176 FERC ¶ 61,160

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. | CP17-40-009 |

ORDER ISSUING TEMPORARY CERTIFICATE

(Issued September 14, 2021)

1. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has issued an opinion vacating and remanding the Commission’s orders authorizing Spire STL Pipeline LLC (Spire) to construct and operate the Spire STL Pipeline[[1]](#footnote-2) and orders denying petitions for rehearing and rehearing *en banc* of that ruling.[[2]](#footnote-3) When the court’s mandate issues, Spire will lack the necessary authority required by the Natural Gas Act (NGA) to operate its facilities.[[3]](#footnote-4) In order to ensure continuity of service for a limited period while the Commission considers appropriate next steps, the Commission is issuing Spire a temporary certificate of public convenience and necessity, pursuant to section 7(c)(1)(B) of the NGA,**[[4]](#footnote-5)** to operate the Spire STL Pipeline.

# Background

1. On August 3, 2018, the Commission issued Spire a certificate of public convenience and necessity under section 7(c) of the NGA**[[5]](#footnote-6)** and Part 157 of the Commission’s regulations**[[6]](#footnote-7)** to construct and operate the Spire Project, a 65-mile-long interstate natural gas pipeline system, extending from an interconnection with Rockies Express Pipeline LLC in Scott County, Illinois, to interconnections with both Spire Missouri Inc. (Spire Missouri) and Enable Mississippi River Transmission, LLC (MRT) in St. Louis County, Missouri.**[[7]](#footnote-8)** The Environmental Defense Fund (EDF), Missouri Public Service Commission, MRT, and Juli Steck each filed timely requests for rehearing, and, on November 21, 2019, the Commission issued an order on rehearing addressing the arguments raised and dismissing, rejecting, or denying the requests for rehearing.**[[8]](#footnote-9)** EDF and Juli Steck each petitioned for review with the D.C. Circuit.
2. On June 22, 2021, the D.C. Circuit issued a decision granting EDF’s petition for review and vacating the Commission’s orders authorizing the Spire Project and remanding to the Commission for further proceedings.**[[9]](#footnote-10)** On July 26, 2021, Spire filed an application for a temporary certificate stating that if the Spire STL Pipeline is removed from service Spire Missouri will be unable to obtain adequate service to satisfy peak demand during the 2021-2022 winter heating season in the St. Louis region.[[10]](#footnote-11) On August 5, 2021, Spire filed petitions for panel rehearing and rehearing *en banc* with the D.C. Circuit, asserting that the court should not have vacated the Commission’s orders because it would cause service disruptions during the winter heating season.**[[11]](#footnote-12)**
3. On August 6, 2021, the Commission issued notice of Spire’s application for a temporary certificate, establishing September 7, 2021, as the deadline for interventions and comments, and October 5, 2021, as the deadline for reply comments.[[12]](#footnote-13) On the same day, the Commission requested additional information from Spire, to be filed by September 7, 2021.
4. On September 7, 2021, the D.C. Circuit denied Spire’s petitions for rehearing.[[13]](#footnote-14)

# Discussion

1. Section 7(c)(1)(B) of the NGA states that “the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate services or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . .”[[14]](#footnote-15)
2. Upon issuance of the D.C. Circuit’s mandate, Spire will lack authorization to operate the Spire STL Pipeline potentially jeopardizing Spire Missouri’s ability to obtain adequate supply, a situation that could be dire during the upcoming winter heating season. As noted above, the Commission’s August 6, 2021 Notice of Application established a schedule for Spire to provide additional information and for interested parties to file comments and reply comments. Some comments filed to date suggest that an abrupt cessation of service on the Spire STL Pipeline could negatively impact customers in the St. Louis region, especially during extreme weather events.[[15]](#footnote-16) Other commenters disagree.[[16]](#footnote-17)
3. We find that once the D.C. Circuit’s mandate issues and until the Commission can complete its assessment of the validity of these claims and determine an appropriate course of action, an emergency exists under NGA section 7(c)(1)(B) insofar as the 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.”[[17]](#footnote-18) Accordingly, we are issuing a temporary certificate to operate the Spire STL Pipeline to assure adequate natural gas supplies to Spire Missouri and its customers while the Commission considers Spire’s July 26 application and other information in the record. This temporary certificate will be issued under the previously approved terms, conditions, authorizations, and tariff, while the Commission evaluates the application and the arguments raised in the responsive filings. This authorization does not permit Spire to engage in any construction or to provide any new service. As a condition of accepting this certificate, Spire must continue all restoration activities along the project right-of-way.[[18]](#footnote-19)
4. In the present case, Spire will not be allowed to expand its facilities as this temporary certificate explicitly prohibits any additional construction. Further, this order does not provide authorization for a large swath of the industry to provide service without Commission oversight. Instead, 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.
5. The dissent contends that the Commission may not issue a temporary certificate under these circumstances--notwithstanding the dissent’s admission that “dire circumstances” may result if pipeline service is disrupted--because the emergency here, precipitated by the D.C. Circuit’s vacatur, is a condition of the Commission’s own making. In fact, however, the emergency is the breakdown in service to existing customers that may result from the cessation in operation of a functioning pipeline. This scenario presents the sort of circumstances that the D.C. Circuit has found section 7(c) to cover: “temporary emergencies and minor acts or operations, like emergency interconnections to cope with breakdowns or sporadic excess demand for gas.”[[19]](#footnote-20) And this scenario is distinguishable from the facts in *Algonquin Gas Transmission Co. v. FPC [[20]](#footnote-21)* and *Consumer Federation*, which involved, respectively, a request to complete construction of facilities needed to provide *new* service to a region that previously did not have natural gas service and orders granting broad authority not tied to the needs of specific customers. Here, the Commission addresses the risk that existing customers in the St. Louis region will experience a disruption in service. The Commission need not wait until such disruption is certain or imminent before acting, and may issue a certificate in order “to assure” maintenance of service.[[21]](#footnote-22)
6. We are issuing this temporary certificate *sua sponte*. Our action here does not prejudge the merits of Spire’s July 26 application or in any way indicate what action we will take in response to the court ruling. The temporary certificate will remain in place for 90 days, while the Commission evaluates Spire’s temporary certificate application and the arguments raised in the responsive filings.

The Commission orders:

1. A temporary certificate of public convenience and necessity is issued to Spire STL Pipeline LLC (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. The temporary certificate does not authorize the construction of any additional facilities or the commencement of any new service. As a condition of accepting this certificate, Spire must continue restoration activities along the project right-of-way.
2. Spire must indicate its acceptance of this certificate, in writing, within three business days of the date of this order.
3. This order will be effective for 90 days, absent further order from the Commission.

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

 attached.

( S E A L )

Debbie-Anne A. Reese,

Deputy Secretary.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

|  |  |  |
| --- | --- | --- |
| Spire STL Pipeline LLC |  Docket No. | CP17-40-009 |

(Issued September 14, 2021)

DANLY, Commissioner, *dissenting*:

1. Today’s order issues a temporary certificate to Spire STL Pipeline LLC (Spire) under section 7(c)(1)(B) of the Natural Gas Act (NGA),[[22]](#footnote-23) the purpose of which is to allow Spire to continue operating its pipeline system following the issuance of the court’s mandate which will vacate Spire’s certificate. Such an issuance is necessary should the Commission wish to ensure continuity of service and we know beyond doubt that “[n]o single factor in the Commission’s duty to protect the public can be more important to the public than the continuity of service furnished.”[[23]](#footnote-24) This duty is all the more important immediately ahead of winter. And while I understand how critical it is to ensure service continues uninterrupted and I appreciate the circumstances faced by Spire, I cannot vote for this order because it violates the NGA and the Administrative Procedure Act (APA).
2. The majority is correct when it declares 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.”[[24]](#footnote-25) This is an exception to the statute’s ordinary requirement that the Commission notice and set for hearing all certificate applications and approve or deny certificates based on whether a proposed facility is in the public convenience and necessity.[[25]](#footnote-26) And I agree with the majority and the commenters who said that dire consequences may attend a cessation of service. The present situation, however, is simply not the type of emergency contemplated by the statute. The courts have explained that section 7(c)(1)(B) has limits: “it 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.”[[26]](#footnote-27)
3. This is not what we face here. This case is not about broken compressor stations, breached pipelines, or unexpectedly cold weather. Instead, what 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. Section 7(c)(1)(B) is simply inapposite. 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. 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. In *Algonquin Gas Transmission Company v. FPC*, 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.”[[27]](#footnote-28) And this makes sense. If the purpose of the provision is to allow for narrow orders to be issued in emergencies for the specific purpose of maintaining service provided by legally-operating pipelines, a certificate of public convenience and necessity would seem a necessary prerequisite.
4. The majority responds by arguing that “the emergency is the breakdown in service to existing customers that may result from the cessation in operation of a functioning pipeline”[[28]](#footnote-29) and likens this emergency to “emergency interconnections to cope with breakdowns or sporadic excess demand for gas.”[[29]](#footnote-30) I find this reasoning convenient, not believable. These are not analogous. It also does not explain the Commission’s delay in acting. In the face of an emergency, why would the Commission notice Spire’s request for a temporary emergency certificate for a 30-day initial comment and 30-day reply comment period? The imminent cessation of service during the upcoming winter season was a possibility then just as it is now. Yet, the Commission not only declined to use its emergency authority then but established a proceeding that deviated from standard practice. Moreover, how can the Commission find there is an emergency warranting a temporary certificate and still “evaluate[] Spire’s temporary certificate application and the arguments raised in the responsive filings”?[[30]](#footnote-31) The Commission absolutely cannot issue a temporary certificate merely because there is an ongoing dispute regarding whether there is in fact an emergency.[[31]](#footnote-32)
5. In sum, this order is unlawful. In order for the Commission to issue a temporary certificate under NGA section 7(c)(1)(B), it must provide an adequate, reasoned explanation for why there is an emergency as contemplated by the statute. Failure to do so is a violation of the NGA and APA.
6. Legal deficiencies aside, the predicament the Commission faces in this proceeding—that it *must* issue an unlawful order to maintain continuity of service—is a Hobson’s choice of its own creation. The Commission could have taken several steps, all simple and prudent, to avoid finding itself in its present dilemma and I would not be in the position of voting against an order designed to continue service that I agree, at least for the time being, is needed.
7. *First*, the Commission could have noticed Spire’s application with a comment period consistent with its standard practice when considering certificate applications—that is, twenty-one days for comments and interventions and no reply comment period.[[32]](#footnote-33) Doing so would have provided the Commission greater flexibility to react to the court’s mandate, which could have issued as early as August 13, 2021.
8. Instead, on August 6, 2021, at the direction of the Chairman, Commission staff noticed Spire’s application and set September 7, 2021, as the deadline for initial comments, and October 5, 2021, as the deadline for reply comments.[[33]](#footnote-34) And as a result, the majority is reacting to the mandate, creating new sub-dockets,[[34]](#footnote-35) acting “*sua sponte*,”[[35]](#footnote-36) and in the end issuing a temporary certificate without notice and hearing—all to get around the fact that, under the timeline the Commission created for itself, reply comments are not due for another twenty-one days. Noticing Spire’s application for the standard 21-day comment period would have obviated the majority’s need to engage in the acrobatics we see in this order by providing the Commission the procedure necessary to issue a certificate under NGA section 7(c) and (e)[[36]](#footnote-37) for the winter season as the Commission considers what to do on remand. Such order could have met the statutory requirements that the Commission notice and set for hearing the application and approve or deny the certificate based on whether the proposed temporary service is in the public convenience and necessity.
9. *Second*, the Commission should have sought rehearing of the court’s vacatur of Spire’s certificate order. Vacatur is an extraordinary remedy and, while the court was correct to instruct the Commission regarding its failure to properly explain its decisions, the court misapplied *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*,[[37]](#footnote-38) and we should have sought rehearing. But, despite support among a majority of my colleagues to seek rehearing, the Chairman declined to do so.[[38]](#footnote-39) Had the Commission itself sought rehearing, the court may have reversed its decision to vacate the Commission’s order and the Commission could have taken the time it needed on remand to either justify its decision to the court’s satisfaction or taken any other steps it deemed necessary.
10. *Third*, at the very least, the Commission should have sought a delay of the issuance of the court’s mandate or should have supported Spire’s request to stay the mandate. Nothing could have been lost by making such a request. It would have afforded the Commission time to issue a durable order that conformed to the procedural requirements of the NGA.
11. My colleagues may believe that their 90-day temporary certificate provides certainty or solace to the City of St. Louis. This is misguided. This temporary certificate will lift December 12, 2021, not even halfway through the winter season. I question the reasons for issuing a temporary certificate for any period shorter than the whole of winter. One wonders why the Commission has taken such a parsimonious approach toward Spire when it was the deficiency of our order, not any action of Spire’s, that has put us where we are. The Commission must fix this infirmity in a manner that is legal and in the public interest.

For these reasons, I respectfully dissent.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

James P. Danly

Commissioner

1. *Env’tl Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir 2021). [↑](#footnote-ref-2)
2. Sep. 7, 2021, Orders Denying Petitions for Rehearing and Rehearing *En Banc*, D.C. Cir. Nos. 20-1016, 20-1017. [↑](#footnote-ref-3)
3. On September 13, 2021, Spire filed a motion in the D.C. Circuit to stay the mandate until December 13, 2021, which is 90 days from when the mandate would otherwise issue.  Although D.C. Circuit Rule 41(a)(2) states that the mandate will not issue during the period in which a motion to stay the mandate is pending, the Commission nonetheless acts today out of an abundance of caution and to ensure adequate supply, as least temporarily, to the St. Louis region. [↑](#footnote-ref-4)
4. 15 U.S.C. § 717f(c)(1)(B). [↑](#footnote-ref-5)
5. 15 U.S.C. § 717f(c). [↑](#footnote-ref-6)
6. 18 C.F.R. pt. 157 (2020). [↑](#footnote-ref-7)
7. *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Certificate Order). [↑](#footnote-ref-8)
8. *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (Rehearing Order). [↑](#footnote-ref-9)
9. *Env’t Def. Fund*, 2 F.4th 953. [↑](#footnote-ref-10)
10. Spire in the alternative requested that the Commission issue, what it styled as, a limited-term certificate issued under sections 7 and 16 of the NGA. [↑](#footnote-ref-11)
11. Spire Aug. 5, 2021 Petition for Rehearing at 7, D.C. Cir. Nos. 20-1016, 20-1017. [↑](#footnote-ref-12)
12. All timely, unopposed motions to intervene filed in response to the August 6, 2021 notice are granted by operation of Rule 214 of the Commission’s Rules of Practice and Procedure.  Any party in the underlying certificate proceeding is deemed to be a party to this proceeding.  Any motion to intervene filed after September 7, 2021, is untimely and must “show good cause why the time limitation should be waived” and provide justification for late intervention by reference to the other factors set forth in Rule 214(d) of the Commission’s Rules of Practice and Procedure. 18 C.F.R.§ 385.214(d) (2020).  [↑](#footnote-ref-13)
13. Sep. 7, 2021, Orders Denying Petitions for Rehearing and Rehearing *En Banc*, D.C. Cir. Nos. 20-1016, 20-1017. [↑](#footnote-ref-14)
14. 15 U.S.C. § 717f(c)(1)(B). Section 157.17 of the Commission’s regulations implements section 7(c)(1)(B) and provides that:

[i]n cases of emergency and pending the determination of any application on file with the Commission for a certificate of public convenience and necessity under section 7 of the Natural Gas Act, application may be made for a temporary certificate authorizing the construction and operation of extensions of existing facilities, interconnections of pipeline systems, or sales of natural gas that may be required to assure maintenance or adequate service, or to service particular customers. 18 C.F.R. § 157.17. [↑](#footnote-ref-15)
15. *See* Missouri Public Service Commission, *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), https://efis.psc.mo.gov/mpsc/commoncomponents /view\_itemno\_details.asp?caseno=GO-2022-002224&attach\_id=2022002468. [↑](#footnote-ref-16)
16. *See Environmental Defense Fund*, Aug. 5, 2021 Protest and Motion to Reject. [↑](#footnote-ref-17)
17. *See* 18 C.F.R. § 157.202(b)(13); *Cf. Penn. Gas & Water Co. v. FPC*, 427 F.2d 568, 575 (D.C. Cir. 1970) (finding economic hardship does not constitute an emergency). [↑](#footnote-ref-18)
18. Spire has stated that it would not construct any new facilities and would continue to perform restoration, as required by the Commission, under any temporary certificate it received. Spire Aug. 26, 2021 Answer to Landowners Aug. 5, 2021 comments at 11, 12. [↑](#footnote-ref-19)
19. *Consumer Federation of America v. FPC*,515 F.2d 347, 353 (D.C. Cir. 1975) (*Consumer Federation*) ; *see also Penn. Gas & Water Co.*, 427 F.2dat 574 (providing illustrative examples of emergencies including “breakdowns in the service of operating natural gas companies”). [↑](#footnote-ref-20)
20. 201 F.32d 334 (1st Cir. 1953). [↑](#footnote-ref-21)
21. 15 U.S.C. § 717f(c)(1)(B). [↑](#footnote-ref-22)
22. 15 U.S.C. § 717f(c)(1)(B). [↑](#footnote-ref-23)
23. *Sunray Mid-Continent Oil Co. v. FPC*, 267 F.2d 471, 473 (10th Cir. 1959); *see also City of Mesa v. FERC*, 993 F.2d 888, 895 (D.C. Cir. 1993) (stating that part of the Commission’s mandate “is a duty to assure that consumers, especially high-priority consumers, have continuous access to needed supplies of natural gas.”). [↑](#footnote-ref-24)
24. *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160, at P 6 (2021) (quoting 15 U.S.C. § 717f(c)(1)(B)). [↑](#footnote-ref-25)
25. *See* 15 U.S.C. § 717f(c)(1)(B) (requiring the Commission to set a certificate application “for hearing and shall give such reasonable notice of the hearing thereon to all interested persons . . . and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly”). [↑](#footnote-ref-26)
26. *Consumer Fed’n of Am. v. FPC*, 515 F.2d 347, 353 (D.C. Cir. 1975); *see also 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)). [↑](#footnote-ref-27)
27. *Algonquin Gas Transmission Co.*, 201 F.2d at 341. [↑](#footnote-ref-28)
28. *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 at P 10. [↑](#footnote-ref-29)
29. *Id*. (quoting *Consumer Fed’n of Am.*, 515 F.2d at 353). [↑](#footnote-ref-30)
30. *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 atP 11. [↑](#footnote-ref-31)
31. *See Penn. Gas & Water Co.*, 427 F.2d at 575 (“Nor may an agency take precipitate action without a hearing on the ground that it can always cancel out and reconstruct if so advised after hearing. To act in haste, repent at leisure, is not a sound motto for an administrative agency.”). [↑](#footnote-ref-32)
32. *See, e.g.*,Commission Staff September 7, 2021 Notice of Applications and Establishing Intervention Deadline in ANR Pipeline Company Docket No. CP21-488-000 (21-day comment and intervention deadline); Commission Staff September 1, 2021 Notice of Amendment to Application and Establishing Intervention Deadline in Roaring Fork Interstate Gas Transmission, LLC Docket No. CP21-462-000 (21-day comment and intervention deadline); Commission Staff August 26, 2021 Notice of Application Establishing Intervention Deadline in Diversified Midstream, LLC Docket No. CP21-484-000 (21-day comment and intervention deadline); Commission Staff August 26, 2021 Notice of Petition for Declaratory Order in Northern States Power Company Docket No. CP21-486-000 (21-day comment and intervention deadline); Commission Staff August 2, 2021 Notice of Applications and Establishing Intervention Deadline in Rover Pipeline, LLC Docket No. CP21-474-000 (21-day comment and intervention deadline). I recognize the Commission can and has noticed applications for shorter or longer comment periods; however, given that the Commission wants to avoid the shutdown of the pipeline, which could have occurred as early as August 13, 2021, it was unwise for the Commission to notice the application for longer than its standard practice. [↑](#footnote-ref-33)
33. It is worth noting that prior to the notice’s issuance, the Public Service Commission of the State of Missouri requested that the Commission take expedited action. *See* Missouri Public Service Commission July 30, 2021 Comments at 1, 4. Several other commenters requested prompt consideration. *See, e.g.*, State of Missouri Senators Mike Cierpiot and Karla May August 3, 2021 Comments at 2. [↑](#footnote-ref-34)
34. Spire’s application for a temporary emergency certificate, or in the alternative, a limited-term certificate is in Docket No. CP17-40-007. This order is issued under the sub-docket -009. [↑](#footnote-ref-35)
35. *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 at P 11. [↑](#footnote-ref-36)
36. 15 U.S.C. §§ 717f(c), (e). [↑](#footnote-ref-37)
37. 988 F.2d 146 (D.C. Cir. 1993). [↑](#footnote-ref-38)
38. It is something akin to an article of faith among FERC Commissioners and staff that the Chairman has unilateral authority over litigation positions, though that power is not unambiguously conferred by the Department of Energy Organization Act and it has never been tested in court. Regardless, the Commission has had a longstanding practice of recording the votes of the commissioners on major litigation decisions. These are typically the subject of litigation memoranda from the FERC solicitor’s office and, in the past, the votes of the various offices were recorded by the Secretary. Recently, at the direction of the Chairman, this practice has been abandoned. I would like to see the Chairman reinstate it.

Indeed, in a recent proceeding, the majority chided me for a dissent that pointed out language in a legal brief from a separate case that I believed was inconsistent with the majority’s reasoning in that case. *See Cent. Hudson Gas & Elec. Corp. v. N.Y. Indep. Sys. Operator, Inc.*,176 FERC ¶ 61,149, at P 31 n.64 (2021). The majority cited judicial opinions reminding litigants that it is the Commission’s “institutional decisions—none other—that bear legal significance” to argue that language from an appellate brief is in no way controlling. *Id*. (quoting *Pub. Serv. Comm’n of N.Y. v. FPC*, 543 F.2d 757, 776 (D.C. Cir. 1974)). The decision the majority cited defined “institutional decisions” as “a decision by a majority vote duly taken.” *Pub. Serv. Comm’n of N.Y.*, 543 F.2d at 776. Given that only such decisions “bear legal significance,” the Commission’s (now former) practice of seeking the views of the body on agency litigating positions was a prudent one—the judiciary ought to have the confidence that the positions argued before it are, in fact, the positions of the Commission as an “entity apart from its members.” *Id*. [↑](#footnote-ref-39)