if pipeline*

[2] See Notice of Application, FERC Docket # CP17-40-007, Accession #20210806-3037 (Aug. 6, 2021).

companies build during the pendency of litigation challenging Section 7 certification, they do so at their own risk. See, e.g., Sabal Trail, Order Denying Stay, 154 FERC ¶ 61,264 (Warning that, "[t]o the extent that the company elects to proceed with construction, it bears the risk that ... our orders will be overturned on appeal," and observing that "[i]f this were to occur, the company might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation."). Spire STL then quickly pivots to describing a supposed parade of horribles[3] that it claims would result from the Commission doing what it ought to do - abide the impending D.C. Circuit mandate.[4] Finally, Spire shifts to supporting its Application by reiterating the same factual basis that the D.C. Circuit found specious enough to require vacatur. The D.C. Circuit took that step for two independently critical reasons: (1) it did not believe, based on the record before it, that the Commission could rehabilitate any rationale for issuing the Spire Certificate; and (2) the court wanted to ensure that Spire would not reap the

[3] These include alleging increased costs to Missouri retail customers, and generic references to placing lives at risk. The former is contravened by the record of the Spire Order, and the latter ignores a record in which all parties agree that there is no increased demand nor inability to purchase needed supply from existing sources. Ironically, while Spire STL has consistently and vigorously argued Missouri PUC was the entity responsible for addressing its impacts on customers, it now comes before the Commission seeking to use *those very impacts* as a basis for requesting emergency authorization.

[4] FERC's Data Request reflects the Commission's understanding that the Application relies on assertions and rhetoric, without giving the Commission the ability to independently evaluate them. See FERC Data Request, Docket #17-40-007, Accession No. 20210806-3036 (Aug. 6, 2021).

rewards of having built its unnecessary pipeline prior to the conclusion of judicial review.

More than a month after the D.C. Circuit decision, Spire STL now claims emergency, asking that the Commission vitiate the D.C. Circuit's reasoning and order within the two weeks following its Application. Spire requests that: (1) the Commission engage in a "forward looking" inquiry based on existing circumstances, (2) permit it to continue operations predicated on an infirm record; and (3) reap the rewards of operating a pipeline that failed to satisfy the Gas Act's Section 7 public convenience and necessity standard. Spire STL's evidentiary support for this request boils down to telling the Commission that there is no way to turn back from Spire's choice to build the very pipeline that the D.C. Circuit found failed to satisfy the NGA's Section 7 standard.

II. The Commission Cannot Ignore The D.C. Circuit's Ruling And Sidestep Its Impending Mandate By Issuing A Limited-Term Certificate Predicated On The Mess Spire Missouri And Spire STL Have Made.

The Commission should reject Spire STL's bid for a "forward looking," limited-term certificate while the Commission reconsiders the certificate that the D.C. Circuit found legally untenable. The Gas Act does not provide for a "limited-term certificate" absent an emergency, and even then, provides for only a temporary emergency authorization when the Commission has determined that *unforeseeable* circumstances have put people at risk. Spire STL's self-made mess

cannot serve as a baseline for some new category of certificate. Rather, on remand, the Commission must confront the data, analysis, and other record evidence that formed the basis for the administrative record upon which it approved Spire STL. Any suggestion otherwise -- that the Commission should use post-approval data to justify pre-approval decision making -- should be a nonstarter. Doing so violates foundational administrative law principles.

III. The Commission Must Gather Additional Data and Analysis If It Considers Emergency Authorization Pending Its Unwinding of Spire STL.

The Commission's emergency authority, arising from Section 7(c)(1)(b), is a narrow and limited one. See Consumer Fed'n of Am. v. Fed. Power Comm'n, 515 F.2d 347, 353 (D.C. Cir. 1975) (emergency authority "was designed as a narrow exception to enable the companies and the Commission to grapple with temporary emergencies and minor acts or operations, like emergency interconnections to cope with breakdowns or sporadic excess demand for gas.") And, as Spire STL acknowledges, no court has ever validated using this narrow statutory provision to keep in service a pipeline whose authorization a federal court of appeals has vacated based on a record showing that the project did not meet Section 7's public convenience and necessity test. See Application at 21. The one Commission (not judicial) decision Spire cites to support a vast expansion of FERC's emergency authorization power involves a pipeline that was built under state -- rather than Commission jurisdiction -- which inadvertently transported *inter*state gas rather

than *intra*state gas due to a scheduling error. See Texas-Ohio Pipeline Inc., 58 FERC ¶ 61,025 (granting pipeline company temporary authorization to operate as an *inter*state pipeline serving its existing customers while the Commission considered its pending Section 7 application). Any connection between the facts of Texas-Ohio and this case is tenuous at best. In Texas-Ohio, the pipeline had an undisturbed state PUC finding of public convenience and necessity, and was seeking to continue service while the Commission considered whether the pipeline met the Section 7 public convenience and necessity standard to provide interstate service. Section 7's emergency use authorization was intended to facilitate, "emergency interconnections of pipe lines, which are sometimes necessary to make it possible to maintain adequate service in cases of extraordinary peak demands, break-downs, and so forth," not to retroactively justify the construction of a new, large capacity, unneeded interstate pipeline. Consumer Fed'n of Am., 515 F.2d at 353 (internal citation omitted). Here, Spire STL has no legal finding that its pipeline ever served the public convenience and necessity - in fact, it has the D.C. Circuit's ruling determining that Gas Act Section 7 requires the Commission's determination of public convenience and necessity to be vacated. But it now asks the Commission to use a narrow statutory provision -- designed to allow existing pipelines or facilities to make temporary, emergency connections -- for an entirely new purpose.

Spire has offered little data or evidence to support this request, other than a parade of horribles in which it suggests that, "it will be impossible to replace that [unauthorized] supply based on current conditions, leading to serious service disruptions for the end-use customers...with potentially fatal consequences." These are precisely the kind of vague allegations upon which the Commission's certificate order was predicated, and which the court found failed to be grounded in record evidence. See Environmental Defense Fund v. Federal Energy Regulatory Commission, 2 F.4th 953, 975 (D.C. Cir. 2021) ("FERC's failure to engage with this evidence did not satisfy the requirements of reasoned decisionmaking. Indeed, as noted above, FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement.")

For all its dire predictions, Spire STL has failed to include specific data demonstrating that its mess cannot be fixed in a timely manner. The current "evidence" provided as to the dangerous chain reaction Spire STL claims it has generated by building prior to having legal certainty appears to rely entirely on the assertions contained in the Carter Affidavit, produced by its sole, affiliated shipper. Yet the Carter Affidavit fails to address why Spire Missouri would position itself in the precarious position of being unable to meet its duty to serve by shifting demand to rely exclusively on an embattled pipeline. The Commission's critical Data Request elicits the kinds of information that will allow it to create a measured

approach to limiting any emergency authorization it found necessary to protect the public interest -- as distinct from protecting Spire STL and its shipper from economic harm from their own poor choices.

If the Commission were to grant Spire STL any pathway out of its own mess, using its narrow statutory emergency provision as grounds, it ought not do so prior to examining evidence from Missouri PUC that Spire Missouri did, in fact, endanger its customers and St. Louis residents by irreversibly[5] altering its system and structure based on its affiliate pipeline deal that was subject to judicial review and vacatur. It is hard to imagine that to be factually correct -- as it would indicate that a failure on Spire STL would lead to precisely the same parade of horribles Spire STL posits here. Moreover, the Commission must examine actual evidence attesting to supply unavailability to meet reliability needs -- not just evidence that there might be greater costs to procuring it.[6] If the Commission finds that Spire Missouri has created an emergency situation that is likely to arise during winter 2021-22 heating season by relying exclusively on its affiliated pipeline, so much so

[5] We note that any allegations of such irreversible reliance must be temporally bounded, if true. This is not a case of "what's done cannot be undone." Shakespeare, Macbeth, Act V, Scene 1, p. 3. The Commission must first ascertain if there is truly an emergency, and then determine how long it will take Spire Missouri to undo any unfortunate position in which it has placed its customers.

[6] See, e.g., Fed. Power Comm'n v. Hunt, 376 U.S. 515 (1964) ("when granting temporary certificates [the Commission] must look even more carefully to the present and future public convenience and necessity and interpose such conditions precedent as would, in [the Commission's] view, fully protect consumers from excessive rates and charges.")

that Spire STL requires an emergency authorization while Spire Missouri unwinds its reliance on this unlawful project, it should simultaneously levy economic penalties against Spire STL, drawn from its existing operational profits/ROE and require Spire STL to pay those into a fund to assist Spire Missouri's retail customers in alleviating any resulting economic harms while this terminal pipeline project is taken off of ratepayer life support.

Spire STL's "Answer" to EDF's Protest, in which it argues that any rate changes are beyond the Commission's purview in this docket, are simply misguided. The D. C. Circuit decision in Environmental Defense Fund v. Federal Energy Regulatory Commission vacated the underlying certificate -- which was the predicate for Spire STL's negotiated rate filing. Thus while Spire STL did, indeed, file its negotiated rate agreement in a separate docket - it did so pursuant to a Commission's requirement set out in its upended certificate. There is no longer any approved rate that could be legally valid for an unauthorized pipeline.[7] With its certificate authorization vacated, its negotiated rate agreement has no legal basis -- it is void *ab initio*. Any viable legal basis would have to arise under an emergency authorization -- precisely the subject of the above-referenced docket, and fully within Commission jurisdiction in this proceeding.

[7]Spire STL was not even a FERC-jurisdictional natural gas company until it received the Section 7 Certificate that the D.C. decision in Environmental Defense Fund v. Federal Energy Regulatory Commission, 2 F.4th 953, 975 (D.C. Cir. 2021) vacated.

IV. Conclusion

For all of the foregoing reasons, the Commission should require Spire STL to provide full and robust answers to its Data Request, and assess independently what, if any, emergency might arise from fully and timely implementing the D.C. Circuit's decision in Environmental Defense Fund v. Federal Energy Regulatory Commission. At this juncture, because Spire STL has chosen to submit multiple "Answers" but no data, and since the Commission data request deadline coincides with its comment deadline, the undersigned Protestors respectfully request that FERC extend additional time for comments and protests responsive to the data Spire STL produces.

Respectfully submitted,

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Dated: September 6, 2021

CERTIFICATE OF SERVICE

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

Dated at New York, NY this 6th day of September, 2021

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