

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION**

Spire STL Pipeline LLC

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Docket No. CP17-40-007

**REPLY COMMENTS OF THE
ENVIRONMENTAL DEFENSE FUND**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice of Application and Establishing Intervention Deadline, the Environmental Defense Fund (“EDF”) respectfully submits these reply comments regarding the Application of Spire STL Pipeline LLC for a Temporary Emergency Certificate, or, in the Alternative, Limited-Term Certificate (“Application” or “Temporary Emergency Application”). These comments supplement EDF’s Motion to Reject in Part and Protest (“Motion and Protest”) filed on August 5, 2021 and reply to other filings in this docket, including the Spire STL Pipeline LLC Motion to Answer and Answer to Motion to Reject in Part and Protest of the Environmental Defense Fund (“Spire STL Answer”) filed on August 20, 2021.

A temporary emergency certificate to permit Spire STL pipeline’s operation during the 2021-2022 winter season is appropriate to prevent disruption to natural gas service to St. Louis residents during that period. Spire STL’s responses to FERC Staff’s recent data requests include substantial information indicating the near-term necessity of continued operation of the Spire STL pipeline to ensure continued service, in light of the significant changes Spire Missouri elected to make to its system despite a pending legal challenge.

While it is appropriate for the Commission to grant Spire STL a temporary certificate to operate during the 2021-2022 winter season, it should also impose conditions on that certificate as proposed in EDF’s Motion and Protest and herein to protect St. Louis gas customers and communities along the pipeline route without risking curtailment of service to firm Spire

Missouri customers. The proposed conditions are all the more paramount here, as there are no competing shippers present to create a reasonable cost benchmark.¹ To ensure the Commission fulfills its primary purpose under the Natural Gas Act (“NGA”) to protect consumers,² the Commission should impose the following conditions, as previously requested by EDF: (1) specify a clear end date for the temporary emergency certificate; (2) allow operation of the pipeline only to the extent necessary to avoid curtailment of firm Spire Missouri customers; (3) protect ratepayers from the costs of the pipeline via a rate condition tied to actual usage; and (4) protect landowners by limiting eminent domain authority and ensuring compensation. Permitting Spire STL to continue to operate under the terms of its unlawful permanent certificate order would be inconsistent not only with the U.S. Court of Appeals for the D.C. Circuit’s decision vacating that order, but also the Commission’s responsibilities under the Natural Gas Act, as well as court and Commission precedent. While the Commission proceeds on remand from the D.C. Circuit and considers whether the Spire STL Pipeline is entitled to a permanent certificate, and if so on what conditions, the Commission should impose the above enumerated conditions. These conditions are appropriate to address the evidence of self-dealing in this matter and limit Spire STL’s profits from captive Spire Missouri ratepayers while the remand proceeding is underway.

I. REPLY COMMENTS

These comments address several of the claims raised in the Spire Answer where Spire STL has made misstatements of fact or of EDF’s position or failed to mention relevant facts or

¹ *Spire STL Pipeline LLC*, Order Issuing Certificates, 164 FERC ¶ 61,085 at P 10 (2018) (“Spire Missouri is the only shipper that subscribed for capacity on the project”).

² *California Gas Producers Ass’n v. FPC*, 421 F.2d 422, 428-29 (9th Cir. 1970) (“The Commission’s primary duty under the Natural Gas Act is the protection of the consumer.”); *Atlantic Refining Co. v. P.S.C. of New York*, 360 U.S. 378, 388 (1959) (“[t]he purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas”).

precedent. EDF adheres to all positions in its Motion and Protest except where explicitly modified or clarified in these Reply Comments. EDF maintains that to grant Spire STL an indefinite temporary certificate identical to its now-vacated permanent certificate without analysis, as Spire STL has requested, would be inconsistent with the D.C. Circuit’s decision finding the certificate unlawful. However, contrary to Spire’s assertions that EDF claimed that any temporary certificate would violate the D.C. Circuit’s decision,³ EDF argued in its initial comments that it would be appropriate for FERC to grant a temporary emergency certificate with appropriate conditions to the extent analysis shows it is necessary to ensure reliable service to St. Louis customers for the 2021-2022 winter season. As explained below, the additional information filed by Spire in response to FERC Staff’s data request has demonstrated, for the first time, that operation of the Spire STL pipeline is necessary to ensure reliable service for the 2021-2022 winter season such that issuance of a temporary emergency certificate, with conditions, is appropriate.

A. The Commission’s Review Should Be Limited to Information Directly Relevant to the Existence of an Emergency

Spire STL and EDF agree: the sole question that the Commission must answer in order to determine whether to grant a temporary emergency certificate is “whether an emergency exists” that could result in the interruption of service to Spire Missouri’s firm customers.⁴ The Commission need not consider information that is extraneous or irrelevant to that issue.

³ Spire STL Answer at 9-10; *see also* Application for a Stay Pending the Filing and Disposition of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Spire Missouri Inc. v. Env’tl. Def. Fund*, No. 21A56 (S. Ct. Oct. 4, 2021), available at <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/21a56.html>.

⁴ *See* Spire STL Answer at 17.

While the Temporary Emergency Application contained some information addressing the question of whether an emergency is present, it failed to provide sufficient detail on many relevant issues while including irrelevant information. For example, it contained claims regarding a supposed \$300 million dollars in cost savings to Spire Missouri stemming from the Spire STL Pipeline during Winter Storm Uri that are both irrelevant to the question of whether an emergency exists and contravened by the Missouri Public Service Commission Staff Investigation Report.⁵ The accuracy of such claims, and more generally the question of whether indefinite operation of the Spire STL Pipeline is in the public interest, are appropriate issues for the proceeding on remand considering whether Spire should receive a permanent certificate; they are not relevant to this proceeding on the Temporary Emergency Application. Whether an emergency exists that justifies a temporary certificate is a separate question from whether long-term continued operation of the Pipeline is in the public interest and these questions should not be inappropriately merged or conflated. Spire STL's continued reliance on the abandonment standard is similarly inappropriate, both because it is not related to the question of whether an emergency exists and because it would improperly favor pipelines that are built or operated without a valid certificate.

FERC Staff's Data Request, which as Spire STL acknowledges overlapped substantially with questions raised in EDF's Motion and Protest, appropriately required Spire STL to file additional information regarding the details of the asserted emergency. Spire STL's response to the Commission's data request demonstrates for the first time that, in light of the system changes

⁵ Staff Investigation Report at 7-8, *Staff's Investigation of Spire STL Pipeline's Application at FERC for a Temporary Certificate to Operate*, Case No. Go-2022-0022 (Aug. 16, 2021) ("In Staff's view, Spire's estimate of savings is overstated compared to a more reasonable comparison of a pre-Spire STL operations versus a post-Spire STL impact").

Spire Missouri elected to make despite a pending legal challenge, operation of the Spire STL Pipeline specifically during the 2021-2022 winter season is necessary to ensure there is no risk of interruption of service to Spire Missouri firm customers.

B. The D.C. Circuit Decision Invalidated FERC’s Approval of the Precedent Agreement

EDF’s proposed rate condition is well within the authority of the Commission and is appropriate given the concerns regarding self-dealing raised by the Court in *EDF v. FERC*. In opposition to EDF’s proposed rate condition, Spire STL explains that “[Spire STL] filed the negotiated rate agreement in a separate docket from the certificate proceeding[,] [t]he Commission accepted the filing, and no parties sought rehearing.”⁶ Given those circumstances, Spire STL claims that it may now “reasonably rely upon the” Commission’s order and that EDF’s proposed rate condition “is a collateral attack on the final and unappealable negotiated rate agreement filing.”⁷ Spire STL’s argument fails because it ignores the fact that a valid certificate order is the *sine qua non* for filing and acceptance of a negotiated rate agreement in a separate docket.⁸

Spire STL’s authority to enter into negotiated rate agreements is “detailed in section 6.18 of the General Terms and Conditions of [the] tariff” it included in its January 26, 2017 application in Docket No. CP17-40.⁹ The Commission’s August 3, 2018 Certificate Order

⁶ Spire STL Answer at 14.

⁷ *Id.*

⁸ See 15 U.S.C. § 717f(c) (“No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts.”) (emphasis added).

⁹ Certificate Order at P 12 n.15; *see also id.* at P 141.

approved Spire STL’s tariff.¹⁰ The Certificate Order also required Spire STL to “file the negotiated rate agreements or tariff records at least 30 days, but not more than 60 days, before the proposed effective date for such rates.”¹¹ Consequently, Spire STL’s ability to file the negotiated-rate contract in a separate docket stems directly from the Certificate Order. Indeed, Spire STL expressly recognized this fact in its October 16, 2019 filing of the negotiated rate agreement in Docket No. RP20-70. There, Spire STL stated that it was submitting the negotiated rate agreement between Spire STL and Spire Missouri “pursuant to Paragraph 141 and Ordering Paragraph (H) of the Commission’s Order Issuing Certificates issued on August 3, 2018 in Docket Nos. CP17-40-000, *et al.*”¹²

There is no independent authority for Spire STL to submit, or for the Commission to approve, a negotiated-rate contract for service over a pipeline that has not been certificated under Section 7 of the NGA.¹³ Where, as here, a Certificate Order is vacated, the factual predicate for the submission and approval of a negotiated-rate contract no longer exists. Consequently, Spire STL cannot “reasonably rely” on the Commission’s approval of the negotiated-rate contract prior to the D.C. Circuit decision vacating the Certificate Order. Spire STL also cannot credibly claim

¹⁰ *See id.* at Ordering Paragraph (F) (“Spire’s initial rates and tariff are approved, as conditioned and modified in this order.”); *see also id.* at P 42.

¹¹ *Id.* at P 141; *see also id.* at Ordering Paragraph (H).

¹² Docket No. RP20-70, Spire STL’s Transmittal Letter at 1; *see also id.* at 3 (“Spire is submitting tariff records pursuant to Paragraph 141 of the Commission Order...in order to reflect the Statement of Negotiated Rates for firm transportation service for Spire Missouri under the Non-Conforming Agreement.”); *id.* (The Certificate Order “accepted these non-conforming provisions and directed Spire to file the Non-Conforming Agreement at least 30 days, but not more than 60 days, before providing service to Spire Missouri.”).

¹³ *See* 15 U.S.C. § 717f(c) (permitting interstate pipelines to “engage in the transportation or sale of natural gas” only if “there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts”).

that EDF's post-vacatur proposal of a rate condition in response to a new, temporary certificate application is an impermissible, collateral attack on the pre-vacatur order approving the negotiated-rate contract.¹⁴

Spire STL also contends that “[a]ny change to Spire STL’s approved rates must be accomplished under either Section 4 or 5 of the NGA.”¹⁵ The contention fails for the same reasons as the arguments regarding Spire STL’s reliance on the pre-vacatur order approving its negotiated-rate contract. The “approved rates” have no legal effect following the Certificate Order’s vacatur. None of the three opinions that Spire STL cites in support of its contention undermines EDF’s proposed rate condition. Those opinions do not involve vacatur of the certificate orders authorizing the new services or initial rates. Nothing in those opinions supports a conclusion that an order approving a negotiated-rate contract remains lawful even where the statutory prerequisite of having “in force . . . a certificate of public convenience and necessity issued by the Commission” is no longer present.¹⁶ Indeed, the Supreme Court has found that the Commission has the authority to impose rate conditions on temporary certificates and the Commission has applied such conditions in the past, including to protect customers from excessive rates and charges.¹⁷

¹⁴ Spire STL accuses EDF of engaging in “a collateral attack on the final and unappealable negotiated rate agreement filing.” Spire STL Answer at 14 (emphasis added). Presumably, Spire STL intended to reference the November 14, 2019 letter order in Docket No. RP20-70 and not Spire STL’s October 16, 2019 filing.

¹⁵ Spire STL Answer at 14 (citing *Tenn. Gas Pipeline Co.*, 160 FERC ¶ 61,027 at P 6 (2017); *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1127-28 (D.C. Cir. 1979); *N. Nat. Gas Co. v. FERC*, 827 F.2d 779, 781 (D.C. Cir. 1987)).

¹⁶ 15 U.S.C. § 717f(c).

¹⁷ *Federal Power Com. v. Hunt*, 376 U.S. 515 (1964); see, e.g., *Texas-Ohio Pipeline, Inc.*, Order Issuing Temporary Certificate, 58 FERC ¶ 61,025 (Jan. 15, 1992).

The three opinions on which Spire STL relies are also distinguishable on other grounds. *Tennessee Gas Pipeline* addressed whether review of initial rates in a Section 7 certificate application could also include review of the pipeline’s existing rates.¹⁸ As a new entrant, Spire STL had no existing rates. Likewise, *Panhandle Eastern* addressed whether Section 7 “authorize[d] the adjustment of rates charged [to] customers not receiving the services to be certificated.”¹⁹ *Northern Natural* addressed whether Section 7 authorized the Commission to require a pipeline to credit fixed-cost related revenues from a newly certificate service to existing customers.²⁰ The issues addressed in *Panhandle Eastern* and *Northern Natural* are not present here.

In sum, Spire STL provides no legitimate rebuttal to, or legal basis undermining, EDF’s proposed rate condition.

C. A Rate Condition Is an Appropriate Measure to Address Potential Self-Dealing and Protect Captive Ratepayers

The Spire Answer argues that a rate condition is unwarranted based on the level of the rate set by the precedent agreement but wholly fails to address the issue of self-dealing. The mere fact that the precedent agreement is lower than the recourse rate does not demonstrate that it is a good deal for captive ratepayers, nor does the fact that the precedent agreement reduces Spire STL’s rate of return compared to the recourse rate. New pipelines invariably sell most if not all of their capacity through precedent agreements providing for service agreements at rates below the recourse rate; however, in most cases, the rates of those agreements are disciplined by the customer’s interest in paying as little as possible. In this case, where the shipper and its sole

¹⁸ *Tenn. Gas Pipeline*, 160 FERC ¶ 61,027 at P 6.

¹⁹ *Panhandle E. Pipe Line*, 613 F.2d at 1127-28.

²⁰ *N. Nat. Gas*, 827 F.2d at 780-81.

customer are affiliates and where record evidence of self-dealing exists, the mere fact that an agreement contains a rate lower than the recourse rate does not render it reasonable.²¹ As demonstrated in the Lander Affidavit, Spire STL stands to make a substantial profit on its contract with Spire Missouri.²² The Commission should impose a rate condition on the temporary emergency certificate to address the record evidence of self-dealing and to protect the captive ratepayers of Spire Missouri during the pendency of the remand proceeding.

D. An Operational Condition Is Consistent with FERC Precedent and Can Be Appropriately Tailored to Preserve Reliable Service

Contrary to Spire STL's assertions, the Commission has previously applied operational conditions to temporary emergency certificates to tailor their usage to the emergency.²³ EDF's proposed condition, that the Spire STL Pipeline only be used where other suppliers cannot meet the needs of Spire Missouri customers and that it report to the Commission on usage, is consistent with this precedent and will not create risk of interruption of service to Spire Missouri customers. Notably, this operational condition does not require Spire STL to seek prior approval, but rather to notify the Commission that its operation was necessary to avoid interruption of service to the firm customers of its affiliate, Spire Missouri. Moreover, EDF suggests that the

²¹ A rate condition is all the more paramount here, as there are no competing shippers present to create a reasonable cost benchmark. *Spire STL Pipeline LLC*, Order Issuing Certificates, 164 FERC ¶ 61,085 at P 10 (2018) (“Spire Missouri is the only shipper that subscribed for capacity on the project”).

²² Motion to Reject in Part and Protest of Environmental Defense Fund, Exhibit A: Lander Affidavit at ¶ 32, Docket No. CP17-40-007 (Aug. 5, 2021).

²³ *Texas-Ohio Pipeline, Inc.*, Order Issuing Temporary Certificate, 58 FERC ¶ 61,025 (Jan. 15, 1992); *Mississippi River Transmission Corporation*, Order Granting Temporary and Permanent Certificates, 40 FPC 190 (July 31, 1968).

Commission require that the Spire STL line be fully pressured, so that its operation to prevent interruption is not delayed due to a low-pressure state.²⁴

Nothing in these requirements would, as Spire STL suggests, limit the ability of Spire STL or Spire Missouri to make appropriate arrangements to ensure gas is available on the Spire STL Pipeline when needed. Nor do MoGas's comments suggest that this condition is inappropriate. Nothing in Spire STL or MoGas's filings suggests that gas transported to MoGas from Spire STL is bound for any customer other than Spire Missouri. To the extent that gas from Spire STL is being transported to MoGas to serve the needs of Spire Missouri, such service would be permitted under this condition as necessary. The benefit that the availability of gas from Spire STL offers to MoGas—to serve Spire Missouri and continue service to its other customers in times of high system utilization—could continue under this framework. Similarly, the attached reporting requirements that EDF recommended in its initial comments would not limit service or require Spire Missouri to re-construct retired facilities to the extent that Spire Missouri does not believe that such re-construction is required to maintain reliable service. The condition proposed by EDF is appropriate in recognition of this unprecedented situation and will limit usage of the pipeline consistent with FERC precedent and the public interest.

²⁴ This “fully pressured” operating condition is an explicit modification and clarification of EDF’s position.

II. CONCLUSION

EDF respectfully recommends that the Commission rule on Spire's Temporary Certificate Application consistent with the recommendations in EDF's August 5, 2021 Motion and Protest and these Reply Comments.

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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 5th day of October, 2021.

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