

177 FERC ¶ 61,114  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
James P. Danly, Allison Clements,  
and Mark C. Christie.

Spire STL Pipeline LLC

Docket No. CP17-40-010

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, GRANTING  
CLARIFICATION, AND DENYING STAY

(Issued November 18, 2021)

1. On June 22, 2021, the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating and remanding the Commission's orders authorizing Spire STL Pipeline LLC (Spire) to construct and operate the 65-mile-long Spire STL Pipeline from Scott County, Illinois, to St. Louis County, Missouri.<sup>1</sup> The Spire STL Pipeline entered service on November 14, 2019.
2. On July 26, 2021, before the court issued its mandate, Spire filed an application with the Commission for a temporary certificate. Spire stated that if the Spire STL Pipeline is removed from service, then Spire Missouri Inc., a local distribution company and shipper on the pipeline, will be unable to obtain adequate service to satisfy peak demand in the St. Louis region during the 2021-2022 winter heating season. The Commission's review of Spire's request for a temporary certificate is ongoing.
3. On September 14, 2021, to ensure continuity of service for a limited period while the Commission considers appropriate next steps, the Commission acted *sua sponte* to issue a temporary certificate to Spire to continue to operate the Spire STL Pipeline for 90 days under Natural Gas Act (NGA) section 7(c)(1)(B).<sup>2</sup> On October 14, 2021, Spire filed a request for expedited clarification or, in the alternative, rehearing of the September

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<sup>1</sup> See *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order), *order on reh'g*, 169 FERC ¶ 61,134 (2019) (Rehearing Order), *vacated sub nom. Envt'l Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir 2021).

<sup>2</sup> *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (September 2021 Order); 15 U.S.C. § 717f(c)(1)(B) (2018).

2021 Order.<sup>3</sup> The Commission also received requests for rehearing from a group of 51 landowners (Spire Landowners)<sup>4</sup> and from landowner Scott Turman, filing jointly with ST Turman Contracting and the Niskanen Center (together, Niskanen Center).<sup>5</sup>

4. Pursuant to *Allegheny Defense Project v. FERC*,<sup>6</sup> the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the NGA,<sup>7</sup> we are modifying the discussion in the September 2021 Order, granting clarification, and continue to reach the same result in this proceeding, as discussed below.<sup>8</sup>

## **I. Requests for Clarification and Rehearing**

### **A. Scope of Authorization under the Temporary Certificate**

5. Spire requests that the Commission clarify two statements in the September 2021 Order. First, the Commission stated that “this temporary certificate will allow for the maintenance of adequate service via the Spire STL Pipeline for Spire Missouri during a defined period of time.”<sup>9</sup> Spire requests that the Commission clarify that Spire may

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<sup>3</sup> Spire STL Pipeline LLC Oct. 14, 2021 Request for Expedited Clarification or Rehearing (Spire Rehearing Request).

<sup>4</sup> Spire Impacted Landowners Oct. 14, 2021 Request for Rehearing (Spire Landowners Rehearing Request); *see id.* app. A (listing landowners).

<sup>5</sup> Scott Turman, ST Turman Contracting, and Niskanen Center Oct. 14, 2021 Request for Rehearing (Niskanen Center Rehearing Request).

<sup>6</sup> 964 F.3d 1 (D.C. Cir. 2020) (en banc).

<sup>7</sup> 15 U.S.C. § 717r(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

<sup>8</sup> *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the September 2021 Order. *See Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

<sup>9</sup> September 2021 Order, 176 FERC ¶ 61,160 at P 9.

continue to provide transportation service to its other existing customer, Spire Marketing.<sup>10</sup>

6. Second, the Commission stated that the temporary certificate does not authorize Spire “to provide any new service” and does not authorize “the commencement of any new service.”<sup>11</sup> Spire requests that the Commission clarify that Spire may enter new contracts using available unsubscribed capacity to provide services currently offered under Spire’s existing tariff.<sup>12</sup>

7. We grant both requests for clarification. The Commission stated that the temporary certificate enables Spire “to continue to operate the facilities authorized by the Commission in Docket Nos. CP17-40-000 and CP17-40-001 that are currently in service, under the terms, conditions, and authorizations previously issued, including the approved tariff.”<sup>13</sup> We clarify that Spire may provide transportation services under existing and new contracts with existing and new customers, so long as those services are consistent with the terms, conditions, and authorizations previously issued by the Commission, including Spire’s approved tariff, during the 90-day effective term of the temporary certificate.

8. Because we are granting Spire’s request for clarification, we dismiss Spire’s alternative request for rehearing as moot.

**B. Eminent Domain Authority**

9. The Spire Landowners and the Niskanen Center argue that the Commission erred in the September 2021 Order by failing to prohibit Spire from exercising eminent domain under the temporary certificate.<sup>14</sup> The Spire Landowners and the Niskanen Center note that section 7(h) of the NGA<sup>15</sup> conveys eminent domain power to the holder of “a

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<sup>10</sup> Spire Rehearing Request at 4, 5-6, 14-16.

<sup>11</sup> September 2021 Order, 176 FERC ¶ 61,160 at P 8 & ordering para. (A).

<sup>12</sup> Spire Rehearing Request at 4, 10-14.

<sup>13</sup> September 2021 Order, 176 FERC ¶ 61,160 at ordering para. (A).

<sup>14</sup> Spire Landowners Rehearing Request at 8; Niskanen Center Rehearing Request at 1, 6-7.

<sup>15</sup> 15 U.S.C. § 717f(h).

certificate of public convenience and necessity.”<sup>16</sup> The Spire Landowners and the Niskanen Center argue that section 7(h) refers only to a certificate issued under section 7(e) of the NGA, for which the Commission must satisfy the statute’s requirements to publicly notice the application, conduct a hearing, and find that the proposed action “is or will be required by the public convenience and necessity.”<sup>17</sup> They claim that the NGA does not convey eminent domain power to the holder of a temporary certificate issued under section 7(c)(1)(B) of the NGA because the Commission is not required to satisfy the same procedural requirements.<sup>18</sup> The Spire Landowners and the Niskanen Center further contend that because section 7(h) of the NGA does not refer specifically to holders of “temporary certificates,” the provision does not satisfy the Supreme Court’s requirement that authority to take private property for public use must be clearly expressed.<sup>19</sup> The Niskanen Center asserts that the taking of property by the holder of a temporary certificate issued without notice and hearing violates the landowner’s right to due process of law under the Fifth Amendment.<sup>20</sup>

10. In 1947, Congress added section 7(h) to the NGA, allowing “any holder of a certificate of public convenience and necessity” to exercise a federal right of eminent domain to acquire land or other property necessary to construct, operate, and maintain a pipeline and related equipment, if the certificate-holder cannot acquire the land or other property by contract.<sup>21</sup> Although the courts have repeatedly held that Congress gave the

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<sup>16</sup> Spire Landowners Rehearing Request at 7; Niskanen Center Rehearing Request at 6-7.

<sup>17</sup> Spire Landowners Rehearing Request at 7; Niskanen Center Rehearing Request at 6-7; *see* 15 U.S.C. § 717f(c)(1)(B), (d) (requiring notice and a hearing, cross-referencing subsection (e)); *id.* § 717f(e) (requiring a finding under the public convenience and necessity standard).

<sup>18</sup> Spire Landowners Rehearing Request at 6-8; Niskanen Center Rehearing Request at 6-7; *see* 15 U.S.C. § 717f(c)(1)(B) (exempting a temporary certificate from notice and hearing).

<sup>19</sup> Spire Landowners Rehearing Request at 8 (citing *Del., Lackawanna W.R.R. v. Morristown*, 276 U.S. 182 (1928)); Niskanen Center Rehearing Request at 7.

<sup>20</sup> Niskanen Center Rehearing Request at 4-6.

<sup>21</sup> 15 U.S.C. § 717f(h); *PennEast Pipeline Co., LLC, v. New Jersey*, 141 S. Ct. 2244, 2252 (2021). In full, section 7(h) states that:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the

Commission no authority to deny or restrict a certificate-holder's exercise of the statutory right of eminent domain in a certificate issued pursuant to the procedures laid out in section 7(e),<sup>22</sup> they have not had occasion to address whether the same holds in the case of a temporary certificate issued without those procedures. Accordingly, we believe that issue, which goes to the scope of section 7(h)—a provision that gives courts a particular implementing role—is an issue better resolved by the courts than the Commission.<sup>23</sup>

11. Next, the Niskanen Center states that the taking of property by the holder of a temporary certificate violates a landowner's right to due process of law under the Fifth

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necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h).

<sup>22</sup> *E.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (internal citation omitted)); *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that NGA section 7(h) “contains no condition precedent” to the right of eminent domain, other than issuance of the certificate, when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder .... Thus, FERC does not have discretion to withhold eminent domain once it grants a Certificate.” (internal citation omitted)).

<sup>23</sup> *See Spire STL Pipeline, LLC v. Betty Ann Jefferson*, Case No. 18-cv-03204, \*6-7 (C.D. Ill. Oct. 28, 2021) (finding that “the only reasonable construction of § 717f is that temporary certificates issued under subsection (c) are ‘certificates of public convenience and necessity’ under subsection (h)”).

Amendment.<sup>24</sup> This argument too goes to the scope of section 7(h), and, for the same reason, should be addressed by the courts rather than the Commission.<sup>25</sup>

12. Finally, the Spire Landowners and the Niskanen Center contend that, under Commission Order Nos. 871-B and 871-C, the temporary certificate is presumptively stayed pending the Commission's response to the requests for rehearing.<sup>26</sup> These parties also claim that, during the stay, any attempt by Spire to exercise eminent domain is a violation of those orders.<sup>27</sup> The Niskanen Center asserts that because the Commission can stay a certificate under Order Nos. 871-B and 871-C, the Commission can take the lesser step of staying only the eminent domain authority related to a temporary certificate.<sup>28</sup>

13. In Order Nos. 871-B and 871-C, the Commission adopted a policy of presumptively staying a certificate order during the 30-day rehearing period and pending Commission resolution of requests for rehearing filed by landowners, thereby addressing concerns regarding a certificate-holder's exercise of eminent domain prior to the conclusion of Commission proceedings.<sup>29</sup> Nevertheless, that stay is "only presumptive" and the Commission made clear that "the question of whether to impose a stay will be

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<sup>24</sup> Niskanen Center Rehearing Request at 4-6.

<sup>25</sup> Cf. *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at PP 27, 54-55 (2020) (explaining that in most circumstances an administrative agency will not adjudicate the constitutionality of congressional enactments; declining to address whether Congress's delegation of eminent domain authority under section 7(h) can overcome state sovereign immunity under the Eleventh Amendment).

<sup>26</sup> Spire Landowners Rehearing Request at 9-10; Niskanen Center Rehearing Request at 7-8. See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), *order on reh'g*, Order No. 871-B, 86, Fed. Reg. 26,150 (May 13, 2021), 175 FERC ¶ 61,098 (2021), *order on reh'g*, Order No. 871-C, 176 FERC ¶ 61,062 (2021).

<sup>27</sup> Spire Landowners Rehearing Request at 9-10; Niskanen Center Rehearing Request at 7-8.

<sup>28</sup> Niskanen Center Rehearing Request at 8.

<sup>29</sup> Order No. 871-B, 175 FERC ¶ 61,098 at PP 45-46 (explaining that courts have held that the Commission lacks authority to restrict the exercise of the right of eminent domain, but the Commission unquestionably may determine the effective date of and stay its own orders, which in practice withholds the eminent domain authority conveyed through a certificate).

decided on the circumstances presented in each particular certificate proceeding.”<sup>30</sup> Here, the Commission found that an “emergency” exists, at least temporarily, insofar as the court’s vacatur presents the potential for “a sudden unanticipated loss of gas supply or capacity that requires an immediate restoration of interrupted service for protection of life or health or for maintenance of physical property.”<sup>31</sup> It would have been inconsistent with that finding of a temporary emergency to stay the certificate, thereby perpetuating the emergency circumstances that the certificate was issued to remedy. Under these circumstances, we find that it would be inappropriate to have temporarily stayed the certificate pending rehearing.

## II. Request for Stay

14. On November 5, 2021, the Spire Landowners filed a request for stay arguing that if the Commission does not grant its request for rehearing, the Commission should stay the September 2021 Order under Order Nos. 871-B and 871-C or the Administrative Procedure Act, until the Commission acts on remand.<sup>32</sup> Consistent with our explanation above that staying the September 2021 Order would be inappropriate,<sup>33</sup> we deny the Spire Landowners’ request for stay.

### The Commission orders:

(A) The request for clarification filed by Spire is granted, as discussed in the body of this order.

(B) The request for rehearing filed by Spire is dismissed as moot.

(C) In response to the requests for rehearing filed by the Spire Landowners and by the Niskanen Center, the September 2021 Order is hereby modified and the result sustained, as discussed in the body of this order.

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<sup>30</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 51.

<sup>31</sup> September 2021 Order, 176 FERC ¶ 61,160 at P 8 (quoting 18 C.F.R. § 157.202(b)(13) (2020)).

<sup>32</sup> Spire Landowners Nov. 5, 2021 Motion for Stay at 2.

<sup>33</sup> *Supra* P 12.

(D) The request for stay filed by the Spire Landowners is denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

Commissioner Christie is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC

Docket No. CP17-40-010

(Issued November 18, 2021)

DANLY, Commissioner, *dissenting*:

1. Today's order grants a request for clarification, addresses the arguments raised on rehearing and denies a request for a stay<sup>1</sup> of the Commission's September 14, 2021 order (September 2021 Order) authorizing a temporary certificate, *sua sponte*, to Spire STL Pipeline LLC (Spire).<sup>2</sup> I write separately to explain why the Commission should not have declined to decide whether Natural Gas Act (NGA) section 7(h)<sup>3</sup> confers eminent domain authority upon temporary certificate holders.

2. As an initial matter, it is necessary to acknowledge that the situation is dire. The winter is upon us, the temporary certificate is weeks away from expiration, and the customers served by Spire Missouri Inc. now rely upon Spire for natural gas. But, as I have said, this emergency is one of the Commission's own making, and all of it was avoidable.<sup>4</sup> It was the Commission's original certificate order that ran afoul of the Administrative Procedure Act (APA).<sup>5</sup> It was our mismanagement of the process in anticipation of, and in reaction to, the court's vacatur and the issuance of the mandate<sup>6</sup> that now subjects the people of St. Louis to an uncertain future.

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<sup>1</sup> See *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 (2021).

<sup>2</sup> *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (September 2021 Order).

<sup>3</sup> 15 U.S.C. § 717f(h).

<sup>4</sup> See September 2021 Order, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at P 3) ("The present circumstances, an 'emergency' of our own making, is not the kind of emergency for which section 7(c)(1)(B) was drafted. And we need not argue this from first principles.").

<sup>5</sup> See *id.* (Danly, Comm'r, dissenting at P 3) ("[W]hat we have on our hands is an unlawful Commission response to the judicial vacatur of a certificate, itself a chastisement for our failure to adequately explain our decisions. In other words, the Commission did not satisfy its obligations under the APA in the first instance.").

<sup>6</sup> See *id.* (Danly, Comm'r, dissenting at PP 6-10) (explaining the various actions

3. But even emergencies do not confer additional authority upon the Commission. The September 2021 Order is as unlawful now as it was at issuance because it failed to explain how NGA section 7(c)(1)(B),<sup>7</sup> a statutory provision of limited scope and narrow purpose, can be employed to allow continuation of service, especially in light of judicial authority to the contrary, though admittedly in dicta.<sup>8</sup>

4. To make matters worse, the Commission could have reached the same result had it simply issued a certificate under NGA sections 7(c) and (e).<sup>9</sup> Had we done so, we could have maintained the status quo, allowing Spire to continue operating through the winter and providing an opportunity for the Commission to consider how to proceed on remand. It is unfortunate; the Commission's mismanagement has had a significant effect on the people of St. Louis. By way of example, the St. Louis Area Police Chiefs Association recently commented:

The urgency to remedy this situation is critical. First responder agencies and the public have started, and will need to continue, preparing for a potential state of emergency. This matter should not be the focus right now as there are many more pressing issues that require our time, attention, and money. Please act quickly so we can return our focus to serving and protecting the St. Louis region.<sup>10</sup>

At the risk of repeating myself: this “potential state of emergency” is one of our own making.<sup>11</sup>

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that the Commission could have taken).

<sup>7</sup> 15 U.S.C. § 717f(c)(1)(B).

<sup>8</sup> See September 2021 Order, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at P 3) (“The courts have already considered (if only as dicta) the *very question* of whether our emergency powers can be employed as a stopgap in the absence of a certificate.”) (emphasis in original) (citing *Algonquin Gas Transmission Co. v. FPC*, 201 F.2d 334, 341 (1st Cir. 1953)).

<sup>9</sup> 15 U.S.C. §§ 717f(c), (e); see September 2021 Order, 176 FERC ¶ 61,160 (Danly, Comm'r, dissenting at PP 7-8).

<sup>10</sup> St. Louis Area Police Chiefs Association, Comments, Docket No. CP17-40-007, at 1 (filed Oct. 28, 2021) (emphasis omitted).

<sup>11</sup> See *supra* P 2 & note 4. Additionally, while I still oppose as unlawful the form the September 2021 Order took, I nevertheless point out that the majority could have

5. As to today's order, the Spire Landowners<sup>12</sup> and Niskanen Center<sup>13</sup> assert in their requests for rehearing that the NGA does not provide eminent domain authority to the holder of a temporary certificate issued under NGA section 7(c)(1)(B).<sup>14</sup> Niskanen Center also claims that the taking of property by the holder of a temporary certificate, issued without notice and hearing, works a violation of the landowners' rights to due process of law under the Fifth Amendment.<sup>15</sup> Rather than answer either question, the Commission instead directs the parties to the courts.<sup>16</sup>

6. To start, I completely agree that the Commission should decline to address the constitutional questions raised on rehearing. My colleagues correctly recognize that the Commission similarly declined to address a constitutional question in *PennEast Pipeline Company, LLC (PennEast)*.<sup>17</sup> Specifically, the Commission declined to answer a question regarding state sovereign immunity under the Eleventh Amendment and whether private parties have the power to hale states into court in order to exercise their eminent domain privileges under NGA section 7(h).<sup>18</sup>

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modified the temporary emergency certificate to be effective through the winter season or until the Commission acts on Spire's July 26, 2021 request, whichever comes earlier. *See* 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals . . . the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

<sup>12</sup> *See* Spire Landowners October 14, 2021 Rehearing Request at Appendix A (listing landowner intervenors requesting rehearing).

<sup>13</sup> Scott Turman, ST Turman Contracting, and Niskanen Center (collectively, Niskanen Center) jointly filed a request for rehearing on October 14, 2021.

<sup>14</sup> *See* Spire Landowners October 14, 2021 Rehearing Request at 7-8; Niskanen Center October 14, 2021 Rehearing Request at 6-7.

<sup>15</sup> *See* Niskanen Center October 14, 2021 Rehearing Request at 4-6.

<sup>16</sup> *See Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 at PP 9-11.

<sup>17</sup> *See id.* P 11 n.25 (citing *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at PP 27, 54-55 (2020) (explaining that in most circumstances an administrative agency will not adjudicate the constitutionality of congressional enactments; declining to address whether Congress's delegation of eminent domain authority under section 7(h) can overcome state sovereign immunity under the Eleventh Amendment)).

<sup>18</sup> *See PennEast*, 170 FERC ¶ 61,064 at P 21 ("[W]e make no attempt to address

7. I disagree, however, with the Commission’s refusal to address the question of whether section 7(h) confers eminent domain authority upon temporary certificate holders. Declining to answer this question, which focuses on a fundamental component of the statute administered by the Commission, is unwise. It is also inconsistent with the approach taken in *PennEast* where the Commission *did* answer a separate, statutory question—one directly related to the question at issue here.<sup>19</sup> When called upon to do so, the Commission interpreted the scope of a certificate holder’s eminent domain authority under NGA section 7(h). Despite the Commission’s holding in *PennEast*, in today’s order, the Commission finds that:

[a]lthough the courts have repeatedly held that Congress gave the Commission no authority to deny or restrict a certificate-holder’s exercise of the statutory right of eminent domain in a certificate issued pursuant to the procedures laid out in section 7(e), they have not had occasion to address whether the same holds in the case of a temporary certificate issued without those procedures. Accordingly, *we believe that issue, which goes to the scope of section 7(h)—a provision that gives courts a particular implementing role—is an issue better resolved by the courts than the Commission.*<sup>20</sup>

8. To require the parties to go to court in order to learn whether NGA section 7(h) confers eminent domain authority upon temporary certificate holders is irresponsible and unnecessary. The Commission implements NGA section 7 and some degree of deference is owed to the Commission’s reasonable interpretation of section 7(h).<sup>21</sup>

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the Eleventh Amendment question left unanswered by the Third Circuit: whether the NGA’s delegation of the federal government’s exemption from state sovereign immunity was a valid, constitutional exercise of federal power.”) (citations omitted); *id.* P 27 (“[W]e deny *PennEast*’s petition to the extent that it would require the Commission to evaluate the constitutional sufficiency of NGA section 7(h) for purposes of abrogating state sovereign immunity or delegating federal authority under the Eleventh Amendment”); *id.* P 55 (“[T]he Commission typically avoids opining on constitutional matters unless they are necessary to a particular decision.”).

<sup>19</sup> See *PennEast*, 170 FERC ¶ 61,064, *reh’g denied*, 171 FERC ¶ 61,135 (2020).

<sup>20</sup> *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 at P 10 (emphasis added) (internal footnotes and citations omitted).

<sup>21</sup> See *PennEast*, 171 FERC ¶ 61,135 at P 20 (“Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.”) (citing *PennEast*, 170 FERC ¶ 61,064 at P 15; *City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013); *Nat’l Cable &*

9. In *PennEast*, the Commission rejected the argument raised by then-Commissioner, now-Chairman Glick that the Commission should not interpret the scope of NGA section 7(h) because courts implement that provision of the NGA.<sup>22</sup> In response to similar arguments on rehearing, the Commission determined that

Congress put the burden of executing condemnation proceedings on state and district courts through NGA section 7(h), and the Commission has appropriately refused to adjudicate issues such as “the timing of acquisition or just compensation.” Nevertheless, the Declaratory Order was appropriate under our statutory mandate because it addresses the operation of NGA section 7(h) within the NGA’s “comprehensive scheme of federal regulation.” While Riverkeeper may disagree with the Commission’s interpretation, it is nonetheless our duty to ensure the faithful execution of the NGA, which includes the removal of uncertainty and termination of controversy.<sup>23</sup>

10. This rationale applies equally here. The fact that courts are the fora in which to bring eminent domain proceedings under NGA section 7(h) does not mean that the Commission has no authority to interpret that provision of the NGA.<sup>24</sup> In fact, in

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*Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*); *id.* P 22 (rejecting an argument that “the Commission does not ‘qualify for *Chevron* deference’ when construing NGA section 7(h)”; *PennEast*, 170 FERC ¶ 61,064 at P 15 (“[O]ur interpretation of NGA section 7(h) merits deference. The Third Circuit’s ruling does not diminish the Commission’s authority to speak on a statute that we administer.”) (citations omitted).

<sup>22</sup> *PennEast*, 171 FERC ¶ 61,135 at P 22 n.68 (“the dissent’s objections necessarily turn on the argument that ‘the Commission has no role to play whatsoever in administering that provision,’ . . . . We disagree.”) (citing *PennEast*, 171 FERC ¶ 61,135 (Glick, Comm’r, dissenting at P 5).

<sup>23</sup> *PennEast*, 171 FERC ¶ 61,135 at P 22 (internal footnotes and citations omitted).

<sup>24</sup> In *Allegheny Defense Project v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit found that “*Chevron* deference d[id] not apply” to the Commission’s interpretation of NGA section 19(a). 964 F.3d 1, 12 (D.C. Cir. 2020) (*Allegheny*). The court reasoned that “statutory provisions addressing the jurisdiction of federal courts do not fit that mold” because “Federal agencies do not administer and have no relevant expertise in enforcing the boundaries of the courts’ jurisdiction.” *Id.* at 11 (citations omitted). The Commission’s interpretation of NGA section 7(h), however, is

*PennEast*, the Commission did offer an interpretation of NGA section 7(h), with which the Supreme Court ultimately agreed.<sup>25</sup>

11. Why ought we decide this question? Because the Commission is particularly well-situated to determine the rights enjoyed by the holder of a temporary certificate under the statute that we administer. This is particularly true in this case—it is procedurally complicated, is being decided in light of an impending crisis, any decision on the matter almost certainly requires the interpretation of our own orders and, absent a declaration on the matter, leaves open a basic question of law implicating either the statutory or Constitutional rights of every party involved. Far from offending the courts for invading their prerogative, the courts would more likely be grateful were we to help inform their deliberations with a decision on the matter in the first instance.

12. The text of NGA section 7(h) states:

When *any holder of a certificate of public convenience and necessity* cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district

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distinguishable from *Allegheny*. Yes, the courts implement NGA section 7(h). Unlike *Allegheny*, the Commission would not be interpreting the ambit of the courts' jurisdiction. Instead, as the Commission did in *PennEast*, it would interpret the scope of the certificate holder's entitlement to the privileges conferred by the temporary certificate issued by the Commission. This is undoubtedly relevant to the Commission's expertise as the agency that administers the NGA.

<sup>25</sup> See *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2263 (2021) (finding that “[b]y its terms, § 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States”); *PennEast*, 171 FERC ¶ 61,135 at P 41 (reaffirming “that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain to acquire lands needed for authorized projects; and that this authority applies to lands in which states hold interest.”).

in which such property may be located, or in the State courts.<sup>26</sup>

13. This language is broad, providing eminent domain authority to “any holder of a certificate of public convenience and necessity.”<sup>27</sup> The Spire Landowners and the Niskanen Center correctly point out that that NGA section 7(c)(1)(B)<sup>28</sup> does not use the phrase “certificate of public convenience and necessity,” but rather uses “temporary certificate.”<sup>29</sup> But, as if to intentionally muddy the waters, the September 2021 Order grants Spire “a temporary certificate *of public convenience and necessity*, pursuant to section 7(c)(1)(B) of the NGA, to operate the Spire STL Pipeline.”<sup>30</sup> Therefore, it appears that our September 2021 Order, by its plain terms, invests Spire with all of the privileges enjoyed by the “holder of a certificate of public convenience and necessity.”<sup>31</sup> Of course, whether that designation is consistent with the statute is an open question.<sup>32</sup>

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<sup>26</sup> 15 U.S.C. § 717f(h) (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 717f(c)(1)(B) (“That the Commission may issue a *temporary certificate* in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.”) (emphasis added).

<sup>29</sup> *See* Spire Landowners October 14, 2021 Request for Rehearing at 7-8; Niskanen Center October 14, 2021 Request for Rehearing at 6-7.

<sup>30</sup> September 2021 Order, 176 FERC ¶ 61,160 at P 1 (emphasis added) (citing 15 U.S.C. § 717f(c)(1)(B)); *see id.* at Ordering Para. (A) (“[a] *temporary certificate of public convenience and necessity* is issued to Spire STL Pipeline LLC . . . .”) (emphasis added).

<sup>31</sup> 15 U.S.C. § 717f(h).

<sup>32</sup> The Commission has in other circumstances included the term “public convenience and necessity” when discussing temporary certificates and NGA section 7(c)(1)(B). *See, e.g., New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 27 (2021) (“NGA section 7(c)(1)(B) provides, in pertinent part, that ‘the Commission may issue a temporary certificate [of public convenience and necessity] in cases of emergency’ to ensure service is maintained ‘pending the determination of an application for a certificate.’”) (quoting 15 U.S.C. § 717[f](c)(1)(B)) (alterations in original); *Tex.-Ohio Pipeline, Inc.*, 58 FERC ¶ 61,025, at Ordering Para. (A) (1992) (issuing “[a] temporary certificate of public convenience and necessity”); *Penn-York Energy Corp. & Nat’l Fuel*

14. And while the language of section 7(h) may be broad, the courts have explained that section 7(c)(1)(B) has limits: “[i]t was designed as a narrow exception to enable the companies and the Commission to grapple with temporary emergencies and minor acts or operations, like emergency interconnections to cope with breakdowns or sporadic excess demand for gas.”<sup>33</sup> Another potential limit was described in *Algonquin Gas Transmission Company v. FPC*, in which the court stated that “it is by no means clear [that] the statutory phrase ‘to assure maintenance of adequate service’ would be construed to include maintenance of a natural gas service no longer authorized by a valid outstanding certificate issued by the Commission under the provision of the Natural Gas Act.”<sup>34</sup> In addition to the courts’ discussion of the limits of this provision, the U.S. Court of Appeals for the First Circuit (First Circuit) also reviewed the legislative history of NGA section 7(c)(1)(B), noting that

“[t]he committee amendment (inserting the words ‘to assure maintenance of adequate service or to serve particular customers’) was made to limit the authority for granting a temporary certificate to emergency situations involving only a comparatively minor extension of the facilities of an existing system.” H.R. Rep. No. 1290, 77th Cong., 1st Sess. 5 (1941).<sup>35</sup>

These cases and the First Circuit’s discussion of the legislative history are instructive in considering the limits of NGA section 7(c)(1)(B).

15. But even as the courts have decreed the purpose of the temporary certificate to be narrow, it is unclear whether, given that narrowness, NGA section 7(h) rights attach. Are the “emergency interconnections to cope with breakdowns” the sort of “minor act” that require eminent domain to effectuate? Are eminent domain proceedings in federal court even amenable to gaining access to land on a temporary, emergency basis? How narrow

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*Gas Supply Corp.*, 37 FERC ¶ 61,109, at Ordering Para. (A) (1986) (same); *Transcon. Gas Pipe Line Corp.*, 34 FERC ¶ 61,402, at Ordering Para. (A) (1986) (same).

<sup>33</sup> *Consumer Fed’n of Am. v. FPC*, 515 F.2d 347, 353 (D.C. Cir. 1975); see *Penn. Gas & Water Co. v. FPC*, 427 F.2d 568, 574 (D.C. Cir. 1970) (“It appears that the provision of [section] 7(c) for temporary certificates was meant to cover a narrow class of situations, to permit temporary and limited interconnection, or expansion of existing facilities in order to meet such emergencies as breakdowns in the service of operating natural gas companies, or sudden unanticipated demands.”) (citing *Algonquin Gas Transmission Co. v. FPC*, 201 F.2d 334 (1st Cir. 1953)).

<sup>34</sup> *Algonquin Gas Transmission Co.*, 201 F.2d at 341.

<sup>35</sup> *Id.* at 340.

should the temporary certificate be in the total absence of process afforded by the statute? The Commission is particularly well-suited to answer these questions. And, instead of providing guidance to Spire and to the parties arguing that eminent domain authority does not attach to temporary certificates, the Commission has instead side-stepped a difficult question and has perhaps even tacitly allowed for the exercise of eminent domain when the Commission has never declared that a temporary certificate holder has the authority to do so.

16. In fact, just last month, Spire successfully opposed a Motion to Dissolve Injunction and Dismiss Condemnation Action for Lack of Subject Matter Jurisdiction in federal district court.<sup>36</sup> The gravamen of that motion? It asked the court to find that section 7(h) eminent domain rights do not attach to temporary certificates issued under section 7(c)(1)(B). And the district court's well-reasoned, text-based holding, in a nutshell, was "that a 'temporary certificate' under § 717f(c)(1)(B) is a 'certificate of public convenience and necessity' under § 717f(h)" and that condemnation rights attach.<sup>37</sup>

17. I take no position, in this statement, on the specific question of whether a temporary certificate holder has condemnation rights under NGA section 7(h). While there is much that weighs against such a determination, there is much that weighs in favor as well, not the least of which is a decision of a federal district court, the very entity that has, as the majority elegantly puts it, "a particular implementing role."<sup>38</sup>

For these reasons, I respectfully dissent.

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James P. Danly  
Commissioner

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<sup>36</sup> See *Spire STL Pipeline LLC v. Jefferson*, No. 18-cv-03204, slip op. (C.D. Ill. Oct. 27, 2021).

<sup>37</sup> *Id.* at 6; *see id.* at 7.

<sup>38</sup> *Spire STL Pipeline LLC*, 177 FERC ¶ 61,114 at P 10.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC

Docket No. CP17-40-010

(Issued November 18, 2021)

CHRISTIE, Commissioner, *concurring*:

1. I support today's order, which appropriately preserves the *status quo ante* as it existed prior to the issuance of the U.S. Court of Appeals for the District of Columbia Circuit's *vacatur* order.<sup>1</sup> I write separately to emphasize the following.

2. First, and most importantly, the people of the St. Louis area are facing a genuine emergency as they head into this winter.<sup>2</sup> Well over 100,000 customers depend on Spire for natural gas to heat their homes and operate their businesses.<sup>3</sup> Because of physical changes that have been implemented since the original certificate was issued, it appears to be simply impossible for Spire's many customers to receive the service they need without the existing Spire pipeline continuing in operation through the coming winter.<sup>4</sup> Putting these customers at risk of losing this vital utility service during the winter cold is a risk we should not take.

3. As a result of the D.C. Circuit Court of Appeals' decision to *vacate* the certificate of public convenience and necessity (CPCN), rather than merely remanding the CPCN to the Commission with its findings of infirmities in the CPCN process and instructions for

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<sup>1</sup> *Spire STL Pipeline, LLC*, 164 FERC ¶ 61,085, *reh'g denied*, 169 FERC ¶ 61,134 (2019); *vacated sub nom. Env. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

<sup>2</sup> *See* 18 C.F.R. § 157.202(b)(13) (defining an "emergency" as "a sudden unanticipated loss of gas supply or capacity that requires an immediate restoration of interrupted service for protection of life or health or for maintenance of physical property.")

<sup>3</sup> *See, e.g.*, Spire Temporary Certificate Application, Docket No. CP17-40-007 at 16 (filed Jul. 26, 2021) ("If the STL Pipeline is not in service during the upcoming winter heating season, without the pipeline's 350,000 Dth per day of capacity, approximately 175,000 – or 27 percent – of Spire Missouri customers could be without gas service . . . .")

<sup>4</sup> *Id.* at 10-17 (describing physical changes to Spire's system and their implications for service to customers).

the Commission to review such findings and to determine what further action was required, Spire's customers face a practical threat to an essential public service. Fortunately, the Natural Gas Act contemplates precisely a situation where there is a need "to assure maintenance of adequate service or to serve particular customers."<sup>5</sup> And under such circumstances, the Act authorizes the Commission to issue an emergency temporary certificate to do so.<sup>6</sup>

4. Second, the Emergency Temporary Certificate we issued *sua sponte* in September under our NGA § 7(c) authority preserves the *status quo ante* that existed before *vacatur*.<sup>7</sup> Consistent with our emergency certification authority under NGA § 7(c), with the inherent logic underlying that provision, and with prior Commission precedent,<sup>8</sup> the Emergency Certificate Order simply preserved the *status quo ante* in all respects. The CPCN holder, Spire, has the same powers under the temporary CPCN it had under the original CPCN – no more, no less. This temporary CPCN was issued to stave off the very real potential for harm to life, health, and property this winter while the Commission prepares to act expeditiously on the Court's remand.

For these reasons, I respectfully concur.

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Mark C. Christie  
Commissioner

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<sup>5</sup> NGA § 7(c), 15 U.S.C. § 717f(c)(1)(B).

<sup>6</sup> *Id.*

<sup>7</sup> *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (Emergency Certificate Order).

<sup>8</sup> See *Texas-Ohio Pipeline, Inc.*, 58 FERC ¶ 61,025 (1992), *reh'g denied*, 69 FERC ¶ 61,145 (1994) (granting temporary certificate in order to avoid interruption of service); *Mississippi River Transmission Corp.*, 40 FPC 190, *reh'g denied*, 40 FPC 932 (1968), *order amending orders*, 42 FPC 1006 (1969) (granting temporary certificate to ensure adequate supplies for customers for the coming winter).