No. 21A-56

IN THE

Supreme Court of the United States

SPIRE MISSOURI INC., ET AL.,

Applicants,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Respondents.

OPPOSITION OF ENVIRONMENTAL DEFENSE FUND TO APPLICATION FOR A STAY OF THE MANDATE

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RULE 29.6 STATEMENT

Environmental Defense Fund is a nonprofit organization with no corporate parent, and in which no publicly held corporation owns an interest.

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INTRODUCTION

The application of Spire Missouri Inc. and Spire STL Pipeline LLC (collectively, "Spire") should be denied because it does not meet the standard for a stay (or recall) of the mandate of the court of appeals pending filing and disposition of a petition for writ of certiorari.[1]

In June of this year, a D.C. Circuit panel issued a unanimous decision holding unlawful and setting aside an order of the Federal Energy Regulatory Commission ("FERC") that had granted a certificate of public convenience and necessity to Spire STL under the Natural Gas Act ("NGA"). The certificate authorized Spire STL to build and operate a pipeline to transport natural gas for its affiliate Spire Missouri, a gas shipper in the St. Louis region. "For the last two decades, natural gas consumption in the St. Louis area has been roughly flat," and "all parties agreed that future demand projections were not expected to increase" when FERC greenlighted Spire STL's pipeline. Ex. A at 9. Indeed, Spire Missouri "had declined to subscribe to [other] proposals for new natural gas pipelines in the region" because they "did not make operational and economic sense for its customers." *Id.* at 10. No unaffiliated shipper signed up to use Spire STL's pipeline either. *Id.* at 3. FERC, however, "ignored record evidence of self-dealing" between Spire STL and Spire Missouri. *Id.* at 5. The Commission refused to "look behind" their "private[ ] … precedent agreement," *id.* at 3, to answer the threshold question "whether there was market need" for another pipeline in the region, *id.* at 34. FERC's subsequent balancing of the project's alleged benefits against its adverse effects "consisted largely of *ipse dixit*" supported by "no concrete evidence." *Id.* at 31.

FERC's order could not be challenged in court until Spire STL had "completed virtually all construction of the pipeline," Ex. A at 17–18, using the eminent-domain power the NGA grants certificate holders, *id.* at 37. The Commission's "serious[ly] deficien[t]" order wilted under judicial

[1] The court of appeals issued its mandate as scheduled on October 8th, ECF No. 1917347; *see* D.C. Cir. R. 41(a)(1).

scrutiny, *id.* at 36, in an opinion whose correctness is not disputed. The panel then determined the appropriate remedy using the D.C. Circuit's decades-old framework. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993). The "obvious deficits" in FERC's order, Ex. A at 31, made it "far from certain that FERC chose correctly in issuing a Certificate to Spire STL," *id.* at 36. And the administrative and judicial record, including the briefs filed by Spire and the Commission, left the panel unpersuaded that the project's "benefits were real," *id.* at 35, such that vacating the order would adversely affect any gas customers. The panel therefore selected "the normal remedy" of vacating "unsustainable agency action." *Id.* at 36; *see* 5 U.S.C. § 706(2).

Unbeknownst to the panel (or FERC, at the time), Spire Missouri had elected during the pendency of litigation to modify its gas-delivery system so as to make its captive customers so heavily reliant on the pipeline of its affiliate Spire STL that their service would be disrupted if the pipeline were waylaid during the 2021–2022 winter heating season.[2] Since the court's decision, Spire Missouri has failed to mitigate that risk by subscribing to cheaper shipping capacity available on a nearby, unaffiliated pipeline for the coming winter.[3]

Spire STL responded to the panel's decision by seeking a temporary certificate from FERC to allow the pipeline to continue operating while the Commission revisited its unlawful permanent certificate order on remand. FERC *sua sponte* issued Spire STL a 90-day "emergency" certificate "out of an abundance of caution and to ensure adequacy of supply" and "continuity of service" to

[2] Motion to Reject in Part and Protest of Environmental Defense Fund ("EDF Partial Protest"), Ex. A ¶ 9–16, at 5–7, *In re Spire STL Pipeline LLC*, FERC Dkt. No. CP-17-40-007 (Aug. 5, 2021), https://tinyurl.com/4jkku7ht. *Contra* Ex. I ¶ 34, at 21 (Spire Missouri president alleging that Spire STL's pipeline has "allowed Spire Missouri to maintain a portfolio consisting of diverse supplies of natural gas").

[3] Reply Comments of Enable Mississippi River Transmission, LLC, *In re Spire STL Pipeline LLC*, FERC Dkt. No. CP17-40-007 (Oct. 5, 2021), https://tinyurl.com/328jm82e; *see also* EDF Partial Protest, *supra* n.2, Ex. A ¶ 22–25, at 8–10.

Spire Missouri customers. Ex. H ¶ 1 at 1 & n.3. Spire STL's application for a temporary certificate, to last for the duration of the Commission's remand proceeding, is now ripe for disposition.

In view of what Spire Missouri told FERC *in September* about the system changes it elected to make despite this litigation, respondent Environmental Defense Fund ("EDF") has recognized before the Commission "the near-term necessity of continued operation of the Spire STL pipeline to ensure continued service" to Spire Missouri's customers through the 2021–2022 winter season, and urged that FERC issue a temporary certificate with reasonable conditions that will not "risk[ ] curtailment of service."[4] Each of EDF's submissions to FERC has made abundantly clear that "the Commission should act as necessary to ensure that residents and businesses in St. Louis continue to have reliable access to natural gas" notwithstanding the unlawfulness of FERC's earlier action. EDF Partial Protest, *supra* page 2 n.2, at 1.

Despite the facts that Spire STL presently holds a certificate authorizing its pipeline to operate until December 13th, and that FERC is now poised to issue another certificate to keep the pipeline operational as necessary to ensure reliable service to the St. Louis region, Spire asks this Court for a prophylactic stay of the D.C. Circuit's mandate pending disposition of a forthcoming petition for certiorari limited to the question of remedy.

Spire's stay application should be denied. On its own terms, Spire's allegation of "Possible Irreparable Harm," Appl. 21, falls far short of the "likelihood of irreparable harm" that every stay applicant in this Court "must demonstrate." *Teva Pharms. USA v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008) (noting that "[a] likelihood" is "not just a possibility"). Spire observes (Appl. 21) that ***if*** FERC does not issue Spire STL a temporary certificate, or else fails to act before Spire STL's

[4] Reply Comments of EDF ("EDF Reply to FERC") at 1, *In re Spire STL Pipeline LLC*, FERC Dkt. No. CP-17-40-007 (Oct. 5, 2021), https://tinyurl.com/tt8hs78w.

emergency certificate expires, ***then*** Spire Missouri's captive customers are likely to confront harm in the form of disrupted gas service this winter. EDF does not dispute the harm that a breakdown in gas service to Spire Missouri's customers would entail. But Spire is ineligible for a stay because any interruption in the Spire STL pipeline's operating authority is not merely *un*likely; FERC's actions to date show the scenario to be utterly fanciful.

After the panel held unlawful the permanent certificate FERC had granted to Spire STL, the Commission, on its own initiative, hastened to proffer Spire STL an emergency certificate, to allow time for FERC to rule on Spire STL's application for a temporary certificate. Ex. H. In so doing, the three-Commissioner majority bluntly stated that a "breakdown in service to existing customers" constitutes an "emergency" that FERC would "not wait" to avert until it became "certain or imminent." *Id.* ¶ 10 at 5; *see* 15 U.S.C. § 717f(c)(1)(B). "Speculation" is too generous a term for Spire's submission that these same Commissioners might abruptly allow a breakdown in service to Spire Missouri's customers this December, just as the Missouri winter gets underway. A stay must be denied here if the prerequisite of *likely* irreparable harm retains any meaning.

Spire fares no better in establishing "a reasonable probability that this Court will grant certiorari" on its unfinished petition, or "a fair prospect that the Court will then reverse the decision below." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). The D.C. Circuit found that, owing to its "serious deficiencies," Ex. A at 36, FERC's order did not "survive scrutiny under the applicable arbitrary and capricious standard of review," *id.* at 5. The Administrative Procedure Act ("APA") provides that unlawful agency action be "set aside," 5 U.S.C. § 706(2) (emphasis added), and the panel here ordered that "normal remedy," Ex. A at 5, due to the gravity of FERC's errors and the available evidence, or lack thereof, regarding the consequences of

vacatur. Its remedy disposition was "cogent and correct," *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers), and unworthy of further review.

Vacatur indisputably is "the normal remedy" under the APA. Ex. A at 5. According to the Administrative Conference of the United States, the alternative of remand *without* vacatur is used exceedingly rarely, and almost exclusively by the D.C. Circuit. Stephanie J. Tathum, *The Unusual Remedy of Remand Without Vacatur*, ACUS Report 22 (2014). That is as it should be. Ordinarily, when a defendant loses and has done something unlawful, it is ordered to stop doing the unlawful thing—particularly where the court's underlying determination of unlawfulness is unchallenged.

Though Spire asserts that the circuits are in "disarray" about when unlawful agency action should be vacated, Appl. 18, every court of appeals that has considered the issue has been guided by the seminal decision in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). The supposedly "conflicting" pronouncements of the Third and Fifth Circuits quoted by Spire are actually verbatim quotations from *Allied-Signal*. The dissenting voices that criticize *Allied-Signal*'s approach are not in Spire's camp; *they* maintain that vacatur is *compelled* by the APA's "literal command." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757–58 (D.C. Cir. 2002) (Sentelle, J., dissenting). There is no reasonable prospect that Spire's forthcoming petition will raise a question worthy of this Court's review, and no good cause to grant the stay application.

STATEMENT

1. In 2016, despite "flat demand" for natural gas in the St. Louis region, Ex. A. at 32, Spire STL—a newly formed corporate affiliate of gas shipper Spire Missouri, *see* Ex. E at 2—proposed a new gas pipeline. Spire Missouri previously had explained that "new natural gas pipelines in the region … did not make operational and economic sense for its customers." Ex. A at 10. Not surprisingly, Spire STL could not attract bids for preconstruction contracts, known as "precedent

agreements," from arms-length shippers. *Id.* at 3. But Spire STL "privately entered into a precedent agreement" with its affiliate Spire Missouri, *ibid.*, to use as the linchpin of an application to FERC for a certificate of public convenience and necessity.

The NGA prohibits construction or operation of interstate natural gas pipelines unless such a certificate is in force, so as "to protect the consumer interests against exploitation at the hands of private natural gas companies." *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944). Before issuing a certificate, FERC must "consider[ ] whether there is a market need for the proposed project"; "then determine[ ] whether there will be adverse impacts"; and only thereafter "balance[ ] the evidence of public benefits to be achieved against the residual adverse effects." Ex. A at 3 (cleaned up) (quoting FERC Certificate Policy Statement).

Spire STL's certificate application "conceded that the proposed pipeline was not being built to serve new [demand]" but proffered its private agreement with Spire Missouri as "evidence of need" for the pipeline. Ex. A at 4. That was enough for the Commission, which did not "'second guess' [the] purported 'business decision'" of Spire Missouri to ship gas through the pipeline of a newly formed affiliate that could not attract shippers on the open market. *Id.* at 5. FERC reasoned that whether Spire STL and Spire Missouri "had engaged in anticompetitive behavior was irrelevant to its determination." *Id.* at 15. The Commission "rejected calls for a market study to assess the need for a new pipeline." *Ibid.* And FERC "explicitly declined to resolve any related factual questions," *id.* at 16, or "apply heightened scrutiny to the Certificate application," *id.* at 13. FERC issued Spire STL a certificate in 2018 to allow construction and operation of the pipeline. Ex. E.

The NGA has a "virtually unheard-of" "mandatory petition-for-rehearing requirement," *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (Scalia, J.), that allows a certificate to take effect while FERC rehears it, yet bars judicial review while rehearing is underway. *See* 15

U.S.C. § 717r. A recently enacted regulation prohibits a certificate holder from building a pipeline pending FERC's rehearing, 18 C.F.R. § 157.23, but that regulation was not in effect during the 15 months EDF's rehearing petition was pending. The Commission entered an open-ended "stay" of the rehearing proceeding, *see* Ex. A at 17, that let Spire STL use the federal eminent-domain power to seize rights-of-way through "well over 200 acres of privately owned land," *id.* at 37—including lands owned by EDF members, *id.* at 25–26—and "complete[ ] virtually all construction of the pipeline," *id.* at 17–18, at far greater cost than its estimate to FERC, *id.* at 18. The Commission denied rehearing of the certificate only after Spire STL's pipeline was built and operational. Ex. G.

2. EDF petitioned for review of FERC's certificate and rehearing orders. Spire intervened to defend the Commission but did not proffer evidence or argument about possible consequences of vacating Spire STL's certificate. ECF Nos. 1827541 & 1829341. EDF's brief argued, in eight separate places, that FERC's order should be held unlawful—and vacated. ECF No. 1871063. The entirety of Spire's response on this point consisted of reciting the *Allied-Signal* framework for deciding when remand without vacatur is warranted, and then asserting without further explanation that, in this case, "it would be plausible that FERC would be able to supply the explanations required, and vacatur of FERC's orders would be quite disruptive, as the Spire STL pipeline is currently operational." ECF No. 1871040 at 42 (cleaned up). Spire did not support this generic assertion of "disruption" with evidence in the administrative record or adduced elsewhere. FERC's brief did not address remedy at all. ECF No. 1871074.

3. A unanimous D.C. Circuit panel declared FERC's order unlawful and set it aside in June 2021. Ex. A. The panel found "that the Commission ignored record evidence of self-dealing" when assessing the need for Spire's proposed pipeline. *Id.* at 5. "No judicial authority endors[ed] a Commission Certificate in a situation in which the proposed pipeline was not meant to serve any

new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline." *Id.* at 30. The panel then observed that, having failed to properly assess market need, FERC separately "failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement." *Id.* at 5. Its balancing "consisted largely of *ipse dixit*" with "no concrete evidence" in support. *Id.* at 31. The Commission's ensuing order denying rehearing mustered only "a superficial effort to remedy the obvious deficits," *ibid.*, in FERC's "ostrich-like approach" to its statutory charge, *id.* at 34.

As to remedy, the panel applied the *Allied-Signal* framework, under which "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." Ex. A at 36 (quoting *Allied-Signal*, 988 F.2d at 150–51). Here, the "serious deficiencies" the panel had "identified … in the Commission's orders" made it "far from certain," and "not at all clear," that FERC "chose correctly"; and called into doubt whether FERC even could "rehabilitate its rationale" using the existing administrative record. *Id.* at 36–37.

The panel "underst[oo]d that the pipeline [wa]s operational"—that it *could* be available to transport gas—and that vacatur of Spire's certificate thus "*may*" have entailed "*some* disrupti[ve]" consequences. Ex. A at 36 (emphases added). But the record did not reveal whether the pipeline's benefits (beyond "increase[d] shareholder earnings," *id.* at 12) "were real or illusory." *Id.* at 35. Spire had supplied no evidence in the underlying FERC proceeding, or its brief before the court, that vacatur would harm third parties. And the Commission had "failed to seriously and thoroughly conduct" its core statutory duty, *id.* at 5–6, a fact that tended to lessen the "weight[ ]" that a possible

disruption carried in the remedy analysis, *id.* at 36. To allow Spire STL's certificate to stand "under these circumstances"—simply because the pipeline *might*, contrary to the record before the court, have shown itself necessary—would be inequitable. *Id.* at 37. Moreover, it would place judicial imprimatur on FERC's decision "to allow building first and conducting comprehensive reviews later." *Ibid.* (cleaned up). That concern was exacerbated by "the significant powers that accompany a certificate," including that of eminent domain. *Ibid.*

For these reasons, the panel vacated Spire's permanent certificate "and remand[ed] the case to the Commission for appropriate action." Ex. A at 6.

4. Spire STL then applied to FERC for "a temporary certificate … to assure maintenance of adequate service or to serve particular customers," 15 U.S.C. § 717f(c)(1)(B), during the period in which the Commission would consider appropriate action on the permanent certificate the D.C. Circuit had set aside.

Responding to Spire STL's application, EDF recognized that FERC should "take whatever action is necessary to alleviate an emergency to ensure that Spire Missouri customers have reliable gas service in the winter months," EDF Partial Protest, *supra* page 2 n.2, at 22, but requested that any temporary certificate include "reasonable terms and conditions," 15 U.S.C. § 717f(e). Spire alludes to "disruptive and costly conditions," like "the recommissioning of retired facilities." Appl. 25. EDF did not propose any condition that would "require Spire Missouri to re-construct retired facilities to the extent that Spire Missouri does not believe that such re-construction is required to maintain reliable service." EDF Reply to FERC, *supra*, page 2 n.4, at 10. The conditions that EDF has proposed that FERC attach to Spire STL's temporary certificate provide a reasonable pathway for operation of the pipeline through the winter, while ensuring that ratepayers are protected with conditions commensurate with record evidence of self-dealing and, as *amicus curiae* American

Antitrust Institute highlighted below, the lack of a "reasonable cost-benchmark" that could "prevent Spire STL from artificially inflating the costs that it imposes on Spire Missouri to raise downstream prices and upstream profits." ECF No. 1850866, at 23. In any case, Spire does not allege likely irreparable harm from possible conditions attached to an as-yet-unissued temporary certificate, which conditions Spire has urged FERC not to attach, and which themselves would be subject to judicial review.

After reviewing new evidence that Spire Missouri had submitted to FERC detailing changes it had made to its gas-delivery system while Spire STL's certificate was under review by the D.C. Circuit, EDF filed new comments with FERC acknowledging "the near-term necessity of continued operation of the … pipeline to ensure continued service," while reiterating a request for reasonable certificate conditions that in no way entailed or even "risk[ed] curtailment of service." EDF Reply to FERC, *supra* page 2 n.4, at 1.

5. After seeking relief from FERC, Spire petitioned the D.C. Circuit to rehear the issue of remedy. Spire did not ask the panel or the full court to reconsider the holding that Spire STL's permanent certificate was unlawfully granted, nor any of the multiple grounds on which the panel had reached that conclusion. In a footnote buried in its rehearing petition, Spire stated that, while it had sought a temporary certificate from the Commission, "[t]he outcome of that proceeding, and the timing of FERC's decision, are far from certain"—*read*, in doubt—"and temporary authority is not identical to [the] permanent certificate" the panel held unlawful. ECF No. 1909142 at 6 n.2. Spire's rehearing petition attached, for the first time, evidence of third-party harms similar to what it presents to this Court. *But cf.* Fed. R. App. P. 40(a)(2) (requiring rehearing petition to state law or facts the panel "overlooked or misapprehended"). The new evidence, in the form of a declaration from Spire Missouri's president, alluded solely to events that predated the judgment—indeed, that

predated oral argument—of which the panel had not been notified. ECF No. 1909142, Ex. 2. With FERC already having moved promptly to consider Spire STL's request for a temporary certificate, the court of appeals denied panel and en banc rehearing without noted dissent. Exs. B & C. Spire then moved the D.C. Circuit to stay its mandate pending the filing and disposition of Spire's forthcoming petition for certiorari in this Court.

6. FERC knew that the pendency of Spire's motion to stay the mandate would prevent the court of appeals from issuing it. Ex. H ¶ 1 at 1 n.3 (citing D.C. Cir. R. 41(a)(2)). "[T]o assure maintenance of adequate service," 15 U.S.C. § 717f(c)(1)(B), however, the Commission acted *sua sponte* to issue Spire STL a 90-day "emergency" certificate "under the previously approved terms, conditions, authorizations, and tariff," Ex. H ¶ 8 at 4. FERC defined the prospective "emergency" as "the breakdown in service to existing customers that may result from the cessation in operation of a functioning pipeline," *id.* ¶ 10 at 5—which "could be dire during the upcoming winter heating season," *id.* ¶ 7 at 3. The Commission assured Spire, and the public, that it would not "wait [to act] until such disruption is certain or imminent." *Id.* ¶ 10 at 5. Spire STL quickly accepted the emergency certificate, whose issuance no one challenged. The emergency certificate is scheduled to expire on December 13th.

7. After Spire STL accepted the emergency certificate, the court of appeals denied Spire's request to stay the mandate. Ex. D; *cf.* Fed. R. App. P. 41(d)(1) (authorizing stay upon showing of "good cause" and "that the petition [for certiorari] would present a substantial question"). On October 5th, EDF and other interested parties filed with FERC reply comments on Spire STL's application, which seeks a temporary certificate of operation "while the Commission adjudicates

an order on remand" from the D.C. Circuit.[5] Because a temporary certificate may issue without a hearing, *see* 15 U.S.C. § 717f(c)(1)(B), Spire STL's application to FERC is ripe for disposition.

The mandate of the court of appeals issued on October 8th.

ARGUMENT

Spire's application should be denied because it has not carried its "heavy burden" to show entitlement to a stay. *Philip Morris U.S.A. Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The merit of Spire's forthcoming petition for certiorari "need not be considered" at this juncture because Spire's application "fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983); *see Teva*, 572 U.S. at 1301 (Roberts, C.J., in chambers). In any event, that forthcoming petition has no "reasonable probability" of being granted. Finally, in the improbable event the Court grants certiorari, there is no "fair prospect" that it will reverse the remedy disposition below. *King*, 133 S. Ct. at 2 (Roberts, C.J., in chambers).

I. Spire Has Not Established A Likelihood of Irreparable Harm Absent A Stay

Spire abjectly fails to allege likely irreparable harm if the mandate is not stayed. The only irreparable harm it identifies, a breakdown in natural gas service to Spire Missouri's customers in the coming winter heating season, is contingent on Spire STL's not holding a valid certificate that authorizes its pipeline to operate. That contingency is not remotely "likely."

Until December 13th, "the action already taken by" FERC, *Socialist Labor Party v. Rhodes*, 89 S. Ct. 3, 4 (1968) (Stewart, J., in chambers), obviates a need for a stay. The emergency certificate that the Commission *sua sponte* issued to Spire STL in September is not scheduled to expire until that date, and Spire is simply wrong to assert that the Commission "expressly reserved its right to

[5] *Application of Spire STL Pipeline LLC for a Temporary Emergency Certificate, or, in the Alternative, Limited-Term Certificate* at 1, FERC Dkt. No. CP-17-40-007 (July 26, 2021), https://tinyurl.com/3tk43dtw; *see also* FERC, *Notice of Application & Establishing Intervention Deadline*, FERC Dkt. No. CP-17-40-007 (Aug. 6, 2021), https://tinyurl.com/ayvz78kd.

shorten or revoke" the emergency certificate. FERC stated that the certificate "will remain in place for 90 days," Ex. H ¶ 11 at 5, "absent further order from the Commission," *id.* at 6. In context, the latter truism could only have been meant to further assure the public that FERC would take steps necessary to avoid "dire circumstances [that] may result" in the highly unlikely event that a further authorization, in the form of Spire STL's applied-for temporary certificate, was not in place after 90 days. *Id.* ¶ 10 at 4. Spire cites no precedent for FERC's "shortening or revoking" an order issued *sua sponte* to forestall any service disruption and enable an orderly administrative proceeding.

With respect to the period *after* Spire STL's emergency certificate expires, Spire's claimed harm is contingent on FERC's denying or failing to act on Spire STL's application, now pending and actively progressing, for a temporary certificate to continue operating the pipeline through the winter season while the Commission proceeds on remand consistent with the D.C. Circuit's ruling. Harm contingent on future agency action is inherently speculative and incapable of supporting a request for extraordinary relief. *Cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). Spire's claim of "likely" harm is especially weak because FERC has unambiguously signaled that *the Commission* will do what is needed to ensure uninterrupted service to customers in the St. Louis region during the coming winter, including permitting the Spire pipeline to operate. This Court does not deploy its equitable authority as a failsafe to "guarantee," Appl. 25, against the possibility that an agency will act (or not) unexpectedly. If, in a startling turn of events, FERC were to deny, or fail to timely act on, Spire STL's ripe application for a temporary certificate, Spire could pursue appropriate and immediate judicial relief at that time. *See* 15 U.S.C. § 717r(b); 28 U.S.C. § 1651(a). In the meantime, Spire is not entitled to extraordinary relief from this Court.

II. There Is Not A Reasonable Probability That This Court Will Grant Certiorari Or A Fair Prospect For Reversal In The Event Certiorari Is Granted

Spire's forthcoming petition, as depicted in its application for stay, will not meet the criteria for certiorari review, and, if the petition were granted, there is no fair prospect that this Court would reverse the remedy disposition below. A stay is therefore unwarranted for these reasons, too.

A. The D.C. Circuit's Remedy Disposition Does Not Warrant Further Review

Vacatur of unlawful agency action is universally recognized as "the normal remedy." Ex. A at 5. *See* Tathum, *Unusual Remedy*, *supra* page 5, at 50; *Fed. Power Comm'n v. Transcon. Gas Pipe Line Co.*, 423 U.S. 326, 331 (1976) ("If the decision of the agency [under the NGA] 'is not sustainable on the administrative record made, then the … decision must be vacated.'" (quotation omitted)). The APA, after all, directs that agency action "held unlawful" be "set aside." 5 U.S.C. § 706(2).

Still, "the case-specific equitable discretion that courts possess in fashioning appropriate relief," which "takes into account the particular facts and circumstances of the dispute before the court," Appl. 20, has led the D.C. Circuit and, to a lesser degree, other courts to depart from this statutory default and to remand but not vacate unlawful agency action in unusual circumstances. Most prominently, courts decline to vacate unlawful agency action when that remedy runs counter to the interest of the prevailing party. *E.g.*, *EDF v. U.S. E.P.A.*, 898 F.2d 183, 190 (D.C. Cir. 1990). That courts retain discretion not to vacate in that situation makes good sense. It ensures that parties who benefit from unlawful agency action, but who would benefit *more* from lawful agency action, are not worse off for having successfully challenged the unlawfulness.

Less frequently, courts remand without vacating unlawful agency action notwithstanding the prevailing party's preference for vacatur. Outside the D.C. Circuit, the courts of appeals have used this remedy exceedingly rarely, and in those rare instances, courts invariably have looked to

the D.C. Circuit's precedents and, in particular, its *Allied-Signal* decision. The circuits are in accord on the standard for remand without vacatur, and the different results they reach in different cases are the natural result of applying a uniform standard to different agency actions and factual settings.

1. *Allied-Signal*'s "influential framework for assessing whether to order remand without vacation," Charles A. Wright et al., 33 Federal Practice & Procedure § 8382 (2d ed. 2018), applies a modest gloss to the fundamental, but necessarily elastic, principle that a court will consider all relevant circumstances before ordering an extraordinary remedy. Judge Williams's opinion for the court observed that "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150–51 (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The two factors are "analogous," *Int'l Union*, 920 F.2d at 967, to the factors that courts use when deciding whether to stay a decision pending further judicial review: The first (gravity of agency error) recalls the "likelihood of success" criterion, and the second (disruptive effects) recalls the other criteria.

Allied-Signal did not reinvent the wheel, but the lower courts have found its framework for decision useful and have widely adopted it, especially in cases, like this one, reviewed under APA standards. Even those courts of appeals that have yet to "formally embrace[ ] the *Allied-Signal* … approach," *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018), still consider what outcome would result under it, *see ibid.* In fact, *Allied Signal* and its D.C. Circuit progeny are cited approvingly by each circuit whose decisions Spire highlights in its futile quest to unearth a conflict. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016); *Natural Resources Def. Council v. U.S. E.P.A.*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior*

Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015); *California Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & South West Servs., Inc. v. U.S. E.P.A.*, 220 F.3d 683, 692 (5th Cir. 2000). Spire cites no authority critiquing the *Allied-Signal* framework as cramped or misguided.

Relying on a sample size of two (one of which is the decision below), Spire asserts that the D.C. Circuit pays *Allied-Signal* lip service but actually applies "a strong presumption in favor of vacatur—especially in challenges to operational oil and gas pipelines." Appl. 15. That is obviously false, so much so that Spire was content to begin and end its remedy argument in the D.C. Circuit by quoting *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), in which that court remanded without vacating a certificate that authorized operation of a natural gas pipeline. ECF No. 1871040 at 42; *see also, e.g.*, *Vecinos para el Beinestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (remanding without vacating certificates authorizing pipeline construction).

Allied-Signal's only real detractors, who have yet to garner a majority on any appellate court, cannot help Spire because they maintain vacatur is *mandatory* if an agency action is held unlawful, at least in APA cases. *Milk Train*, 310 F.3d at 757 (Sentelle, J., dissenting); *Checkosky v. SEC*, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., separate opinion); *see also In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring). Those critics invoke the statutory language providing that "[t]he reviewing court *shall* … hold unlawful *and set aside* agency action" that fails the APA standard of review. 5 U.S.C. § 706(2) (emphases added). The question whether the APA *compels* vacatur of unlawful agency action could not properly be the subject of Spire's forthcoming petition, of course, because its resolution would not affect the disposition of this case.

2. Spire's ostensibly "conflicting" decisions do not attest to "disarray," Appl. 18, but are precisely what is to be expected by application of a uniform standard in a wide array of factual settings. For instance, in *Central & South West Services, Inc. v. U.S. E.P.A.*, 220 F.3d 683 (5th Cir. 2000), the Fifth Circuit declined to vacate a rule an agency had issued without responding to fifteen public comments. Quoting *Allied-Signal* and other D.C. Circuit precedent approvingly, the court found that the agency "m[ight] well be able to justify its decision" when it got around to responding to the comments on remand, and that vacatur "would be disruptive" insofar as the rule "applie[d] to other members of the regulated community," *id.* at 692. Here, in contrast, the panel found it "not at all clear" that FERC could fix "serious deficiencies," and only that vacatur "may" have caused "some disruption." Ex. A at 36–37. Moreover, the critical fact in *Central & South West*—presence of other regulated parties whom vacatur would affect—is absent in this petition for review of an adjudication of a single regulated party's certificate. *Cf. Prometheus*, 824 F.3d at 52 (opting against "mass vacatur" of five agency rules that "would invite chaos" throughout "the broadcast industry").

The Fifth Circuit subsequently declined to vacate a "rule prohibiting the manufacture and sale of any children's toy or child care article" containing high concentrations of chemicals that "affect the male reproductive system and … and normal [child] development." *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 372–73 (5th Cir. 2021); *see also id.* at 389 n.186 (citing *Allied-Signal*, 988 F.2d at 150–51). The rule was deficient insofar as the agency had neither thoroughly considered its cost nor provided adequate opportunity for comment, but there remained "at least a serious possibility" that "the agency w[ould] be able to substantiate" it on remand. *Id.* at 389. The D.C. Circuit is similarly disinclined to vacate marginally defective agency rules that protect public health. *E.g.*, *Davis Cty. Solid Waste Mgmt. v. U.S. E.P.A.*, 108 F.3d 1454, 1458 (D.C. Cir. 1997). The Fifth Circuit's dictum that "only in rare circumstances is remand

for agency reconsideration not the appropriate solution," *Texas Ass'n of Mfrs.*, 989 F.3d at 389 (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238–39 (5th Cir. 2007)), must be read with an eye to the quoted case, in which the court *upheld* vacatur of an agency's unlawful permit but refused to dictate its procedures on remand, *O'Reilly*, 477 F.3d at 239–40 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978)). This panel did not dictate or otherwise interfere with FERC's remand proceeding.

To highlight a supposed conflict with *Allied-Signal*, Spire quotes the Third Circuit quoting *Allied-Signal* for the proposition that an agency's ability to rehabilitate its decision on remand weighs against vacatur. Appl. 16 (quoting *Prometheus*, 824 F.3d at 52 (quoting *Allied-Signal*, 988 F.2d at 151)). The Third Circuit's decision not to vacate agency actions when the court "ha[d] no reason to suspect that" the agency could not "justify at least some" portion thereof, *Prometheus*, 824 F.3d at 52, is altogether consistent with *Allied-Signal* and the panel decision here.

In *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989 (9th Cir. 2012), the Ninth Circuit "balance[d] the[ ] errors" in an agency's order "against the consequences of such a remedy," before leaving in place an action whose vacatur "would … be economically disastrous," would likely require a legislative fix, and could compromise "a much needed power plant," *id.* at 993–94. With no basis in the record to find that *this* pipeline was needed at all by Spire Missouri's customers, let alone "much needed," the D.C. Circuit reasonably arrived at a different conclusion.

The Eleventh Circuit's statement that remanding without vacatur is appropriate "where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process," *Black Warrior Riverkeeper*, 781 F.3d at 1290, is also consistent with the panel decision below. In this case, "the obvious deficits" in FERC's reasoning, Ex. A at 31, signaled a serious risk of "incurable taint" in the Commission's decision.

Lastly, the pair of First Circuit opinions in *Town of Weymouth v. Massachusetts Department of Environmental Protection* track the panel's approach and, indeed, show why Spire is not eligible for relief. The First Circuit held unlawful a permit issued by a state agency to a natural gas company for construction of a new pipeline. 961 F.3d 34 (1st Cir. 2020). The court's initial judgment vacated the permit on the understanding that agency proceedings on remand "w[ould] be expedited" and that the existing administrative record would be "insufficient" to cure the agency's errors. *Id.* at 58. After both predictions proved incorrect, the court revised its judgment to remand the permit without vacatur, 973 F.3d 143 (1st Cir. 2020), without calling into question the correctness of its original remedy. *See also Cent. Me. Power*, 252 F.3d at 48 (declining to vacate unlawful orders where the Commission "warrant[ed]" to the court that they were "needed now to assure adequate energy supplies"). In contrast, FERC here acted promptly to alleviate disruption that vacatur might have caused, and there was no subsequent "material development," *Weymouth*, 973 F.3d at 146, showing that the Commission's underlying errors were easier to fix than the panel had believed.

3. As there is no conflict among the circuits, and the legal standard the D.C. Circuit applied is generally accepted and not controversial in any respect pertinent to Spire's petition, Spire will be left to argue that the panel erred in its selection of remedy. There is no reasonable probability that such a petition will corral the requisite four votes. *Cf.* this Court's Rule 10. In fact, the question Spire intends to pose—"whether remand without vacatur is the appropriate remedy where invalid agency action could plausibly be corrected on remand and where vacatur *would* have *serious* disruptive consequences," Appl. 2 (emphases added)—is not presented here. The panel found, based on the evidence before it, merely that vacatur of FERC's order "may" have had "some disrupti[ve]" effects. Ex. A at 36. Spire casts aspersions on that finding based on evidence not before the panel when judgment was entered. *E.g.*, Appl. 26. Apart from the fact that belatedly proffered evidence

of events that predated judgment is not a proper basis to reverse, *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (discussing Fed. R. Civ. P. 59(e)), any quarrel over the panel's factual finding regarding the disruptive consequences of vacatur would not warrant this Court's review.

Even if it would, there is a distinct possibility that FERC, building upon the emergency certificate it has already issued, will issue Spire a new temporary certificate that allows its pipeline to operate through the coming winter, and perhaps until the conclusion of the remand proceeding—and that moots Spire's yet-to-materialize petition before plenary review can ever be had in this Court.

B. The D.C. Circuit's Remedy Disposition Was Correct

This D.C. Circuit panel got the remedy right. First, the panel correctly gauged the slim odds that FERC would be able to rely on the record as it existed to reissue Spire an identical permanent operating certificate on remand. Spire no longer disputes that the Commission's order granting the original certificate had two independent and serious flaws: FERC's blinkered reliance on a single, private precedent agreement with a prospective pipeline operator's corporate affiliate to establish market need for a new pipeline, and the Commission's *ipse dixit* "analysis" weighing the pipeline's benefits against its adverse effects.

Market need is a prerequisite for issuing a certificate, Ex. A at 3, and the "evidence of self-dealing," *id.* at 5, in the existing administrative record must be countered with evidence not yet adduced (e.g., "a market study," *id.* at 33) to show need. Spire cherry-picks the panel's observation that "it is not enough" that evidence of the pipeline's benefits "may exist within the record," *id.* at 35, to suggest that FERC merely "overlook[ed] record evidence," Appl. 20. The panel did not find that evidence of benefits *did* exist, only that it *might* exist. Regardless, the existence of project benefits is irrelevant to the Commission's inquiry where, as a threshold matter, there is no showing of market need. Ex. A at 3. And, even if project benefits were demonstrated, FERC would have to

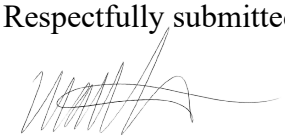
find that they outweighed "adverse impacts on 'existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *Ibid.* The profound problems with FERC's order, detailed in the panel's careful (and unchallenged) merits analysis, amply support the panel's finding that the Commission's permanent certificate will be difficult to rehabilitate on this record.

The panel also was "attentive to the potentially disruptive consequences of vacatur." Appl. 21. It "underst[oo]d" and considered the only consequence with which it was presented: disruption to authorized operation of a pipeline capable of transporting natural gas. Ex. A at 36. Spire argued, and still argues, that the mere fact that a pipeline is "operational" is dispositive evidence that its certificate should not be vacated. That a pipeline is "operational," however, simply means that it is "authoriz[ed]" to transport natural gas, 15 U.S.C. § 717f(e), not that it *will*, or *must*, do so to meet customer needs. *Cf.* Ex. A at 10 (observing that Spire Missouri "declined to subscribe to proposals for new natural gas pipelines" that "did not make operational and economic sense"). *This* pipeline did not relieve unmet demand or reduce consumer costs, *id.* at 30, and the panel could not discern from the merits briefing or administrative record whether any benefit the pipeline *did* purport to confer was "real or illusory," *id.* at 35. In short, "[t]he record before [the panel] d[id] not appear to speak to the effects of an interim change" in operating authority for Spire STL's pipeline. *Int'l Union*, 920 F.2d at 967. The panel did not ignore that change, nor did it commit reversible error when it set aside FERC's unlawful action.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted,



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