

**ORAL ARGUMENT NOT SCHEDULED**  
**No. 24-60002**

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**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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24-60002

consolidated with

24-60197

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GAS TRANSMISSION NORTHWEST, L.L.C.,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

consolidated with

No. 24-60280

COLUMBIA RIVERKEEPER; ROGUE CLIMATE; STATE OF  
WASHINGTON; STATE OF OREGON,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

consolidated with

No. 24-60354

STATE OF WASHINGTON; STATE OF OREGON  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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**PETITION FOR REVIEW FROM THE  
FEDERAL ENERGY REGULATORY COMMISSION  
No. CP22-2-000; CP22-2-001; CP22-2-002**

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**OPENING BRIEF FOR THE STATES OF WASHINGTON AND  
OREGON**

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made for the judges of this Court to evaluate possible disqualification or recusal.

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## STATEMENT REGARDING ORAL ARGUMENT

This petition seeks review of a decision from the Federal Energy Regulatory Commission. The Commission arbitrarily approved the expansion of a natural gas pipeline that is unnecessary and will likely only serve to enrich the pipeline company at consumers' expense. The Commission's decision is internally inconsistent: it approved the project because its proposed revenue exceeded costs, but also acknowledges that substantial costs may be left out of the equation. And under the Commission's policy and regulations, it *was* leaving out substantial costs from the equation. The rest of the Commission's decision is equally flawed. The Commission bases its conclusions on pure conjecture and ignores undisputed evidence to the contrary. Accordingly, straightforward and well-established principles of administrative law resolve this case. However, the Court may still benefit from oral argument to distill the relevant facts and pin down the regulatory scheme and procedural history involved. *See* 5th Cir. R. 28.2.3.

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## I. INTRODUCTION

Natural gas pipelines are both an “essential and monopolistic industry.” *Fla. Power & Light Co. v. FERC*, 598 F.2d 370, 379 (5th Cir. 1979). Accordingly, Congress passed the Natural Gas Act to “protect [] consumer interests against exploitation” from those companies. *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 612 (1944). A centerpiece of that legislation requires the Federal Energy Regulatory Commission approve new pipeline facilities only if they serve a demonstrated public necessity.

Commission policy (and common sense) requires projects to meet a threshold test of market need: the new business must fully pay the cost to serve that new business. Pipelines cannot rely on existing captive customers to subsidize expansions. And if other public benefits justify the project, there must be evidence showing those benefits are likely.

Here, the Commission ignored that test and approved an unnecessary expansion, leaving millions of dollars in costs unaccounted for. The Commission ignored or unreasonably discounted ample evidence in the record indicating that the expansion’s new business would not fully pay for its costs, or deferred consideration of that evidence for no rational reason. The Commission then hypothesized that the expansion could provide other public

benefits, but ignored evidence that those benefits were illusory. Because the Commission failed to meet its statutory obligation to only approve projects required by the public convenience and necessity and to make a rational, reasonably explained decision based on the facts before it, the Court should vacate the Commission’s Orders and remand for further consideration.

## II. JURISDICTION

The Federal Energy Regulatory Commission (“FERC”) approved the GTN Xpress pipeline expansion project (the “Expansion”) based on its authority under the Natural Gas Act to permit expansions of interstate pipelines “required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e); Order Issuing Certificate, 185 FERC ¶ 61,035, ¶ 12 (Oct. 23, 2023) (“Certificate Order”)<sup>1</sup>.

Parties “aggrieved by” a FERC order may petition for review in the Court of Appeals, provided they first seek rehearing at FERC. *See* 15 U.S.C. § 717r(b). Parties must petition for review within sixty days after FERC rules on their rehearing request. *See id.* The States requested rehearing of

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<sup>1</sup> Petitioners cite FERC’s Orders by the paragraph number, e.g. “Certificate Order ¶ [Paragraph Number].” We cite all other original-record documents as R.[Record Item Number in FERC’s Certified Index]:[Page Number of the Document]. We cite these documents by their overall PDF page number, even when the document has internal pagination.

FERC's Order, which FERC denied by operation of law on December 22, 2023. *See* R.588. On February 12, 2024, the States timely petitioned for review in the D.C. Circuit. *See* Pet. for Review, No. 24-60280, ECF 3-2 (5th Cir.); 15 U.S.C. § 717r(b).

FERC subsequently modified its Order on rehearing. *See* Order Addressing Arguments Raised on Rehearing and Dismissing Stay, 187 FERC ¶ 61,023 (Apr. 16, 2024) ("Rehearing Order"). The States requested rehearing of the Rehearing Order to the extent it raised new issues, which FERC denied by operation of law on June 14, 2024. R.643. On June 17, 2024, the States timely petitioned for review in the D.C. Circuit, seeking review of the Order, the Rehearing Order, and the denial of their second rehearing request. *See* Pet. Review, No. 24-60354, ECF 1-3 (5th Cir.). The same day, FERC issued a second rehearing order, reaching the same result as the first, for the same reasons.<sup>2</sup> *See* Order Addressing Arguments Raised on Rehearing, 187 FERC ¶ 61,177 (June 17, 2024) ("Second Rehearing Order").

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<sup>2</sup> The States did not need to specifically list the Second Rehearing Order in their petition. The Second Rehearing Order only modifies the first Rehearing Order and reaches the same result, so requesting review of the first Rehearing Order and denial of its second request for rehearing was sufficient. *See Evergy Kan. Cent., Inc. v. FERC*, 77 F.4th 1050, 1054-55 (D.C. Cir. 2023).

The States seek review of FERC’s Certificate Order, Rehearing Order, and the Second Rehearing Order, which are final judgments that dispose of all the States’ claims.

The D.C. Circuit transferred the States’ petitions to this Court because the applicant, Gas Transmission Northwest (“GTN”), had already petitioned for review of FERC’s orders in this Circuit. *See* Order, No. 24-1002, ECF 2054176 (D.C. Cir. May 13, 2024); Order, No. 24-1204, ECF 2064207 (D.C. Cir. July 11, 2024). The States moved to dismiss GTN’s petition for lack of jurisdiction and to return the States’ petitions to the D.C. Circuit, since an improper petition cannot establish venue. *See generally* Mot. Dismiss, ECF 34. A divided Fifth Circuit panel denied the States’ motion. *See* Order, ECF 92. That decision is not binding on the merits panel. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020). The States maintain that venue is improper in this Circuit.

### **III. ISSUES PRESENTED**

1. Whether FERC’s reliance on the existence of precedent agreements that did not cover the full cost to expand was arbitrary, capricious, not in accordance with law, and unsupported by substantial evidence in violation of the Administrative Procedure Act (“APA”) and Natural Gas Act?

- a. FERC concluded it could postpone deciding what the Expansion’s costs are to a future rate case, despite arguments that doing so ignored important aspects of the public need analysis and would harm future consumers. Was FERC’s attempt to defer these issues to a future proceeding arbitrary and capricious?
- b. The Expansion’s costs will long outlive the term of the agreements, and the undisputed evidence showed there would not be sufficient future demand to pay those remaining costs. FERC ignored this evidence based on “policy,” without further explanation. Did FERC violate the APA by failing to substantiate its policy or otherwise support its reasoning with substantial evidence?
- c. 18 C.F.R. § 2.55(b) allows routine replacements of facilities without FERC approval, but replacements cannot incidentally increase pipeline capacity. Here, GTN replaced three compressors with larger compressors that would increase capacity for the Expansion’s use. FERC excluded the cost of the upgrades from Expansion costs, claiming section 2.55(b) authorized the replacements. Was FERC’s interpretation of section 2.55(b) unlawful and arbitrary?

2. The APA requires agencies to support their findings with substantial evidence and address contradictory evidence. Here, FERC found that the Expansion would provide certain public benefits but did not cite evidence supporting that finding or grapple with contradictory evidence. Was FERC’s finding of public benefits arbitrary, capricious, and unsupported by substantial evidence?
3. FERC considered some, but not all, of GTN’s rate filing on its own initiative. At the same time, FERC categorically rejected the States’ answer to GTN’s rehearing request, which re-submitted GTN’s rate filing into the Certificate docket, as “prohibited.” Was FERC’s refusal to consider the entire rate filing and categorical rejection of the States’ answer arbitrary and capricious?

#### **IV. STATEMENT OF THE CASE**

##### **A. Legal Background**

To protect consumers from monopolistic pipeline companies, Congress directed FERC to review proposals to construct new pipeline facilities and approve only to those “required by the present or future public convenience or necessity.” 15 U.S.C. § 717f(e); *see also* *Hope Nat. Gas Co.*, 320 U.S. at 611-12. FERC exercises that “Certificate” authority pursuant to its regulations and

Certificate Policy. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) (“Certificate Policy”).

The Certificate Policy imposes a “threshold requirement . . . that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.” 88 FERC at ¶ 61,746. The new customers must be “willing to purchase capacity at a rate that pays the full costs of the project.” 90 FERC at ¶ 61,392. Ensuring projects can stand on their own financially is an “important indicator of market-based need.” 88 FERC at ¶ 61,747.

When new customers do not face the true costs of the project, it “send[s] the wrong price signals to the market [and can] lead to inefficient investment and contracting decisions which can cause pipelines to build capacity for which there is not a demonstrated market need.” 90 FERC at ¶ 61,391. Existing customers may face rate hikes to pay for expansion costs that they are “ill equipped to bear,” or be forced “to shoulder the costs of unused capacity that results from competing projects that are not financially viable.” 88 FERC at ¶ 61,745-46.

If the project satisfies this threshold test, then FERC will consider “*all relevant factors*” bearing on public need. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 959 (D.C. Cir. 2021); *see also* Certificate Policy, 88 FERC at ¶ 61,747. Precedent agreements (contracts to buy the project’s capacity) are important evidence, but are “not a sufficient indicator by itself of the need for a project.” *Id.* ¶ 61,744; *see also id.* ¶¶ 61,748-49; *Env’t Def. Fund*, 2 F.4th at 973; *N.J. Conserv. Found. v. FERC*, 111 F.4th 42, 58-62 (D.C. Cir. 2024). Relying exclusively on precedent agreements raises “difficult questions of establishing the public need for the project.” Certificate Policy, 88 FERC at ¶ 61,744. Instead, “the evidence necessary to establish the need for the project will usually include a market study . . . vague assertions of public benefits will not be sufficient.” *Id.* ¶ 61,748.

## **B. The Expansion Was a Two-Phase Project, But FERC’s Approval Only Considered the Second Phase**

GTN operates a natural gas pipeline that transports gas produced in Western Canada through Idaho, Washington, and Oregon, where it connects to pipelines serving California. In 2019, GTN announced GTN Xpress, a project

to increase the capacity of its pipeline through replacing existing compressors<sup>3</sup> with larger compressors and other work. R.102:112-113. In 2021, after upgrading the three compressors, GTN applied for a certificate to increase its capacity by removing artificial software limits on the three recently upgraded compressors, adding a fourth compressor, and performing ancillary work at the compressor stations. *See* R.1:13-14.

**1. The Expansion relies on existing customers to pay for upgrading compressors necessary to expand**

GTN announced its Expansion to investors in 2019, claiming it would provide “up to 250,000 [Dekatherms/day (‘Dth/d’)] of additional firm transportation service”<sup>4</sup> on its pipeline for a cost of \$335 million. *See* R.102:112-113. Existing customers would pay \$251 million, three-quarters of the total cost. *Id.* In 2019, GTN offered the 250,000 Dth/d in new firm service, with 100,000 Dth/d available in “Phase I” of the Expansion, and 150,000 Dth/d available in “Phase II.” R.1:86. GTN executed agreements with three companies to purchase the 250,000 Dth/d in new capacity:

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<sup>3</sup> Compressors are machines that increase the pressure of gas by reducing its volume, which enables the pipeline to transport more gas without enlarging the pipe.

<sup>4</sup> GTN sells the ability to transport natural gas on its pipeline, referred to as pipeline capacity. When GTN sells “firm” capacity, GTN guarantees that capacity will always be available.

| <b>Expansion Customer</b>  | <b>Amount purchased</b>    |
|--|----------------------------|
| <i>Phase I</i>   |                            |
| Tourmaline Oil Company, a Canadian oil producer                  | 100,000 Dth/d <sup>5</sup> |
| <i>Phase II</i>  |                            |
| Tourmaline Oil Company   | 51,000 Dth/d               |
| Cascade Natural Gas Corporation, a Washington and Oregon utility | 20,000 Dth/d               |
| Intermountain Gas Company, an Idaho utility                      | 79,000 Dth/d               |

R.1:16. The agreements included a negotiated rate for service, but, as GTN admits, the negotiated rates “are too low to recover both the Project costs and the costs [to upgrade the compressors].” Declaration of Joshua Gibbon, ECF 74-2, ¶ 8; *see also* R.102:49-52.

In what appears to have been “Phase I” of the Expansion, GTN invoked 18 C.F.R. § 2.55(b), a streamlined FERC procedure intended for basic, routine replacements that do not “result in an incidental increase” in pipeline capacity. 18 C.F.R. § 157.202(b)(2)(i); *see also* Certificate Order ¶ 15. GTN then spent \$251 million to replace the three “Avon” compressors, rated at 14,300 horsepower, with larger “Solar Titan” compressors, rated at 23,470 horsepower. R.47:5-6. GTN finished installing the new compressors in November 2021 and included software to artificially limit each compressor to

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<sup>5</sup> See R.1:15; R.304:12 (citing GTN, Delegated Order, Dkt. RP23-578-000 (2023) (explaining that the 100,000 Dth/d contract was sold to Tourmaline)).

14,300 horsepower, consistent with GTN’s certificated limit. *See id.*; R.304:9-11.

In what was likely “Phase II,” GTN applied to FERC for a certificate to increase its pipeline’s capacity by 150,000 Dth/d for \$75.1 million. *See R.1:13-15.* The proposed \$75.1 million in Expansion costs did not include any of the \$251 million that GTN already spent to upgrade its compressors. *See R.102:48.*

GTN stated that the Expansion was self-supporting because the annual revenues from Expansion customers exceeded the Expansion’s annual cost of service. *See R.1:20-21.* The annual cost of service included a depreciation expense, spreading the recovery of GTN’s \$75.1 million investment over a 47-year period. *See id.*; R.102:95-97. The 47-year period was based on the depreciation rate GTN used in its last rate case. *See R.1:20-21.* However, the agreements supporting the Expansion will expire after 30-33 years. R.1:16. GTN did not provide any evidence that demand was likely to continue after the agreements expired. *See generally R.1.*

GTN explained in a footnote that, while it initially sold 250,00 Dth/d in expansion capacity, it later determined it could provide 100,000 Dth/d in new firm capacity with existing facilities. R.1:15, n.6. Thus, GTN only sought authorization for 150,000 Dth/d in new capacity. *Id.* GTN later disclosed that it

began providing the other 100,000 Dth/d in new firm capacity to Tourmaline in March 2023. *See R.304:12.*

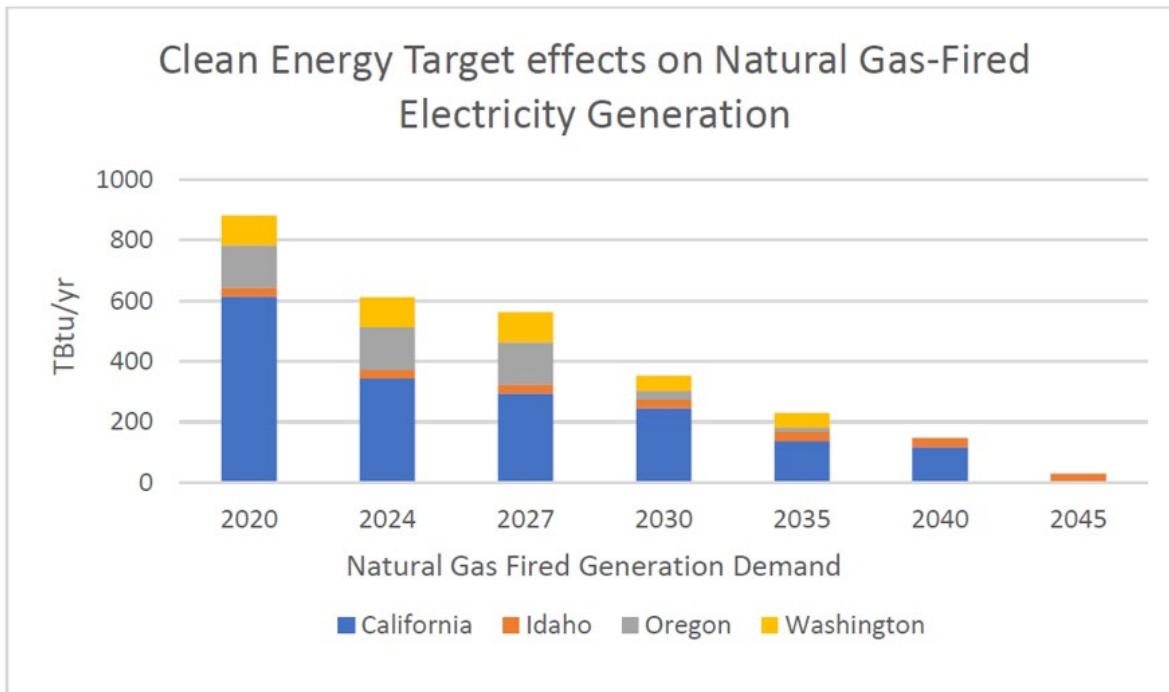
**2. Washington, Oregon, California, environmental advocates, and two utilities protested the Expansion**

Washington, Oregon, California, environmental advocates, and two of GTN’s utility customers intervened to protest the Expansion. Puget Sound Energy, a Washington utility, argued that GTN’s application was “void of the necessary transparency to protect ratepayers.” R.47:4. The utility argued that “GTN should be required to explain how it achieved the capability to provide an additional 100,000 Dth/d of service without changing its system,” particularly since that service was presented as “Phase I” of the Expansion. *Id.* 47:4-5. FERC must also consider the “appropriate amount of costs from the new compressors” when assessing the Expansion’s costs and rate treatment. *Id.* 47:6. A California utility made similar arguments and requested a technical conference to fully explore the costs and impact of the Expansion on existing customers. *See R.43:4.*

The States of Washington, Oregon, and California argued, among other points, that the precedent agreements could not justify a finding of public need for the Expansion because the Expansion’s revenue would not pay for all of its costs. *See R.102:13-16, 19-20.* Undisputed expert testimony showed that the

Expansion is not economically viable unless existing customers pay for 100% of the upgraded compressors and millions of dollars in Expansion costs after the precedent agreements expire. *See R.102:47-52, 95-97.* Leaving costs for recovery after the agreements expire will harm future consumers, given the undisputed projections of declining regional demand. *See R.102:20-21.*

Numerous parties and commenters presented evidence to FERC showing anticipated declining demand. For one, mandatory state laws requiring electric utilities to transition to 100% zero-emission electricity over the next two decades will significantly impact the region's future need for gas and, accordingly, gas pipelines:



R.102:89; *see also id.* 102:86-90. For another, dozens of large-scale renewable energy projects are developing in the region, which will compete with demand for gas-fired electricity. *See* R.102:42-45; R.93:6; R.109:45-50. Other factors affecting future demand include: regional consumer trends strongly favoring electric heat pumps over gas furnaces and water heaters; dozens of state and local laws, policies, and regulations that will reduce gas hookups for residential and commercial purposes; and federal subsidies for electric heating and renewable energy. R.102:37-42, 79, 82-86, 91; R.167:1-2; R.109:36-41. In light of these factors, the long horizon of the Expansion and its 47-year term for recovering Expansion costs “increases the risk of creating a stranded asset and can also mean that customers least likely to avail themselves of other fuel choices will be the ones footing the bill for the capacity expansion.” R.102:95-97.

**3. FERC reviewed undisputed evidence showing that declining regional demand threatens GTN’s economic viability**

GTN did not dispute the State’s evidence projecting declining regional demand. In fact, GTN’s application relied on a market report with the same projection. GTN’s application cited an “IHS Markit” report for its assertion that, because supplies from the Rocky Mountains were declining, “markets on the West Coast served by Rockies supply will need access to other sources” of

natural gas. R.1:20.<sup>6</sup> IHS Markit projected declining production in the Rockies, but did not support GTN’s claim that West Coast markets needed access to other sources of natural gas as a result. Like the States’ experts, IHS Markit projected a “steep drop in power sector demand.” R.315:9. The combination of falling regional demand and rising production elsewhere in the Western U.S. would lead the region to become a net *exporter* of gas as early as 2032. *See id.* 315:53-55. Further, the Expansion “[is] expected to largely displace Rockies deliveries to [the Pacific Northwest] market,” not fill a gap from declining Rockies production. *Id.* 315:64. IHS Markit indicated that the real motivator of the Expansion is not to serve new demand in the Western U.S., but to increase the market share of Canadian gas producers. *Id.* 315:12, 59, 64.<sup>7</sup>

In April 2023, FERC requested GTN to respond to the States’ arguments and provide “any additional information/data/studies that natural gas consumption in the region is expected to increase, taking account of the recent legislation.” R.300:3. GTN declined, arguing instead that its precedent agreements superseded any other evidence regarding future demand. *See*

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<sup>6</sup> GTN’s application cited the analysis as confidential, but FERC requested the full document. *See* R.1:20, n.15; R.300:4.

<sup>7</sup> The Canadian Association of Petroleum Producers intervened in this Court to defend the Expansion. *See* Not. Intervention, ECF 10.

R.304:3-4. GTN also argued the effect of state energy laws was speculative, but did not address any of the other factors likely to affect future demand for its pipeline. *Id.*

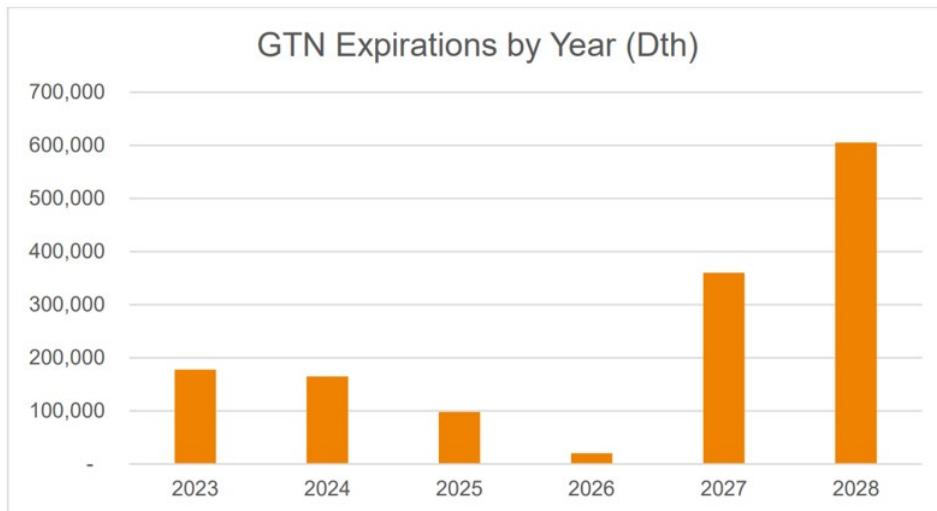
Five months later, GTN provided FERC the information it had sought, but did so in a parallel case seeking to increase rates on all customers (the “rate filing”). *See* Rehearing Order ¶¶ 4-5 (Clements, Comm’r, dissenting). The rate filing revealed GTN’s expectation of dramatic declines in demand for its pipeline as early as 2028 due to the combined impact of competition from renewable energy, rising Canadian gas prices, federal, state, and local laws, and expiring contracts that are unlikely to be renewed. *See* R.566:29-30, 32, 135-45, 158-87. As a result of these significant demand-side risks, GTN did not expect to be profitable after 2050. *See id.* 566:158, 195-97. GTN accordingly requested a new depreciation rate to recover its entire investment before 2050. *See id.*

GTN submitted hundreds of pages of testimony and exhibits to support its position that it was unlikely to be profitable after 2050. *See, e.g.*, R.566:110-920. For example, GTN’s witness testified that replacing natural gas with renewable energy is feasible, as “the potential energy from renewable sources within Washington, Oregon, and California equals over 85 times those states’

current electricity consumption.” R.566:178-179. It is also cheaper than burning natural gas for electricity. *Id.* 566:184. And when renewable sources are unavailable, battery storage increasingly displaces natural gas. *See* R.566:184-87. Battery storage costs have fallen 89% since 2010, followed by an immense rise in utilization. *See id.* 566:186.

In GTN’s Expansion Application, GTN made repeated, unsupported claims that its Expansion would provide access to lower-cost gas. *See* R.1:11, 18, 20. In the rate filing, GTN provided sworn expert testimony contradicting those claims. GTN’s expert testified that new export terminals in Western Canada and increased demand in Canada will likely increase the price of Western Canadian gas relative to other sources. R.566:139-40. These price increases will “render [GTN] less economic for current and prospective shippers.” *Id.* 566:139.

GTN’s witnesses also revealed that nearly half of its pipeline contract base will expire as early as 2028 and that it anticipates difficulty re-contracting for that soon-to-be available capacity. *See* R.566:142-44.



*Id.* 566:143. Over half of the expiring contracts belong to California and Oregon utilities, who are subject to state laws requiring transitions to cleaner energy. *See R.566:80-82.* Another sizeable percentage belongs to gas producers, who will likely be drawn to more valuable export markets in Western Canada once new export terminals become operational. *See id.;* R.566:138-39. “These market forces will make it considerably more difficult for GTN to recontract this expiring capacity at maximum tariff rates.”

R.566:143. Collectively, the capacity held in these expiring contracts is 1.4 billion cubic feet per day, which translates to 1,400,000 Dth/d. *Id.* 566:142. That is more than nine times larger than the 150,000 Dth/d that the Expansion proposes to create, but GTN never explained why this expiring capacity could not be used to meet the Expansion customers’ needs. *See Rehearing Order ¶ 6 (Clements, Comm’r, dissenting).*

Finally, GTN explained that declining demand will impact future gas consumers. Declining demand will leave “a shrinking customer base to pay the fixed costs of the system” and rate hikes. R.566:161. For example, a 74% decline in demand could require a 384% rate hike for remaining customers. *Id.* 566:161-62. Such increases will cause the remaining customers to “decide to leave the system, thereby causing a spiral of rate increases and more customers leaving the system.” *Id.* 566:162. “[A]t some point, gas rates can become prohibitive.” *Id.* 566:161.

#### **4. FERC approves the Expansion and denies rehearing**

One month after GTN’s rate filing, FERC determined that “the public convenience and necessity requires approval of the [Expansion].” Certificate Order ¶ 99. FERC concluded that existing customers would not subsidize the Expansion because the annual revenue from the precedent agreements would exceed the annual costs. *Id.* ¶¶ 17, 40-42. That calculation did not include any of the cost to upgrade the compressors because FERC did not decide whether some of the costs to upgrade the compressors should be allocated to the Expansion. *See id.* ¶¶ 17, 53. Instead, FERC deferred that question to a future rate case. *See id.* FERC also reasoned that the compressor upgrade costs were properly excluded from the Expansion application based on GTN’s claim that

they were routine replacements under 18 C.F.R. § 2.55(b). *See id.* ¶¶ 16-17. FERC adopted GTN’s proposal to spread the remaining Expansion costs over a 47-year period, citing its “general policy” of using the rate from the last-approved rate case. *Id.* ¶ 40 n.85. FERC did not explain why this depreciation rate was justified in light of the declining demand projections. *Id.* FERC next found that the precedent agreements were proof of market need for the Expansion, and that the Expansion would provide public benefits: access to lower-cost gas, supply diversification, and reliability. *Id.* ¶¶ 36, 39.

Commissioner Clements “reluctantly” concurred with the Certificate Order because the States had “raised serious questions concerning the present and future need” for more pipeline capacity in their States. *Id.* ¶ 1 (Clements, Comm’r, concurring in part and dissenting in part). Under the majority’s approach, FERC has “no meaningful ability to assess the risk of over-building and the concomitant risk of saddling ratepayers with the costs of underused facilities.” *Id.* ¶ 4.

The States, Columbia Riverkeeper, Rogue Climate, and GTN each sought rehearing. GTN argued FERC should have rolled the Expansion costs into existing rates because, GTN claimed, the compressor upgrades were already “reflected in GTN’s existing rates.” R.564:3; *see also id.* 564:16. GTN

alternatively requested the issue be resolved in a future rate case, not its recently-filed one. R.564:3. This was the first time the States' counsel received notice of the rate filing. *See* R.566:23. The States promptly answered GTN's request to clarify the issues and provide a more complete record. R.566:4-6. Though GTN's rehearing request asserted the cost to upgrade its compressors was already "reflected in GTN's existing rates," R.564:3, its rate filing explained that the last rate settlement simply extended the terms of prior settlements so "GTN's current rates were essentially established in the 2018 Settlement," R.566:28; *see also id.* 566:6-7. GTN's rate filing also explains that it seeks to raise rates to reflect capital expenditures for "work at various compressor stations to replace outdated, less efficient compressor units." R.566:29. This work includes \$211 million for a "GTN Xpress" project with an in-service date of November 1, 2021. R.566:54. As the States pointed out in their answer, this coincides with the estimated \$251 million that GTN planned to spend to upgrade compressors at the three stations the Expansion relies on, which also went into service in November 2021. R.566:6-7. The States also refiled GTN's expert testimony and supporting documents, which contradicted GTN's position in the Certificate docket that its Expansion was needed to serve growing regional demand. *See* R.566:7-15.

In a 2-1 decision, FERC denied rehearing. The majority rejected the States' answer as jurisdictionally barred and alternatively concluded that GTN's rate filing would not "compel" a different outcome. Rehearing Order ¶¶ 8-10, 78. Commissioner Clements dissented, arguing that GTN's rate filing "so undermines the foundations of the Certificate Order that it cannot rationally be sustained on rehearing." *Id.* ¶ 9 (Clements, Comm'r, dissenting). Had GTN provided information in the Certificate docket consistent with its rate filing, Clements would not have approved the Expansion. *Id.* ¶ 21 n.72. She concluded that FERC's "myopic focus on precedent agreements and its reflexive dismissal of any other evidence of future need as too 'speculative'" abrogated FERC's duty to predict the future need for pipeline capacity and consider all relevant evidence. *Id.* ¶ 10. She also criticized the majority's apparent "double standard in assessing the probative value of record evidence," *id.* ¶ 12, exemplified by the majority's acceptance of GTN's unsworn statements but blanket rejection of sworn testimony and reports showing the opposite. *Id.* ¶ 15.

The States filed a second request for rehearing on the limited issue of FERC's rejection of their answer and evidence in GTN's rate filing. *See* R.628. The request was denied by operation of law on June 14, 2024. *See* R.643; 15

U.S.C. § 717r(a). FERC subsequently issued another 2-1 decision summarily denying the States' request, with Commissioner Clements dissenting, for the reasons previously stated. *See* Second Rehearing Order ¶ 11; *id.* ¶ 1 (Clements, Comm'r, dissenting).

## **V. SUMMARY OF ARGUMENT**

The Court should vacate FERC's approval of the Expansion because FERC relied entirely on the existence of precedent agreements without meaningfully addressing evidence undermining their probative value. This warrants reversal for at least three independent reasons.

First, FERC erroneously reasoned that it could defer the question of whether the Expansion improperly shifts costs onto existing customers, or is likely to burden future gas consumers, to a future rate-setting case. Under the Gas Act and FERC's Certificate Policy, the existence of a subsidy is a threshold question that must be resolved before FERC may find that public necessity requires an expansion. FERC cannot defer resolving that question to a future proceeding. FERC also failed to consider how postponing the issue is likely to impact future gas consumers, which ignored an important aspect of the problem as well as its statutory command to use its certificate authority to protect consumers.

Second, FERC erred in relying on the precedent agreements because the Expansion's costs will long outlive the agreements and there was no evidence of future demand to pay those costs. FERC found that the Expansion would have an economic life of 47 years and, accordingly, spread GTN's recovery of its investment until approximately 2071. However, the undisputed evidence showed there would not be sufficient demand to pay for the Expansion's costs after the precedent agreements expire in the early 2050s. FERC did not address this evidence and relied solely on its practice of using the depreciation rate from GTN's last rate case. FERC did not explain the purpose of its general practice or why it could not make an exception to its policy, as it has in other cases. FERC's failure to substantiate its policy was arbitrary, and its finding that the Expansion would have a 47-year economic life is unsupported.

Third, the revenue from the precedent agreements will not pay for any of the costs to upgrade three compressor units on which the Expansion service relies. FERC excluded those costs because GTN had invoked 18 C.F.R. § 2.55(b) for the upgrades. Section 2.55(b) only permits replacements that are substantially equivalent in size and do not incidentally increase the pipeline's capacity. *See* 18 C.F.R. §§ 2.55(b); 157.202(b)(2)(i). While FERC has, historically, permitted replacement compressors with slightly more horsepower

than the original, it has done so when the replacement was the closest-available size and the increase was minor, in the range of 500-700 horsepower, not the 9,170 horsepower increase that FERC condoned here. FERC arbitrarily fails to acknowledge its change in position, much less justify it, and its new interpretation does not accord with its regulations or the Gas Act's requirement that it approve new facilities based on a demonstrated public necessity *before* construction begins. *See* 15 U.S.C. § 717f(c)(1)(A).

Even if section 2.55(b) could authorize larger-sized replacements, FERC did not adequately explain and support its determination that a larger size was necessary here. FERC uncritically deferred to GTN's explanation that, because the closer-available compressor would produce about 200 horsepower less than the originals on the coldest days, the super-sized compressors were needed for existing service. Yet FERC never explained how, if that were true, GTN could add 100,000 Dth/d in new firm service following the replacements. Because FERC's decision leaves important questions unanswered, it violates the APA.

Aside from the precedent agreements, FERC recited other public benefits that might occur. Rehearing Order ¶ 89. These vague findings cannot support FERC's order because FERC did not support them with evidence or consider evidence indicating those benefits "may be illusory." *Id.* ¶ 7

(Clements, Comm'r, dissenting). Accordingly, they too must be set aside as unsupported and arbitrary.

Finally, FERC erroneously claimed it could not consider GTN's rate filing, although FERC actually did consider parts of it on its own initiative. *See* Rehearing Order ¶ 36 nn.130-32, ¶ 53 n.208. FERC's consideration of some parts of GTN's rate filing, but refusal to consider other parts that contradicted its conclusions, was arbitrary and capricious. FERC also improperly rejected the States' answer to GTN's rehearing request, which clarified the record and re-submitted key documents from GTN's rate filing in the Certificate docket. FERC claimed its regulation "prohibit[s]" such answers. Rehearing Order ¶ 9. But FERC's regulation allows answers for good cause and FERC never explained why good cause was absent here. The Court need not address this issue to decide in favor of the States on the above issues. However, FERC's treatment of the rate filing highlights the egregiousness of those errors and is another independent reason for reversal.

## VI. STANDING

To seek judicial review, a party must be aggrieved. *See* 15 U.S.C. § 717r(b). The standard for aggrievement "Duplicates the traditional requisites for Article III standing" of injury, traceability, and redressability. *Gulfport*

*Energy Corp. v. FERC*, 41 F.4th 667, 676 (5th Cir. 2022). FERC’s approval of the Expansion directly injures the States’ quasi-sovereign and proprietary interests, which this Court can redress.

**A. The Expansion Injures the States’ Quasi-Sovereign Interests in Protecting Consumers and Imposes Regulatory Burdens on the States**

Numerous provisions in the Gas Act demonstrate an intent to allow States to seek review of FERC orders in order to protect their quasi-sovereign interests in the traditional governmental field of utility regulation. *See Md. People’s Couns. v. FERC*, 760 F.2d 318, 320-21 (D.C. Cir. 1985) (Scalia, J.) (citing 15 U.S.C. §§ 717r(a)-(b), 717n(a), 717a). This Court has also found that a State’s interest in “protecting their citizens from monopolistic [pipelines, and] in avoiding the expense of imposing their own regulation of natural gas to compensate for FERC’s decision,” established standing. *Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1194-96 (5th Cir. 1997); *see also Md. People’s Counsel*, 760 F.2d at 320-322 (finding that a state agency had standing as *parens patriae* to represent the interests of its citizens who purchase gas affected by a FERC program).

Cascade Natural Gas, a utility serving Washington and Oregon, contracted for Expansion capacity. *See R.1:16, 18.* Cascade already included its Expansion contract in its resource plan for consumers in both states, though

both state regulators refused to acknowledge Cascade’s last long-term plan. *See* Roberson Decl., Ex. A at 1-3, 29-33 (attaching staff comments concerning the prudency of Cascade’s GTN Xpress contract); Novick Decl., Ex. A at 6-7 (noting deficiencies in Cascade’s approach to forecasting future demand). Now that FERC has approved the Expansion, it is reasonably certain that Cascade will seek to pass on the costs of that contract onto state consumers in a future rate-setting case. *See* Declaration of Jeff Roberson ¶¶ 4-5; Declaration of Steve Novick, Ex. A at 3 (discussing the relationship between the resource plan and the rate case).

In a future rate-setting case, or when reviewing Cascade’s next resource plan, regulators will need to expend staff time and resources to determine whether Cascade’s Expansion contract was reasonable. *See* Roberson Decl. ¶¶ 3-11; Novick Decl., Ex. A at 3, Ex. B at 1-2. And even if regulators disallow recovery of Cascade’s contract in consumer rates, that does not avoid all harm to consumers. Disallowing recovery of an expense in rates “has the very real effect, among others, of increasing the risks of investing in the utility.” *See People’s Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm’n*, 104 Wash. 2d 798, 811 (1985). Increasing the risk of investment will increase the utility’s cost of capital and, consequently, the utility’s overall operating

costs, which consumers ultimately pay. FERC's approval of the Expansion thus directly harms Washington and Oregon consumers and burdens state resources.

*See Pac. Gas & Elec. Co.*, 106 F.3d at 1194.

**B. The Expansion Injures the States' Quasi-Sovereign and Proprietary Interests by Increasing Air Pollution and Safety Hazards and Harming State-Owned Wildlife**

FERC's approval of the Expansion also harms the States' proprietary and quasi-sovereign interests in protecting its air quality, wildlife, and state-owned lands, each of which independently suffices for standing.

First, the Expansion will contribute to degraded air quality and associated harms to human health, vegetation, crops, and water quality in each State. *See* R.135:73-76, 93; Declaration of Julian Marshall ¶¶ 5-9. Air pollutants will likely reach state-owned land near the expanded compressor stations and contribute to degraded air quality on those lands. *See* R.135:93 (using a 20-kilometer radius for air quality impacts); Marshall Decl. ¶¶ 8-9. Washington and Oregon each own numerous land parcels within a 20-kilometer radius of the expanded compressor stations in each state. *See* Declaration of Brandon Kuykendall ¶¶ 5-6; Declaration of Erin Serra ¶¶ 5-6. The pollutants will likely also cause an increased prevalence of adverse health effects for Washington residents. *See* Marshall Decl. ¶ 10; *see also* R.103:24-

27, 151-188. The discharge of a pollutant that “contributes to the pollution that impairs” plaintiffs’ interests suffices for standing. *See Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 556-58 (5th Cir. 1996).

Second, construction activities in Washington and Oregon will “likely increase the rates of stress, injury, and mortality experienced by wildlife.” R.135:47; *see also* R.1:499-500. Wildlife are the property of each State. *See Wash. Rev. Code* § 77.04.012; *Or. Rev. Stat.* § 498.002(1). Injury to state-owned wildlife independently establishes standing. *See Clean Wis. v. EPA*, 964 F.3d 1145, 1159-61 (D.C. Cir.), *judgment entered*, 812 F. App’x 4 (D.C. Cir. 2020) (holding Illinois and Chicago had standing to challenge emissions controls based on harm to government-owned vegetation).

Third, the Expansion will increase the pressure of gas in GTN’s pipeline, which creates an “incremental risk to the public due to the potential for accidental release of natural gas,” including hazards such as “a fire or explosion following a major pipeline rupture.” R.135:89; *see also* Declaration of Richard Kuprewicz ¶¶ 15-19. As one commenter explained to FERC, GTN and its parent company, TC Energy, have a history of violating safety regulations. *See* R.298:1-10. Just last year, another TC Energy gas pipeline exploded near a highway, highlighting these safety risks. R.385.

The GTN pipeline intersects 43 state-owned properties, as well as state-owned water bodies and rights of way. Kuykendall Decl. ¶¶ 5, 10-11; Serra Decl. ¶¶ 8-10. The Expansion will likely result in more and greater gas leaks along the pipeline, and even a small leak will damage vegetation on the States' properties. *See* Kuprewicz Decl. ¶¶ 15-16. The Expansion also poses a higher risk of fire, explosion, or fatalities from a pipeline failure on or near these properties. *See* Kuprewicz Decl. ¶¶ 17-19.

This Court has found standing based in part on a project's increased risk of oil spills affecting the plaintiff's property. *See Citizens for Clean Air & Clean Water in Brazoria Cnty. v. U.S. Dep't of Transp.*, 98 F.4th 178, 188 (5th Cir. 2024); *see also Myersville Citizens for a Rural Cmtys., Inc. v. FERC*, 783 F.3d 1301, 1317 (D.C. Cir. 2015) (holding that residents had standing to challenge FERC order based in part on heightened safety hazards). As in those cases, the States have standing based on the Expansion's increased safety hazards and risk of property damage to their properties.

For all of these reasons, the States have standing.

## **VII. ARGUMENT**

To avoid repetition, the States join and adopt the arguments made by Columbia Riverkeeper and Rogue Climate concerning FERC's violations of

the National Environmental Policy Act. The States' brief focuses on FERC's violations of the Natural Gas Act and APA.

### **A. Standard of Review**

These petitions challenge FERC's approval of the Expansion under the Natural Gas Act and the APA. Under the Gas Act, FERC must find the construction of new pipeline facilities "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 U.S.C. § 717f(e). FERC's findings must be based on substantial evidence. 15 U.S.C. § 717r(b).

Under the APA, a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious . . . not in accordance with the law . . . [or] unsupported by substantial evidence." 5 U.S.C. § 706(2). Agencies act arbitrarily when they fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). An agency cannot "entirely fail[] to consider an important aspect of the problem [or] offer[] an explanation for its decision that runs counter to the evidence before the agency." *Id.* Nor can an agency shift its understanding of the law and "deny or

downplay the shift [or] gloss over or swerve from prior precedents without discussion.” *Wages & White Lion Invs., LLC v. FDA*, 90 F.4th 357, 381 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).

**B. FERC Erred by Relying on Precedent Agreements as Conclusive Evidence of Need Although the Agreements Would Not Fully Pay for the Expansion**

It should be common sense that a precedent agreement is significant evidence of market need only if the amount the new customer agrees to pay reflects the cost to provide the new capacity. Take this hypothetical: Coffee Co. opens a new location. Each cup of coffee costs it \$2 to produce. But its customers at the new location will only pay \$1.50. There is no market demand for Coffee Co.’s new location. Likewise, agreements with Coffee Co.’s new customers to buy coffee for less than the cost of providing it is not evidence that market demand requires the new location.

GTN’s proposal is like Coffee Co.’s. Unlike Coffee Co., GTN seeks to expand nonetheless because, as a regulated monopoly, it can charge existing customers whatever price FERC approves. GTN is counting on raising rates on existing customers to subsidize the Expansion.

FERC approved the Expansion based on the existence of precedent agreements to buy the Expansion service, but did not engage with evidence that

the agreements would not fully pay for the Expansion's costs. *See Certificate Order ¶ 36.* FERC's assessment of the Expansion's cost of service, and its ensuing conclusion to approve the Expansion based on precedent agreements purporting to cover that cost, was unlawful and arbitrary for three reasons. First, FERC erroneously reasoned it could approve the Expansion and defer these cost-recovery issues to another proceeding, although doing so would harm consumers and violate the Gas Act's requirement to only approve projects required by the public necessity. Second, FERC did not allocate any of the \$251 million that GTN spent upgrading compressors to the Expansion. Instead, FERC erroneously concluded this was a routine maintenance expense, allowable under 18 C.F.R. § 2.55(b), rather than an obvious component of the Expansion. Third, FERC arbitrarily concluded that the Expansion's useful life was 47 years (lasting through 2071 at least), although the undisputed evidence showed demand would not continue after 2050. FERC instead relied on a general practice used in past cases that it never substantiated.

**1. FERC's attempt to defer these critical questions to a future rate case is not reasonable**

The Court should reject FERC's attempt to defer these issues to a future rate case. *See Rehearing Order ¶¶ 43, 50-53.* First, the Gas Act does not permit FERC to defer questions essential to whether a project serves the public

necessity. Second, FERC arbitrarily ignored the potential harm to consumers that would result from such a decision.

**a) FERC cannot defer questions central to its public need finding**

FERC arbitrarily found a public need without answering questions central to that finding: will existing customers subsidize the Expansion if the Expansion’s cost excludes all the costs to upgrade GTN’s compressors? Is it appropriate to postpone recovery of Expansion costs until after the precedent agreements expire, when the undisputed evidence shows there will not be demand sufficient to pay those costs? *See* Rehearing Order ¶¶ 43, 53. FERC acknowledged that both issues may “result in existing customers subsidizing the [Expansion].” *Id.* ¶ 52; *see also id.* ¶ 43. And FERC’s Certificate Policy clearly states that the existence of a subsidy is a “threshold requirement in establishing the public convenience and necessity.” 88 FERC at ¶ 61,746. Approving a project that may be subsidized violates the Certificate Policy.

Failure to resolve these questions also infects FERC’s finding of market need based on the precedent agreements and abrogates FERC’s duty to only certificate the construction of new facilities based on a demonstrated public necessity. *See* 15 U.S.C. § 717f(c)(1)(A), (e). As Commissioner Clements explained, the precedent agreements “speak [only] to market demand for

transportation services *at specifically negotiated prices.*” Second Rehearing Order ¶ 2 n.12 (Clements, Comm’r, dissenting). If those prices are not reasonable because they exclude substantial costs, “nothing” supports FERC’s approval. *Id.* ¶ 2.

FERC policy and common sense dictate that FERC must determine what the Expansion’s true costs are, and who will pay them, *before* finding that no subsidy exists and a demonstrated public necessity. The Gas Act does not have a “build first, decide later” policy. *See* 15 U.S.C. § 717f(c)(1)(A), (e). By deferring the issue, FERC approved a project that is either (1) not economically viable or (2) dependent on subsidization from existing customers. *See* R.102:48-51, 92, 95-97; *see also* Gibbon Decl., ECF 74-2, ¶ 8. Neither outcome complies with FERC’s obligation under the Gas Act to only approve projects “required by the public convenience and necessity” and fully address important aspects of the problem before it. 15 U.S.C. § 717f(e); *State Farm*, 463 U.S. at 43.

FERC responded that it could postpone the determination of just and reasonable rates to the rate case. Rehearing Order ¶ 51. But the existence of a subsidy is not solely a question of rates. *See* Certificate Policy, 88 FERC at ¶¶ 61,745-47. Regardless, FERC still has a duty to exercise “a most careful

scrutiny and responsible reaction to initial price proposals” in the certificate proceeding. *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391 (1959).

In *Missouri Public Service Commission v. FERC*, the D.C. Circuit rejected FERC’s argument that it could avoid objections to a proposal by deferring a more detailed evaluation of rates to the next rate case. 601 F.3d 581, 587 (D.C. Cir. 2010). While the review in a certificate case “is not coterminous with the just and reasonable standard” used in rate cases, FERC still has a “duty to use its [certificate] power to protect consumers . . . Indeed, the Commission’s usual practice in Section 7 certificate proceedings is to apply, to the extent practicable, the same ratemaking policies that it applies in Section 4 rate cases.” *Id.* (cleaned up). FERC’s failure to offer a “reasoned explanation” why it could not decide the rate issue in the certificate proceeding violated the APA. *Id.*

Like in *Missouri*, FERC offers no reasonable explain why it could not decide these issues now. Instead, FERC surmises that the compressor costs “appear to be in existing rates.” Rehearing Order ¶ 32 n.112. FERC then explains that, if it allocated some compressor costs to the Expansion, GTN would recover those costs twice, once from Expansion customers and once from existing customers. *Id.* ¶ 53. FERC’s explanation is irrational. First,

GTN’s current rate filing, not a past one, seeks to include the costs for compressor upgrades in its “proposed rates,” not the existing system rate. *Id.* ¶ 36. Second, the precedent agreements have negotiated rates, so whatever rate FERC sets for the Expansion does not affect what they pay. *Id.* ¶ 52 n.202; *see also* R.102:51-52.

FERC did not have to proceed in the dark here. Certificate applications must include “detailed cost-of-service data supporting the cost of the expansion project” and a “detailed rate impact analysis” on its currently effective rate schedules. 18 C.F.R. § 157.6(b)(8). GTN’s failure to submit a complete application was a reason to reject, not approve, it. *See* 18 C.F.R. § 157.5. As this Court has repeatedly held, agencies “cannot play the ‘administrative law shell-game’ of offering ‘future [proceedings] as a response to a claim of agency illegality.’” *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 366 (5th Cir. 2023); *see also* *BNSF Ry. Co. v. Fed. R.R. Admin.*, 105 F.4th 691, 699 (5th Cir. 2024).

**b) FERC did not consider the consequences of its decision for future gas consumers**

FERC’s punt to a future proceeding also fails to address the consequences of that decision on future gas consumers. If demand does not exist to pay the Expansion’s costs after 2050, the evidence does not indicate

that GTN can absorb those costs. As GTN explained to FERC, declining demand could render its entire pipeline uneconomic by 2050. R.566:149-198.

Remember Coffee Co. that charged new customers \$1.50 for coffee and then increased the prices on its existing captive customers to cover the rest of its costs for the new location? Now the new customers paying \$1.50 have moved away, but Coffee Co. has not yet recovered its investment. There also have been substantial declines in demand for coffee overall, shrinking the pool of customers at its original location. The smaller pool of customers must share in the same fixed costs of the original café, plus those of the new location. Coffee Co. will need to drastically increase prices to stay afloat. Unfortunately, these customers tend to be those who could not easily switch to a different beverage already and can least afford the higher prices.

As in Coffee Co., FERC's decision will almost certainly harm future gas consumers. For GTN to remain economic, it will have to drastically raise rates to recover its fixed costs. *See* R.566:161-62. For example, GTN calculated that a 74% decline in gas demand could result in transportation rates increasing by 384%. *Id.* At some point, the rates will become “prohibitive” and GTN may have to abandon service. *Id.*; *see also* R.102:95-97. FERC's decision piles on more unrecoverable expenses without assessing the impact on future gas

consumers. *See* Certificate Order ¶ 4 (Clements, Comm'r, concurring in part and dissenting in part) (criticizing FERC's failure to assess the "risk of saddling ratepayers with the costs of underused facilities").

FERC's failure to decide who should pay for GTN's compressor upgrades, or how Expansion costs will be recovered after the precedent agreements expire, "entirely failed to consider an important aspect of the problem" before it. *State Farm*, 463 U.S. at 43. As one Commissioner explained in another case, "[w]hatever probative weight [the precedent agreements have], the Commission cannot simply point to the agreement's existence and then ignore the evidence that undermines the agreement's probative value. In so doing, the Commission ignores arguably the most important aspect of the problem in this case: Whether the precedent agreement on which it rests its entire determination of need actually tells us anything about the need for this pipeline." *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134, 62,002 (2019), (Glick, Comm'r, dissenting), *vacated by Envir. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

**2. The Expansion's costs will long outlive the agreements, but there was no evidence of future demand to pay for them**

FERC calculated the Expansion's annual depreciation expense based on its finding that the Expansion's "useful life is approximately 47 years."

Rehearing Order ¶ 41. As a result, GTN will need to recover millions of dollars of its investment in the decades after the precedent agreements expire in the early 2050s. *See R.102:95-97.* The undisputed record evidence shows that demand for natural gas will be significantly decreased at that time. *See supra* pp. 12-23. GTN similarly argued to FERC in its rate filing that declining demand and the inability to recover its costs could render the pipeline uneconomic by 2050. *See R.566:158, 195.* By ignoring this evidence and adopting a 47-year depreciation rate, FERC set up the Expansion to become a stranded asset.

To justify its decision, FERC relied on its policy of using the depreciation rate from the pipeline company's last rate case. *See Rehearing Order ¶ 40.* FERC's rationale violates the Gas Act and APA because (1) it did not substantiate its policy and (2) aside from its unsupported citation to policy, no evidence supports FERC's finding that the Expansion will have a useful life of 47 years.

**a) FERC did not substantiate its policy to use a depreciation rate unmoored from the evidence before it**

This Court has previously remanded to FERC for establishing a policy through case-by-case adjudications and then applying it in a particular case

without regard to the individual facts and without substantiating the policy. *See Shell Oil v. FERC*, 707 F.2d 230, 234-36 (5th Cir. 1983); *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 44-45 (5th Cir. 1989); *see also El Paso Elec. Co. v. FERC*, 832 F.3d 495, 503 (5th Cir. 2016). While FERC may announce a general policy through case-by-case adjudication, it must “substantiate[] the application of its policy, either through the development of specific facts or by making a reasoned explanation,” in each case. *Fla. Gas Transmission Co.*, 876 F.2d at 45. FERC has made the same error here.

*Florida Gas* and *Shell* illustrate how FERC must substantiate a policy announced in case-by-case adjudication. In *Florida Gas*, FERC explained that its policy was necessary to reduce the “potential for undue discrimination” and because the industry was in a transition period adapting to new rules. *Id.* 44. This Court reversed. Merely stating “a prophylactic purpose” for the policy was insufficient when FERC had rejected alternatives that could equally serve its purpose without explanation. *Id.* 45.

In *Shell*, FERC applied a policy based on a finding that certain producers could utilize existing well footage. 707 F.2d at 234. Shell challenged the policy because Shell did not use existing well footage. *Id.* This Court reversed. FERC had never adduced evidence to support the “critical facts” that producers can

utilize existing well footage. *Id.* 235. Since no evidence supported “the facts upon which [the] rule is based[,]” the policy was invalid. *Id.*

As in *Shell* and *Florida Gas*, FERC applies a policy, developed in case-by-case adjudication, without regard to the specific facts before it. *See* Rehearing Order ¶ 40. This case is more straightforward, because FERC offered no explanation of the purpose of its policy, much less evidence supporting the facts underlying it. *See* Rehearing Order ¶¶ 40-43.

In a footnote, FERC cites another case, *Tennessee Gas Pipeline*, which explains that case-by-case review of depreciation rates “may cause undue delay.” 169 FERC ¶ 61,230, 62,832 (2019). To the extent this is the policy justification, it is not reasonably explained or supported with evidence. FERC does not cite evidence of delays from case-by-case review of depreciation rates, especially not in cases like this one, where the relevant evidence is undisputed. FERC also does not explain why such delay, if it happens, would be “undue” when FERC already must assess the same evidence regarding future demand to approve a certificate. Finally, FERC did not reasonably explain why an abstract concern of delay outweighs the risk of burdening future gas consumers with stranded assets or approving an uneconomic expansion project.

FERC's application of the policy is also arbitrary because FERC does not consistently apply the policy. *See Tenn. Gas*, 169 FERC at ¶ 62,832. In other cases, FERC has not insisted on using the last-approved depreciation rate when that rate may not accurately reflect the economic life of new facilities. *Wyo. Interstate Co.*, 119 FERC ¶ 61,251, 62,416 (2007); *Gulf S. Pipeline Co., LP v. FERC*, 955 F.3d 1001, 1015 (D.C. Cir. 2020). On rehearing, FERC claimed those policy exceptions only apply to lateral pipes serving a single customer, *see* Rehearing Order ¶ 40, but this is incorrect, *see, e.g.*, *Equitrans, L.P.*, 153 FERC ¶ 61,381, ¶¶ 17, 27, 31 (2015), *aff'd on reh'g* 155 FERC ¶ 61,194 (2016) (approving a depreciation rate based on the contract term where the project “overlays much of Equitrans existing system”); *Tenn. Gas*, 169 FERC at ¶ 62,832. FERC's failure to substantiate its policy was arbitrary and capricious.

**b) No evidence supports FERC's finding that the Expansion would have an economic life of 47 years**

FERC's finding that the Expansion would have a useful life of 47 years was also “flatly and overwhelmingly contradicted by [the record] evidence.” *MCR Oil Tools, L.L.C. v. U.S. Dep't of Transp.*, 110 F.4th 677, 698 (5th Cir. 2024). Factual findings that run counter to the record evidence violate the APA. *Id.* The undisputed evidence from the States and GTN indicated that the

Expansion's useful life will expire with the precedent agreements in the early 2050s. No evidence suggested the Expansion would be needed after the precedent agreements expire.

Case in point: GTN claimed in its rate filing that the useful life for its entire pipeline would be just 27 years, which was based on “competitive pressure from the declining cost of alternative energy, electrification, and battery storage” and the requirements of federal, state, and local governments.

R.566:149.

The evidence in the Certificate docket mirrored GTN’s testimony in the rate filing. In its application, GTN cited a market analysis that described “a steep drop in power sector demand” in the Western U.S., as renewable energy out-competes natural gas for electricity generation. R.315:9; *see also id.* 315:48, 55; R.566:178-187. The States also submitted a report from energy planning expert David Hill. Hill explained that 32% of total regional gas consumption is used to generate electricity, but laws in California, Oregon, and Washington will require significant reductions in gas-fired electricity generation by 2045 or earlier. R.102:87-89. This will substantially reduce demand for GTN. *Id.* Moreover, gas demand for other uses, like space and water heating, will also likely decline due to consumer trends favoring electric

heat pumps, building code changes, and federal subsidies to electrify buildings.

*Id.* 102:78-80; *see also id.* 102:37-42; R.315:11; R.566:170-172.

Without addressing this evidence, FERC irrationally concluded that “the States provide no evidence to support the Commission deviating from its policy.” Rehearing Order ¶ 40. FERC speculated that the Expansion customers “may” extend their precedent agreements, or that GTN could remarket the capacity, but did not explain why this was likely.<sup>8</sup> Rehearing Order ¶ 43; *compare* Rehearing Order ¶ 9 (Clements, Comm’r, dissenting). This “unsubstantiated agency speculation does not overcome” the undisputed evidence projecting declining demand. *Calumet Shreveport Refin., LLC v. EPA*, 86 F.4th 1121, 1142 (5th Cir. 2023).

FERC also erred in stating that an asset’s useful life is based “both on wear and tear and on the exhaustion of natural resources.” Rehearing Order ¶ 40. That is not the standard. “[C]hanges in demand and requirements of public authorities” are also relevant. 18 C.F.R pt. 201 ¶ 12.B; *see also*

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<sup>8</sup> FERC only cited a past case, *Northern Border Pipeline*, which found, based on the facts of the case, that it was speculative to assume the project shippers would not continue as customers of the pipeline after their agreements expire. 76 FERC ¶ 61,141, 61,771 (1996); Rehearing Order ¶ 42. But there, the project shippers expressed on the record their intent to continue as customers after their agreements expired, and there was no indication that demand would decline. *Northern Border*, 76 FERC at ¶ 61,771.

*Panhandle E. Pipeline Co., LP*, 181 FERC ¶ 61,211, 62,440 (2022) (finding a 35-year economic life based on changes in demand). As this Court has held, applying the wrong legal standard and ignoring relevant factors renders FERC's rationale arbitrary and capricious. *See Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5th Cir. 2007); *see also BNSF Ry. Co.*, 105 F.4th at 699.

**3. The precedent agreements do not pay for upgrading the compressors necessary to expand**

FERC arbitrarily concluded that GTN's compressor upgrades were not part of the Expansion. In the Certificate Order, FERC found the Expansion was unsubsidized only because it excluded the cost to upgrade three compressors, citing GTN's explanation that 18 C.F.R. § 2.55(b) separately justified those upgrades. *See* Certificate Order ¶ 16; Rehearing Order ¶ 23. Section 2.55(b) did not authorize the cost to upgrade GTN's compressors because the replacements were not substantially equivalent in size and created new pipeline capacity, which the Expansion will use. FERC therefore should have considered those costs in determining the Expansion's costs.

On rehearing, FERC alternatively claimed that whether the replacements were justified under section 2.55(b) was "outside the scope" of the Certificate proceeding. Rehearing Order ¶ 17. However, as discussed above, FERC cannot determine whether existing customers will subsidize the Expansion if it does

not know whether expansion costs are being incorrectly shifted on existing customers. FERC also cannot rely on the existence of precedent agreements as evidence of market demand if those agreements will not make Expansion economically viable. *See supra* pp. 35-39.

**a) FERC's finding that 18 C.F.R. § 2.55(b) authorized the compressor upgrades does not accord with law**

FERC's conclusion that section 2.55(b) justified the upgrades must be set aside because it is not a lawful interpretation and, even if it was, it arbitrarily deviates from FERC's past interpretations without explanation. *See* 5 U.S.C. § 706(2)(A); *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 477-79 (5th Cir. 2021) (agency incorrectly interpreting its regulations was arbitrary); *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 857 (5th Cir. 2022) (holding agency's shifting interpretations, without acknowledging change in position, was arbitrary).

The Gas Act requires FERC to review and approve any new pipeline "facilities" before construction begins. 15 U.S.C. § 717f(c)(1)(A). FERC regulations create a narrow exception to this rule for replacement of deteriorated or obsolete equipment. *See* 18 C.F.R. § 2.55(b). But section 2.55(b) only permits replacement of deteriorated or obsolete facilities that

“have a substantially equivalent designed delivery capacity.” § 2.55(b)(1)(ii).

Previously, FERC “viewed replacement as being limited to like-size facilities.”

*Columbia Gas Transmission Corp.*, 68 FERC ¶ 61,043, 61,143 (1994).

Allowing larger-size replacements “could open section 2.55(b) to potential abuse.” *Id.* More costly replacements could also “disturb the assumptions supporting the original certification.” *Id.*

FERC’s application of section 2.55(b) to GTN’s compressor upgrades stretches that regulatory exception beyond its logical limits. The upgrades increased the horsepower of each unit by 9,170, or 64%.<sup>9</sup> A 64% increase, with a multi-million-dollar price tag, is not a like-size replacement and cannot reasonably be viewed as “substantially equivalent.” § 2.55(b)(1)(ii); *see also Columbia*, 68 FERC at ¶¶ 61,142-43. As FERC acknowledges, it has occasionally approved section 2.55(b) replacements that were the “closest off-the-shelf size.” Rehearing Order ¶ 24 (citing cases). That is not the case here. A smaller size was available; GTN just claimed it needed a larger one for engineering reasons. Rehearing Order ¶ 18; R.102:48.

Moreover, in those past cases, the increased horsepower was “minor,” generally in the 500-700 range, and the replacements had physical

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<sup>9</sup>  $(23,470-14,300)/14,300$

modifications to limit horsepower, not artificial software limits.<sup>10</sup> Thus, these closest available size replacements were “substantially equivalent” to the originals. Those cases do not support a replacement that is *not* the closest available size, and instead entailed a 9,170 (64%) increase in available horsepower, based solely on the pipeline company’s promise not to use the increased capacity via software controls.<sup>11</sup> *Compare Columbia*, 68 FERC at ¶¶ 61,142-43 (holding section 2.55(b) did not justify replacement of larger-size pipe, even though safety and reliability reasons justified the larger size and it would not increase the main pipeline’s capacity). They particularly do not support a replacement whose excess capacity will be “activated and used to

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<sup>10</sup> *NorAm Gas Transmission Co.*, 82 FERC ¶ 62,121, 64,190 (1998) (authorizing replacement that was 700 horsepower larger because the original unit was no longer manufactured and the increase was minor); *see also Transwestern Pipeline Co.*, 81 FERC ¶ 61,172, 61,752 (1997) (authorizing replacement that was the same model as the original, but due to advanced technology, had 500 more horsepower); *Transwestern Pipeline Co.*, 79 FERC ¶ 62,102, 64,309, n.2 (1997) (authorizing replacement with 1,150 more horsepower due to the unavailability of parts for the existing unit and noting that the cost did not exceed the “applicable” cost limit for blanket certificate treatment); *Dominion Transmission, Inc.*, 129 FERC ¶ 61,048, 61,263 (2009) (approving, in a certain proceeding, replacement with 500 more horsepower because no other unit could meet the pipeline’s requirement to reduce emissions and the larger size would result in “de minimus” additional capacity).

<sup>11</sup> In fact, only one recent decision relied on the pipeline’s use of software controls to limit the horsepower of a larger-sized replacement, but no party filed comments or protests, the increase was still lower than here (3,900 horsepower), and the pipeline company proposed an incremental rate to avoid subsidization by existing customers. *See ANR Pipeline Co.*, 171 FERC ¶ 61,233, 62,688-89 (2020), *vacated in part*, *ANR Pipeline Co.*, 180 FERC ¶ 61,119 (2022). Just because FERC was not presented with objections in that case does not permit it to ignore the valid objections raised in this one.

provide expansion project service,” Certificate Order ¶ 53, because section 2.55(b) does not permit replacements that may result in an “incidental increase in capacity,” 18 C.F.R. § 157.202(b)(2)(i).

Tellingly, FERC relies on Order 603-A to approve GTN’s super-sized replacements, stating that an applicant must “support its prudent decision to use any replacement facility that is not the closest available size or horsepower rating to the facility being replaced.” Rehearing Order ¶ 24 (citing Order 603-A, FERC Stats. & Regs. ¶ 31,081, 30,927 (1999) (cross-referenced at 64 Fed. Reg. 54,522, 54,527 (Oct. 7, 1999)). Order 603-A concerns replacements under the blanket certificate, a separate process that would not have allowed GTN’s compressor replacements because they were too costly. *See* 18 C.F.R. § 157.208(b); Order 603, 64 Fed. Reg. 26,572, 26,573, 26,580-81 (May 14, 1999). Nothing in Order 603-A suggests that section 2.55(b) allows a pipeline company to replace compressors with units that were not the closest available size.

In fact, FERC’s rulemaking in Order 603 and 603-A confirms that FERC’s current interpretation of section 2.55(b) is incorrect and impermissibly deviates from its prior interpretation. In Order 603 and 603-A, FERC amended the definition of facilities eligible for replacement under a pipeline’s “blanket

certificate” to include compressor replacements “that do not qualify under § 2.55(b) because they will have an impact on mainline capacity.” Order 603, 64 Fed. Reg. at 26,579-80; *see also* Order 603-A, 64 Fed. Reg. at 54,523, 54,526-27 (addressing rehearing requests); 18 C.F.R. § 157.202(b)(2)(i) (amended definition). Such replacements may qualify under the pipeline’s blanket certificate if they are “done for sound engineering purposes.” § 157.202(b)(2)(i).

Order 603 explains the difference between replacements under section 2.55(b) and the blanket certificate. Replacements under section 2.55(b) “should only involve basic maintenance or repair to relatively minor facilities.” Order 603-A, 64 Fed. Reg. at 54,524. If the replacement “*may* result in an incidental increase in mainline capacity because the replacement facilities do not exactly match the original,” the blanket certificate, not section 2.55(b), applies. *Id.* 54,527 (emphasis added). Applying software controls does not bring a larger-size replacement out of the blanket certificate process and qualify it for section 2.55(b). That is because even under the blanket certificate, pipeline companies “still [must] design the replacements so that they have a substantially equivalent designed delivery capacity.” *Id.*

The distinction between section 2.55(b) and blanket certificates is not trivial. Section 2.55(b) is automatic. Blanket certificates protect ratepayers from pipelines seeking to super-size replacements to expand capacity at ratepayer expense. Under the blanket, replacements must not exceed certain cost thresholds. *See* 18 C.F.R. § 157.208. This “provide[s] some basis for judging whether a proposed activity is sufficiently routine and will have a sufficiently small impact on ratepayers, so that it should be approved under the streamlined [blanket] procedure.” Interstate Pipeline Certificates for Routine Transactions, 47 Fed. Reg. 24,254, 24,258 (1982). If a party protests the replacement, FERC will review and decide the application. *See* 18 C.F.R. § 157.205(a)(2), (f).

These protections responded to ratepayer concerns that pipeline companies would abuse the replacement process to subsidize expansions. Ratepayers commented to FERC that there must be a mechanism to protest blanket certificate replacements that are “not being done for ‘sound engineering reasons,’ but solely to increase capacity.” Order 603, 64 Fed. Reg. at 26,580; *see also* Order No. 603-A, 64 Fed. Reg. at 54,526-27 (addressing similar comments).

Here, FERC’s new interpretation of section 2.55(b) evades those ratepayer protections. According to FERC, section 2.55(b) justifies larger-size replacements even if the blanket certificate does not. Rehearing Order ¶¶ 24-25. This interpretation renders the blanket certificate process and its procedural protections superfluous. It is nonsensical to have cost limits on replacements or avenues for parties to obtain administrative review through the blanket certificate if pipelines can simply notice the same replacements under section 2.55(b) and avoid those protections altogether. *See BNSF Ry. Co. v. U.S.*, 775 F.3d 743, 759 (5th Cir. 2015) (rejecting broad interpretation of one provision that would subsume more specific provisions and render them inoperative).

As FERC acknowledged, the increased capacity of the replaced compressors will be “activated and used to provide expansion project service.” Certificate Order ¶ 53. The replacement and expansion projects are not independent. *See R.102:112-113* (GTN’s press release announcing “GTN Xpress,” a combined replacement and expansion project). FERC’s reasoning arbitrarily allows pipeline companies to rely on software and piecemeal regulatory processes to circumvent the Gas Act’s mandate that companies obtain a certificate of public convenience and necessity prior to expanding

facilities. FERC’s refusal to consider the cost to upgrade compressors when it determined the Expansion’s cost was therefore unlawful and arbitrary.

**b) FERC arbitrarily failed to consider all the evidence or offer a reasonable explanation based on the evidence**

Assuming *arguendo* that section 2.55(b) authorizes larger-size replacements that create incidental capacity (so long as the pipeline promises not to use it via software controls), FERC still did not explain and support its determination here. FERC deferred to GTN’s explanation that it could not maintain “existing service levels,” with the Solar Mars unit (rated at 15,900 horsepower), which was closer in size to the replaced Avon unit (rated at 14,300 horsepower). Rehearing Order ¶¶ 16-18. But FERC never explained how, if that were true, GTN could add 100,000 Dth/d in new firm capacity following the compressor upgrades. An agency’s “conclusory statement [does] not constitute adequate agency consideration of an important aspect of a problem.” *La. v. U.S. Dep’t of Energy*, 90 F.4th 461, 473 (5th Cir. 2024).

The mid-sized Solar Mars compressors would produce only about 200 horsepower less than the original Avon compressors on the coldest days. *See* R.304:13. FERC uncritically deferred to GTN’s claim that losing 200 horsepower would have reduced service through the facilities. *See id.*;

Rehearing Order ¶ 19. Yet *after* replacing the compressors, GTN began providing 100,000 Dth/d in *new* firm service. *See* R.304:11-12. Significantly, this 100,000 Dth/d in new capacity was marketed and sold as “*Phase I*” of GTN Xpress and would begin on or around November 2022. *See* R.1:85-86. Though parties urged FERC to investigate how GTN could increase firm service without modifying facilities, *see* R.47:4-5; R.43:4, FERC never addressed the objection and refused to hold a technical conference to explore it. *See* Certificate Order ¶ 11.

FERC should have investigated and explained how GTN could add 100,000 Dth/d in new service if service at the time of compressor replacement already required the maximum available horsepower. (For context, the Expansion will add 50,980 horsepower to increase service by 150,000 Dth/d, *see* R.1:13-14) FERC’s failure to independently determine whether a measly 200 horsepower was actually necessary for existing service did not “examine the relevant data and articulate a satisfactory explanation for its actions.” *State Farm*, 463 U.S. at 43.

### **C. Without the Precedent Agreements, Nothing Supports FERC’s Order**

As Commissioner Clements stated, “[w]ithout the precedent agreements, there is nothing to support the Commission’s need determination.” Second

Rehearing Order ¶ 2 (Clements, Comm'r, dissenting). Instead, FERC offered what one Commissioner termed in another case as a “throw-away paragraph” reciting public benefits that might occur in an “attempt to bolster its finding of need.” *Spire*, 169 FERC at ¶ 62,006 (Glick, Comm'r, dissenting). FERC’s findings of public benefits are not supported with evidence and ignore record evidence indicating those benefits “may be illusory.” Rehearing Order ¶ 7 (Clements, Comm'r, dissenting). They cannot justify FERC’s order. *See Env’t Def. Fund*, 2 F.4th at 973 (vacating *Spire* in part because FERC “pointed to no concrete evidence to support [its] assertions” of public benefits).

First, FERC found that “the project will likely decrease costs to consumers.” Certificate Order ¶ 26. For this, FERC relied on GTN’s say-so. *See id.* ¶ 21 (citing R.1:18-19); Rehearing Order ¶ 89. FERC cannot find a benefit is likely to occur based only on a “naked assertion” from the applicant. *La. Env’t Action Network v. EPA*, 382 F.3d 575, 586 (5th Cir. 2004).

Additionally, in contrast with GTN’s bare assertions in its application, GTN presented sworn testimony in its rate filing indicating that this “purported benefit may be illusory. According to GTN’s witness Mr. Kearley, a variety of factors will cause the price of gas from Western Canada to *increase*, thereby making the gas less ‘economic’ relative to gas from other areas.” *See*

Rehearing Order ¶ 7 (Clements, Comm'r, dissenting) (citing R.566:135-136, 139). The FERC majority waved this concern aside and continued to rely on its low-cost finding without further explanation. *See* Rehearing Order ¶¶ 84, 89. But FERC may not simply “disregard those facts or issues that prove difficult or inconvenient” or “refus[e] to come to grips” with the evidence before it. *Jupiter Energy Corp.*, 482 F.3d at 297; *see also La.*, 90 F.4th 461 (stating that an agency’s “bare acknowledgment [of a concern] is no substitute for reasoned consideration”).

Significantly, FERC’s Certificate Policy requires a “market study . . . to explain the basis for [a] projection [of lower gas rates].” 88 FERC at ¶ 61,748. The APA and FERC’s Certificate Policy require more than just a hint of consumer benefits before requiring consumers to pay millions of dollars in Expansion costs.

FERC also found the Expansion would “increase supply diversity,” adopting GTN’s claim that the Expansion was necessary to replace declining production of gas in the Rocky Mountain region. Rehearing Order ¶ 89. For that claim, FERC relied on GTN’s submission of a two-page excerpt from its “IHS Markit” report. *Id.* (citing R.304:25-26). The rest of the report, however, described a combination of falling regional demand and rising regional

production in other parts of the Western U.S., leading the Western U.S. to become a net exporter of gas by 2032, *see R.315:57*, potentially oversupplying Western markets, *see id. 315:11*. FERC’s reliance on a two-page excerpt, without addressing other parts of the report that contradicted its conclusion, was arbitrary and capricious.

FERC also claimed the Expansion would increase “reliability,” Rehearing Order ¶ 89, but never cited any evidence to show greater reliability was needed, or explained how the Expansion would meet that need. *See Chamber of Com. v. SEC*, 85 F.4th 760, 776-78 (5th Cir. 2023) (holding agency did not substantiate alleged benefit of reducing improper stock buybacks without evidence showing that improper buybacks were a real problem).

#### **D. FERC Failed to Develop a Complete Record by Refusing to Consider Evidence from GTN’s Rate Filing that Contradicted its Conclusions**

FERC considered parts of GTN’s rate filing on its own initiative, then arbitrarily refused to consider parts of the same filing that contradicted its conclusions. *See* Rehearing Order ¶¶ 9-10, 36, 53. FERC also erroneously claimed to be legally barred from considering the States’ answer to GTN’s rehearing request. *See id.* The Court need not reach this issue in order to vacate FERC’s orders for all of the reasons described above; GTN’s rate filing

highlights the egregiousness of those errors. Nonetheless, the Court should also reverse FERC’s attempt to “unnecessarily tie [its] hands procedurally” and refuse to consider relevant evidence that was already before it in a parallel docket. Rehearing Order ¶ 11 (Clements, Comm’r, dissenting).

First, FERC could consider GTN’s rate filing in a parallel docket on its own initiative— a point made obvious by the fact that it did so. *See* Rehearing Order ¶ 36 nn.131-133, ¶ 53 n.208 (citing testimony and cover letter from GTN’s rate filing, protest, and FERC order setting case for hearing). “It is not the law that an agency may never rely on data in its files, or on public information, in rendering a decision. Section 556(e) of the APA recognizes that agency decisions often will rest on official notice of material facts not appearing in the record evidence.” *Air Prod. & Chemicals, Inc. v. FERC*, 650 F.2d 687, 697 (5th Cir. 1981). Further, where FERC “knew, or should have known” of facts relevant to the public interest, it cannot simply ignore them. *Mich. Consol. Gas Co. v. Fed. Power Comm’n*, 283 F.2d 204, 226 (D.C. Cir. 1960) (holding FERC erroneously refused to consider a settlement proposal submitted after the deadline to request rehearing). FERC has “an affirmative duty to inquire into and consider all relevant facts.” *See Scenic Hudson Preserv. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965); *R.R.*

*Comm'n of Tex. v. FERC*, 874 F.2d 1338, 1343 (10th Cir. 1989). Applicants have a parallel duty to provide in their applications “all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon [the] applicant’s present and future operations.” 18 C.F.R. § 157.5(a).

Here, FERC took notice of GTN’s rate filing in the Certificate docket. Rehearing Order ¶¶ 36, 53. Once it did so, it had to consider the whole filing, including evidence in it contradicting FERC’s conclusions, and, if necessary, modify its order. For instance, FERC relied on some sentences in GTN’s cover letter, but then ignored other parts of the same letter describing expert testimony projecting declining demand and supply constraints. *See* Rehearing Order ¶ 36 n.131, ¶ 53 n.208 (citing Transmittal Letter, R.566:26-39). FERC cannot rely on parts of a filing but disregard the parts contradicting its conclusions.

Second, FERC had the discretion to consider the States’ answer, so its position that it had no discretion was arbitrary and legal error. Rehearing Order ¶ 9. 18 C.F.R. § 385.213(a)(2) prohibits answers to requests for rehearing “unless otherwise ordered.” *See also* § 385.713(d)(2) (stating FERC “may afford parties an opportunity to file briefs . . . on one or more issues presented

by a request for rehearing”). FERC permits answers to rehearing requests for good cause, which include “aid[ing] in [FERC’s] understanding and resolution of the issues raised,” *Wrightsville Power Facility, L.L.C. v. Entergy Ark., Inc.*, 102 FERC ¶ 61,212, 61,615 (2003), being equitable under the circumstances and “of value in developing a full and complete record,” *Great Lakes Gas Transmission Co.*, 38 FERC ¶ 61,051, 61,152 (1987), or providing more details about a fact another party presented in their request for rehearing, *City of Kaukauna*, 137 FERC ¶ 61,072, \*3 (2011). FERC has also allowed answers to requests for rehearing based on the “nature of the issues raised and because of the particular stake that [State Commissions] and their consumers have in [a] matter.” *State-Fed. Reg’l RTO Panels*, 98 FERC ¶ 61,309, 62,322 (2002). Even here, FERC construed section 385.213(a)(2) to allow other “prohibited” answers because they “provide[d] information that assist[ed] [its] decision-making.” Certificate Order ¶ 10. Because FERC’s regulation affords it discretion to accept answers to requests for rehearing, FERC’s categorical rejection of the State’s answer is not a reasoned explanation. Rehearing Order ¶ 9.

## VIII. CONCLUSION

The States request the Court grant their petitions, vacate the Orders, and remand to FERC for further proceedings.

RESPECTFULLY SUBMITTED this 28th day of October, 2024.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 12,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: October 28, 2024

*s/ Megan Sallomi*  
Megan Sallomi  
Assistant Attorney General

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

GAS TRANSMISSION  
NORTHWEST, LLC; COLUMBIA  
RIVERKEEPER; ROGUE CLIMATE;  
STATE OF WASHINGTON; STATE  
OF OREGON,

Petitioners,

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

Respondent.

Case No. 24-60002  
(consolidated with Case Nos.  
24-60197, 24-60280, 24-60354)

**DECLARATION OF RICHARD B. KUPREWICZ**

I declare under penalty of perjury under the laws of the United States of America  
that the following is true and correct to the best of my knowledge and belief:

1. My name is Richard B. Kuprewicz. I am a chemical engineer and president  
of Accufacts Inc. I specialize in gas and liquid pipeline investigation,  
auditing, risk management, siting, construction, design, operation,  
maintenance, training, leak detection, management review, emergency  
response, and regulatory development and compliance. *See Exhibit A (CV).*
2. I personally reviewed relevant portions of Gas Transmission Northwest's  
Public Abbreviated Application for a Certificate of Public Convenience and  
Necessity, R.1:1-114; the Final Environmental Impact Statement, R.135:1-

102; comments from the Pipeline Safety Trust submitted to the Commission on March 29, 2023, R.298, and July 26, 2023, R.385; and the declarations of Brandon Kuykendall and Erin Serra.

3. The Gas Transmission Northwest (“GTN”) pipeline system is mainly a 42-inch diameter interstate looped gas transmission pipeline.<sup>1</sup> Specific pipeline details are kept confidential as critical energy infrastructure information.
4. The GTN Xpress Project will add 50,980 horsepower in compression at three compressor stations on GTN’s pipeline system. This compression will push the gas molecules closer together by raising the operating pressure, enabling GTN to transport more gas along its pipeline – thereby increasing pipeline capacity. GTN Xpress will raise the average operating pressure along the pipeline, not just the area near the compressor stations.

**A. GTN Xpress’ Higher Operating Pressure Will Increase Leaks and the Potential for Ruptures Along the Pipeline**

5. In general, gas pipelines fail through leaks or ruptures.
6. The combination of pipeline pressure and imperfections in the pipewall from corrosion, cracking, punctures, or denting produce leaks. Leaks also occur at various points along the system such as valves, flanges, or compressor seals.

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<sup>1</sup> See TC Energy, Gas Transmission Northwest LLC System Map (March 31, 2021), <https://tcplus.com/GTN/SharedFolder/DisplayFile/274a6d4df3601015e026fd3afe4a9e7ace13a73?downloadType=SystemMap>.

7. Natural gas pipelines like GTN's will leak gas along the pipeline. Agencies presume such leaks will occur. *See, e.g.*, Environmental Impact Statement, R.135:74-76 (calculating anticipated equipment leaks at the compressor stations). Recently, satellite monitoring and remote laser detection have proven that leaks are far more extensive than previously thought.
8. It is well-known that higher pressure systems will inevitably leak more gas. Even relatively small gas leaks will harm trees, crops, or other vegetation near the pipeline. Larger leaks can lead to fire, explosions, injuries, or death depending on the circumstances.
9. Increased pipeline pressure can make a pipeline rupture more likely and severe. That is because the higher the pressure, the more gas that will be released during a leak or rupture. And the more gas released, the more severe the damage.
10. A rupture can occur when those imperfections grow and fracture the pipeline, causing the immediate release of large quantities of gas and pipe steel. This usually results in a large crater and fireballs. The heat release alone can be fatal.
11. To reduce the risk of leaks and ruptures, federal regulation sets a “maximum allowable operating pressure” (MAOP) for each pipeline.<sup>2</sup> Staying below the

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<sup>2</sup> 49 C.F.R. § 192.3.

MAOP reduces the risk of a severe leak or rupture but does not eliminate it.

Significantly, the MAOP assumes that a pipeline's integrity is assured.

12. For large-diameter, older, often called vintage pipelines like GTN's, it is very difficult, if not impossible, to assure the pipeline's integrity. Over time, wear and tear will increase the number and severity of imperfections and cracks in the pipe, compromising its integrity.

13. Where the pipeline's integrity cannot be assured, raising the operating pressure will also increase the risk of a severe leak or rupture and reduce the margin of safety that the MAOP is intended to provide.

14. GTN Xpress adds a large amount of compression, 50,980 horsepower, for a relatively small increase in capacity (150,000 Dekatherms/day). This indicates that GTN is likely approaching the MAOP, which further increases the safety risks that GTN Xpress poses to property and communities near the pipeline.

**B. GTN Xpress Will Increase Leaks and the Risk of Damage to State-Owned Lands**

15. According to the declarations of Brandon Kuykendall and Erin Serra, the GTN pipeline intersects 51 parcels of land that Washington and Oregon own or partially own. Looped pipelines of a 42-inch diameter usually are not in the same pipeline right-of-way resulting in a greater impact to state-owned land parcels. It is a well-known fact that higher pressure systems will

inevitably leak more gas. As a result, because GTN Xpress will increase the operating pressure of GTN's pipeline system, it will cause more leaks along the pipeline than would normally occur and increase the risk of larger leaks, or the risks of catastrophic failure known as pipeline rupture.

16. Because GTN crosses numerous land parcels that the States of Washington and Oregon own, the increase in leaks and potential severity of leaks resulting from GTN Xpress will damage vegetation and increase the risk of other damage to state-owned land. Even a relatively small gas leak will increase damage to vegetation growing near the pipeline. Larger leaks will increase the risk of fire, explosion, and serious health effects. Leaks can be most dangerous if they migrate into structures near a pipeline right-of-way that can then result in catastrophic explosions.

**C. GTN Xpress Will Make a Pipeline Rupture More Likely and Severe and Increase the Risk of Fire, Explosion, Injury, and Fatalities**

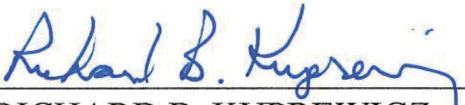
17. The increased pressure from GTN Xpress will increase the risk of fire, explosion, safety hazards, injury, and fatalities on land that the pipeline crosses, including lands belonging to the States of Washington and Oregon. That is because the increased pressure will heighten the likelihood of a pipeline failure and, if a failure occurs, its severity.

18. In the case of GTN, a severe pipeline failure such as rupture will likely result in fire, explosions, and injury to wildlife and people. The GTN

pipeline crosses parts of Eastern Washington and Oregon that are prone to wildfire. Even if a pipeline failure occurs on land the States do not own, state lands could be harmed because a fire in that region could easily spread. Even a small fire or explosion could have devastating consequences as the fire could spread and cause widespread and severe damage to property and injury to state wildlife and people in the surrounding areas. For example, according to the National Weather Service, the 2023 wildfire season in Washington and Oregon burned 326,273 acres with a total cost of over \$606 million.<sup>3</sup>

19. A large fire or crater could result in more severe damage to state property, wildlife, and people. The heat release alone can be fatal and result in significant damage and loss of life.

EXECUTED this 23 day of October, 2024 in Nipomo, California.

  
\_\_\_\_\_  
RICHARD B. KUPREWICZ  
President, Accufacts Inc.

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<sup>3</sup> Mary Wister, Christel Bennese, 2023 Fire Weather Summary, National Weather Service Pendleton, Oregon (July 28, 2023), [https://www.weather.gov/media/pdt/pdt\\_firewx\\_summary\\_2023.pdf](https://www.weather.gov/media/pdt/pdt_firewx_summary_2023.pdf).

# EXHIBIT A

## Curriculum Vitae.

### **Richard B. Kuprewicz**

**Tel:** 425-802-1200 (Office)  
**E-mail:** kuprewicz@comcast.net

8151 164<sup>th</sup> Ave NE  
 Redmond, WA 98052

#### **Profile:**

As president of Accufacts Inc., I specialize in gas and liquid pipeline investigation, auditing, risk management, siting, construction, design, operation, maintenance, training, SCADA, leak detection, management review, emergency response, and regulatory development and compliance. I have consulted for various local, state and federal agencies, NGOs, the public, and pipeline industry members on pipeline regulation, operation and design, with particular emphasis on operation in unusually sensitive areas of high population density or environmental sensitivity.

#### **Employment:**

#### **Accufacts Inc.**

**1999 – Present**

Pipeline regulatory advisor, incident investigator, and expert witness on all matters related to gas and liquid pipeline siting, design, operation, maintenance, risk analysis, and management.

**Position:** President  
**Duties:** > Full business responsibility  
 > Technical Expert

#### **Alaska Anvil Inc.**

**1993 – 1999**

Engineering, procurement, and construction (EPC) oversight for various clients on oil production facilities, refining, and transportation pipeline design/operations in Alaska.

**Position:** Process Team Leader  
**Duties:** > Led process engineers group  
 > Review process designs  
 > Perform hazard analysis  
 > HAZOP Team leader  
 > Assure regulatory compliance in pipeline and process safety management

#### **ARCO Transportation Alaska, Inc.**

**1991 - 1993**

Oversight of Trans Alaska Pipeline System (TAPS) and other Alaska pipeline assets for Arco after the Exxon Valdez event.

**Position:** Senior Technical Advisor  
**Duties:** > Access to all Alaska operations with partial Arco ownership  
 > Review, analysis of major Alaska pipeline projects

#### **ARCO Transportation Co.**

**1989 – 1991**

Responsible for strategic planning, design, government interface, and construction of new gas pipeline projects, as well as gas pipeline acquisition/conversions.

**Position:** Manager Gas Pipeline Projects  
**Duties:** > Project management  
 > Oil pipeline conversion to gas transmission  
 > New distribution pipeline installation  
 > Full turnkey responsibility for new gas transmission pipeline, including FERC filing

Four Corners Pipeline Co.**1985 – 1989**

Managed operations of crude oil and product pipelines/terminals/berths/tank farms operating in western U.S., including regulatory compliance, emergency and spill response, and telecommunications and SCADA organizations supporting operations.

**Position:** Vice President and Manager of Operations

**Duties:** > Full operational responsibility

> Major ship berth operations

> New acquisitions

> Several thousand miles of common carrier and private pipelines

Arco Product CQC Kiln**1985**

Operations manager of new plant acquisition, including major cogeneration power generation, with full profit center responsibility.

**Position:** Plant Manager

**Duties:** > Team building of new facility that had been failing

> Plant design modifications and troubleshooting

> Setting expense and capital budgets, including key gas supply negotiations

> Modification of steam plant, power generation, and environmental controls

Arco Products Co.**1981 - 1985**

Operated Refined Product Blending, Storage and Handling Tank Farms, as well as Utility and Waste Water Treatment Operations for the third largest refinery on the west coast.

**Position:** Operations Manager of Process Services

**Duties:** > Modernize refinery utilities and storage/blending operations

> Develop hydrocarbon product blends, including RFGs

> Modification of steam plants, power generation, and environmental controls

> Coordinate new major cogeneration installation, 400 MW plus

Arco Products Co.**1977 - 1981**

Coordinated short and long-range operational and capital planning, and major expansion for two west coast refineries.

**Position:** Manager of Refinery Planning and Evaluation

**Duties:** > Establish monthly refinery volumetric plans

> Develop 5-year refinery long range plans

> Perform economic analysis for refinery enhancements

> Issue authorization for capital/expense major expenditures

Arco Products Co.**1973 - 1977**

Operating Supervisor and Process Engineer for various major refinery complexes.

**Position:** Operations Supervisor/Process Engineer

**Duties:** > FCC Complex Supervisor

> Hydrocracker Complex Supervisor

> Process engineer throughout major integrated refinery improving process yield and energy efficiency

**Qualifications:**

Served for over fifteen years as a member representing the public on the federal Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC), a technical committee established by Congress to advise PHMSA on pipeline safety regulations.

Committee members are appointed by the Secretary of Transportation.

Served seven years, including position as its chairman, on the Washington State Citizens Committee on Pipeline Safety (CCOPS).

Positions are appointed by the governor of the state to advise federal, state, and local governments on regulatory matters related to pipeline safety, routing, construction, operation and maintenance.

Served on Executive subcommittee advising Congress and PHMSA on a report that culminated in new federal rules concerning Distribution Integrity Management Program (DIMP) gas distribution pipeline safety regulations.

As a representative of the public, advised the Office of Pipeline Safety on proposed new liquid and gas transmission pipeline integrity management rulemaking following the pipeline tragedies in Bellingham, Washington (1999) and Carlsbad, New Mexico (2000).

Member of Control Room Management committee assisting PHMSA on development of pipeline safety Control Room Management (CRM) regulations.

Certified and experienced HAZOP Team Leader associated with process safety management and application.

**Education:**

MBA (1976)

Pepperdine University, Los Angeles, CA

BS Chemical Engineering (1973)

University of California, Davis, CA

BS Chemistry (1973)

University of California, Davis, CA

**Publications in the Public Domain:**

1. "An Assessment of First Responder Readiness for Pipeline Emergencies in the State of Washington," prepared for the Office of the State Fire Marshall, by Hanson Engineers Inc., Elway Research Inc., and Accufacts Inc., and dated June 26, 2001.
2. "Preventing Pipeline Failures," prepared for the State of Washington Joint Legislative Audit and Review Committee ("JLARC"), by Richard B. Kuprewicz, President of Accufacts Inc., dated December 30, 2002.
3. "Pipelines - National Security and the Public's Right-to-Know," prepared for the Washington City and County Pipeline Safety Consortium, by Richard B. Kuprewicz, dated May 14, 2003.
4. "Preventing Pipeline Releases," prepared for the Washington City and County Pipeline Safety Consortium, by Richard B. Kuprewicz, dated July 22, 2003.
5. "Pipeline Integrity and Direct Assessment, A Layman's Perspective," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated November 18, 2004.
6. "Public Safety and FERC's LNG Spin, What Citizens Aren't Being Told," jointly authored by Richard B. Kuprewicz, President of Accufacts Inc., Clifford A. Goudey, Outreach Coordinator MIT Sea Grant College Program, and Carl M. Weimer, Executive Director Pipeline Safety Trust, dated May 14, 2005.
7. "A Simple Perspective on Excess Flow Valve Effectiveness in Gas Distribution System Service Lines," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated July 18, 2005.
8. "Observations on the Application of Smart Pigging on Transmission Pipelines," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated September 5, 2005.
9. "The Proposed Corrib Onshore System - An Independent Analysis," prepared for the Centre for Public Inquiry by Richard B. Kuprewicz, dated October 24, 2005.
10. "Observations on Sakhalin II Transmission Pipelines," prepared for The Wild Salmon Center by Richard B. Kuprewicz, dated February 24, 2006.
11. "Increasing MAOP on U.S. Gas Transmission Pipelines," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated March 31, 2006. This paper was also published in the June 26 and July 1, 2006 issues of the Oil & Gas Journal and in the December 2006 issue of the UK Global Pipeline Monthly magazines.
12. "An Independent Analysis of the Proposed Brunswick Pipeline Routes in Saint John, New Brunswick," prepared for the Friends of Rockwood Park, by Richard B. Kuprewicz, dated September 16, 2006.
13. "Commentary on the Risk Analysis for the Proposed Emera Brunswick Pipeline Through Saint John, NB," by Richard B. Kuprewicz, dated October 18, 2006.
14. "General Observations On the Myth of a Best International Pipeline Standard," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated March 31, 2007.
15. "Observations on Practical Leak Detection for Transmission Pipelines – An Experienced Perspective," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated August 30, 2007.
16. "Recommended Leak Detection Methods for the Keystone Pipeline in the Vicinity of the Fordville Aquifer," prepared for TransCanada Keystone L.P. by Richard B. Kuprewicz, President of Accufacts Inc., dated September 26, 2007.
17. "Increasing MOP on the Proposed Keystone XL 36-Inch Liquid Transmission Pipeline," prepared for the Pipeline Safety Trust by Richard B. Kuprewicz, dated February 6, 2009.
18. "Observations on Unified Command Drift River Fact Sheet No 1: Water Usage Options for the current Mt. Redoubt Volcano threat to the Drift River Oil Terminal," prepared for Cook Inletkeeper by Richard B. Kuprewicz, dated April 3, 2009.

19. "Observations on the Keystone XL Oil Pipeline DEIS," prepared for Plains Justice by Richard B. Kuprewicz, dated April 10, 2010.
20. "PADD III & PADD II Refinery Options for Canadian Bitumen Oil and the Keystone XL Pipeline," prepared for the Natural Resources Defense Council (NRDC), by Richard B. Kuprewicz, dated June 29, 2010.
21. "The State of Natural Gas Pipelines in Fort Worth," prepared for the Fort Worth League of Neighborhoods by Richard B. Kuprewicz, President of Accufacts Inc., and Carl M. Weimer, Executive Director Pipeline Safety Trust, dated October, 2010.
22. "Accufacts' Independent Observations on the Chevron No. 2 Crude Oil Pipeline," prepared for the City of Salt Lake, Utah, by Richard B. Kuprewicz, dated January 30, 2011.
23. "Accufacts' Independent Analysis of New Proposed School Sites and Risks Associated with a Nearby HVL Pipeline," prepared for the Sylvania, Ohio School District, by Richard B. Kuprewicz, dated February 9, 2011.
24. "Accufacts' Report Concerning Issues Related to the 36-inch Natural Gas Pipeline and the Application of Appleview, LLC Premises: 7009 and 7010 River Road, North Bergen, NJ," prepared for the Galaxy Towers Condominium Association Inc., by Richard B. Kuprewicz, dated February 28, 2011.
25. "Prepared Testimony of Richard B. Kuprewicz Evaluating PG&E's Pipeline Safety Enhancement Plan," submitted on behalf of The Utility Reform Network (TURN), by Richard B. Kuprewicz, Accufacts Inc., dated January 31, 2012.
26. "Evaluation of the Valve Automation Component of PG&E's Safety Enhancement Plan," extracted from full testimony submitted on behalf of The Utility Reform Network (TURN), by Richard B. Kuprewicz, Accufacts Inc., dated January 31, 2012, Extracted Report issued February 20, 2012.
27. "Accufacts' Perspective on Enbridge Filing to NEB for Modifications on Line 9 Reversal Phase I Project," prepared for Equierre Canada, by Richard B. Kuprewicz, Accufacts Inc., dated April 23, 2012.
28. "Accufacts' Evaluation of Tennessee Gas Pipeline 300 Line Expansion Projects in PA & NJ," prepared for the Delaware Riverkeeper Network, by Richard B. Kuprewicz, Accufacts Inc., dated June 27, 2012.
29. "Impact of an ONEOK NGL Pipeline Release in At-Risk Landslide and/or Sinkhole Karst Areas of Crook County, Wyoming," prepared for landowners, by Richard B. Kuprewicz, Accufacts Inc., and submitted to Crook County Commissioners, dated July 16, 2012.
30. "Impact of Processing Dilbit on the Proposed NPDES Permit for the BP Cherry Point Washington Refinery," prepared for the Puget Soundkeeper Alliance, by Richard B. Kuprewicz, Accufacts Inc., dated July 31, 2012.
31. "Analysis of SWG's Proposed Accelerated EVPP and P70VSP Replacement Plans, Public Utilities Commission of Nevada Docket Nos. 12-02019 and 12-04005," prepared for the State of Nevada Bureau of Consumer Protection, by Richard B. Kuprewicz, Accufacts Inc., dated August 17, 2012.
32. "Accufacts Inc. Most Probable Cause Findings of Three Oil Spills in Nigeria," prepared for Bohler Advocaten, by Richard B. Kuprewicz, Accufacts Inc., dated September 3, 2012.
33. "Observations on Proposed 12-inch NGL ONEOK Pipeline Route in Crook County Sensitive or Unstable Land Areas," prepared by Richard B. Kuprewicz, Accufacts Inc., dated September 13, 2012.
34. "Findings from Analysis of CEII Confidential Data Supplied to Accufacts Concerning the Millennium Pipeline Company L.L.C. Minisink Compressor Project Application to FERC, Docket No. CP11-515-000," prepared by Richard B. Kuprewicz, Accufacts Inc., for Minisink Residents for Environmental Preservation and Safety (MREPS), dated November 25, 2012.
35. "Supplemental Observations from Analysis of CEII Confidential Data Supplied to Accufacts Concerning Tennessee Gas Pipeline's Northeast Upgrade Project," prepared by Richard B. Kuprewicz, Accufacts Inc., for Delaware Riverkeeper Network, dated December 19, 2012.

36. "Report on Pipeline Safety for Enbridge's Line 9B Application to NEB," prepared by Richard B. Kuprewicz, Accufacts Inc., for Equiterre, dated August 5, 2013.
37. "Accufacts' Evaluation of Oil Spill Joint Investigation Visit Field Reporting Process for the Niger Delta Region of Nigeria," prepared by Richard B. Kuprewicz for Amnesty International, September 30, 2013.
38. "Accufacts' Expert Report on ExxonMobil Pipeline Company Silvertip Pipeline Rupture of July 1, 2011 into the Yellowstone River at the Laurel Crossing," prepared by Richard B. Kuprewicz, November 25, 2013.
39. "Accufacts Inc. Evaluation of Transco's 42-inch Skillman Loop submissions to FERC concerning the Princeton Ridge, NJ segment," prepared by Richard B. Kuprewicz for the Princeton Ridge Coalition, dated June 26, 2014, and submitted to FERC Docket No. CP13-551.
40. Accufacts report "DTI Myersville Compressor Station and Dominion Cove Point Project Interlinks," prepared by Richard B. Kuprewicz for Earthjustice, dated August 13, 2014, and submitted to FERC Docket No. CP13-113-000.
41. "Accufacts Inc. Report on EA Concerning the Princeton Ridge, NJ Segment of Transco's Leidy Southeast Expansion Project," prepared by Richard B. Kuprewicz for the Princeton Ridge Coalition, dated September 3, 2014, and submitted to FERC Docket No. CP13-551.
42. Accufacts' "Evaluation of Actual Velocity Critical Issues Related to Transco's Leidy Expansion Project," prepared by Richard B. Kuprewicz for Delaware Riverkeeper Network, dated September 8, 2014, and submitted to FERC Docket No. CP13-551.
43. "Accufacts' Report to Portland Water District on the Portland – Montreal Pipeline," with Appendix, prepared by Richard B. Kuprewicz for the Portland, ME Water District, dated July 28, 2014.
44. "Accufacts Inc. Report on EA Concerning the Princeton Ridge, NJ Segment of Transco's Leidy Southeast Expansion Project," prepared by Richard B. Kuprewicz and submitted to FERC Docket No. CP13-551.
45. Review of Algonquin Gas Transmission LLC's Algonquin Incremental Market ("AIM Project"), Impacting the Town of Cortlandt, NY, FERC Docket No. CP14-96-0000, Increasing System Capacity from 2.6 Billion Cubic Feet (Bcf/d) to 2.93 Bcf/d," prepared by Richard B. Kuprewicz, and dated Nov. 3, 2014.
46. Accufacts' Key Observations dated January 6, 2015 on Spectra's Recent Responses to FERC Staff's Data Request on the Algonquin Gas Transmission Proposal (aka "AIM Project"), FERC Docket No. CP 14-96-000 related to Accufacts' Nov. 3, 2014 Report and prepared by Richard B. Kuprewicz.
47. Accufacts' Report on Mariner East Project Affecting West Goshen Township, dated March 6, 2015, to Township Manager of West Goshen Township, PA, and prepared by Richard B. Kuprewicz.
48. Accufacts' Report on Atmos Energy Corporation ("Atmos") filing on the Proposed System Integrity Projects ("SIP") to the Mississippi Public Service Commission ("MPSC") under Docket No. 15-UN-049 ("Docket"), prepared by Richard B. Kuprewicz, dated June 12, 2015.
49. Accufacts' Report to the Shwx'owhamel First Nations and the Peters Band ("First Nations") on the Trans Mountain Expansion Project ("TMEP") filing to the Canadian NEB, prepared by Richard B. Kuprewicz, dated April 24, 2015.
50. Accufacts Report Concerning Review of Siting of Transco New Compressor and Metering Station, and Possible New Jersey Intrastate Transmission Pipeline Within the Township of Chesterfield, NJ ("Township"), to the Township of Chesterfield, NJ, dated February 18, 2016.
51. Accufacts Report, "Accufacts Expert Analysis of Humberplex Developments Inc. v. TransCanada Pipelines Limited and Enbridge Gas Distribution Inc.; Application under Section 112 of the National Energy Board Act, R.S.C. 1985, c. N-7," dated April 26, 2016, filed with the Canadian Nation Energy Board (NEB).
52. Accufacts Report, "A Review, Analysis and Comments on Engineering Critical Assessments as proposed in

PHMSA's Proposed Rule on Safety of Gas Transmission and Gathering Pipelines," prepared for Pipeline Safety Trust by Richard B. Kuprewicz, dated May 16, 2016.

53. Accufacts' Report on Atmos Energy Corporation ("Atmos") filing to the Mississippi Public Utilities Staff, "Accufacts Review of Atmos Spending Proposal 2017 – 2021 (Docket N. 2015-UN-049)," prepared by Richard B. Kuprewicz, dated August 15, 2016.
54. Accufacts Report, "Accufacts Review of the U.S. Army Corps of Engineers (USACE) Environmental Assessment (EA) for the Dakota Access Pipeline ("DAPL")," prepared for Earthjustice by Richard B. Kuprewicz, dated October 28, 2016.
55. Accufacts' Report on Mariner East 2 Expansion Project Affecting West Goshen Township, dated January 6, 2017, to Township Manager of West Goshen Township, PA, and prepared by Richard B. Kuprewicz.
56. Accufacts Review of Puget Sound Energy's Energize Eastside Transmission project along Olympic Pipe Line's two petroleum pipelines crossing the City of Newcastle, for the City of Newcastle, WA, June 20, 2017.
57. Accufacts Review of the Draft Environmental Impact Statement for the Line 3 Pipeline Project Prepared for the Minnesota Department of Commerce, July 9, 2017, filed on behalf of Friends of the Headwaters, to Minnesota State Department of Commerce for Docket Nos. CN-14-916 & PPL-15-137.
58. Testimony of Richard B. Kuprewicz, president of Accufacts Inc., in the matter West Goshen Township and Concerned Citizens of West Goshen Township v. Sunoco Pipelines, L.P. before the Pennsylvania Public Utilities Commission, Docket No. C-2017-2589346, on July 18, 2017, on Behalf of West Goshen Township and Concerned Citizens of West Goshen Township.
59. Direct Testimony of Richard B. Kuprewicz, president of Accufacts Inc., on Behalf of Friends of the Headwaters regarding Enbridge Energy, Limited Partnership proposal to replace and reroute an existing Line 3 to the Minnesota Office of Administrative Hearings for the Minnesota Public Utilities Commission (MPUC PL-9/CN-14-916 and MPUC PL-9/PPL-15-137), September 11, 2017 and October 23, 2017.
60. Direct Testimony of Richard B. Kuprewicz On Behalf of The District of Columbia Government, before the Public Service Commission of the District of Columbia, in the matter of the merger of AltaGas Ltd. and WGL Holdings, Inc., Formal Case No. 1142, September 29, 2017.
61. Report to Mississippi Public Utilities Staff ("MPUS"), "Accufacts Review on Atmos Energy Corporation's Proposed Capital Budget for Fiscal Year 2018 related to System Integrity Program Spending (Docket N. 2015-UN-049)," prepared by Richard B. Kuprewicz, dated December 4, 2017.
62. Report to Hugh A. Donaghue, Esquire, Concord Township Solicitor, "Accufacts Comments on Adelphia Project Application to FERC (Docket No. CP18-46-000) as it might impact Concord Township," dated May 30, 2018.
63. Report to Mississippi Public Utilities Staff ("MPUS"), "Accufacts Review on Atmos Energy Corporation's Proposed Capital Budget for Fiscal Year 2019 related to System Integrity Program Spending (Docket N. 2015-UN-049)," prepared by Richard B. Kuprewicz, dated August 20, 2018.
64. Report to West Goshen Township Manager, PA, "Accufacts report on the repurposing of an existing 12-inch Sunoco pipeline segment to interconnect with the Mariner East 2 and Mariner East 2X crossing West Goshen Township," dated November 8, 2018.
65. Report to West Whiteland Township Manager, PA, "Accufacts Observations on Possible Pennsylvania State Pipeline Safety Regulations," prepared by Richard B. Kuprewicz, dated March 22, 2019.
66. Accufacts Public Comments on the Proposed Joint Settlement, BI&E v. Sunoco Pipeline L.P. ("SPLP"), Docket No. C-2018-3006534 ("Proposed Settlement"), submitted on August 15, 2019 to the Pennsylvania Public Utility Commission on the behalf of West Goshen Township as an intervener.
67. Report to West Whiteland Township Manager, Ms. Mimi Gleason, "Accufacts Perspective on Two Questions from West Whiteland's Board of Supervisors on Proposed Changes to ME 2 and ME 2X Construction/Operational Activities within West Whiteland," dated September 5, 2019."

68. Report to West Goshen Township Manager, Mr. Casey LaLonde, "Accufacts Report on the episode on the evening of 8-5-19 at the Mariner East Boot Road Pump Station ("Event"), Boot Road, West Goshen Township, PA," dated September 16, 2019.
69. Provided direct testimony before the Arizona Corporation Commission, In the Matter of the Application of Southwest Gas Corporation for the Establishment of Just and Reasonable Rates and Charges Designed to Realize a Reasonable Rate of Return on Fair Value of the Properties of Southwest Gas Corporation Devoted to its Arizona Operations (Docket No. G-01551A-19-0055), testified on behalf of Utilities Division Arizona Corporation Commission, February 19, 2020.
70. Report to West Goshen Township Manager, Mr. Casey LaLonde, "Accufacts Report on the Mariner East 2X Pipeline Affecting West Goshen Township," dated July 23, 2020.
71. Assisted the Commonwealth of Massachusetts, Office of the Attorney General in developing pipeline safety processes to be incorporated into the settlement agreement related to Columbia Gas' sale of Assets to Eversource following the Merrimack Valley, Massachusetts overpressure event of September 13, 2018.
72. Report to Natural Resources Defense Council, Inc., "Accufacts' Observations on the Use of Keystone XL Pipeline Pipe Exhibiting External Coating Deterioration Issues from Long Term Storage Exposure to the Elements," October 1, 2020.
73. Report to Pennsylvania Public Utilities Commission ("PAPUC"), "Accufacts Comments on Proposed Pennsylvania Intrastate Liquid Pipeline Safety Regulations," dated October 29, 2021, prepared for West Whiteland Township Board of Supervisors, West Whiteland Township, PA. Filed to PAPUC public web docket November 5, 2021 by West Whiteland Township under Reference Docket Number L-2019-3010267. Addresses suggested improvements in proposed pipeline safety rules for PA intrastate liquid transmission pipelines.
74. Submitted written testimony of Richard B. Kuprewicz on Behalf of Bay Mills Indian Community to ALJ Dennis Mack, dated December 14, 2021, in the matter of the Application of Enbridge Energy, Limited Partnership for Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, before the State of Michigan Public Service Commission, U-20763.
75. Public presentation to New York State Indian Point Nuclear Facility Decommissioning Oversight Board on Holtec removal activities in proximity to Enbridge three Natural Gas Transmission Pipelines, March 17, 2022.
76. Report to Pipeline Safety Trust and Bold Alliance, "Accufacts' Perspectives on the State of Federal Carbon Dioxide Transmission Pipeline Safety Regulations as it Relates to Carbon Capture, Utilization, and Sequestration within the U.S.," March 23, 2022.
77. Accufacts Inc., Public Presentation for the National Academies of Science Engineering Medicine and The Transportation Research Board, "To Committee on Criteria for Installing Automatic and Remote-Controlled Shutoff Valves on Existing Gas and Hazardous Liquid Transmission Pipelines," 4/27/22.
78. Accufacts Inc, "6/13/22 Webinar to Illinois Emergency Responders, Healthcare Providers, & Local Officials on Responses to CO<sub>2</sub> Transmission Pipeline Releases," 6/13/22.
79. Accufacts Report for Pipeline Safety Trust, "Safety of Hydrogen Transportation by Gas Pipelines," 11/28/22.
80. Completed a series of testimonies related to Enbridge's Line 5 proposal to replace 2 – 20-inch diameter existing submerged pipelines currently lying across the bottom of the Straits of Mackinac with a 30-inch diameter grade X-70 pipeline, proposed to be installed in a 21-foot diameter concrete tunnel to be installed across the approximate 4-mile span of the Straits of Mackinac. Testified on Behalf of the Bay Mill Indian Community before the State of Michigan Public Service Commission, Docket U-20763, in opposition to this very poorly designed proposal/installation allowing for movement of the pipeline on rollers within the tunnel. Final testimony to the docket submitted May 19, 2023. This is the only pipeline proposal I am aware of in the world that would place a crude oil and liquid propane pipeline, especially a 30-inch diameter pipeline, within a tunnel.
81. Issued to Ms. Niroop Srivatsa, City Manager, "Accufacts Report for the City of Lafayette on the Status of the Tree Assessment Process with PG&E," indicating most of the trees identified for removal by PG&E risk management

approach have nothing to do with gas pipeline safety, June 15, 2023.

82. Issued Direct Testimony to Illinois Commerce Commission (“ICC”) on the Navigator Heartland Greenway LLC Application for a Carbon Dioxide Transportation and Sequestration pipeline, under Docket 23-0161, on behalf of Citizens Against Heartland Pipeline (“CAHGP”), McDonough County, Christian County and Hancock County (the “Counties”) (jointly, “Citizen and County Intervenors” of “CCI”), raising serious questions as to PHMSA’s recent assertions of pipeline safety jurisdiction, and underscoring the ICC’s authority for pipeline siting jurisdiction of said pipeline proposal in the State of Illinois, filed June 15, 2023. Applicant has terminated their application.
83. Issued Direct Testimony to Illinois Commerce Commission (“ICC”) on the WOLF Carbon Solutions US LLC Application for a Carbon Dioxide Transportation and Sequestration pipeline, under Docket 23-0475, for a certificate of authority to construct and operate a carbon dioxide pipeline and when necessary to take interest in property as provided by law of eminent domain, testifying on Behalf of Citizens Against Predatory Pipelines (“CAPP”): 1) identifying serious inadequacies in PHMSA’s pipeline safety regulations, 2) explaining why the Commission should require pipeline temperature profiles 3) detailing why DNV-RP-F104 is not relevant to this filing and 4) underscoring the ICC’s authority to require additional critical information from the Applicant in this matter, filed October 24, 2023. Applicant has withdrawn their submission to the Commission.
84. Provided general summary, main observations/concerns, on “Draft Environmental Impact Statement: Otter Tail to Wilkin Carbon Dioxide Pipeline Project” submitted to Minnesota Public Utilities Commission regarding Summit Carbon Solutions, LLC proposed 28 mile long 4-inch diameter CO<sub>2</sub> liquid transmission pipeline (“Otter Tail Pipeline”) within Minnesota, PUC Docket No. IP-7093/PPL-22-422, provided to Clean Up the River Environment (“CURE”) on 1/29/2024.
85. Issued, “Observations concerning Kern County’s Draft Environmental Impact Report (“DEIR”) on the TerraVault I Carbon Capture and Storage Project (“Project”),” proposed by California Resources Corporation to separate a portion of the pre-combustion Elk Hills field gas production, treat and inject CO<sub>2</sub> into two sequestration injection wells within the Elk Hill oil field, identifying many technical gaps in the DEIR, produced for Earthjustice, February, 26, 2024.