

No. 21A-\_\_

IN THE  
**Supreme Court of the United States**

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SPIRE MISSOURI INC.; SPIRE STL PIPELINE LLC,  
*Applicants,*

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,  
*Respondents.*

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APPLICATION FOR A STAY PENDING THE FILING AND  
DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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## **PARTIES TO THE PROCEEDING**

In the consolidated proceedings below, the Environmental Defense Fund was petitioner in Case No. 20-1016, and Juli Steck was petitioner in Case No. 20-1017. The Federal Energy Regulatory Commission was respondent, and Spire STL Pipeline LLC and Spire Missouri Inc. were intervenors in support of respondent.

## **RELATED PROCEEDINGS**

There are no directly related proceedings as defined in Rule 14.1 of this Court.

## **RULE 29.6 STATEMENT**

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

Spire Missouri Inc. is a wholly-owned subsidiary of Spire Inc.

Spire STL Pipeline LLC (“Spire STL”) is a limited liability company organized and existing under the laws of the State of Missouri. Spire STL’s sole member is Spire Midstream LLC, a Missouri limited liability company, which in turn is wholly owned by Spire Resources LLC. Spire Resources LLC’s sole member is Spire Inc.

Spire Inc. (NYSE MKT: SR) is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 12.0% of Spire Inc.’s common stock, and The Vanguard Group, Inc. owns 10.56% of Spire Inc.’s common stock.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. §§ 1651 and 2101(f), Applicants Spire Missouri Inc. (“Spire Missouri”) and Spire STL Pipeline LLC (“Spire STL,” collectively “Applicants”) respectfully request that this Court stay the issuance of the D.C. Circuit’s mandate pending the filing and disposition of a timely petition for a writ of certiorari.

In this case, the D.C. Circuit vacated an order of the Federal Energy Regulatory Commission (“FERC”) granting a certificate of public convenience and necessity (the “Permanent Certificate Order”) to Spire STL to construct and operate the Spire STL Pipeline (the “Project”), a 65-mile natural-gas pipeline that serves as a critical source of



natural gas for hundreds of thousands of homes and businesses in and around St. Louis, Missouri. Good cause exists for a stay of the D.C. Circuit's mandate because this case presents a substantial question as to 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—a frequently recurring, fundamental question of administrative law that has divided the lower courts and that this Court has never addressed. Applicants are in need of relief from this Court because the issuance of the D.C. Circuit's mandate will vacate the Project's Permanent Certificate Order, leaving the Project with only a time-limited emergency Temporary Certificate Order that FERC issued after the D.C. Circuit denied rehearing. If the Temporary Certificate Order expires after the D.C. Circuit's mandate has issued—it is currently scheduled to expire on December 13, but FERC expressly reserved its right to shorten or revoke the certificate—the expiration will require (in the absence of some alternative operational authorization from FERC) the immediate shutdown of the Project. Shutting down the Project under those circumstances could potentially lead to widespread, prolonged, and life-threatening natural-gas service disruptions for residents and businesses in the St. Louis area before this Court has an opportunity to rule on Applicants' forthcoming petition for a writ of certiorari.

Because the D.C. Circuit's mandate is scheduled to issue on October 8, 2021, Applicants respectfully request a ruling on this Application in advance of that date.

## I. INTRODUCTION

For the second time this year, the D.C. Circuit has invalidated agency approval for an operational energy pipeline based on a supposed error in reasoning that the agency could correct on remand and declined to leave the approval in place pending further agency proceedings even though vacatur could have far-reaching disruptive consequences. *See Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (attached hereto as Ex. A); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (vacating easement for Dakota Access Pipeline because the agency failed to prepare an environmental impact statement), *pet. for cert. filed*, No. 21-\_\_\_\_ (Sept. 20, 2021).

In so doing, the D.C. Circuit deepened an existing split in the circuits regarding whether remand without vacatur is the appropriate remedy where an agency could correct its errors on remand and where vacatur would have disruptive consequences. According to the D.C. Circuit's decision, vacatur is required where it is "not at all clear" and "far from certain" that an agency could rehabilitate its reasoning on remand, even if vacatur would undisputedly result in at least "some disruption." Ex. A at 36-37. In the D.C. Circuit's view, the disruptive consequences of shutting down an operational pipeline had no bearing on the appropriate remedy because the court "identified serious deficiencies in the [Permanent] Certificate Order." *Id.* at 36. That holding is directly at odds with the decisions of other circuits holding that remand without vacatur is the *presumptive* remedy in administrative-law cases and should be granted whenever it is "conceivable" the agency "can, if given the opportunity, create a supportable" ruling and vacatur risks

“disruptive consequences.” *Prometheus Radio Project v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016); *see also Tex. Ass’n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021) (“[o]nly in rare circumstances is remand for agency reconsideration not the appropriate solution”) (alteration in original; internal quotation marks omitted).

Although the D.C. Circuit’s decision to vacate the Project’s Permanent Certificate Order conflicts with the great weight of lower-court authority, even those circuits that would have granted remand without vacatur in this case cannot agree on the appropriate standard to apply in determining whether remand without vacatur is warranted. *Compare Tex. Ass’n of Mfrs.*, 989 F.3d at 389 (“[r]emand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so”), *with Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (“when equity demands, the regulation can be left in place while the agency follows the necessary procedures”). This case presents the Court with an ideal opportunity to resolve that issue, which is arguably the most significant question of administrative law unaddressed by this Court in the 75 years since the Administrative Procedure Act (“APA”) became law. Accordingly, there is, at a minimum, a reasonable probability that the Court will grant review in this case. There is also at least a fair prospect that the Court will conclude, on the merits, that the D.C. Circuit should have granted remand without vacatur because FERC could plausibly rehabilitate its reasoning on remand and vacatur could lead to far-reaching disruption to the supply of natural gas in the St. Louis area.

The remaining equitable considerations also support a stay. The issuance of the D.C. Circuit’s mandate will vacate the Permanent Certificate Order for the Project; if the Project’s Temporary Certificate Order expires on schedule on December 13 (or is shortened or revoked) without a new grant of operating authorization from FERC, Spire STL will be required immediately to shut down that essential natural-gas pipeline. As Applicants established before the D.C. Circuit, the Project has already produced tremendous benefits for the St. Louis area, including by ensuring the availability of a reliable, reasonably priced natural-gas supply during Winter Storm Uri, a severe winter weather event in February 2021 that subjected other regions, including Texas and Oklahoma, to widespread energy shortages and extreme price spikes. Shutting down the Project would create a serious risk of up to 400,000 St. Louis-area homes and businesses losing gas service for prolonged periods of time during the freezing temperatures of the upcoming winter.

Respondents have never disputed the potentially dire consequences of vacatur, and those consequences have been confirmed by the staff of the Missouri Public Service Commission—the primary regulator of the State’s gas utilities—which found that “Spire Missouri cannot reasonably reconfigure its system to replace or restore former capacity, or replace reliance on Spire STL for transportation before or during the Winter of 2021-2022,” and that “peak day service interruptions could be expected without access to [the Project’s] capacity.” Staff’s Investigation of Spire STL Pipeline’s Application at FERC for a Temporary Certificate to Operate at 3, 7, No. GO-2022-0022 (Mo. Pub. Serv. Comm’n Aug. 16, 2021), <https://tinyurl.com/5rjr84ew> (“Staff Report”).

A stay is warranted to afford this Court an opportunity to consider Applicants’ forthcoming petition for a writ of certiorari before vacatur of the Project’s Permanent Certificate Order and the expiration or revocation of its Temporary Certificate Order imperil the gas supply to hundreds of thousands of St. Louis-area homes and businesses this winter, thus bringing about the potentially catastrophic and fatal consequences that remand without vacatur is designed to avoid.

## **II. OPINIONS BELOW**

The D.C. Circuit’s June 22, 2021 opinion is published at 2 F.4th 953. *See* Ex. A. Its September 7, 2021 orders denying panel rehearing and rehearing en banc are unpublished. *See* Exs. B & C. Its October 1, 2021 order denying Applicants’ motion to stay the mandate is likewise unpublished. *See* Ex. D. The FERC orders on review in the D.C. Circuit were published at 164 FERC ¶ 61,085 (2018 WL 3744001), 169 FERC ¶ 61,074 (2019 WL 5556590), and 169 FERC ¶ 61,134 (2019 WL 6242969). *See* Exs. E, F & G. The FERC order granting an emergency temporary certificate is published at 176 FERC ¶ 61,160 (2021 WL 4192131). *See* Ex. H.

## **III. STATEMENT OF FACTS**

1. For decades, St. Louis was heavily dependent on natural gas from Texas and surrounding States. JA586. To reach St. Louis, most of this gas had to travel hundreds of miles through a single pipeline that originated in Texas and traversed the New Madrid Fault, “the most active seismic area in the United States east of the Rocky Mountains,” which has produced significant earthquakes in the past and has a “high” risk of doing so again “in the near future.” JA109-111, 156, 300-02, 381, 933.

In the last decade, however, widespread hydraulic fracturing (or fracking) has significantly changed the natural-gas market, opening up new sources of natural gas from Appalachia. JA293. In 2015, the formerly west-to-east Rockies Express (“REX”) pipeline—located just 65 miles from St. Louis—was modified to make it bidirectional, allowing the pipeline to bring westward more than 2 million Dekatherms (“Dth”) a day of natural gas from Appalachia. JA293-94, 383; *see* Ex. A at 10.

These developments prompted Spire Missouri—St. Louis’s local gas utility—to explore the feasibility of accessing this new source of natural gas. *See* JA293. Tapping into this source was attractive to Spire Missouri because it would increase the reliability and diversity of Spire Missouri’s natural-gas supply, reducing Spire Missouri’s vulnerability to a seismic event affecting the older pipeline originating in Texas, and because it would ensure Spire Missouri’s access to an affordable gas supply in the face of growing demand for gas sourced from Texas and the Gulf Coast. JA109, 297-300. It would also allow Spire Missouri to retire the obsolete propane-peaking facilities that Spire Missouri used to satisfy periods of peak demand, the continued operation of which posed environmental and operational concerns. JA110, 136-37, 295-96, 830-32. These benefits would help Spire Missouri to fulfill its duty as a regulated natural-gas utility to provide its customers with safe and adequate service at just and reasonable rates. JA134.

After unsuccessful discussions between Spire Missouri and other pipeline developers, Spire STL proposed to construct and operate the Project, a pipeline that would provide Spire Missouri with access to natural-gas supplies from Appalachia while meeting Spire Missouri’s requirements with respect to cost, operational date, and

environmental conditions. JA292-93, 822. Spire STL then entered into a “precedent agreement” to provide Spire Missouri 87.5% of the Project’s 400,000 Dth/day capacity for an initial term of twenty years. JA90; Ex. A at 10.

2. To begin construction, Spire STL was required to obtain a certificate of public convenience and necessity from FERC. *See* JA87-130. As evidence that the Project was needed and would serve the public interest, Spire STL cited its long-term precedent agreement with Spire Missouri. JA109. It also explained to FERC that the Project would provide several additional benefits by diversifying the natural-gas supply to Spire Missouri and reducing its reliance on a single, vulnerable source of gas from Texas and the Gulf Coast region.

In particular, the Project would connect St. Louis to the REX pipeline, “one of the newest and largest pipeline systems in the United States” with access to substantial natural-gas supplies from “the Rocky Mountains all the way to the Appalachian Basin.” JA109. In so doing, the Project would “enhance overall natural gas supply security and affordability in the region” by making St. Louis less reliant on the “single pipeline” that then provided 87 percent of the “firm”—*i.e.*, contractually locked-in—“pipeline transportation capacity” to the area. JA109. It would also “eliminate [Spire Missouri’s] current reliance on propane facilities” during periods of peak demand. JA110. And it would put Spire Missouri and other shippers using the Project “in a substantially better position to protect their system operations” “[i]n the event of a planned or unplanned service outage on the current pipelines delivering into the region,” such as one caused by an earthquake along the New Madrid Fault. JA110-11. Finally, the Project would

“provide natural gas transportation infrastructure” that would “support potential growth in demand for natural gas in the industrial and power generation sectors,” should such growth occur. JA111.

In August 2018, FERC concluded that “Spire [STL] has sufficiently demonstrated that the [P]roject is needed” and therefore granted Spire STL the Permanent Certificate Order authorizing construction and operation of the Project. Ex. E ¶ 73. The Permanent Certificate Order required the Project to be put into service within two years. Ex. E.

Environmental Defense Fund (“EDF”) and Juli Steck sought rehearing, which FERC denied more than a year later. Ex. A at 17-18. During the intervening period, Spire STL spent nearly \$300 million to construct the Project, which has been in operation since 2019. *Id.*

3. After FERC denied rehearing, EDF and Steck sought review in the D.C. Circuit, which issued an opinion vacating the Permanent Certificate Order on June 22, 2021. *See* Ex. A.<sup>1</sup>

The D.C. Circuit held that FERC’s decision to grant the Permanent Certificate Order to Spire STL was arbitrary and capricious. Ex. A at 29-36. The court acknowledged that, “[u]nder established law, precedent agreements are ‘always . . . important evidence of demand for a project’” and can “demonstrate both market need and benefits that outweigh adverse effects of a new pipeline.” *Id.* at 29 (citations omitted;

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<sup>1</sup> The D.C. Circuit determined that Steck did not have standing to pursue her claims against FERC, but that EDF had associational standing to sue on behalf of four of its members. Ex. A at 20-26.



ellipses in original). But the court deemed it arbitrary and capricious for FERC to have relied on the precedent agreement between Spire STL and Spire Missouri because “there was a single precedent agreement for the pipeline” (even though the agreement was for nearly 90% of the Project’s capacity for 20 years); “that precedent agreement was with an affiliated shipper” (even though the D.C. Circuit had previously declined to distinguish between precedent agreements between affiliates and those between unaffiliated parties, *see City of Oberlin v. FERC*, 937 F.3d 599, 605-06 (D.C. Cir. 2019); *Appalachian Voices v. FERC*, 2019 WL 847199, at \*1 (D.C. Cir. Feb. 19, 2019)); and “projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future” and FERC had not made a finding that “the construction of the proposed pipeline would result in cost savings” (even though Spire STL had not identified these considerations as the reasons for the Project and no statute or regulation required either increasing demand or lower prices). *Id.* at 10-11, 35.

Despite identifying these purported gaps in FERC’s reasoning, the D.C. Circuit did not conclude that the record evidence was insufficient to support FERC’s determination that the Permanent Certificate Order was justified or foreclose the possibility that FERC would be able to cure its supposed errors on remand. *See* Ex. A at 35 (“[I]t is not enough that such evidence may exist within the record; the question is whether the Commission’s decisionmaking, as reflected in its orders, will allow us to conclude that the Commission has sufficiently evaluated that evidence in reaching a reasoned and principled decision.”).

With respect to the remedy, the D.C. Circuit acknowledged its longstanding precedent authorizing it to remand without vacatur. Ex. A at 36 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). The court nevertheless opted to vacate the Permanent Certificate Order because it claimed to have “identified serious deficiencies” in FERC’s action, and it was “far from certain” and “not at all clear to [the court] at this juncture” that FERC could rehabilitate its reasoning on remand. *Id.* at 36-37. In so ruling, the D.C. Circuit recognized that “the pipeline is operational” and that “there may be some disruption” from vacatur but gave no weight to the disruptive effects of vacatur in light of the supposed deficiencies in FERC’s analysis. *Id.* at 36. Citing the reasoning in its earlier opinion vacating authorization for the Dakota Access Pipeline, the court also expressed concern that “remanding without vacatur under these circumstances would give [FERC] incentive to allow ‘build[ing] first and conduct[ing] comprehensive reviews later.’” *Id.* at 37 (second and third alterations in original) (quoting *Standing Rock Sioux Tribe*, 985 F.3d at 1052).

4. Because vacatur of the Permanent Certificate Order would have required Spire STL to discontinue operation of the Project, Spire STL promptly sought emergency relief from FERC by submitting an application seeking temporary operating authority. FERC is actively considering that application and has set a deadline of October 5 for interested parties to submit reply comments regarding the application. There is no firm timetable, however, for FERC to issue a decision on Spire STL’s application.

5. Applicants also sought rehearing or rehearing en banc from the D.C. Circuit, requesting that the court amend its opinion to order remand without vacatur. Applicants

explained that vacatur would cause significant disruptions because the Project's capacity cannot be replaced in advance of this winter, and submitted an extensive declaration documenting the serious risks that vacatur would pose to the hundreds of thousands of households and businesses in the St. Louis area that are dependent on the Project for their natural-gas supply.

After calling for a response from EDF and Steck, the D.C. Circuit denied rehearing and rehearing en banc without explanation. Exs. B & C.

6. Applicants then sought a stay of the mandate from the D.C. Circuit pending the filing and disposition of a petition for a writ of certiorari. The D.C. Circuit denied Applicants' motion to stay the mandate on October 1, 2021, again without explanation. *See* Ex. D. The court's mandate is currently scheduled to issue on October 8, 2021.

7. Hours after Applicants sought a stay of the mandate from the D.C. Circuit, FERC *sua sponte* issued an emergency Temporary Certificate Order on September 14, 2021, "to ensure continuity of service for a limited period while the Commission considers appropriate next steps," including Spire STL's still-pending application seeking temporary operating authority. Ex. H at 1 ¶ 1 & n.1. FERC recognized that if the D.C. Circuit's mandate shut down the Project, this would "potentially jeopardiz[e] Spire Missouri's ability to obtain adequate supply, a situation that could be dire during the upcoming winter heating season." *Id.* at 3 ¶ 7. The Temporary Certificate Order "will be effective for 90 days, absent further order from" FERC, and thus expires on December 13, 2021, unless FERC modifies that period. *See id.* at 6.

Commissioner Danly wrote separately, expressing his view that the D.C. Circuit “misapplied *Allied-Signal*” when it declined to remand without vacatur and faulting FERC for not seeking rehearing in the D.C. Circuit. Ex. H at 11 ¶ 9. He noted that “a majority of [his] colleagues” supported seeking rehearing but that the new Chairman, who had dissented from FERC’s 2018 grant of the Permanent Certificate Order, “declined to do so.” *Id.*

## **V. JURISDICTION**

This Court, or any Justice thereof, has jurisdiction to issue a stay pending the filing and disposition of a petition for a writ of certiorari under 28 U.S.C. § 2101(f), and Rules 22 and 23 of this Court. *See also* 28 U.S.C. § 1651(a) (authorizing this Court to “issue all writs necessary or appropriate in aid of” its jurisdiction).

## **VI. REASONS FOR GRANTING THE STAY**

A stay pending the filing and disposition of a petition for a writ of certiorari is appropriate where there is “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In addition, “[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Id.* Each of these factors weighs strongly in favor of a stay in this case.

**A. There Is At Least A Reasonable Probability That This Court Will Grant Review And A Fair Prospect That The Court Will Reverse The D.C. Circuit’s Decision.**

The question whether remand without vacatur is the appropriate remedy where invalid agency action could plausibly be corrected on remand and where vacatur could have disruptive consequences is a frequently recurring issue of administrative law that has divided the lower courts. The stringent standard for granting remand without vacatur that the D.C. Circuit applied in this case—with the court deciding to vacate the Permanent Certificate Order because it was “not at all clear” and “far from certain” that FERC could rehabilitate its reasoning on remand despite the acknowledged “disruption” that vacatur would cause, Ex. A at 36-37—conflicts with other circuits’ more permissive approaches to remand without vacatur, ignores the very real possibility that FERC could correct its decision on remand based on existing evidence in the record, and fails to give adequate weight to the disruptive consequences of ordering the shutdown of an operational natural-gas pipeline. Accordingly, there is, at a minimum, a reasonable probability that the Court will grant Applicants’ petition for a writ of certiorari and a fair prospect that the Court will reverse the D.C. Circuit’s decision to order vacatur of the Permanent Certificate Order.

**1. The Circuits Are Divided Over The Standard For Determining When Remand Without Vacatur Is The Appropriate Remedy For Agency Error.**

Although “[i]t is well settled that ‘an inadequately supported rule’” or other agency action “‘need not necessarily be vacated,’” *Shands Jacksonville Med. Ctr., Inc. v. Azar*, 959 F.3d 1113, 1118 (D.C. Cir. 2020) (quoting *Allied Signal, Inc.*, 988 F.2d at 150

(alteration omitted), this Court has never articulated a standard for determining when remand without vacatur is appropriate. In the absence of this Court’s guidance, the circuits have adopted divergent standards and reached contrary outcomes with respect to whether remand without vacatur is the appropriate remedy where an invalid agency action could plausibly be corrected on remand and where vacatur could have disruptive consequences.

The D.C. Circuit has traditionally looked to two factors to guide the “decision whether to vacate”: “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly)” and “the disruptive consequences” of vacatur. *Allied-Signal, Inc.*, 988 F.2d at 150-51 (citation omitted). In recent cases, however, the D.C. Circuit has refined its so-called *Allied-Signal* analysis into a strong presumption in favor of vacatur—especially in challenges to operational oil and gas pipelines. See Ex. A at 36; *Standing Rock Sioux Tribe*, 985 F.3d at 1050-51; see also *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (“[i]n *rare* cases, . . . we do not vacate the action but instead remand for the agency to correct its errors”) (emphasis added).

In the decision below, the D.C. Circuit held that, despite the acknowledged “disruption” that would result from shutting down an operational pipeline, vacatur was required because it was “not at all clear” and “far from certain” that FERC could cure its purportedly erroneous reasoning supporting the Permanent Certificate Order on remand. Ex. A at 36-37. The D.C. Circuit’s decision in this case follows on the heels of its decision earlier this year to vacate an easement for the already operational Dakota Access

Pipeline because, in the court’s view, violations of the National Environmental Policy Act are invariably “serious notwithstanding an agency’s argument that it might ultimately be able to justify the challenged action” and because the district court supposedly did not abuse its discretion in discounting the disruptive effects of a pipeline shutdown. *Standing Rock Sioux Tribe*, 985 F.3d at 1053. The Dakota Access Pipeline vacatur is the subject of a pending petition for a writ of certiorari. *See Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-\_\_\_\_ (filed Sept. 20, 2021).

The overwhelming presumption in favor of vacatur applied by the D.C. Circuit—even where an agency decision could be remedied on remand and vacatur would lead to disruption—squarely conflicts with the decisions of other circuits. The Fifth Circuit, for example, has endorsed the opposite presumption. There, “[r]emand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.” *Tex. Ass’n of Mfrs.*, 989 F.3d at 389. Thus, the Fifth Circuit has stated that “[o]nly in rare circumstances is remand for agency reconsideration *not* the appropriate solution.” *Id.* (emphasis added; citation omitted; alteration in original); *see also Cent. & S.W. Servs. Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur because the agency “may well be able to justify its decision” on remand “and it would be disruptive to vacate a rule that applies to other members of the regulated community”).

Similarly, the Third Circuit will not vacate where it is “conceivable” the agency “can, if given the opportunity, create a supportable rule” and vacatur risks “disruptive consequences.” *Prometheus Radio Project*, 824 F.3d at 52. And the Eleventh Circuit

uses the same “not at all clear” language invoked by the D.C. Circuit in this case, but in support of the *opposite* presumption: “where it is not at all clear that the agency’s error incurably tainted the agency’s decisionmaking process, the remedy of remand without vacatur is surely appropriate.” *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1290 (11th Cir. 2015).

Several circuits apply the D.C. Circuit’s two-factor *Allied-Signal* test but add a balancing of the equities as a third factor that supports remand without vacatur where vacatur would have disruptive consequences. *See Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (“whether to [vacate] . . . depends *inter alia* on the severity of the errors, the likelihood that they can be mended without altering the order, and on the balance of equities and public interest considerations”); *Black Warrior Riverkeeper*, 781 F.3d at 1290 (“a court must [also] balance the equities” “[i]n deciding whether an agency’s action should be remanded without vacatur”). In circumstances indistinguishable from this case, the First Circuit recently applied that standard to conclude that remand without vacatur was appropriate where a state environmental agency erred in granting a permit for a compressor station connected to a natural-gas pipeline. *See Town of Weymouth v. Mass. Dep’t of Env’tl. Prot.*, 973 F.3d 143, 146 (1st Cir. 2020) (per curiam). The court reasoned that the “balance of equities and public interest considerations” supported remand without vacatur because the pipeline otherwise would “be out of operation for most of the New England and Canadian winter heating season, when demand for natural gas in the region is at its peak and shortages most likely.” *Id.*



Finally, other circuits apply a more amorphous approach that focuses exclusively on equitable considerations. In particular, both the Second and Ninth Circuits apply an open-ended test in which they decline to vacate ““when equity demands”” that result. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (remanding without vacatur) (quoting *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405 (remanding without vacatur)). On analogous facts, the Ninth Circuit applied that equitable standard to hold that remand without vacatur was appropriate where the EPA had erred in approving a state environmental agency’s emissions plan, because vacatur would prevent “a much needed power plant” from coming online and, without it, “the region might not have enough power next summer, resulting in blackouts.” *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012).

The lower courts are thus deeply divided over the standard for determining whether to remand without vacatur and, applying their disparate approaches, have reached irreconcilable outcomes in factually indistinguishable cases. In light of the circuits’ disarray, there is at least a reasonable probability that the Court will grant Applicants’ forthcoming petition for a writ of certiorari to resolve this frequently recurring question of administrative law that has gone unanswered in the more than seven decades since the APA was enacted. Indeed, whether a court vacates invalid agency action is of immense consequence. An improvident vacatur, as in this case, can risk clear and life-threatening harm to a region with hundreds of thousands of homes and businesses, whereas vacatur improperly withheld can effectively deny the fruits of victory to a successful litigant by leaving an illegal, impossible-to-justify regulation in force for

years. The Court’s authoritative guidance on this fundamental remedial question is urgently needed.

**2. The D.C. Circuit’s Decision To Vacate The Permanent Certificate Order Is Erroneous.**

There is also a strong likelihood that, after granting review, this Court will reverse the D.C. Circuit’s decision to vacate the Permanent Certificate Order and hold that remand without vacatur is the appropriate remedy in this case.

The “clear” or “certain” test applied by the D.C. Circuit effectively compels vacatur of agency decisions even where an agency’s decision could be readily sustained on remand and vacatur would assuredly have serious disruptive effects. Indeed, the D.C. Circuit acknowledged both that there was record evidence on which FERC might rely to justify the Permanent Certificate Order on remand, Ex. A at 35, and that vacatur would lead to “disruption” because the Project is already “operational,” *id.* at 36. The court nevertheless concluded that vacatur was appropriate because it was not “clear” or “certain” that FERC would be able to cure its alleged errors on remand and because remand without vacatur would supposedly incentivize FERC to allow “‘build[ing] first and conduct[ing] comprehensive reviews later.’” *Id.* at 36-37 (quoting *Standing Rock Sioux Tribe*, 985 F.3d at 1052 (alterations in original)). That reasoning would *always* justify vacatur of completed projects whenever the court finds an agency’s review was

inadequate, regardless of vacatur’s disruptive impact and the likelihood that the agency will reach the same result on remand.<sup>2</sup>

The D.C. Circuit’s weighty, across-the-board presumption in favor of vacatur is inconsistent with the case-specific equitable discretion that courts possess in fashioning appropriate relief, which necessarily takes into account the particular facts and circumstances of the dispute before the court. *See, e.g., United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 496 (2001); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). It also improperly discounts the disruptive impact of vacatur, which is an essential component of the remedial inquiry, especially where, as here, the agency has at most committed errors in reasoning, such as overlooking record evidence, that are susceptible to correction on remand. *See* Ex. A at 35 (“[I]t is not enough that such evidence may exist within the record” because FERC did not “sufficiently evaluate[ ] that evidence”).

Although the courts of appeals outside of the D.C. Circuit are not in agreement about the specific formulation of the standard for determining whether to grant remand

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<sup>2</sup> In addition, the D.C. Circuit’s concern is likely eliminated by recent developments. Last year, in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), the court overruled prior cases and held that parties may now seek judicial review of a FERC order 30 days after a rehearing petition is filed, even if the petition remains pending before FERC. Although *Allegheny* was not decided in time to allow immediate judicial review in this case, the combination of prompt judicial review under *Allegheny*, and a 2020 FERC order that no longer allows pipeline construction until the time for rehearing has passed or FERC has acted on that petition, *see* Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, 171 FERC ¶ 61,201 (June 9, 2020), will prevent FERC from intentionally deferring meaningful consideration of a project until after it is completed.

without vacatur, all of those courts are attentive to the potentially disruptive consequences of vacatur. *See, e.g., Cent. & S.W. Servs.*, 220 F.3d at 692; *Prometheus Radio Project*, 824 F.3d at 52. Under any of their standards, a court would have been compelled to conclude that remand without vacatur is the appropriate remedy in this case because FERC could plausibly rehabilitate its reasoning on remand and because, as discussed further below, vacatur could have potentially life-threatening consequences by depriving hundreds of thousands of St. Louis-area homes and businesses of natural gas during the upcoming winter. *See Town of Weymouth*, 973 F.3d at 146 (remanding without vacatur because a pipeline otherwise would “be out of operation for most of the New England and Canadian winter heating season”); *Cal. Cmty. Against Toxics*, 688 F.3d at 993-94 (remanding without vacatur because “a much needed power plant” otherwise would be offline and “the region might not have enough power next summer”).

Accordingly, there is, at a minimum, a fair prospect that this Court will reverse the D.C. Circuit’s remedial ruling.

**B. A Stay Would Avert Possible Irreparable Harm To Hundreds Of Thousands Of St. Louis-Area Households And Businesses.**

All relevant equitable considerations favor a stay of the D.C. Circuit’s mandate. In the absence of a stay, Spire STL will be required to shut down the Project immediately upon expiration of the Temporary Certificate Order on December 13, 2021 (or even earlier if the order is shortened or revoked), in the event that FERC does not grant alternative operating authority for the Project. A shutdown of the Project in the middle of winter could result in the loss of natural-gas service to hundreds of thousands of homes

and businesses in the St. Louis area. A stay would leave the Project's Permanent Certificate Order in place and ensure that this Court has an opportunity to consider Applicants' forthcoming petition for a writ of certiorari before the Project is shut down, thus averting the serious, irreparable harm that could occur if the mandate issues immediately and the Temporary Certificate Order expires on schedule or is shortened or revoked.

Shutting down the Project could result in approximately 175,000-400,000 of the households and businesses that Spire Missouri serves—including elderly homeowners, nursing homes, hospitals, and schools—losing gas service this winter. Ex. I ¶¶ 18-19. These outages could last for days, or longer, because disrupted gas service cannot simply be switched back on, but instead necessitates time-consuming, complicated restoration work involving laborious site-by-site inspections and re-lighting procedures by trained technicians. *Id.* ¶¶ 23-25. Thus, homes and businesses could remain without heat, hot water, and cooking ability for a prolonged time as technicians work to restore service safely. *Id.* ¶ 23.

These possible service outages are a direct result of recent operational and contractual changes to the St. Louis natural-gas market. Once the Project became operational (as the Permanent Certificate Order required within two years), Spire Missouri turned back about 180,000 Dth/day of firm capacity on the pipeline it had previously utilized and cancelled the upstream contracts that fed that capacity. Ex. I ¶ 9. That pipeline, in turn, remarketed Spire Missouri's previously held capacity to other

shippers and now has virtually no firm capacity available for Spire Missouri to replace what it currently receives through the Project. *See* JA593-94, 976; Ex. I ¶¶ 38-39.

Capacity available elsewhere cannot accommodate Spire Missouri's needs if the Project is shut down. The only significant capacity available to St. Louis can now be accessed exclusively through the Project. *See* JA933-35 & n.9; Ex. I ¶¶ 39-40. Nor can Spire Missouri replace the additional 160,000 Dth/day needed for winter "peak day" requirements previously provided by its propane-peaking facilities, which Spire Missouri decommissioned after the Project became operational. Ex. I ¶¶ 9, 42. Bringing those facilities back online would require rebuilding the primary vaporization systems, which cannot be done by this winter. *Id.* ¶ 42.

Accordingly, if the Project is shut down, Spire Missouri could not meet demand this winter at average daily temperatures of 9° F, which St. Louis has experienced during four of the past five winters, Ex. I ¶ 20, and, depending on the availability of gas at its underground storage facility, Spire Missouri may not even be able to meet demand at temperatures as high as 38° F, *id.* ¶ 21. And there is no question that Spire Missouri could not meet demand at the -10.6° F "peak" demand temperature it presently uses for system planning purposes. *Id.*

In sum, as the staff of the Missouri Public Service Commission found, Spire Missouri "cannot . . . replace reliance on Spire STL for transportation before or during the Winter of 2021-2022," and "peak day service interruptions could be expected without access to Spire STL capacity." Staff Report at 3, 7. A stay would afford this Court an opportunity to consider Applicants' forthcoming petition for a writ for certiorari without

a risk that these potentially life-threatening, irreparable consequences come to pass before the Court has ruled.<sup>3</sup>

If the Temporary Certificate Order expires or is revoked after the D.C. Circuit’s mandate has already issued and FERC fails to grant alternative operating authority, an emergency application to this Court to recall the mandate at that point may come too late to prevent service disruptions this winter because shutting down and decommissioning the Project—which would likely be required in the event the Project loses its operating authority—would necessitate steps that would make it impossible for the Project to resume operations for up to 10-12 weeks after receiving re-authorization. Ex. J ¶¶ 8, 24, 26.

Nor is there any assurance that FERC will act to stave off the Project’s looming shutdown in mid-December by granting Spire STL’s pending temporary-certificate application or taking other regulatory action. EDF has vigorously opposed Spire STL’s pending application, going so far as to argue that FERC *cannot* grant temporary relief without “violat[ing] the D.C. Circuit’s finding that vacatur of the certificate orders is the appropriate relief.” EDF Mot. to Reject in Part and Protest at 4, 20-21, Spire STL

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<sup>3</sup> The Project’s importance is underscored by the fact that Spire STL’s pending temporary-certificate application has garnered substantial support from a diverse array of interested parties, including the Governor, Lieutenant Governor, and Attorney General of Missouri; Missouri’s Director of Economic Development; several Missouri federal and state legislators; the mayors of St. Louis, Kansas City, and more than 40 other Missouri municipalities; the Missouri School Boards’ Association; the Urban League of Metropolitan Saint Louis, Inc.; and the United Steelworkers of America, District 11, among many others.

Pipeline LLC, FERC Dkt. No. CP17-40-007 (filed Aug. 2, 2021). Moreover, there is no guarantee that FERC will achieve the internal consensus necessary to ensure continuity of natural-gas service to the St. Louis area past December 13, 2021. FERC currently has only four Commissioners, *see* Meet the Commissioners, FERC, <https://www.ferc.gov/about/commission-members> (Aug. 30, 2021), and its decision to grant Spire STL an emergency temporary certificate was a divided one, *see* Ex. H. In the event of a deadlock, the Commission would be unable to act on the application. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). A stay of the D.C. Circuit's mandate is therefore the only way to guarantee that the critical natural gas supplied by the Project remains available to the residents and businesses of St. Louis this winter.

Furthermore, even if FERC were to grant a temporary certificate by December 13, that would still be no substitute for the non-vacatur of the Permanent Certificate Order that Applicants will be seeking through their forthcoming petition for a writ of certiorari. Any temporary certificate could entail disruptive and costly conditions, such as those proposed by EDF (including, for example, the recommissioning of retired facilities). *See* EDF Mot. to Reject in Part and Protest at 1, 4, 29-36, and Exhibit A, Spire STL Pipeline LLC, FERC Dkt. No. CP17-40-007 (filed Aug. 2, 2021). These disruptive and costly conditions would then have to be undone, thereby entailing further disruption and cost, if FERC eventually grants a Permanent Certificate Order on remand or this Court rules that vacatur was improper. These are the types of disruptions that remand without vacatur exists to prevent, but without a stay of the D.C. Circuit's vacatur remedy, there is no way



to avoid them pending consideration by this Court and a final determination by FERC on remand.

There are no competing considerations on the other side of the equitable ledger. Indeed, EDF and Steck have never disputed that shutting down the Project would imperil the supply of natural gas to hundreds of thousands of St. Louis-area homes and businesses this winter and have never identified any harm that would result from permitting the Project to remain operational during a time-limited stay.

To the contrary, events in early 2021 confirmed Spire Missouri's and FERC's determinations regarding the need for and benefits of the Project. During Winter Storm Uri, freezing weather in Texas disrupted gas supplies and hugely increased their cost; in response, Texas banned the out-of-state shipment of gas that could be used for Texas power generation. *See* Cayla Harris, *Gov. Greg Abbott Mandates Natural Gas Producers Keep Supply in Texas Until Sunday*, *Houston Chronicle* (Feb. 17, 2021), <https://tinyurl.com/3brwnanr>. As a result, Kansas City—only 200 miles away from St. Louis but without access to the Project and the diversified gas sources it supplied—experienced skyrocketing prices. *See* Travis Meier et al., *Kansas, Missouri Officials Urge Energy Conservation Following Round of Rolling Blackouts*, *Fox 4 Kansas City* (Feb. 15, 2021), <https://tinyurl.com/8zxsnr76>.

Meanwhile, the St. Louis area's reduced reliance on natural gas from Texas and surrounding areas—as a result of its access to the natural gas supplied by the Project—protected it from the shortages, skyrocketing prices, and humanitarian emergencies that plagued other parts of the country. Spire Missouri estimates that, without the Project, up

to 133,000 homes and businesses in the St. Louis area would have lost service in February 2021, or, alternatively, that total gas costs for St. Louis-area customers would have increased by up to \$300 million, assuming Spire Missouri would even have been able to serve all of its customers during the storm. Ex. I ¶ 30; *see also* Staff Report at 8 (confirming that the Project provided “overall” savings during Winter Storm Uri, although lower than those calculated by Spire Missouri).

The relevant equitable considerations therefore weigh unanimously and unequivocally in favor of a stay to preserve the supply of essential natural gas to St. Louis this winter.

## **VII. CONCLUSION**

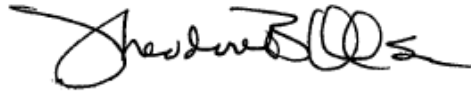
A stay is warranted to ensure that hundreds of thousands of St. Louis-area residents continue to have access to a reliable supply of natural gas to heat their homes and businesses while the Court considers the substantial question raised in Applicants’ forthcoming petition for a writ of certiorari. This Court should therefore stay the issuance of the D.C. Circuit’s mandate pending the filing and disposition of that petition.

Respectfully submitted.

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