ORAL ARGUMENT NOT YET SCHEDULED

No. 25-1252

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CENTRAL JERSEY SAFE ENERGY COALITION, FOOD & WATER WATCH, NEW JERSEY LEAGUE OF CONSERVATION VOTERS EDUCATION FUND, NY/NJ BAYKEEPER, PRINCETON MANOR HOMEOWNERS ASSOCIATION, SIERRA CLUB, AND NATURAL RESOURCES DEFENSE COUNCIL,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID NY, KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID, AND TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Intervenors for Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

FINAL REPLY BRIEF OF PETITIONERS

Moneen Nasmith
Susan J. Kraham
EARTHJUSTICE
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7384
mnasmith@earthjustice.org
skraham@earthjustice.org

Ann Jaworski
EARTHJUSTICE
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
773-245-0837
ajaworski@earthjustice.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, Princeton Manor Homeowners Association, and Sierra Club

Additional counsel listed on next page

Christopher Miller
Kaitlin Morrison
EASTERN ENVIRONMENTAL LAW CENTER
One Gateway Center Suite 2600
Newark, NJ 07102
973-424-1461
cmiller@easternenvironmental.org
kmorrison@easternenvironmental.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, and Princeton Manor Homeowners Association

Gillian Giannetti
Jared E. Knicley
NATURAL RESOURCES DEFENSE COUNCIL
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 836-9454
ggiannetti@nrdc.org
jknicley@nrdc.org

Counsel for Petitioner Natural Resources Defense Council

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GLOSSARY

EIS	Environmental impact statement
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
SEIS	Supplemental environmental impact statement.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Addendum to Petitioners' Opening Brief and in Respondent's Brief.

SUMMARY OF ARGUMENT

In a radical departure from decades of using the standard procedure mandated by the Natural Gas Act ("NGA") and its implementing regulations, the Federal Energy Regulatory Commission ("FERC") invented a process out of whole cloth—resurrecting an eight-year-old application for Transcontinental Gas Pipeline Company's ("Transco") Northeast Supply Enhancement Project that Transco abandoned years ago and whose certificate had expired and been vacated by FERC. FERC's unprecedented action is neither authorized by nor in accord with the NGA or FERC's regulations, which aim to facilitate the orderly development of the interstate gas system and ensure predictability, certainty, and finality, and do not permit FERC to make up new Section 7 review procedures as it goes.

None of FERC's contradictory rationales justifies reissuing an expired and vacated certificate. FERC claimed it could base its 2025 review on Transco's 2017 application, because nothing had changed, but simultaneously conducted a haphazard and open-ended updating of some of the application's information. FERC claims that having Transco file a current application reflecting 2025 conditions would make no difference, but it also argues that following the standard process would have been so disruptive as to undermine the NGA's goals. FERC justifies its invented, never-before used process, but faults the public for not foreseeing how that process would unfold and not submitting materials before unknown deadlines. FERC can't have it both ways.

FERC's failure to follow the NGA's process is procedurally unlawful and undermines the substantive validity of FERC's decision. FERC's invented process curtailed public participation and created a lopsided evidentiary record on the Project's market need and benefits, a problem FERC compounded by arbitrarily ignoring or discounting evidence undermining Project need and showing that it may harm ratepayers. FERC also arbitrarily skipped a key step under the National Environmental Policy Act ("NEPA") to prepare a supplemental environmental impact statement ("EIS," "SEIS"), claiming that nothing had changed sufficiently since 2019 and failing to subject what little new analysis it did undertake to public comment. FERC's orders should be vacated and remanded.

ARGUMENT

I. Petitioners Did Not Need to Request Rehearing of the Rehearing Order or File a Separate Petition for Review.

None of Petitioners' claims are barred because Petitioners did not separately challenge the Rehearing Order. *Contra* FERC Br. 21, 56-57; Transco Br. i n.1, 26. Petitioners may challenge the Rehearing Order's reasoning without having filed a separate rehearing request or petition for review of it.

A timely petition for review of a FERC order grants this Court jurisdiction to review a subsequent order on rehearing, issued prior to filing the administrative record, that merely modifies the discussion in the initially-challenged order. *Cent. Hudson Gas & Elec. Corp. v. FERC*, 138 F.4th 531, 534 (D.C. Cir. 2025); *Evergy Kansas Cent., Inc. v. FERC*, 77 F.4th 1050, 1054-55 (D.C. Cir. 2023). No separate rehearing request or petition for review is required where, as here, a rehearing order "makes no change in the result, but merely supplies a new improved rationale." *S. Nat. Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1989). *See also Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015); *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 741-42 (D.C. Cir. 2007). This Court held that

Congress would not have intended to require aggrieved parties to submit rehearing requests and petitions for review of orders that do not change the outcome, as FERC argues here, and create "'an endless cycle of applications for rehearing and denials,' limited only by FERC's ability to think up new rationales." *S. Nat. Gas Co.*, 877 F.2d at 1073 (quoting *Boston Gas Co. v. FERC,* 575 F.2d 975, 978 (1st Cir. 1978)).

The Rehearing Order "modif[ied] the discussion in the [Reissuance] Order and continu[ed] to reach the same result." Rehearing Order at P 2 [JA661-JA662]; *see also id.* at Ordering Paragraph B [JA712]. The Rehearing Order upheld: FERC's decision to reissue the certificate without requiring a new application, while adding a new rationale based on NGA Section 16, *id.* PP 22-36 [JAJA674-JA683]; FERC's finding of need, while adding new discussion of why materials attached to the rehearing request did not change the result, *id.* PP 41-65 [JAJA686-JA702]; and FERC's reliance on the 2019 EIS, while adding a new rationale based on water quality certifications issued after the Reissuance Order, *id.* PP 68-83 [JAJA703-JA712]. FERC's Rehearing Order merely expanded the Reissuance Order's reasoning without changing its outcome. Petitioners may challenge that reasoning without filing a rehearing request or petition for review specific to the Rehearing Order.

Petitioners also are not barred from challenging FERC's analysis of materials submitted with Petitioners' Rehearing Request. FERC and Transco contend that without requesting rehearing of FERC's decision not to accept those materials, Rehearing Order PP 15-21 [JAJA668-JA674], Petitioners may not challenge the Rehearing Order's discussion of why FERC nonetheless claims the materials are unpersuasive. FERC Br. 40; Transco Br. 26. Petitioners may challenge FERC's discussion of those materials as arbitrary and capricious. *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004); *Oceana, Inc. v. Ross*, 290 F. Supp.3d 73, 80 (D.D.C. 2018). Respondents do not argue that because FERC was not obligated to address excluded materials, any arbitrary or capricious discussion of them was mere harmless error.

The result FERC and Transco seek would be highly inequitable. Petitioners submitted the materials on rehearing because FERC accepted Transco's late-filed answer and the attached key new information, but issued the Reissuance Order before the 30-day deadline for parties to respond to Transco's answer had lapsed. Additionally, FERC now seeks to bolster its position by relying on the very same documents Petitioners attached to their Rehearing Request, FERC Br. 49, 54-55, 57-58; *see also* Transco Br. 33, while claiming Petitioners cannot rely on them. FERC cannot cherry pick procedures to suit its desired outcome.

II. The NGA and FERC's Regulations Do Not Allow FERC to "Reissue" an Expired and Vacated Certificate.

None of the briefs supporting FERC contend that any provision of the NGA or FERC's regulations expressly provides for "reissuance" of an expired and vacated certificate. They do not dispute that, across the thousands of projects FERC has reviewed and approved, FERC has never before "reissued" a vacated and expired certificate or used a resurrected eight-year-old application for a later-vacated certificate as the basis for issuing a Section 7 authorization. Instead, they provide a variety of unavailing defenses of FERC's novel approach to Section 7.

A. FERC's Discretion Under the NGA Does Not Permit Invention of New Processes Not Contemplated in the Act or FERC's Regulations.

Neither Section 7 nor FERC's regulations allow an eight-year-old application to be resurrected and used as the basis for "reissuing" a previously-expired and vacated certificate. FERC and Transco claim that nothing in the NGA prohibits doing so, *see* FERC Br. 29-30, 32; Transco Br. 18, but agencies may only exercise authority explicitly granted to them by Congress. *Loper Bright Enters v. Raimondo*, 603 U.S. 369, 394 (2024). Section 7 requires formal applications conforming to FERC's regulations, 15 U.S.C. § 717f(d), which require applications contain "all pertinent data and information necessary for a full and complete understanding of the proposed project." 18 C.F.R. §§ 157.5(a), 385.204; *see also* Opening Br. 22-23.

FERC contends that the existence of the 2017 application excuses its failure to require a new application. FERC Br. 29. But FERC also repeatedly emphasizes all the updating of the 2017 application undertaken in 2025, *id.* 17, 22, 24, 27-28, 30, 32-35, 51, 63, 65-66, conceding that the 2017 application did not contain the information necessary to "understand" the Project in 2025. FERC's regulations require that all that information be present at the outset of the process, not added willy-nilly. *See* 18 C.F.R. § 157.5(a).[1]

[1] FERC's contention that it could have treated the Petition as an "application," FERC Br. 33 n.7, also fails. *See* Opening Br. 24-25.

Only one FERC regulation contemplates giving an expired certificate further legal effect: 18 C.F.R. § 385.2008(b). FERC and Transco repeatedly disavow invoking this provision but keep missing the point. No matter the label, Transco sought and FERC bestowed the same practical outcome contemplated only in 18 C.F.R. § 385.2008(b) and possible only through compliance with that provision.

In addition, neither Section 16 of the NGA, 15 U.S.C. § 717o, nor FERC's authority to manage its dockets or construe filings empowers FERC to ignore the NGA's other provisions or FERC's own regulations. Opening Br. 35-40. Section 16 authority is not unbounded, as the precedent FERC cites makes clear. *See* FERC Br. 32 (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n,* 379 F.2d 153, 158 (D.C. Cir. 1967)).

The many practical differences between pre-approval review of an application and revisiting a certificate vacated by a court illustrate why analogizing the two does not justify FERC's failure to follow required procedures. Reconsideration of a certificate following a court's vacatur and remand is done pursuant to a public order with instructions to address a limited set of issues. Here, FERC exercised unbounded discretion to update whichever items it wanted. On remand from a court, FERC's review happens relatively quickly after the original certificate's issuance, not the infinite time that could elapse under FERC's new approach. A court-vacated certificate creates no finality or certainty problem since, absent the project being abandoned, everyone understands that FERC will revisit its prior analysis and findings to comply with the court's order on remand.

B. Allowing FERC to Invent a Novel and Arbitrary Process Does Not Serve the NGA's Purpose.

FERC and Transco are wrong that requiring submission of a new, updated application would be contrary to the NGA's purposes and FERC's mandate under Section 7.

The NGA's well-recognized goal is to ensure the "*orderly* development" of the interstate natural gas system, *Myersville Citizens for a Rural Cmty.*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (emphasis added), not to approve all gas infrastructure, using any process applicants request. Opening Br. 25-31. Section 7 requires FERC to adhere to a clear process in exercising its Congressionally-granted authority. 15 U.S.C. § 717f(d) (requiring a written application to "be in such form, contain such information, … as [FERC] shall, by regulation, require"). A complete application provides a key foundation for future review by FERC and the public. That foundation is required for meaningful public comment—and development of a complete and balanced record—on the Project as it stands in 2025, not on the 2017 version of the facts that may be updated in some unpredictable fashion.

Neither FERC nor Transco explains why requiring a new application with updated information would contravene the NGA's purpose or FERC's Section 7 mandate. *See* FERC Br. 38. There is no evidence that significant—or even any—harms would have occurred had FERC denied Transco's Petition and required a new, updated application. Indeed, Transco updating everything at once would have been more efficient and rendered many of FERC's information requests unnecessary. Claims that requiring Transco to submit a new application would have been contrary to the NGA's purpose are particularly unavailing where minimal construction has occurred more than ten months after the Project's approval.[2]

[2] *See* Notice to Proceed with Request No. 1, Docket No. CP17-101 (Mar. 3, 2026), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20260303-3041 (authorizing minimal construction).

Moreover, by insisting that because it updated the 2017 application, the process here was the functional equivalent of standard Section 7 process, FERC Br. 28-31, FERC undermines any claim that requiring an updated application would run afoul of the NGA. FERC cannot have it both ways: if what FERC required of Transco was so similar to the standard process, then it adhering to the standard process could not run contrary to the NGA's purpose.

FERC has also recognized that "orderly development" includes ensuring finality and certainty by preventing certificates' legal effects from lasting indefinitely. *See Sierra Club v. FERC*, 97 F.4th 16, 20 (D.C. Cir. 2024). Whether couched as resuscitating the expired and vacated certificate or the 2017 application, FERC's actions here undercut those goals. Until the Reissuance Order, landowners and industry could make investments and decisions based on the certainty that FERC's rules previously created: an expired or vacated certificate meant a project was no more, absent a new application. By reissuing Transco's certificate without a new application, FERC unlawfully and arbitrarily destroyed the finality and certainty that a certificate's expiration previously provided. This is not mere conjecture, as FERC claims, FERC Br. 34, but common sense.

C. Adhering to the NGA and FERC's Regulations Would Not Elevate Form Over Substance.

The lawful course of action here was for FERC to dismiss Transco's Petition and require a complete application containing all the required updated information. That would not have been needlessly duplicative, *id. at* 31; Transco could have used whatever 2017 application material was still relevant in 2025. But it would have avoided the confusing process FERC used here that violated the NGA and made meaningful public participation impossible.

FERC claims that, because it requested updated information and received comments on Transco's Petition, its hodgepodge process neither created uncertainty nor undermined the order the NGA and FERC's regulations are meant to provide. *Id*. at 36. This is wrong. First, the only application material FERC noticed for formal public comment was the 2017 application Transco resubmitted, claiming that nothing had changed. *See* R.8892 [JA362-JA367]. The extent of the updates

FERC required and heavily relies upon,[3] however, demonstrates that the 2017 application did not contain "all pertinent data and information necessary for a full and complete understanding of the proposed project." *See* 18 C.F.R. § 157.5(a). The comments, therefore, were based on inadequate and stale information that failed to qualify as an "application" under FERC's regulations, *id.* and the NGA, 15 U.S.C. § 717f(d). Thus, those comments are not evidence of the process' substantive adequacy or compliance with the law. Nor did they provide FERC with an adequate record for decisionmaking.

Second, until FERC issued the Reissuance Order, the public had no way of knowing when FERC deemed the updating process complete and the record to finally contain all information 18 C.F.R. § 157.5(a) required. FERC's failure to comply with its own regulations regarding the time to respond to Answers only added to the uncertainty. Transco's August 5, 2025, Motion for Leave to File an Answer and Proposed Answer to Petitioners' June 24 Protest came well outside the 30 days regulations provide for an answer to a pleading, *see* 18 C.F.R.

[3] FERC's claim that there is "no persuasive evidence that the passage of time…resulted in stale information," FERC Br. 34, is belied by the updates it required.

§ 385.213(d)(2)(ii). Transco's Answer included two new documents purporting to assess the Project's benefits, R.10301 (Attachment 1 & 2) [JA383-JA423], which FERC relied on extensively in evaluating the Project's need and alleged benefits. Although Petitioners planned to file more detailed responses[4] to Transco's reports, because FERC released the Reissuance Order on August 28, they appended them to their Rehearing Request instead. *See* Rehearing Request at 17 [JA524]. FERC's criticism of the public's failure to file responsive materials within days or meet deadlines they did not know existed, FERC Br. 42, rings hollow. The public did not know when the updating process was complete or when the docket contained information sufficient to convey a complete picture of the Project.

In addition, FERC's failure to require a new application is not excused by its purported adherence to the Policy Statement during substantive Section 7 review. *Contra* FERC Br. 28-31; Transco Br. 23-24. The Policy Statement sets out substantive standards for exercise of

[4] Some Petitioners filed an Answer to Transco's Motion for Leave and an initial proposed Answer to Transco's Answer to object to Transco's late filing on August 20, within the 15 days FERC's regulations provide for responses to motions. R.10305 at 1 [JA447].

Section 7 authority *and* "provide[s] participants in certificate proceedings with a framework for shaping the record." *Certification of New Interstate Natural Gas Pipeline Facilities,* 88 FERC ¶ 61,227, 61,750 (Sept. 15, 1999). The Policy Statement recognizes what FERC ignores: having the process follow a prescribed form impacts whether FERC reaches the appropriate—and lawful—substantive result.

D. Petitioners Did Not Waive Process Arguments.

Petitioners did not, *contra* Transco Br. 21, forfeit the argument that FERC's process was inconsistent with the NGA's purposes. FERC's Reissuance Order did not raise the NGA's purposes. FERC raised the NGA's purposes for the first time in the Rehearing Order in arguing that NGA Section 16 (which allows actions consistent with the NGA's purposes) authorizes reissuance of certificates. Rehearing Order PP 25-27 [JA675-JA677]. FERC's Brief, at 23, 32, continues to invoke the NGA's purposes and Section 16 to support its actions. Petitioners allowably raised the NGA's purposes, Opening Br. 26-27, to respond to FERC's new justification for continuing to reach the same outcome, *Columbia Gas Transmission Corp.*, 477 F.3d at 741-42, and to support

Petitioners' argument, Rehearing Request at 4-5, 8-16 [JA511-512, JA515-JA523], that FERC's process here violated the NGA.

Transco's claim that Petitioners forfeited unspecified uncertainty arguments, Transco Br. 22, n.3, also fails, as Petitioners' Rehearing Request argued that reissuing long-expired certificates "would create significant uncertainty." Rehearing Request at 11 [JA518]; *see also id.* at 12-13 [JA519-JA520]. While the Rehearing Request did not explicitly raise uncertainty in other federal agencies' processes, FERC Br. 37, Petitioners raised this merely as a further concrete example of the uncertainty previously raised, Opening Br. 40-42.

III. FERC Arbitrarily and Capriciously Evaluated the Project's Market Need and Non-Environmental Harms and Benefits.

In evaluating whether the Project was required by the public convenience and necessity, FERC had to both find a market need for the Project's capacity and weigh the Project's harms and benefits, including its effects on the markets and consumers it will serve. FERC arbitrarily and capriciously employed a one-sided review, cherry-picking information that favored the Project and dismissing or ignoring evidence that did not.

A. Precedent Agreements Do Not Allow FERC to Treat Record Evidence in an Arbitrary and Capricious Manner.

FERC's and Transco's briefs focus on the role precedent agreements play in establishing market need, but Petitioners do not contest that precedent agreements are important evidence of need. Petitioners argue that the existence of precedent agreements does not allow FERC to arbitrarily ignore evidence casting doubt on need for the Project's capacity and illustrating the Project's potential harms to downstream customers.

Although FERC claims that *Sierra Club v. FERC*, 153 F.4th 1295 (D.C. Cir. 2025) ("*Cumberland*") holds that FERC need never examine additional evidence where there are precedent agreements and no evidence of self-dealing, FERC Br. 45, the Court need not reach the question of whether FERC is *required* to consider information beyond precedent agreements, because FERC *did* consider additional information here. This Court has held that when FERC weighs evidence, it must do so in a non-arbitrary manner. *N.J. Conservation Found. v. FERC*, 111 F.4th 42, 60-61 (D.C. Cir. 2024) ("*NJCF*").

In attempting to distinguish *NJCF*, FERC mischaracterizes it. *NJCF*'s holding is not limited to situations in which a state entity submits evidence undermining project need. *Contra* FERC Br. 48-49. The Court held that FERC failed to provide a non-arbitrary response to evidence provided by both a state agency and non-state intervenors. 111 F.4th at 60.[5]

Even if FERC could find market need based solely on the existence of precedent agreements, that is only the first step in FERC's inquiry. The language FERC cites in *Cumberland* allows substantial reliance on precedent agreements only when establishing market need, not when evaluating the project's benefits and harms to energy markets and customers as part of FERC's ultimate Section 7 determination. *See Cumberland*, 153 F.4th at 1310.

B. FERC Is Not Barred from Considering Harm to Ratepayers.

FERC is not jurisdictionally barred from considering a project's potential harms to ratepayers. This Court has expressly said those

[5] FERC claims that, unlike in *NJCF*, it explained why it would not consider potential adverse impacts to ratepayers, but it fails to identify any explanation given in the record. FERC Br. 49.

harms are relevant under Section 7, and it is arbitrary to consider, as FERC does here, a project's downstream benefits but ignore harms to the same constituencies. Opening Br. 63. None of the Respondent-side briefs grapples with *NJCF*'s holding or explains how FERC could be jurisdictionally barred from considering how the Project harms downstream ratepayers but not the Project's supposed reliability and other benefits to ratepayers and downstream energy markets.

Nor does the *Cumberland* decision support FERC's position. The Court found that "[Section] 7 of the Natural Gas Act permits [FERC] 'to look into matters excluded from [its] direct regulatory jurisdiction." 153 F.4th at 1310. What FERC may not do is "purport to regulate matters outside its jurisdiction." *Id.* The Court concluded that FERC need not second-guess the Tennessee Valley Authority's decision to choose gas generation over other alternatives. *Id.* "FERC's role is limited to reviewing whether *this pipeline* is in the public interest," *id.* (emphasis in original), which is exactly what Petitioners seek to have FERC do by evenly considering the Project's harms and benefits. If FERC considers the Project's reliability, cost savings, and other purported benefits to downstream ratepayers, it cannot refuse to consider potential Projectinduced ratepayer rate increases. That is not the same as FERC second-guessing whether utilities should be using gas. Determining whether the Project is required by the public convenience and necessity requires weighing who bears the Project's costs and who enjoys its benefits.

C. Petitioners' Claims Regarding the Project's Harms and Benefits to Energy Ratepayers Are Not Mere Speculation.

Record evidence raises questions about whether the Project's capacity is necessary to serve the shippers' ratepayers. That evidence, discussed at length in the Opening Brief, is not confined to the materials FERC claims are excluded from the record (that FERC did consider and now seeks to rely on, *see supra* Section I).

Transco's materials reference the 2025 demand forecasts, which indicated that 2024 forecasts might substantially overstate potential demand by ratepayers. R.10301, Attachment 2 at 13 [JA399]. Those numbers raise significant questions about the extent of the claimed market need for additional capacity over the Project's life and, therefore, the extent to which ratepayers paying for the Project will benefit from it. FERC did not request any clarification or additional information to justify complete reliance on the 2024 numbers. Nor has

FERC ever explained its position that the 2025 numbers required refinement, but the 2024 numbers did not, or how a 30% change in demand for gas over the Project's life would necessarily be refined away. Generalized concerns about reliability and local distribution companies' obligation to supply adequate gas supplies do not justify FERC's failure to grapple with updated forecasts suggesting that actual demand would be much lower than originally projected. *See* Rehearing Request at 21 [JA528].

FERC's reliance on potential electric sector need also shows that National Grid's customers may not actually need the Project's gas, may not benefit from the Project to the extent Transco claims, and may be harmed by paying for gas capacity they will not use. While FERC says that, because shipper local distribution companies can have electric generator customers, the evaluation of market need may include electric sector needs, FERC Br. 54, nothing in the record suggests that the shippers' captive ratepayers include any electric generators. If gas-fired generators ultimately procure the Project's capacity—creating the electric sector benefits FERC cites—it will be because the shippers' ratepayers do not need it. But those generators are not the captive ratepayers whose bills may increase to cover the Project's cost. Thus, the potential for electric sector benefits is evidence of the lack of captive ratepayer need and the Project's potential to harm those ratepayers.

Transco's eleventh-hour claim that National Grid's ratepayers will not bear the cost of gas capacity they will not use does not save FERC's unlawful analysis. First, this claim was not the basis of FERC's decisionmaking below and cannot form the basis of any *post hoc* rationalization now, especially when coming from an industry intervenor. Second, there is no evidence in or out of the record that Transco's claims are accurate. Transco claims that the risk is "neutralized," but points only to a state order directing National Grid "provide ways to mitigate bill impacts," Transco Br. 33 (citing R.10316, Exhibit D at 83 [JA592]). Requiring that National Grid provide a list of mitigation options is not the same as barring the utility from passing on the Project's costs to ratepayers, and certainly falls far short of guaranteeing that ratepayers will not experience bill impacts from Project capacity they do not use or need.

IV. FERC Violated NEPA by Failing to Complete an SEIS.

A. FERC Arbitrarily Relied on the 2019 EIS Instead of Preparing an SEIS.

Relying on the outdated EIS and failing to undertake a new or supplemental EIS violated NEPA, 42 U.S.C. §§ 4331 *et seq*., and left FERC without the information required to rationally determine whether the Project's benefits outweigh its harms, violating the NGA, *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1331 (D.C. Cir. 2021).

An SEIS is required when portions of the original environmental review remain valid, but other portions must be updated. *City of Port Isabel v. FERC*, 111 F.4th 1198, 1207 (D.C. Cir. 2024), *on reh'g in part*, 130 F.4th 1034 (D.C. Cir. 2025). There is therefore nothing "[r]emarkable," *contra* FERC Br. 61, or inconsistent in Petitioners' statement that FERC "was not required to redo still-valid portions of its 2019 EIS," Opening Br. 16. The issue is that FERC neither required Transco to submit updated information on current environmental conditions nor itself examined what has changed, beyond a cursory look at a few, select topics. Consequently, FERC lacked any rational basis for finding that no changes invalidated the 2019 EIS's conclusions.

FERC arbitrarily relied on a supposed absence of public comments raising new environmental impacts as a basis for not completing an SEIS. FERC has an independent obligation to fulfill its NEPA duties, *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014), and cannot rely on the public to fulfill that obligation. FERC conflates the question of whether comments on Transco's petition raised *concerns* similar to those in comments on the 2019 EIS with the question of whether facts on the ground and environmental impacts have changed. FERC Br. 60 (citing R.10285 [JA378]). The fact that commenters at both points were concerned about stream impacts, for example, does not establish that stream impacts now will be identical or similar to those predicted in 2019.

FERC must "at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities," *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019), which includes attempting to gather information about current environmental conditions and impacts. Transco tries to distinguish *Birckhead,* arguing that FERC has not claimed to lack information, but to have enough information to determine that an SEIS is unwarranted. Transco Br. 39-40. This misses the point—FERC is incorrect about what information is necessary. Nor does *Seven County* overrule *Birkhead*'s holding that FERC must attempt to collect whatever information is necessary, notwithstanding that the missing information in *Birckhead* related to greenhouse gas emissions. NEPA review should address information necessary "to inform agency decisionmaking" under the substantive statute at issue, *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo.*, 605 U.S. 168, 173 (2025), and the NGA requires FERC to weigh a project's harms, including environmental harms, against its benefits, *City of Oberlin*, 937 F.3d at 602; *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014).

Petitioners are not, *contra* Transco Br. 38, flipping the standard for SEISs on its head. Transco appears to argue that there is no need to submit or collect additional environmental information unless FERC first decides that significant new impacts render supplementation necessary; but Transco does not explain how FERC could make that determination without updated environmental information. Transco's argument also ignores that, if not for FERC's unlawful process, there would have been a new application and new environmental review.

Petitioners are not arguing for endless rounds of additional process; Petitioners argue that FERC's reliance on an outdated application and EIS to resurrect a long-dormant Project violated NEPA and left FERC without information sufficient to inform its 2025 decision that the Project is required by the public convenience and necessity. Relying uncritically on 6-year-old analysis of older data does not "ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document" and "make use of reliable data and resources," 42 U.S.C. §§ 4332(D), (E), as NEPA requires.

Nor are Petitioners' water quality arguments rendered moot by the 2025 water quality certifications. FERC, Transco, and amici argue that the 2025 certifications moot Petitioners' arguments that 2020 certification denials undermined the EIS's water quality conclusions. FERC Br. 67-68; Transco Br. 41-42; INGAA Br. 25-28. FERC never addressed the questions those denials raised about the EIS's conclusion that impacts could be adequately mitigated, including whether Transco accurately estimated the jet trenching sediment loss rate and or would clamshell dredge at speeds low enough to prevent water quality standard exceedances. Opening Br. 48-50. Additionally, Petitioners' argument that FERC failed to address whether Transco's accelerated construction schedule undermined the EIS's conclusion that harms from dredging could be adequately mitigated, Rehearing Request at 38 [JA545]; Opening Br. 49-50, does not depend on the water quality certifications' status.

As to other new circumstances, FERC argues only that changed environmental conditions and regulatory standards, such as those raised in comments, "do not necessarily require supplemental NEPA review." FERC Br. 64 (citing Rehearing Order P 79, JA710). FERC, however, failed to establish that new circumstances do not require supplemental review *here* or to examine any circumstances beyond those commenters raised. FERC's cursory dismissal of new cumulative impacts or impacts related to updated stormwater rules is not supported by FERC's observations that the Project, and other projects, must comply with all regulations and that new cumulative impacts would be considered in permitting. *Contra* Transco Br. 44, 46. That other agencies may consider Project impacts in later permitting or impose mitigation conditions does not substitute for FERC's NEPA review of those impacts, as the agency with power to permit or deny the Project overall. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971). Nor does it substitute for FERC's reasoned consideration of what conditions to impose upon the certificate to mitigate those impacts, 15 U.S.C. § 717f(e), which can only be properly informed if FERC collects relevant information through NEPA review.

B. FERC Should Have Provided Its Limited New Analysis in an SEIS.

FERC violated NEPA by providing new analysis—on a few select topics—for the first time in the Reissuance Order instead of in an SEIS subject to public comment. *City of Port Isabel*, 111 F.4th at 1207-11.

Despite arguing that no relevant environmental facts had changed, FERC admits selectively examining new information, arguing that it "addressed *updated* information in its latest orders" and its "analysis, as *supplemented* to account for current system conditions, fully satisfied its NEPA obligation… ." FERC Br. 24 (emphasis added). *See also* Rehearing Order at P70 [JA704] (stating that FERC "relies on the analysis conducted in the final EIS and [a 2020 environmental assessment], as supplemented by the 2025 Certificate Order" to meet NEPA obligations). Transco admits "FERC obtained *updated* environmental information where needed" and based its NEPA decisions on the "record as *supplemented*." Transco Br. 34 (emphasis added). The Reissuance Order contained new analysis of stormwater management and flooding rules, air impacts, quarry blasting, and cumulative impacts. Reissuance Order PP 73, 82-85, 103, 105 [JA486-JA487, JA491-JA492, JA499-JA501]. FERC cannot play both sides: either there was no need to update the 2019 EIS's analysis, or updates were required, which must be in a NEPA document for public comment.

This Court has held that new environmental analysis must be presented in a NEPA document subject to public comment, not only in a FERC order, and that opportunity to comment on underlying data does not substitute for opportunity to comment on the analysis itself. *City of Port Isabel*, 111 F.4th at 1207-11. FERC erred by failing to provide that opportunity here. Transco and FERC argue that *City of Port Isabel* is distinguishable because FERC's order in that case analyzed a larger geographic scope than the EIS examined, in contrast to situations in which an SEIS was not required because "the 'new' information is only updated information about an issue that the agency had already considered adequately and to a similar extent," *id.* at 1208. Transco Br. 46-47; FERC Br. 62-63. While Petitioners agree that FERC's additional analysis here was not robust or extensive, where FERC relies on new analysis as necessary to support its 2025 decision that the Project is required by the public convenience and necessity, FERC Br. 24; Rehearing Order P70 [JA704], that analysis must comply with NEPA, including by being published in an NEPA document for public comment.

FERC's discussion of select topics in its Reissuance Order, rather than in a NEPA document, also created confusion as to whether FERC has newly analyzed certain topics. While FERC's brief does not address cumulative impacts, Transco claims that FERC did not actually engage in new cumulative impacts analysis. Transco Br. 45-46. The Reissuance Order, however, states that FERC staff searched for nearby projects not captured in the 2019 EIS's cumulative impacts analysis and judged that the projects found "were of a similar magnitude and would have similar effects as those addressed in the final EIS. No new potential environmental cumulative effects were identified." Reissuance Order PP

105-106 [JA500-JA502]. This paltry attempt to address cumulative impacts falls far short of NEPA's requirements. Had FERC prepared an SEIS, there would have been clarity about what FERC did, or did not, do in an attempt to fulfill its NEPA obligations.

C. FERC's NEPA Errors Were Not Harmless.

While FERC and Transco waive any harmless error argument, amicus argues harmless error, INGAA Br. 25-28. "Error is harmless … 'when [it] clearly had no bearing on the procedure used or the substance of decision reached.'" *Ctr. for Biological Diversity v. U.S. Int'l Dev. Fin. Corp.*, 77 F.4th 679, 690 (D.C. Cir. 2023) (*quoting Braniff Airways v. Civ. Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967)). FERC's error was not harmless because: (1) it prejudiced the ability of the public to comment on FERC's analysis, and (2) FERC could have reached a different outcome if a lawful SEIS had informed its NGA decisionmaking,

Seven County did not overrule *City of Port Isabel*'s holding that failure to provide environmental review in a NEPA document is an error warranting remand. *Contra* INGAA Br. 28. *Seven County* applied the same harmless error standard used in *City of Port Isabel. Compare*

Seven Cnty., 605 U.S. at 185, *with City of Port Isabel*, 111 F.4th at 1210. Just as remand would not have been pointless in *City of Port Isabel* where the error prejudiced the public's ability to comment on FERC's environmental analysis, 111 F.4th at 1210, FERC's error here prejudiced the public's ability to comment on analysis not provided before the Reissuance Order.

Amici are wrong that even if FERC completed a SEIS it would not likely reach a different outcome because FERC already found supplementation unnecessary and FERC did complete some additional environmental analysis. The first argument is circular; if this Court reverses FERC's determination that supplementation was unnecessary, FERC must prepare an SEIS examining issues it has not addressed, which could change its ultimate decision. Second, FERC's limited analysis of select new topics falls short of what was required to fulfill either FERC's NEPA obligations or to rationally inform its substantive NGA decisionmaking; the additional, required analysis could meaningfully shift FERC's weighing of the Project's harms and benefits.

D. Petitioners Did Not Waive NEPA Arguments.

Petitioners did not fail to preserve their argument that an SEIS was required because the 2019 EIS's conclusions were no longer entirely valid. FERC's claim that Petitioners did not contest FERC's finding that it could rely on the 2019 EIS instead of preparing an SEIS, FERC Br. 61, is belied by the record and FERC's prior acknowledgement of Petitioners' argument in both challenged orders. Reissuance Order at 56 [JA477-JA478]; Rehearing Order at 72, 75-76, 79 [JA704-JA705, JA707-JA708, JA710]. Petitioners' Rehearing Request made this argument, Rehearing Request at 6-8, 31-33 [JA513-JA515, JA538-JA540], and Transco admits that Petitioners properly preserved at least the argument that the 2020 water quality certification denials were changed circumstances requiring an SEIS. Transco Br. 41-42.

Transco's argument that Petitioners waived the ability to cite *City of Port Isabel* in their briefs by failing to cite that case in their Rehearing Request, Transco Br. 36, has no basis. FERC's rules require a rehearing request's statement of issues to include only "representative" precedent, not all precedent, and provide for waiver of any omitted "issue," not waiver of omitted cases. 18 C.F.R.

§ 385.713(c)(2). Transco cites no caselaw prohibiting petitioners from citing a case in support of an argument preserved below, merely because the rehearing request did not cite it. Nor would such a rule serve any purpose here, where FERC was certainly on notice of this recent case remanding a FERC order. FERC's brief also addresses the case, without arguing for waiver. FERC Br. 62-63.

Petitioners also did not waive their argument that new circumstances, other than the 2020 water quality certification denials, justified an SEIS, *contra* Transco Br. 35-37; FERC Br. 66-67. The Rehearing Request raised air pollution, cumulative impacts, and updated stormwater rules. Rehearing Request at 3, 11 & n.39, 34 [JA510, JA518, JA541]. Petitioners sufficiently flagged them as issues requiring an SEIS.

The Rehearing Request raised the argument that FERC engaged in additional environmental analysis that should have been in an SEIS, Rehearing Request at 41 [JA548]; *see also id*. at 3, 11 & n.39 [JA510, JA518], so it is not, *contra* INGAA Br. 23, waived.

V. Remedy

The Response Briefs fail to establish any reason to deviate from the usual remedy of vacatur when agency action is found to be arbitrary and capricious. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)).

The FERC orders' serious deficiencies and the fact that the Response Briefs fail to establish that vacatur would cause significant disruption weigh in favor of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). FERC has authorized only limited construction activities. Notice to Proceed with Request No. 1, *supra* note 2. Potential disruption to local distribution companies' planning does not weigh against vacatur, *contra* AGA Br. 20-21; reliance on a first-of-its-kind certificate process is imprudent.

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Respectfully submitted,

<u>/s/ Moneen Nasmith</u>
Moneen Nasmith
Susan J. Kraham
EARTHJUSTICE
48 Wall Street, 15th Floor
New York, NY 10005

212-845-7384
mnasmith@earthjustice.org
skraham@earthjustice.org

Ann Jaworski
EARTHJUSTICE
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
773-245-0837
ajaworski@earthjustice.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, Princeton Manor Homeowners Association, and Sierra Club

/s/ Christopher Miller
Christopher Miller
Kaitlin Morrison
EASTERN ENVIRONMENTAL LAW CENTER
One Gateway Center Suite 2600
Newark, NJ 07102
973-424-1461
cmiller@easternenvironmental.org
kmorrison@easternenvironmental.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, and Princeton Manor Homeowners Association

/s/ Gillian Giannetti
Gillian Giannetti
Jared E. Knicley
NATURAL RESOURCES DEFENSE COUNCIL

1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 836-9454
ggiannetti@nrdc.org
jknicley@nrdc.org

Counsel for Petitioner Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE

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/s/ Moneen Nasmith
Moneen Nasmith
EARTHJUSTICE
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7384
mnasmith@earthjustice.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, Princeton Manor Homeowners Association, and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2026, I have served the foregoing brief on all registered counsel through the Court's electronic filing system (ECF).

/s/ Moneen Nasmith
Moneen Nasmith
EARTHJUSTICE
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7384
mnasmith@earthjustice.org

Counsel for Petitioners Central Jersey Safe Energy Coalition, Food & Water Watch, New Jersey League of Conservation Voters Education Fund, NY/NJ Baykeeper, Princeton Manor Homeowners Association, and Sierra Club