

on the record evidence of self-dealing through a rate condition or other protective measure that will still permit operation of the Pipeline during Winter 2021-22.

I. REQUEST FOR REHEARING

A. Specification of Error

Pursuant to 18 C.F.R. § 385.713(c)(1), EDF respectfully submits that the Temporary Certificate Order contains the following error:

1. The Temporary Certificate Order's failure to address the D.C. Circuit's finding that there is record evidence of self-dealing by the Spire Affiliates or to impose conditions on the temporary certificate to protect captive ratepayers is arbitrary and capricious and contrary to law (Temporary Certificate Order at ¶¶ 58-60).

B. Statement of Issue

Pursuant to 18 C.F.R. § 385.713(c)(2), EDF respectfully provides the following Statement of Issue:

1. Whether the Temporary Certificate Order is arbitrary and capricious and contrary to law in its failure to address the D.C. Circuit's finding that there is record evidence of self-dealing by the Spire Affiliates,⁴ including by its failure to impose any condition on the temporary certificate to protect captive ratepayers.⁵

⁴ *EDF v. FERC*, 2 F.4th at 960, 975-6; *see FPC v. Conway Corp.*, 426 U.S. at 279; *Gulf States Utilities Co. v. FPC*, 411 U.S. at 767; *see also Tapstone Midstream, LLC*, 150 FERC ¶ 61,016 at ¶ 15 (“Because the shipper is an affiliate, there is no assurance that there was an arms-length negotiation between the entities agreeing to the rate, as required by Commission policy and precedent.”).

⁵ *FPC v. Conway Corp.*, 426 U.S. at 279; *Gulf States Utilities Co.*, 411 U.S. at 767; *see also Cove Point LNG Limited Partnership*, 68 FERC ¶ 61,128, 61,613, 61,618-61,623 (denying Cove Point LNG's proposal to charge negotiated market-based rates for the proposed peaking services given the concern that there were no similarly situated non-affiliates to which the Commission could turn for information on reasonable prices); *TECO Power*

II. ARGUMENT

The Commission’s Failure to Address Self-Dealing by the Spire Affiliates in the Temporary Certificate Order Is Arbitrary and Capricious and Contrary to Law

The Supreme Court has held that the Commission has “a responsibility to deal with anticompetitive practices in the power industry.”⁶ The Commission has fulfilled this responsibility in other cases, fully considering the anticompetitive effects of transactions and even recognizing the need to apply protections against such threats of abuse.⁷ In this matter, the D.C. Circuit vacated and remanded the Commission’s August 3, 2018 Order Issuing Certificates (“Spire Certificate Order”) and November 21, 2019 Order on Rehearing (“Spire Rehearing Order”) because, *inter alia*, there was “record evidence of self-dealing” that the Commission ignored.

Servs. Corp., 52 FERC ¶ 61,191, 61,697 (1990) (“we cannot conclude, on the basis of the facts presented, that there has been no abuse of self-dealing. In addition, we cannot conclude that neither Power Services nor Tampa Electric exercised market power over Seminole. Accordingly, we will reject the Applicants’ filing and will dismiss their request for waiver.”).

⁶ *Gulf States Utilities Co.*, 411 U.S. at 767 (emphasis added); *Pub. Utils. Comm’n of State of Cal. v. FERC*, 900 F.2d 269, 297 (D.C. Cir. 1990) (citing *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956)) (the Commission “must consider claims that a § 7 certificate would cause anticompetitive effects”).

⁷ *Transcontinental Gas Pipe Line Corp.*, 60 FERC ¶ 62,153 at p. 63,378 (1992) (“Transactions between affiliates create special concerns due to the fact that these are not arms-length transactions.”); *Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368 at p. 62,249 (1990) (comparing market power to self-dealing and requiring “updated evidence to substantiate the continued absence of self-dealing and reciprocal dealing if Commonwealth seeks changes to the rate that we are accepting today.”). Protections against these types of threats are particularly acute in the case of an affiliate transaction where the counterparty is a public utility with captive ratepayers, as in the case of Spire Missouri, that can shift any risk away from shareholders to those ratepayers. *Cf. Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155 at P 4 (2008) (explaining “that a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders.”).

In denying the Spire Affiliates’ unsupported request that the Certificate and Rehearing Orders be remanded without vacatur, the Court explained that deficiencies in the Orders, including the failure to address self-dealing, rendered it “far from certain that FERC ‘chose correctly’” and explained that allowing the certificate to stand during remand “would give the Commission incentive to allow ‘build[ing] first and conduct[ing] comprehensive reviews later.’”⁸ In fact, during a colloquy with Commission counsel, Judge Tatel suggested that, if the court found that self-dealing may have occurred, it would be inappropriate to allow the Pipeline to continue to operate under its current certificate.⁹ The D.C. Circuit denied the Spire Affiliates’ request for rehearing on the remedy of vacatur, and both the D.C. Circuit and the Chief Justice of the U.S. Supreme Court denied their request that the issuance of the mandate, and therefore the effectiveness of vacatur, be stayed.¹⁰ In opposing these requests, EDF explained to the D.C. Circuit and the Supreme Court that vacatur was the appropriate remedy because, *inter alia*, it returned the status of the Pipeline during the remand proceeding to the Commission’s jurisdiction, which would allow the Commission to include appropriate conditions addressing self-dealing in any temporary certificate.¹¹ Before the Commission, EDF and other intervenors filed responses to the Spire Affiliates’ Temporary Certificate Application explaining the need for

⁸ *EDF v. FERC*, 2 F.4th at 976 (alterations in original) (quoting *Standing Rock Sioux Tribe v. Army Corps of Eng’rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021)).

⁹ *EDF v. FERC*, D.C. Cir. Docket 20-1016, Oral Arg. 1:03:20-1:03:32 (“If we think that this record supports an inference of self-dealing, why would we allow the pipeline to continue?”).

¹⁰ *Spire Mo. Inc. v. EDF*, S. Ct. No. 21A56; *EDF v. FERC*, D.C. Circuit Docket 20-1016, ECF No. 1912949 (denying rehearing); ECF No. 1912952 (denying rehearing en banc); ECF No. 1916411 (denying motion for stay of mandate).

¹¹ *Spire Mo. Inc. v. EDF*, S. Ct. No. 21A56, Response to application from respondent Environmental Defense Fund; *EDF v. FERC*, D.C. Circuit Docket 20-1016, ECF No. 1911398 (EDF filing in opposition to rehearing); ECF No. 1915492 (EDF filing in opposition to stay of mandate).

such conditions and proposing specific conditions that could protect captive ratepayers from the impact of self-dealing.

In the Temporary Certificate Order, the Commission acknowledged the D.C. Circuit's holding that the record contained evidence of self-dealing but failed to further engage with the Spire Affiliates' self-dealing or address the implications of the self-dealing finding for the tailoring of a temporary certificate.¹² The Commission did not explain any basis on which it can ignore record evidence of self-dealing; rather, it found fault in the specifics of the certificate conditions proposed by EDF and other intervenors and on that basis declined to apply any new certificate condition at all, or otherwise address self-dealing by the Spire Affiliates.

While FERC was not obligated to accept EDF's proposed conditions to address the record evidence of self-dealing, the Commission may not refuse to address a legitimate issue raised by intervenors based on its disagreement with the specific remedies intervenors propose to address that issue. The Commission has an obligation to consider the anticompetitive impacts of *all* Section 7 applications, whether they request temporary or permanent certificates.¹³ That obligation is all the more important here given that the *EDF v. FERC* Court found that FERC "ignored record evidence of self-dealing."¹⁴ The Commission has both the authority and the responsibility to evaluate the self-dealing that the Spire Affiliates engaged in and impose a remedy tailored to that self-dealing. Choosing to acknowledge and then ignore the threat altogether does not satisfy the requirements of reasoned agency decision-making.

¹² Temporary Certificate Order at ¶¶ 58-60.

¹³ *Pub. Utils. Comm'n of State of Cal. v. FERC*, 900 F.2d at 297 (citing *City of Pittsburgh v. FPC*, 237 F.2d 741, 754) (the Commission "must consider claims that a §7 certificate would cause anticompetitive effects").

¹⁴ 2 F.4th 953, 960.

III. CONCLUSION

EDF respectfully requests that the Commission grant rehearing, in part, of the Temporary Certificate Order to add appropriate conditions to the temporary certificate issued therein to address the self-dealing of the Spire Affiliates while avoiding disruption of natural gas service to Spire Missouri's captive customers.

Dated: January 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding either by U.S. Mail or electronic service, as appropriate. Dated at Washington, D.C., this 3rd day of January, 2022.

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