

183 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Spire STL Pipeline LLC

Docket No. CP17-40-016

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued April 20, 2023)

1. On January 17, 2023, the Environmental Defense Fund (EDF) requested rehearing of the Commission’s order on remand, which reissued a certificate of public convenience and necessity and other authorizations to Spire STL Pipeline LLC (Spire) for the Spire STL Pipeline Project (Spire STL Pipeline).¹ EDF claims that the Commission did not provide sufficient opportunities for public participation and did not fully consider or mitigate anticompetitive effects related to alleged self-dealing between Spire and the affiliated shipper Spire Missouri Inc. (Spire Missouri).

2. Pursuant to *Allegheny Defense Project v. FERC*,² the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the Natural Gas Act (NGA),³ we are modifying the discussion in the

¹ *Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022) (Remand Order). In *Env’l Defense Fund v. FERC*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded the Commission’s original orders authorizing the construction and operation of the Spire STL Pipeline. 2 F.4th 953 (D.C. Cir. 2021) (*EDF v. FERC*), cert. denied sub nom. *Spire Mo. Inc. v. EDF*, 142 S. Ct. 1668 (2022); *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order), on reh’g, 169 FERC ¶ 61,134 (2019) (Rehearing Order).

² 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³ 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.”).

Remand Order and continue to reach the same result in this proceeding, as discussed below.⁴

I. Background

A. Certificate Proceeding, CP17-40-000, -001, -002

3. On January 26, 2017, Spire filed an application for authorization to construct and operate the Spire STL Pipeline, a new 65-mile-long interstate natural gas pipeline system, extending from an interconnection with Rockies Express Pipeline LLC (REX) in Scott County, Illinois, to interconnections with Spire Missouri and with Enable Mississippi River Transmission, LLC (MRT) in St. Louis County, Missouri. Spire designed the project to provide up to 400,000 dekatherms per day (Dth/d) of firm transportation service to the St. Louis metropolitan area, eastern Missouri, and southwestern Illinois. Spire executed a binding precedent agreement with Spire Missouri for 350,000 Dth/d of firm transportation service, 87.5% of the total design capacity of the project. Spire Missouri, a local distribution company and indirect wholly-owned subsidiary of Spire, provides natural gas distribution service to approximately 650,000 residential, commercial, and industrial customers in the St. Louis metropolitan area and surrounding counties in eastern Missouri. Spire Missouri's rates and services are regulated by the Missouri Public Service Commission (Missouri PSC).

4. Protesters challenged the need for the Spire STL Pipeline, arguing that a single precedent agreement with an affiliate was insufficient to demonstrate need, particularly when the project would not serve increased demand in the St. Louis market and existing infrastructure could meet the project purpose.

5. On August 3, 2018, the Commission issued Spire a certificate of public convenience and necessity and related authorizations to construct and operate the Spire STL Pipeline (Certificate Order).⁵ The Commission stated that it would not look behind the precedent agreement and found that the benefits of the project outweighed the potential adverse effects.⁶

⁴ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Remand Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁵ Certificate Order, 164 FERC ¶ 61,085.

⁶ *Id.* P 75.

6. EDF, the Missouri PSC, and Juli Steck each filed timely requests for rehearing of the Certificate Order.⁷ Following project construction, the Commission authorized Spire to commence service on the majority of the pipeline on November 14, 2019. On November 21, 2019, the Commission issued an order on rehearing that, among other things, affirmed its underlying determination that Spire had provided a sufficient demonstration of need for the project (Rehearing Order).⁸

B. Judicial Review

7. EDF appealed the Commission's orders. On June 22, 2021, the D.C. Circuit issued its decision in *EDF v. FERC* granting EDF's petition, vacating the Commission's Certificate and Rehearing Orders, and remanding the case to the Commission for further proceedings.⁹ The court found that the Commission's grant of a certificate of public convenience and necessity was arbitrary and capricious because even though "the Commission was presented with strong arguments as to why the precedent agreement between Spire STL and Spire Missouri was insufficiently probative of market need and benefits of the proposed pipeline," the Commission relied upon a single precedent agreement with an affiliated shipper, Spire Missouri, to establish need and failed to weigh the project's benefits against its adverse effects.¹⁰ Specifically, the court stated that:

nothing in the Certificate Policy Statement suggests that a precedent agreement is conclusive proof of need in a situation in which there is no new load demand, no Commission finding that a new pipeline would reduce costs, only a single precedent agreement in which the pipeline and shipper are corporate affiliates, the affiliate precedent agreement was entered into privately after no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.¹¹

⁷ MRT filed a timely request for rehearing but ultimately withdrew its request. Rehearing Order, 169 FERC ¶ 61,134 at PP 6-7.

⁸ Rehearing Order, 169 FERC ¶ 61,134 at PP 12-38.

⁹ 2 F.4th at 976-977.

¹⁰ *Id.* at 973.

¹¹ *Id.*

The court also found that the Commission failed to engage with plausible evidence of self-dealing identified by EDF and others.¹² The court further held that the Commission failed to adequately balance public benefits and adverse impacts, given that the Commission pointed to no concrete evidence to support asserted benefits and did not address claims raised by EDF and others challenging whether asserted benefits were likely to occur.¹³ Accordingly, once the D.C. Circuit's mandate became effective, the Commission's orders and Spire's authorizations would no longer be valid.

C. Proceedings After Remand

1. Temporary Certificates

8. On July 26, 2021, Spire filed an application requesting that, because the Certificate Order had been vacated, the Commission issue a temporary certificate under NGA section 7(c)(1)(B) during the pendency of the remand proceeding to prevent an emergency loss of service to Spire Missouri, MoGas Pipeline LLC, and these entities' residential customers going into the winter heating season.¹⁴ On August 6, 2021, the Commission issued a public notice of the application, which established deadlines for initial comments, motions to intervene, and reply comments.¹⁵ EDF filed a protest, comments replying to Spire's answer to EDF's protest, and an answer to the Missouri PSC's reply comments.¹⁶ EDF argued that the potential emergency was of Spire's own making and questioned how long it would take Spire Missouri to obtain other supply sources.¹⁷

¹² *Id.* at 975.

¹³ *Id.* at 973-74.

¹⁴ Spire July 26, 2021 Application for a Temporary Emergency Certificate at 1-3.

¹⁵ Notice of Application and Establishing Intervention Deadline, 86 Fed. Reg. 44,352 (Aug. 12, 2021).

¹⁶ EDF, Protest, (Docket No. CP17-40-007) (filed Aug. 5, 2021); EDF, Reply Comments, Docket No. CP17-40-007 (filed Oct. 5, 2021) (replying to Spire's August 20, 2021 answer to EDF's protest, among other unspecified filings); EDF Oct. 20, 2021 Answer to Missouri PSC October 5, 2021 Reply Comments (filed Docket No. CP17-40-007).

¹⁷ EDF, Reply Comments, Docket No. CP17-40-007 at 1; EDF, Protest, Docket No. CP17-40-007 at 18, 31 (Aug. 5, 2021).

9. On September 14, 2021, to prevent an emergency from the immediate cessation of service by Spire, the Commission acted *sua sponte* to issue a temporary certificate for 90 days while it evaluated Spire's temporary certificate application.¹⁸

10. The court's mandate became effective on October 8, 2021.¹⁹

11. On December 3, 2021, the Commission issued a temporary certificate to Spire.²⁰ The Commission vacated the prior *sua sponte* temporary certificate and stated that the new temporary certificate would remain in effect until the Commission issued an order on remand. The Commission also stated that it would address on remand issues raised by EDF in the temporary certificate proceeding.²¹

12. The Niskanen Center and EDF filed timely requests for rehearing of the Temporary Certificate. EDF argued that the Commission failed to address the allegations of self-dealing between Spire and Spire Missouri identified by the D.C. Circuit. On February 17, 2022, the Commission issued an order addressing arguments raised on rehearing.²² The Commission sustained its decision to issue a temporary certificate and again stated that issues remanded by the court would be addressed in the remand proceeding.²³

2. Order on Remand

13. On November 12, 2021, while the Commission was considering Spire's request for a temporary certificate, Spire filed a "Request for Expedited Reissuance of Certificates."²⁴ In its request, Spire asked that the Commission reissue the Certificate of

¹⁸ *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160, *order on reh'g*, 177 FERC ¶ 61,114 (2021).

¹⁹ D.C. Cir. Oct. 8, 2021 Mandate, Docket No. 20-1016.

²⁰ *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (2021) (Temporary Certificate Order).

²¹ Temporary Certificate Order, 177 FERC ¶ 61,147 at P 61.

²² *Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 (2022).

²³ *Id.* P 19. Landowners represented by the Niskanen Center appealed the Commission's Temporary Certificate and related rehearing order to the D.C. Circuit. *Scott Turman v. FERC*, D.C. Cir. No. 22-1043 (filed Mar. 7, 2022). On April 3, 2023, at the request of the landowners, the court dismissed the petition for review.

²⁴ Spire November 12, 2021 Request for Expedited Reissuance of Certificates in

Public Convenience and Necessity; the blanket certificate issued under Part 157, Subpart F of the Commission's regulations authorizing certain routine construction, operation, and abandonment activities; and a blanket certificate under Part 284, Subpart G of the Commission's regulations authorizing Spire to provide transportation service under its tariff.

14. On December 15, 2021, Commission staff published a notice of intent to prepare a supplemental environmental impact statement (EIS) that would analyze the environmental impacts related to continued operation of the Spire STL Pipeline facilities.²⁵ The notice established a 30-day comment period about the scope of issues to be addressed.²⁶ EDF filed timely scoping comments and untimely supplemental scoping comments.²⁷

15. On June 16, 2022, Commission staff issued a draft EIS to update the environmental review for the Spire STL Pipeline. EDF filed timely comments on the draft EIS.²⁸ Commission staff issued a final EIS on October 7, 2022.

16. On December 15, 2022, the Commission issued the Remand Order addressing the problems identified by the court and reissuing the requested authorizations to Spire for the Spire STL Pipeline based on a finding that project is now needed and that the benefits outweigh the adverse impacts.²⁹ In the Remand Order, the Commission responded to claims by EDF and the Niskanen Center that the Commission improperly limited public participation because the Commission did not publish notice of Spire's November 12, 2021 Request to Reinstate Certificates and did not solicit comments regarding evidence

Docket Nos. CP17-40-000, CP17-40-001, CP17-40-002, CP17-40-003, CP17-40-004, and CP17-40-007 (November 12, 2021 Request).

²⁵ Notice of Intent To Prepare a Supplemental Environmental Impact Statement, 86 Fed. Reg. 72,943 (Dec. 23, 2021).

²⁶ *Id.* at 72,944.

²⁷ EDF Jan. 14, 2022 Scoping Comments; EDF Feb. 16, 2022 Supplemental Scoping Comments.

²⁸ EDF August 8, 2022 Comments on Draft EIS.

²⁹ Remand Order, 181 FERC ¶ 61,232 at PP 51, 117.

of self-dealing, the benefits or adverse impacts of the pipeline, or Spire's request.³⁰ The Commission explained that:

Agencies on remand, unless otherwise directed by the court, may proceed as needed to supplement the record and redress issues identified by the court. Consistent with how the Commission has processed other remand orders, we reviewed the record before us to determine whether the deficiencies identified by the court could be redressed and what, if any, additional information would be helpful. We find, as discussed below, the record is sufficient to allow us to proceed without requesting supplemental briefing or initiating a new proceeding and issuing a notice of Spire's application.³¹

To support its position, the Commission cited court opinions in *SFPP, L.P. v. FERC*³² and *Cooley v. FERC*,³³ as well as a Commission decision in *Williston Basin Interstate Pipeline Company*,³⁴ recognizing the Commission's discretion whether to reopen the record on remand.³⁵ The Commission also cited its decisions in *NEXUS Gas Transmission, LLC*³⁶ and *Florida Southeast Connection, LLC*³⁷ as examples where the Commission made case-specific determinations as to whether additional information would be helpful.³⁸

17. The Commission explained that because facts in the record allowed the Commission to satisfy its obligation on remand to determine present and future need for

³⁰ *Id.* PP 18-19.

³¹ *Id.* P 20 (internal citations omitted).

³² 967 F.3d 788, 797 (D.C. Cir. 2020).

³³ 843 F.2d 1464, 1473 (D.C. Cir. 1983).

³⁴ 125 FERC ¶ 61,303, at P 16 (2008).

³⁵ Remand Order, 181 FERC ¶ 61,232 at P 20 n.49.

³⁶ 172 FERC ¶ 61,199 (2020).

³⁷ 162 FERC ¶ 61,233 (2018).

³⁸ Remand Order, 181 FERC ¶ 61,232 at P 20 n.50.

the Spire STL Pipeline, “it is unnecessary to decide what weight, if any, the Commission should have accorded the precedent agreement between Spire and Spire Missouri in issuing the original certificate for the Spire STL Pipeline.”³⁹

II. Discussion

A. Procedure

18. On rehearing, EDF asserts that because the Commission did not conduct a new process to determine whether to issue permanent authorizations for the Spire STL Pipeline, the Commission failed to give effect to the D.C. Circuit’s vacatur.⁴⁰ EDF disputes the applicability of precedent cited by the Commission to support its discretion about whether and how to supplement the record on remand,⁴¹ claiming that the cited decisions either did not follow vacatur⁴² or, if they did, addressed narrower procedural or substantive questions that it contends do not apply here.⁴³ EDF states that the D.C. Circuit has drawn a core distinction that, following remand with vacatur, the agency must “initiate another . . . proceeding if it would seek to confront the problem anew.”⁴⁴ EDF claims that the Commission should have reinitiated a notice and comment process to address the court-identified deficiencies related to the Commission’s determinations regarding need, self-dealing, and the balancing of benefits and adverse impacts.⁴⁵ EDF

³⁹ *Id.* P 39.

⁴⁰ Rehearing Request at 4.

⁴¹ Rehearing Request at 8-10.

⁴² *Id.* at 8-9 (discussing *Cooley v. FERC*, 843 F.2d 1464, *NEXUS Gas Transmission LLC*, 172 FERC ¶ 61,199). EDF states that in *NEXUS Gas Transmission, LLC*, the issue of required process on remand was not raised. Rehearing Request at 10.

⁴³ *Id.* at 8 (noting that *SFPP, L.P. v. FERC*, 967 F.3d 788, addressed the Commission’s discretion to grant or deny a late request to reopen the record after the Commission had issued its order on remand); *id.* at 9 (noting that *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, responded to vacatur based wholly on deficiencies in the environmental impact statement). EDF states that in *Florida Southeast Connection, LLC*, the issue of required process on remand was not raised. Rehearing Request at 10.

⁴⁴ *Id.* at 4 (quoting *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1989)); see *United Mine Workers, Int’l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989).

⁴⁵ Rehearing Request at 10.

contends that the opportunities for comment related to the additional environmental review were inadequate, because they specifically limited the scope of comments to environmental matters.⁴⁶

19. We are not persuaded that the vacatur of the Certificate Orders obligated the Commission to reinitiate notice and comment proceedings. The court explained that vacatur was appropriate due to the extent of the Commission's error, specifically its substantive failure to address questions in the record raised about self-dealing and the need for the project, and therefore failed to appropriately balance the project's costs and benefits.⁴⁷ The court did not identify any deficiencies in the Commission's development of the record that would have required additional procedural steps.⁴⁸ Nothing in the court's decision suggested that additional process, beyond the Commission's addressing the issues specified by the court, would be necessary.

20. The cases cited by EDF arose in the context of notice-and-comment rulemaking under the Administrative Procedure Act (APA) and are not on point in the context of case-specific adjudication like the Commission's certificate proceedings at issue here. EDF cites *Independent U.S. Tanker Owners Committee v. Dole*⁴⁹ and *United Mine Workers, International Union v. Dole*,⁵⁰ which explain that the court has discretion "in fashioning a remedy for an agency's failure to present an adequate statement of basis and purpose" for a rulemaking under the APA: the court "may either remand for specific procedures to cure the deficiency without vacating the rule . . . or it may vacate the rule, thus requiring the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew."⁵¹ In both cases, the effect of vacatur was a return to the pre-existing regulations.

⁴⁶ *Id.* at 6-7.

⁴⁷ See 2 F.4th 953 at 976 (applying the test for vacatur established in *Allied-Signal Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

⁴⁸ Cf. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051 (discussing the test for vacatur where the challenge is to an agency's procedural decision, e.g., the decision not to prepare an EIS, rather than the agency's final action itself).

⁴⁹ 809 F.2d 847, 854.

⁵⁰ 870 F.2d 662.

⁵¹ *Indep. U.S. Tanker Owners Comm.*, 809 F.2d at 854 (citations omitted); *United Mine Workers, Int'l Union v. Dole* 870 F.2d at 673 (quoting *Indep. U.S. Tanker Owners Comm.*, 809 F.2d at 854). *But see Intercollegiate Broad. Sys., Inc. v. Copyright Royalty*

21. By contrast, in *EDF v. FERC* the effect of vacatur was the return of Spire's application to pending status,⁵² in a proceeding where extensive opportunities for public involvement already had been provided.⁵³ As discussed,⁵⁴ the Court faulted the Commission for failing to "seriously engage with nonfrivolous arguments" and appropriately engage in its balancing test;⁵⁵ not that the Commission failed to develop the record. Accordingly, the D.C. Circuit did not state that vacatur required the Commission to provide additional notice and comment. In the Remand Order, the Commission explained its conclusion that the record was sufficient to allow the Commission to

Bd., 796 F.3d 111, 125 (D.C. Cir. 2015) (explaining that even where the APA ordinarily requires notice-and-comment proceedings, an agency need not "start from scratch in every situation in which rules are vacated," given that that APA itself provides an exception based on a finding that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest") (internal citation omitted); *Mobil Oil Corp. v. Env'tl. Protection Agency*, 35 F.3d 579, 584 (D.C. Cir. 1994) (same).

⁵² *E.g.*, *Notice of Intent To Prepare a Supplemental Environmental Impact Statement*, 86 Fed. Reg. 72,943, n.2 ("Following the D.C. Circuit's vacatur and remand of the Commission's 2018 Order, Spire's January 26, 2017 application for a certificate of public convenience and necessity to construct and operate the Spire STL Pipeline Project is again pending before the Commission."). Consistent with this approach, in *EDF* the D.C. Circuit specifically described the effect of its ruling as "de-issuance of the Certificate, caused by vacatur." *EDF v. FERC*, 2 F.4th at 976; *cf.* Rehearing Request at 4 (citing *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) ("[n]ormally when an agency so clearly violates the APA we would vacate its action ... and simply remand for the agency to start again.")).

⁵³ *E.g.*, Certificate Order, 164 FERC ¶ 61,085 at PP 15-24 (noting published notices of Spire's initial application and its later amended application, the Commission's grant of EDF's late motion to intervene, EDF's protests of both the initial application and amended application, the Commission's acceptance of EDF's responses to answers filed by Spire and others to EDF's protest, and the incorporation into the record of EDF's excerpted transcript and brief from Spire Missouri's rate case proceeding before the Missouri PSC); *id.* PP 200-206 (noting published notices of the Commission's intent to prepare an EA, three public scoping sessions, publication of the EA for an initial 30-day comment period, and an additional comment period on the EA).

⁵⁴ *See supra* P 19.

⁵⁵ *EDF v. FERC*, 2 F.4th at 960.

proceed without requesting supplemental briefing or initiating a new proceeding and issuing a notice of Spire's November 12, 2021 filing.⁵⁶

22. Next, EDF states that Spire's "Request for Expedited Reissuance of Certificates," filed on November 12, 2021, is properly understood as an application for a certificate and thus initiated a new proceeding.⁵⁷ Accordingly, EDF contends that the Commission's regulations, the NGA, and the APA required that the Commission, at a minimum, determine whether the application was complete; issue a public notice establishing the time period for filing interventions, protests, and comments; and consider any filed comments and protests.⁵⁸ EDF notes that Spire submitted its request "pursuant to part 157 of the Commission's regulations," which address applications for certificates.⁵⁹ EDF adds that the Commission's regulations do not establish any other category of filing that would apply to Spire's request.⁶⁰

23. In the Remand Order the Commission acted on the record first opened by Spire's filing of its original application on January 26, 2017.⁶¹ Regardless of how an entity labels its submission to the Commission, the Commission has discretion to determine the actual nature of the filing and to treat the filing accordingly.⁶² We are not persuaded that

⁵⁶ Remand Order, 181 FERC ¶ 61,232 at P 20; *see id.* PP 24-39 (discussing operational, economic, and public benefits of the Spire STL Pipeline that supported a finding that the project is needed).

⁵⁷ Rehearing Request at 4-5.

⁵⁸ *Id.* at 5-6 (citing 18 C.F.R. §§ 157.9, 157.10 (2022); 15 U.S.C. § 717f(a), (c)(2), (d); 5 U.S.C. § 554(b), (c)). The Commission followed such a process, EDF notes, in response to Spire's application for a temporary certificate on July 26, 2021.

⁵⁹ *Id.* at 4. *See* Spire November 12, 2021 Request for Expedited Reissuance of Certificates at 1 (citing 18 C.F.R. pt. 157 (2022)).

⁶⁰ Rehearing Request at 5.

⁶¹ *Supra* note 53.

⁶² *Alcoa Power Generating Inc.*, 152 FERC ¶ 61,040, at P 17 (2015). It is well established that the Commission has discretion to determine the best procedures to address the issues before it. *E.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (recognizing that agencies have broad discretion over the formulation of their procedures); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 81 (D.C. Cir. 2014) (*per curiam*) (affirming the Commission's discretion in how to manage the proceedings before it); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion "to mold its procedures to the

Spire's November 12, 2021 filing was an application. The ambiguous opening sentence in Spire's filing, which is the sole basis of EDF's view, recites section 7(c) of the NGA and part 157 of the Commission's regulations as authorities under which the Commission could reissue the requested authorizations. In contrast, Spire's earlier July 26, 2021 "Application for a Temporary Emergency Certificate" included the same ambiguous opening sentence but went on to explain that Spire was filing its "application" under sections 157.7 and 157.17 of our regulations and noted that under section 157.6, data need not be duplicated from its original certificate application. In that filing, Spire included exhibits required by section 157.14. The November 12, 2021 filing had no similar further indicators of an application.

24. EDF claims that, in effect, the Commission accepted new arguments and evidence from Spire STL Pipeline in its November 12, 2021 request for expedited reissuance of its previous authorizations, but the Commission failed to offer other stakeholders the opportunity to comment on, question, or dispute those arguments and evidence.⁶³

25. EDF was not denied a meaningful opportunity to respond to Spire's November 12, 2021 request. EDF has not alleged on rehearing that it was not properly served Spire's November 12, 2021 request and thereby lacked actual notice.⁶⁴ Rather, it appears that EDF elected not to respond to the request even though EDF availed itself of the opportunity to comment in the post-remand proceedings. Between Spire's filing of its request and the Commission's Remand Order, EDF submitted four filings related to the Commission's temporary and then permanent reauthorization of the operation of the

exigencies of the particular case") (quoting *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 762 (1973)).

⁶³ Rehearing Request at 6. EDF notes that the Commission's webpage for its Office of Public Participation did not include Spire's request for expedited reissuance of certificates despite having listed other filings submitted before and after that request. *Id.* at 7-8. Whether or how Commission staff in the Office of Public Participation list a filing does not determine how the Commission treats the filing.

⁶⁴ See 18 C.F.R. § 385.2009 (2022) ("Unless actual notice is given or unless newspaper notice is given as required by law, notice by the Commission is provided by the Secretary only by publication in the Federal Register. Actual notice is usually given by service under Rule 2010."); 18 C.F.R. § 385.2010(a)(1)(i) (2022) (requiring that any participant filing a document in a proceeding must serve a copy of the document on "each person whose name is on the service list, or applicable restricted service list, for the proceeding or phase of the proceeding").

Spire STL Pipeline.⁶⁵ In the Remand Order the Commission relied in part on information from Spire's November 12, 2021 request to respond to commenters' concerns that the captive customers of Spire Missouri will pay excessive rates.⁶⁶ Here again, nothing requires that the Commission formally invite comments each time information is submitted during a pending proceeding. The fact that EDF elected not to respond to the evidence that Spire submitted more than a year before the Remand Order, and indicated as such during the proceeding,⁶⁷ does not mean that EDF was denied adequate process. As the D.C. Circuit has explained, "a commenter before the Commission who has ample time to comment on evidence before the deadline for rehearing is not deprived of a meaningful opportunity to challenge the evidence."⁶⁸ EDF argues on rehearing that stakeholders were denied an opportunity to submit detailed comments on evidence of and potential remedies for self-dealing and that the Commission should have considered self-dealing's anticompetitive impacts.⁶⁹ But, as noted, EDF had time to respond to Spire's filing, but elected not to do so. In any case, EDF does not dispute any of the evidence in Spire's November 12, 2021 request or the Commission's consideration of it in the Remand Order. In the Remand Order, the Commission also referred to the November 12, 2021 request with respect to four other issues: the current operational conditions of Spire

⁶⁵ EDF Jan. 3, 2022 Request for Rehearing of Temporary Certificate Order; EDF Jan. 14, 2022 Scoping Comments for Environmental Impact Statement; EDF Feb. 16, 2022 Supplemental Scoping Comments for Environmental Impact Statement; EDF Aug. 8, 2022 Comments on the Draft EIS.

⁶⁶ Remand Order, 181 FERC ¶ 61,232 at P 35. EDF prematurely raised these issues in the temporary certificate proceeding. *E.g.*, EDF January 3, 2022, Request for Rehearing of Temporary Certificate Order at 3-5 (warning of anticompetitive effects of self-dealing transactions and the need to protect captive ratepayers). The Commission deferred issues related to self-dealing to the remand proceeding. Temporary Certificate Order, 177 FERC ¶ 61,147 at P 60, *order on reh'g*, 178 FERC ¶ 61,109 at P 19.

⁶⁷ EDF August 8, 2022 Comments on the Draft EIS at 3. Despite "recognizing the Commission's discretion to manage the remand process," EDF stated that it had not responded to the November 10, 2021 request "as the Commission has not yet solicited comments on those topics." *Id.*

⁶⁸ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1327 (D.C. Cir. 2015) (citing *Minisink Residents for Env'l Preservation & Safety v. FERC*, 762 F.3d 97, at 115 (D.C. Cir. 2014)).

⁶⁹ Rehearing Request at 13.

Missouri;⁷⁰ the delivered costs of natural gas for Spire Missouri;⁷¹ market dynamics;⁷² and impacts to competitor pipeline MRT.⁷³ EDF's rehearing request does not challenge or otherwise address any of these four issues. We conclude that the Commission committed no procedural error and that EDF, having received actual notice of the November 12, 2021 request, was not aggrieved.⁷⁴

B. Consideration of Self-Dealing

26. EDF states that, given the court's finding that the Commission ignored record evidence of self-dealing, the Commission must evaluate the self-dealing between Spire and Spire Missouri and impose a remedy tailored to it.⁷⁵ EDF states that the Commission failed to engage in reasoned decision-making by choosing to acknowledge but then ignore the issue.⁷⁶ EDF claims that the Commission did not meet its obligation to consider whether self-dealing between Spire and its affiliated shipper, Spire Missouri, has resulted in anticompetitive effects and whether certificate conditions could protect captive ratepayers from such effects.⁷⁷

27. In the Remand Order, the Commission appropriately responded to the court's remand and the parties' concerns regarding the need for the project. The court found in *EDF v. FERC* that the Commission failed to engage with arguments as to why the

⁷⁰ Remand Order, 181 FERC ¶ 61,232 at PP 29, 31, 34, 36 (citing Spire Nov. 12, 2021 Request to Reinstate Certificates at 6, 28, 36, 58).

⁷¹ *Id.* P 32 (citing Spire Nov. 12, 2021 Request to Reinstate Certificates at 34-35, 48).

⁷² *Id.* P 33 (citing Spire Nov. 12, 2021 Request to Reinstate Certificates, attach. A at 2-7 & attach. B at 5, 6, 14).

⁷³ *Id.* P 41 (citing Spire Nov. 12, 2021 Request to Reinstate Certificates at 5-6, 29, 56).

⁷⁴ No other entity, including the Niskanen Center which requested rehearing of both the *sua sponte* temporary certificate and the later Temporary Certificate, has claimed to be aggrieved by lack of notice or has requested rehearing of the Commission's Remand Order.

⁷⁵ Rehearing Request at 13.

⁷⁶ *Id.*

⁷⁷ *Id.* at 10-13.

precedent agreement between Spire and Spire Missouri was insufficiently probative of market need and benefits of the proposed pipeline.⁷⁸ In the Remand Order, having discussed in detail the economic, operational, and other public benefits of the Spire STL Pipeline,⁷⁹ the Commission explained why it put aside the question of the probative weight of the precedent agreement:

It is unnecessary to decide what weight, if any, the Commission should have accorded the precedent agreement between Spire and Spire Missouri in issuing the original certificate for the Spire STL Pipeline. On remand, the Commission's obligation is to consider evidence in the record to determine present and future need for the pipeline, and we have done so.⁸⁰

In other words, the Commission concluded that the operational facts on the ground indicated that the Spire STL Pipeline is now needed, without relying on the now-superseded⁸¹ precedent agreement. As such, the Commission's conclusion on remand did not turn on the precedent agreement. Accordingly, EDF's concerns about the probative value of that agreement, due to the alleged self-dealing, do not call our conclusions of need into question due to current operational conditions. Therefore, we have no further need to examine any potential evidence of self-dealing in the record. In any case, EDF does not identify a specific deficiency in the Commission's reliance on the economic, operational, and other public benefits of the project to determine market need, and we continue to find that "it is appropriate to determine the public convenience and necessity by taking into account current facts and circumstances."⁸²

⁷⁸ *EDF v. FERC*, 2 F.4th at 973.

⁷⁹ Remand Order, 181 FERC ¶ 61,232 at PP 25-38.

⁸⁰ *Id.* P 39.

⁸¹ Spire's precedent agreement with Spire Missouri has been superseded by the execution of a long-term service agreement for 87.5% of the project's firm transportation service. Spire Oct. 16, 2019 Negotiated Rate Agreement and Non-Conforming Service Agreement Filing, Docket No. RP 20-70-000. Commission staff accepted the tariff records on November 14, 2019. *Spire STL Pipeline, LLC*, Docket No. RP20-70-000 (Nov. 14, 2019) (delegated letter).

⁸² Remand Order, 181 FERC ¶ 61,232 at P 25.

28. The court in *EDF v. FERC* did not specifically address the nexus between self-dealing and anti-competitive impacts.⁸³ In the Remand Order, the Commission responded to commenter concerns that the captive customers of Spire Missouri will pay excessive rates:

... Spire reports that its return on equity is approximately 8%, which is less than the 14% return on equity the Commission approves for greenfield pipelines. We note that the recourse rates set by the Commission serve as the upper bound, but in many instances the negotiated rate is less than the recourse rate yielding a return on equity less than the Commission-approved return. That is the case here where Spire Missouri is paying a negotiated rate of \$0.25 Dth/d, significantly lower than the approved recourse rate of \$0.357 Dth/d: Spire is earning a return on equity less than the maximum the Commission authorizes for either a greenfield pipeline, a 14% return on equity, or an operating pipeline, a 10.55% return on equity.⁸⁴

The Commission also found that Spire is providing service to Spire Missouri at a fully delivered per Dth cost that is less than Spire Missouri would pay for service on MRT (\$6.36 and \$6.70 Dth/d, respectively).⁸⁵ Thus, Spire Missouri is paying less for the cost of delivered gas than it would pay had it not taken service on the Spire STL Pipeline, undermining EDF's allegation that Spire Missouri's captive customers are paying excessive rates due to the Spire STL Pipeline.

29. The Commission added that a study by Missouri PSC staff evaluating the prudence of Spire Missouri's contract for gas transportation on the Spire STL Pipeline determined that "the decision made by Spire to build the Spire STL [Pipeline] was reasonable and prudent" and that Missouri rate payers were shielded from cost overruns of the Spire STL Pipeline due to the terms of the precedent agreement.⁸⁶ The Commission concluded, based on the record, that the construction and operation of the

⁸³ EDF offered only one example in its briefs to the court: EDF claimed that Spire Missouri had agreed not to oppose a future filing by Spire to increase the negotiated rate paid by captive customers of Spire Missouri. EDF Nov. 13, 2020 Final Reply Brief of Petitioner EDF at 14 (D.C. Cir. No. 20-1016).

⁸⁴ Remand Order, 181 FERC ¶ 61,232 at P 35 (internal citations omitted).

⁸⁵ *Id.* P 37.

⁸⁶ *Id.*

Spire STL Pipeline has not imposed excessive costs on Spire Missouri and its captive ratepayers.⁸⁷ EDF asserts that the Commission was required to “determine whether the Spire Affiliates engaged in impermissible self-dealing,”⁸⁸ but does not challenge the Commission’s explanation that where, as here, there is evidence that the project will result in lower delivery costs to the affiliate and its ratepayers, the concerns raised concerning costs to potential “self-dealing” are ameliorated.⁸⁹ EDF has not identified any particular error in the Commission’s analysis or explained what a further consideration of anticompetitive impacts should entail. Accordingly, in light of the unique facts of this proceeding and the Commission’s consideration of the full record before us, we sustain the decision to reissue the certificate of public convenience and necessity and related authorizations for the project.⁹⁰

The Commission orders:

In response to EDF’s request for rehearing, the Remand Order is hereby modified and the result sustained, as discussed in the body of this order.

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

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

⁸⁷ *Id.*

⁸⁸ Rehearing Request at 13.

⁸⁹ Remand Order, 181 FERC ¶ 61,232 at P 37 n.104. In any case, as noted above, *supra* P 7, the Court’s concerns regarding self-dealing involved the probative value of the precedent agreement in establishing a need for the Spire STL Pipeline, *EDF v. FERC*, 2 F.4th at 975, and the Commission did not rely on that agreement in finding on remand that the pipeline was needed.

⁹⁰ *Id.* PP 51, 117, ordering para. A.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Spire STL Pipeline LLC

Docket No. CP17-40-016

(Issued April 20, 2023)

DANLY, Commissioner, *concurring*:

I agree with the Commission’s determination to “sustain the decision to reissue the certificate of public convenience and necessity and related authorizations for the project.”¹ I write separately to draw the reader’s attention to my separate statement to the underlying Remand Order.²

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹ *Spire STL Pipeline LLC*, 183 FERC ¶ 61,048, at P 29 (2023).

² *See Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022) (Remand Order) (Danly, Comm’r, concurring in the result).