

No. 21-848

IN THE
Supreme Court of the United States

SPIRE MISSOURI INC.; SPIRE STL PIPELINE LLC,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For
The District Of Columbia Circuit**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8, petitioners Spire Missouri Inc. and Spire STL Pipeline LLC (“Spire STL”) file this supplemental brief to alert the Court to a pertinent development that occurred after petitioners filed their petition for a writ of certiorari and to explain why that development does not diminish the need for this Court’s review.

1. On December 3, 2021, petitioners filed a petition for a writ of certiorari seeking review of the question whether remand without vacatur is the appropriate remedy where the record indicates that an agency’s inadequately reasoned decision could be corrected on remand and vacatur of the decision could result in serious, and potentially life-threatening, disruptive consequences.

As the petition describes, the Federal Energy Regulatory Commission (“FERC”) issued a certificate of public convenience and necessity (the “Permanent Certificate Order”) in 2018 authorizing Spire STL to construct and operate the Spire STL Pipeline (the “Project”). Pet. 6–7. The Permanent Certificate Order required Spire STL to construct and put the Project into service within two years. *Id.* at 7. In accordance with that FERC-imposed deadline, Spire STL completed construction of the Project in 2019, and it now serves as a critical source of natural gas for the St. Louis region. *Id.*

Nearly two years after the Project went into service, the D.C. Circuit held in the decision below that FERC had not sufficiently justified its decision to issue the Permanent Certificate Order. Pet. App. 31a–

38a. Rather than leaving that certificate in place during the proceedings on remand—in which FERC will have the opportunity to remedy the gaps in reasoning identified by the D.C. Circuit—the court vacated the Permanent Certificate Order. Pet. App. 39a–40a. In so doing, the court invalidated the Project’s operating authority and created a substantial risk that hundreds of thousands of St. Louis-area households and businesses would lose natural-gas service during the winter months.

To avert that crisis, Spire STL filed an application with FERC in July 2021 for a temporary certificate pending completion of remand proceedings. Pet. 11. FERC did not set a firm timetable for action on that application, but, on September 14, 2021, *sua sponte* granted Spire STL an emergency temporary certificate, which was scheduled to expire on December 13, 2021. *Id.* at 11–12.

When petitioners filed their petition for a writ of certiorari on December 3, the Project was continuing to operate pursuant to the *sua sponte* temporary certificate. Given the rapidly approaching December 13 expiration of the Project’s temporary operating authority, petitioners also submitted a letter to this Court on December 3 renewing their previously filed application for a stay of the D.C. Circuit’s mandate. *See Spire Mo. Inc. v. Envtl. Def. Fund*, No. 21A56 (Oct. 15, 2021) (Roberts, C.J., in chambers) (denying initial stay application).

Later that day, FERC granted Spire STL’s application for a temporary certificate pending completion of remand proceedings, finding that “an emergency exists” because “the record demonstrates that without a temporary certificate, [Spire STL’s] customer, Spire

Missouri, will experience a loss of gas supply potentially impacting hundreds of thousands of homes and businesses during the winter heating season.” Order Issuing Temporary Certificate, Spire STL Pipeline LLC, 177 FERC ¶ 61,147, at 20–21 ¶ 47 (Dec. 3, 2021) (“December 3 Temporary Certificate Order”). This new temporary certificate “will be effective until the Commission acts on remand on Spire’s pending [permanent] certificate application,” *id.* at 30, a proceeding that is expected to last at least until the fall of 2022, *see* Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Spire STL Pipeline Project, at 5, Spire STL Pipeline LLC, No. CP17-40-007 (Dec. 15, 2021) (setting October 7, 2022 as the deadline for issuing a supplemental Environmental Impact Statement for the Project).*

The following business day, Spire STL accepted this new temporary certificate, and petitioners withdrew their renewed application for a stay of the D.C. Circuit’s mandate.

2. For at least two independent reasons, FERC’s order granting a temporary certificate pending completion of proceedings on remand neither moots this case nor diminishes the need for this Court’s review of the exceptionally important question presented in the petition.

* Although both the temporary and permanent certificates are certificates of public convenience and necessity, they were issued pursuant to different sources of authority. FERC issued the Permanent Certificate Order pursuant to Section 7(c)(1)(A) of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A), and issued the December 3 Temporary Certificate Order pursuant to Section 7(c)(1)(B), *id.* § 717f(c)(1)(B).

First, the December 3 Temporary Certificate Order is subject to the possibility of rehearing by FERC and judicial review by a circuit court of appeals. The Natural Gas Act and FERC regulations provide that any party to a FERC proceeding aggrieved by a final FERC order may seek rehearing from FERC within 30 days of issuance of the order. 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b). Once FERC has acted on the request for rehearing—or if it fails to act on the request within 30 days—an aggrieved party may seek judicial review of the order. 15 U.S.C. § 717r(b).

Several landowners have already sought rehearing of the December 3 Temporary Certificate Order and asked FERC to declare that the order does not provide Spire STL with the eminent-domain authority on which it relies to continue operating the Project. *See* Request for Rehearing of Intervenors Scott Turman et al., Spire STL Pipeline LLC, No. CP17-40-007 (filed Dec. 17, 2021) (“Landowners’ Rehearing Request”). And the period for seeking rehearing will not expire until January 3, 2022. There remain numerous other parties—including environmental groups that intervened to oppose Spire STL’s application for a temporary certificate and to urge FERC to impose conditions on any such certificate, *see* December 3 Temporary Certificate Order, 177 FERC ¶ 61,147, at 6–7 ¶¶ 15–16 & nn.27–28; *id.* at 30—that may also seek rehearing by the January 3 deadline.

Accordingly, at this juncture, there is no guarantee that the December 3 Temporary Certificate Order will remain in place and afford Spire STL authority to continue operating the Project through the duration of remand proceedings. Although Spire STL is confident that the December 3 Temporary Certificate Or-

der was validly issued, it remains possible that the order will be set aside by FERC on rehearing or by a court on judicial review. In light of that possibility, petitioners' petition for a writ of certiorari seeking reinstatement of the Permanent Certificate Order pending the completion of remand proceedings continues to present a live issue that could afford meaningful relief to petitioners.

Second, there is an ongoing dispute between Spire STL and a number of landowners over whether a temporary certificate provides a certificate holder with the eminent-domain authority needed to operate a natural-gas pipeline. Before FERC and in ongoing district-court condemnation proceedings, several landowners opposed to the Project have argued that only a permanent certificate provides eminent-domain authority to a certificate holder. This issue is also the subject of the landowners' recently filed rehearing request. *See* Landowners' Rehearing Request, at 1. Although Spire STL will not need to pursue *new* eminent-domain actions now that the Project has been built, in the absence of eminent-domain authority under the December 3 Temporary Certificate Order, Spire STL could be required to cease operating the Project and could face trespass liability to affected landowners whose land was the subject of eminent-domain actions. *See id.* at 2 (claiming "the right to seek damages for Spire's continued trespass").

Neither FERC nor any court has yet agreed with the landowners' position on the eminent-domain issue, but the question remains contested and the subject of ongoing litigation. In an order denying rehearing of Spire STL's emergency temporary certificate, FERC declined to decide the question, concluding that it "is an issue better resolved by the courts than the

Commission.” Order Addressing Arguments Raised on Rehearing, Granting Clarification, and Denying Stay, Spire STL Pipeline LLC, 177 FERC ¶ 61,114, at 3–6 ¶¶ 9–11 (Nov. 18, 2021); *see also* December 3 Temporary Certificate Order, 177 FERC ¶ 61,147, at 29 ¶ 70 (same). Thus far, district courts in condemnation proceedings in Illinois and Missouri have agreed with Spire STL by rejecting the landowners’ arguments that a temporary certificate does not provide a certificate holder with eminent-domain authority. *See Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, Dkt. 216, at 5–7 (C.D. Ill. Oct. 28, 2021); *Spire STL Pipeline LLC v. 3.31 Acres of Land*, No. 18-cv-1327, Dkt. 694, at 2–4 (E.D. Mo. Nov. 23, 2021). Spire STL believes that those courts were correct and that the December 3 Temporary Certificate Order confers the right of eminent domain under Section 7(h) of the Natural Gas Act. 15 U.S.C. § 717f(h). Nevertheless, those condemnation proceedings remain ongoing, and it is possible that the landowners will seek to raise the eminent-domain issue on appeal, either in one of these condemnation proceedings or from a denial of rehearing by FERC.

In the event a landowner is successful on that issue, the restoration of Spire STL’s Permanent Certificate Order during proceedings on remand—which petitioners are seeking through their petition for a writ of certiorari—would ensure that the Project could continue to operate until FERC has completed its remand proceedings and determined whether to grant Spire STL a new permanent certificate, and would prevent the loss of natural-gas supply that FERC found would occur during the winter heating season without the Project.

* * *

Both the possibility of further review of the December 3 Temporary Certificate Order and the ongoing dispute over whether the new temporary certificate grants Spire STL eminent-domain authority necessary to continue the Project's current operations make clear that this case presents a live controversy. If the D.C. Circuit had remanded without vacatur—as petitioners contend it should have in their petition for a writ of certiorari—Spire STL would not be facing the risk of losing its FERC operating authority during remand proceedings (as a result of rehearing or judicial review of the December 3 Temporary Certificate Order) or its eminent-domain authority (as a result of a landowner successfully establishing that a temporary certificate does not grant such authority). These risks, and their potentially grave impact on residents and businesses in the St. Louis area, are direct consequences of the D.C. Circuit's improvident decision to vacate the Permanent Certificate Order, contrary to the practice of other courts of appeals. Accordingly, for all of the reasons set forth in the petition for a writ of certiorari, this Court's review remains warranted.

CONCLUSION

The Court should grant the petition for a writ of certiorari or, in the alternative, hold this petition pending disposition of the petition for a writ of certiorari in *Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-560.

Respectfully submitted.

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