

ORAL ARGUMENT NOT YET SCHEDULED
No. 23-1064 (and consolidated cases)

IN THE
United States Court of Appeals
for the District of Columbia Circuit

NEW JERSEY CONSERVATION FOUNDATION, *et al.*,
Petitioners,
NEW JERSEY DIVISION OF RATE COUNSEL,
Intervenors,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents,
TRANSCONTINENTAL GAS PIPE LINE CO., LLC, *et al.*,
Intervenors.

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

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS*
***CURIAE* IN SUPPORT OF PETITIONERS**

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STATEMENT AS TO PARTIES, RULINGS, & RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for the Institute for Policy Integrity at New York University School of Law certify as follows:

- (1) All parties, *amici*, and intervenors appearing in this case are listed in Petitioners' opening briefs.
- (2) References to the final agency action under review and related and consolidated cases appear in Petitioners' opening briefs. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity (Policy Integrity) is a nonpartisan, not-for-profit organization at New York University School of Law.* No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

* This brief does not purport to represent the views, if any, of New York University School of Law.

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GLOSSARY OF ACRONYMS & ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

FERC	Federal Energy Regulatory Commission
NJBPU	New Jersey Board of Public Utilities
RTO/ISO	Regional Transmission Organization/Independent System Operator

INTEREST OF *AMICUS CURIAE* & AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law (Policy Integrity) is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a focus on environmental issues.¹

Policy Integrity publishes scholarship on gas pipeline permitting and gas and electric transmission infrastructure planning. *E.g.*, Libby Dimenstein & Burçin Ünel, *Regional Planning for Just and Reasonable Rates* (Working Paper, 2023), <https://perma.cc/8HVK-RGFY>; Sarah Ladin & Burçin Ünel, Inst. for Pol’y Integrity, *Reforming Pipeline Review* (2022), <https://perma.cc/47ZB-XGHV>.

Drawing on this scholarship, Policy Integrity advocates for efficient and equitable governance of our nation’s energy systems before the

¹ Per Federal Rule of Appellate Procedure 29(a)(4)(E), no party’s counsel authored this brief wholly or partly, and no person contributed money intended to fund its preparation or submission. Out of an abundance of caution, Policy Integrity notes that one of the attorneys on this brief, Jennifer Danis, previously served as counsel of record for Petitioners while employed at the Niskanen Center, which represents Petitioners in this litigation. Ms. Danis left the Niskanen Center and withdrew her appearance in April 2023.

Federal Energy Regulatory Commission (FERC or the Commission). *E.g.*, Inst. for Pol’y Integrity, Comments on FERC’s Proposed Policy Statements for Natural Gas Infrastructure (Apr. 25, 2022), <https://perma.cc/WR6F-3LXX>; Inst. for Pol’y Integrity, Comments to FERC on Its Transmission Notice of Proposed Rulemaking (Aug. 17, 2022), <https://perma.cc/2G67-6FR3>. Policy Integrity submitted comments critiquing FERC’s analysis of the environmental impacts of the pipeline at issue. Inst. for Pol’y Integrity, Comments to FERC on Regional Energy Access Expansion Project Draft Environmental Impact Statement (Apr. 25, 2022), <https://perma.cc/5UYS-9GBW>.

Additionally, Policy Integrity offers its legal, economic, and modeling expertise in *amicus curiae* briefs to help courts adjudicate complex energy issues. *E.g.*, Brief for Inst. for Pol’y Integrity as *Amicus Curiae* Supporting Respondent, *PJM Power Providers Grp. v. FERC*, Nos. 21-3068, 21-3205 & 21-3243 (3d Cir. Aug. 12, 2022), <https://perma.cc/RT7E-VT82>. That is precisely what Policy Integrity offers here. This brief explains that, despite the similarities between FERC’s authority under the Federal Power Act and the Natural Gas Act, FERC exercises its power very differently under each statute. Understanding

that divergence is central to the issues the Court must adjudicate here. Policy Integrity's expertise in gas and electric transmission infrastructure operations and planning thus provides this Court with a unique perspective on pivotal questions at issue here.

All parties have consented to the filing of this brief. A single joint *amicus curiae* brief is not practicable in this case due to the numerous and complicated legal issues involved. It is also not practicable because the other *amici* supporting Petitioners are State entities.

SUMMARY OF ARGUMENT

Federal law requires FERC to protect the public interest by regulating interstate transmission and wholesale sales of electricity and gas. The Commission must also ensure the orderly development of electricity and gas supplies at reasonable prices. When it comes to electricity, FERC strives to fulfill this statutory duty by requiring a robust infrastructure planning process that accounts for project need, monitoring electricity markets for unfair corporate practices, and ensuring system reliability through strict operational standards. When it comes to gas, however, FERC does not require any planning process at

all, nor does it oversee system reliability or operations. This leads, as here, to the inefficient construction of unnecessary and often costly gas transportation infrastructure, namely pipelines.

While it is economically efficient for regulators to optimize the number and size of pipelines serving a region—it is typically more efficient to have fewer large pipelines than more small pipelines—doing so effectively gives pipeline owners monopoly-like rights with guaranteed high returns on their approved investments. That is why Congress requires that, for these kinds of actors with monopoly-like power, FERC protect the public interest by ensuring “just and reasonable” rates. One important way to discharge this duty is to ensure pipeline investments are economically efficient and truly needed through a robust planning process—as noted, something FERC does for electricity, but not for gas. This lack of oversight might not merit much concern if private actors shouldered all the costs, including externalities, of their own business decisions. But they don’t.

What is more, some state agencies, like the New Jersey Board of Public Utilities (NJBPU), have stepped up to do exactly that: analyze the need for newly proposed gas pipelines. But rather than rely on these

studies, which could help FERC fulfill its duty to protect the public interest and ensure “just and reasonable rates,” FERC ignores them—as it did here. FERC’s blinkered decision makes little sense on its own; it makes even less sense when compared to the robust oversight it exercises over electric infrastructure.

I. Congress passed the Natural Gas Act and the Federal Power Act with twin aims: to effectuate the orderly development of the gas and electric supply and to protect consumers from unreasonable pricing by powerful monopolies. To accomplish these objectives, Congress tasked FERC with ensuring that consumers pay “just and reasonable rates” for electricity and gas. The Natural Gas Act further requires that FERC approve new gas infrastructure only when that infrastructure is or will be “required by the public convenience and necessity.”

II. Despite the statutes’ similarity, FERC treats the electric and gas sectors radically differently. Its governance of the wholesale electric sector is both broad in its scope and granular in its requirements. For example, FERC uses its “just and reasonable” authority under the Federal Power Act to require electric transmission providers to engage in regional infrastructure planning and ensure reliable operations. These

endeavors must account for regional needs, stakeholder input, and public policy, including state energy policies. FERC supplements this planning requirement with other rules designed to ensure fair, competitive markets for wholesale electricity.

III. Conversely, the Commission imposes no planning or reliability requirements for interstate gas pipelines, despite having virtually identical “just and reasonable” authority under the Natural Gas Act. FERC almost always approves the applications of gas pipeline developers, who receive significant returns on investment for building new pipelines, whether needed or not. But FERC itself conducts no independent planning or analysis; it also lacks pricing information from which it can ascertain the need for additional space to move gas on a pipeline—referred to as pipeline “capacity”—or whether the interstate gas market is functioning efficiently. The stark disparity between the Commission’s oversight of the wholesale electric and gas sectors highlights that FERC, while possessing the authority, lacks the present ability to meaningfully assess whether new gas pipelines will further the public interest.

IV. In the face of this regulatory gap, some states have stepped up. NJBPU, the regulator for the state to which most of the challenged pipeline's gas will flow, commissioned a detailed analysis of its present and future gas capacity needs to try to guide more efficient investments in energy infrastructure. Based on that study and extensive stakeholder input, including from New Jersey's ratepayer advocate, the state determined that no new infrastructure is needed. The Commission accorded NJBPU's study no particular weight, ignored the ratepayer advocate's findings, and relied instead on the assertions of the financially interested developer and its customers—often called “shippers”—that additional capacity is needed.

This Court should vacate the challenged orders because FERC lacked substantial evidence to support its authorization and failed to accord appropriate weight to evidence demonstrating that the project runs counter to the public interest.

ARGUMENT

I. Federal Law Requires FERC To Oversee The Orderly Development Of Electric And Gas Supply And To Protect Consumers.

To understand FERC's missteps here, some legal background on two key statutes governing FERC's authority may be helpful. Two principal statutes authorize the Commission to regulate the U.S. interstate energy sector: the Federal Power Act of 1935, 16 U.S.C. §§ 791 *et seq.*, under which FERC regulates electricity; and the Natural Gas Act of 1938, 15 U.S.C. §§ 717 *et seq.*, under which it regulates gas.² Because Congress patterned the Natural Gas Act on the Federal Power Act, the statutes share many structural and textual similarities, and courts frequently look to one when interpreting the other. *See, e.g., Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 164 n.10 (2016) ("This Court has

² Both the Federal Power Act and Natural Gas Act divide regulatory jurisdiction over the electric and gas sectors between FERC and the states. *See, e.g.,* Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 Harv. L. Rev. 1360, 1372, 1386 (2021). In simplified terms, FERC has authority over interstate transmission and wholesale sales of electricity and gas, while states retain authority over intrastate transmission and retail sales of electricity and gas. *Id.*

routinely relied on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa.”).

Congress enacted both laws because the provision of electricity and gas bear characteristics of natural monopolies. The statutes share overriding purposes: regulating the orderly development of the U.S. electric and gas supply and protecting consumers from unreasonable pricing at the hands of powerful electric and gas monopolies. *See, e.g., Associated Gas Distribs. v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987) (“The Natural Gas Act has the fundamental purpose of protecting interstate gas consumers from pipelines’ monopoly power.”); *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747, 758 (1973) (describing the two “primary and related purposes” of the Federal Power Act as “curb[ing] abusive practices of public utility companies by bringing them under effective control” and “provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce”).

To accomplish the twin goals of orderly development and consumer protection, Congress tasked FERC with ensuring that the rates charged for the interstate transmission and sale of electricity and gas be “just and

reasonable.” *See Pub. Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979) (“Both the Natural Gas Act and the Federal Power Act aim to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory.”); *NAACP v. Fed. Power Comm’n*, 520 F.2d 432, 438–39 (D.C. Cir. 1975) (describing how the Natural Gas Act “evinces the same concern for ‘just and reasonable’ rates as does the Federal Power Act”). Congress granted this authority in Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d(a), 824e(a), and Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c(a), 717d(a).

Although the two statutes are similar in many ways, the Natural Gas Act contains an additional layer of protection, as well as significant power: before constructing, operating, or abandoning interstate gas infrastructure, a developer must obtain authorization from the Commission, and with this authorization comes the delegated power of federal eminent domain. 15 U.S.C. § 717f. This authorization is commonly referred to as a Section 7 certificate, referring to Section 7(e) of the Natural Gas Act, which provides that FERC may authorize new gas infrastructure only if it finds the proposed project “is or will be

required by the present or future public convenience and necessity.” *Id.* § 717f(e). Section 7(e) thus complements FERC’s “just and reasonable” authority under Sections 4 and 5 and furthers the law’s overarching goals. *See, e.g., Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959) (finding the “heart” of the Natural Gas Act in its Section 7 permitting authority and its Section 5 provision requiring “just and reasonable” rates).

The upshot is that the Federal Power Act and Natural Gas Act accord FERC similar authority to accomplish the statutes’ twin goals. As explained in the next two sections, however, FERC has chosen to exercise that same authority in very different ways when stewarding the interstate electric and gas sectors: it requires an extensive infrastructure planning process, operational safeguards, and market monitoring for the electric sector, but not for gas. This disparity highlights a significant gap in FERC’s ability to protect the public interest and ensure “just and reasonable” rates under the Natural Gas Act.

II. For Electric Infrastructure, FERC Requires An Extensive Planning Process That Accounts For Project Need And Imposes Other Market Protections.

The Commission has used its “just and reasonable” authority under the Federal Power Act to require electric transmission providers to engage in a sophisticated infrastructure planning process driven by consumer need, among other things.

The modern age of electric transmission planning began at the turn of the twenty-first century, when FERC used its Section 206 authority to encourage the formation of regional transmission organizations and independent system operators (RTOs/ISOs). *See Order No. 2000*, 89 FERC ¶ 61,285 (1999). RTOs/ISOs are FERC-regulated, independent, membership-based, nonprofit entities that operate regional electric transmission systems and wholesale markets. *See id.* at 5–6, 24, 152, 194.

Over the next decade, the Commission promulgated Order No. 890, 118 FERC ¶ 61,119 (2007), and Order No. 1000, 136 FERC ¶ 61,051 (2011). The former requires electric transmission providers to engage in an “open, transparent, and coordinated transmission planning process.” *Order No. 890*, para. 3. The latter requires transmission providers to undertake a regional planning process that, among other things,

identifies transmission alternatives that “more . . . efficiently and cost-effectively” meet a region’s transmission needs, considers transmission needs “driven by Public Policy Requirements” like state and federal decarbonization and electrification mandates, and results in the “development of a regional transmission plan.” *Order No. 1000*, para. 6. FERC’s statutory mandate to establish “just and reasonable” rates is the underlying authority supporting both orders. *Order No. 890*, para. 43; *Order No. 1000*, para. 99; *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (upholding this authority).

Today, RTOs/ISOs typically perform the electric transmission planning process. FERC, *Energy Primer* 68–69 (2010), <https://perma.cc/2DBQ-FCQC>. Regions that lack an RTO/ISO conduct transmission planning through regional planning groups comprised of FERC-regulated utilities. To identify transmission needs and develop a transmission plan, the RTOs/ISOs and regional planning groups engage with numerous stakeholders, including transmission owners, electric generators, public and private electric distributors, state public utility commissions, and consumer advocates. Joseph H. Eto & Giulia Gallo, Lawrence Berkeley Nat’l Lab’y, *Regional Transmission Planning* 12–23

(2017), <https://perma.cc/Y7LF-B4MG>. They also perform economic studies to determine whether additional transmission infrastructure is needed to ensure grid reliability under a variety of supply-demand scenarios. *Id.* at 18–20. RTOs/ISOs and regional planning groups must also ensure that their regional grids meet the reliability standards established by the North American Electric Reliability Corporation. 16 U.S.C. § 824o; *Order No. 693*, 118 FERC ¶ 61,218 (2007).

The Commission imposes other safeguards to ensure that rates for wholesale electricity are “just and reasonable.” For example, FERC requires RTOs/ISOs to regularly provide it with detailed market information that includes, among other things, data on offers and bids for electricity. *Order No. 760*, 139 FERC ¶ 61,053 (2012). According to FERC, this data will “enhance Commission efforts to detect anti-competitive or manipulative behavior, or ineffective market rules, thereby helping to ensure just and reasonable rates.” *Id.* para. 1. If FERC determines that a rate charged for wholesale electricity transmission is indeed unjust or unreasonable, it can require that ratepayers be refunded the amount they paid above what a “just and reasonable” rate would have been. 16 U.S.C. § 824e(b).

Market monitors provide electricity consumers with another bulwark against unreasonable pricing and other market abuses. These entities, which can operate independently or serve as a unit within an RTO/ISO, help ensure that the design and functioning of their respective electricity markets result in “just and reasonable” rates for consumers. *Order No. 2000* at 462. In addition to developing monitoring plans, market monitors submit reports to FERC that identify “opportunities for efficiency improvement, market design flaws[,] and market power abuses in the markets the [RTOs/ISOs] operate[.]” *Id.* at 463.

In sum, FERC oversees an extensive, collaborative electric transmission planning process designed to meet regional needs. It further protects consumers by collecting electricity market data and requiring market monitoring. While this system is hardly perfect, it incorporates significant economic and scientific analysis as well as input from a range of stakeholders, with the goal of ensuring adequate delivery of electricity to the public at “just and reasonable” rates.

III. Conversely, FERC Approves Gas Pipelines On An Ad Hoc Basis And Otherwise Fails To Mitigate Monopoly Power.

In contrast, the Commission has not used its authority under the Natural Gas Act to require anything approaching the degree of

infrastructure planning or market transparency it requires under the Federal Power Act. There are no FERC-regulated regional gas transportation system operators and no FERC-approved regional needs assessments or reliability standards. Nor does FERC require the disclosure of gas prices or adequately verify whether interstate gas markets are functioning efficiently. Rather, FERC evaluates gas pipeline proposals only on a developer-driven, ad hoc basis. This lack of oversight arises not because FERC has no authority to regulate, but because it chooses not to. The Commission's regulatory failure exposes end-use consumers to inefficiently high costs resulting from long-lived, expensive, unnecessary pipelines.

A. Although FERC could require a robust planning process for gas pipelines, it employs an ad hoc process that relies heavily on private party contracts.

As described in Part I, FERC has exclusive siting authority for interstate gas pipelines: before constructing an interstate pipeline, a developer must obtain a Section 7 certificate of public convenience and necessity from the Commission demonstrating that the project serves the public interest. 15 U.S.C. § 717f(c). FERC must also ensure that the rates charged to customers are “just and reasonable.” *Id.* § 717d(a); *Fed. Power*

Comm'n v. Hope, 320 U.S. 591, 600–02 (1944). Using this authority, FERC easily could deploy the tools it uses when regulating under the Federal Power Act to fulfill these mandates. It doesn't.

In theory, FERC's understanding of its Section 7 role under the Natural Gas Act appears in a policy statement last updated in 1999. *Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("1999 Policy Statement"); *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128 (2000); *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000). According to this 1999 Policy Statement, FERC must conduct a multipart evaluation for each pipeline application.

First, FERC must ascertain whether a developer can and will construct the proposed pipeline without financial subsidies from its existing customers. 1999 Policy Statement, ¶¶ 61,746–47. Second, FERC should assess whether, after steps are taken to minimize adverse impacts, the proposed pipeline will negatively impact (1) the pipeline's existing customers, (2) existing pipelines and their customers, or (3) surrounding landowners and communities. *Id.* ¶¶ 61,747–48. Third, FERC should weigh those adverse impacts against the proposed

pipeline’s anticipated public benefits. In assessing a project’s benefits, FERC can consider “any relevant evidence.” *Id.* ¶ 61,748. This last step is thus where FERC *should* analyze whether the new pipeline will address a capacity constraint, or whether it will address an identifiable reliability need for the project’s confirmed shippers.³

FERC’s actual practice, however, differs substantially from the one described above. To determine if pipeline need exists, FERC relies “almost exclusively” on precedent agreements—contracts in which future customers agree to purchase a certain amount of pipeline capacity.⁴

³ FERC released an update to the Policy Statement in early 2022. *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (“Updated Policy Statement”). The Updated Policy Statement, which FERC later converted to a draft statement, *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022), calls for the Commission to eschew relying on precedent agreements in favor of a broader review of pipeline need, Updated Policy Statement, para. 54. FERC has not finalized the draft statement.

⁴ Gas consumers pay both for gas as a commodity and for the various costs of transporting that gas through a pipeline, including the right to reserve space in the pipeline for transport (capacity). Kristina Mohlin, Env’t Def. Fund, *The U.S. Gas Pipeline Transportation Market* 6, <https://perma.cc/3TBX-KL3J>. There are generally two different types of capacity available for gas transportation: firm and interruptible. The kinds of contracts pipeline customers sign during pipeline development are for firm capacity, which means that this transportation service gets priority over other types of delivery; consequently, it is the most expensive kind. *Id.* at 9.

Updated Policy Statement, para. 54. The Commission views precedent agreements as “the best evidence” that the pipeline’s intended markets need the additional gas the pipeline will supply. *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, para. 55 (2017). FERC has previously concluded that precedent agreements are “better evidence” of pipeline need than market studies and long-term demand projections, which it sees as “uncertain.”⁵ *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, para. 37 (2019). FERC also does not require a showing that pipeline shippers have no other cost-effective ways of meeting any new demand.

As a result of its narrow conception of need, FERC approves almost every pipeline application it receives: since publishing the 1999 Policy Statement, the Commission has greenlit 423 out of 425 major pipeline proposals. Alison Gocke, *Pipelines and Politics*, 47 Harv. Env’t L. Rev. 207, 235–36 (2023). Notably, the two applications it rejected failed to submit evidence of precedent agreements. *Id.* at 239.

As noted, FERC has the authority to require the development of gas pipelines in a more reasoned, coherent manner. In fact, it once used that

⁵ Ironically, these are the very kinds of data and analyses on which FERC predicates its electric transmission planning requirements. *See, e.g., Order No. 890*, paras. 542–51.

authority to conduct a more holistic review of pipeline need. *See* Romany Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. Env't L.J. 179 (2020). But it has not used this authority for several decades. Gocke, *supra*, at 230–31.

B. FERC's ad hoc approach has led to the inefficient overbuild of gas pipelines at ratepayers' expense.

FERC's lack of planning for gas infrastructure has negative consequences, namely the wasteful construction of unnecessary and costly pipelines. As infrastructure with natural monopoly features, gas pipelines typically operate under "cost-of-service" regulation: FERC determines the rate that a pipeline can charge customers by evaluating the pipeline's costs and adding to that a "reasonable" rate of return, which regularly reaches 14%. *E.g.*, *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, para. 118 (2016), *amended by* 156 FERC ¶ 61,160 (2016); *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, para. 81 (2017). This guaranteed high return on capital incentivizes developers to overbuild pipelines. *See* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 Am. Econ. Rev. 1052, 1059 (1962) (describing this incentive to overinvest in capital, which has since

been termed the “Averch-Johnson effect”). A recent working paper finds that, in the first two decades of the twenty-first century, the United States built 38% more gas pipeline and 27% more underground storage than it needed, totaling \$179 billion in wasted investment. Thuy Doan et al., *Are We Building Too Much Natural Gas Pipeline?* 1 (Econ. Rsch. Org. at Univ. of Haw., Working Paper No. 2022-2, 2022).

Just as pipelines have incentives to overbuild, their direct customers—shippers—have incentives to over-procure pipeline capacity. Shippers that are state-regulated utilities pass their capacity costs through to their retail customers, e.g., homes and businesses that use gas. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 478 U.S. 354, 372 (1988). Thus, shippers do not themselves ultimately shoulder the cost of new infrastructure: retail customers do. And when shippers have capacity beyond what they need to serve their customers, they can resell it on the secondary market for additional revenue. Mohlin, *supra*, at 17–19. It thus benefits them to sign precedent agreements in support of proposed pipeline projects, even when customer demand has been (and can continue to be) met with access to existing gas supply.

Federal and state regulation allows this resale-based profit because it encourages shippers to offer unused capacity when needed to meet another party's demand, increasing gas market efficiency. *See Order No. 712*, 123 FERC ¶ 61,286, para. 16 (2008). But when a shipper-utility's incentive to procure excess capacity is too strong relative to ratepayer benefit—for example, when there is no cap on how much excess capacity a shipper can procure—utilities will inefficiently over-procure pipeline capacity, harming ratepayers who must pay for expensive, new gas capacity they do not truly need. *See Ken Costello & James F. Wilson, Nat'l Regul. Rsch. Inst., A Hard Look at Incentive Mechanisms for Natural Gas Procurement* 1, 8–9 & nn.13–14 (2006), <https://perma.cc/669C-9YFB>.

To make matters worse, FERC lacks sufficient data to adequately protect those ratepayers from potential market power abuses at the hands of pipelines. Unlike the centralized interstate markets for electricity, interstate gas markets operate through private bilateral contracts. Morgan Ricks et al., *Networks, Platforms & Utilities* 794–95 (2022). While FERC regulates the prices pipelines charge shippers in the primary gas market—long-term pipeline capacity contracts initially

supporting the pipeline—FERC generally does not regulate prices in the secondary resale markets. Mohlin, *supra*, at 6–7, 14–18. These secondary market prices are essential indicators of whether the interstate pipeline system is constrained—prices will be higher at times when there is more congestion along a given pipeline segment and lower when there is excess capacity. *Id.* at 24. Although FERC does encourage the collection and aggregation of wholesale gas market data into price indices, market participants are not obligated to report their transactions, and many choose not to or aggregate them in ways that obscure visibility into whether physical pipeline constraints exist. *Actions Regarding the Commission’s Policy on Price Index Formation*, 179 FERC ¶ 61,036, paras. 10, 16–17 (2022). Because FERC lacks granular data about these prices with respect to time and location, it cannot determine whether and where additional pipeline capacity is necessary, as it can for the electric transmission system.⁶

⁶ FERC-regulated wholesale electricity markets (operated by FERC-regulated RTOs/ISOs, not disparate, private gas pipeline companies) make available price information, called locational marginal pricing, which reflects sub-day demand and supply and transmission constraints. Mohlin, *supra*, at 24; *see also* N. Am. Energy Standards Bd., *Gas Electric Harmonization Forum Report 2* (2023), <https://perma.cc/VAV2-QMRP>

Even when FERC does determine that a rate charged for gas is unjust or unreasonable, it can only make a prospective correction, as it lacks the statutory refund power it has for electricity. Adam Vann et al., Cong. Rsch. Serv., *The Natural Gas Act: Overview, Analysis, and Comparison with Federal Power Act Ratemaking Authority* 6–8 (2020), <https://perma.cc/6L7Y-WQER>. Together, these features of the wholesale gas market make it difficult for FERC to ascertain infrastructure needs, remedy instances of market manipulation, or ensure “just and reasonable” rates.

* * *

The Commission knows what regulating in the public interest looks like. It does so in the electric context, imposing extensive planning mandates on independent electric transmission operators that require regional collaboration, stakeholder engagement, consideration of state policies that may promote or reduce demand, and cost-effectiveness analysis. FERC supplements these planning requirements with additional protections against unreasonable costs, such as market

(describing the gas industry’s opposition to increased operational transparency).

monitoring provisions and detailed transmission modeling requirements for infrastructure applicants, which ensure useful and economic projects. When it comes to gas, however, FERC fails to engage in gas planning or capacity analyses, instead relying on private party contracts as a proxy for public interest. The Commission has acknowledged as much, noting it “has not historically engaged in planning the development of natural gas capacity.” *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, para. 18 (2018). By failing to exercise its authority to require system- or region-wide planning or need evaluations, FERC has impaired its own ability to meaningfully evaluate whether proposed gas pipelines are needed.

IV. FERC Improperly Discounted New Jersey’s Reasoned Finding That Additional Gas Capacity Is Not Needed.

Luckily, states have stepped in to fill this analytical gap and protect consumers from paying for inefficient infrastructure investments. While FERC has jurisdiction over interstate gas pipelines (and wholesale rates for gas), states have jurisdiction over utilities that serve retail customers. Like public utility commissions in other states, NJBPU has begun to engage in long-term gas planning for utilities serving retail customers to try to ensure that consumers do not pay for unneeded, long-lived assets. This type of long-term planning to ensure well-informed and efficient

energy infrastructure investments is now more crucial than ever, as federal, state, and local climate and clean energy laws will progressively increase demand for electricity and decrease ratepayer demand for gas. See Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 Yale J. on Regul. 658, 674–76 (2022).

New Jersey, the state that most of the challenged pipeline’s capacity is designed to serve, commissioned an extensive gas capacity analysis to determine whether its state-regulated utilities serving retail customers need additional infrastructure to meet current and projected demand. These utilities are the same ones that plan to use the pipeline at issue here—the ones who signed the private contracts that FERC takes as near-definitive evidence that a new pipeline serves the public interest.

After reviewing the independent capacity analysis and soliciting stakeholder comment, NJBPU found that no additional capacity is needed. *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,006, para. 22 (2023). FERC described these findings in its order. *Id.* paras. 22–23, 28–31. The order even explains how the “market need” study commissioned

by the pipeline’s developer—the Transco Levitan Study—relies on flawed assumptions about future gas supply and demand, assumptions that fail to account for the effects of New Jersey’s energy policies or the availability of “downstream” gas capacity from outside New Jersey during high-demand periods. *Id.* para. 27. Yet FERC credited this flawed study submitted by a profit-motivated pipeline developer even though it conflicted with the study and findings resulting from an independent analysis vetted through NJBPU’s stakeholder proceeding. This cannot be right.

To be sure, FERC need not defer to any and all state-issued studies. For example, if a state issued a report calling for inefficient and wasteful investments in energy infrastructure, FERC should explain why that report does not pass muster. But no one is contending that is the case here. To the contrary, NJBPU’s study thoroughly assessed capacity needs with the goal of avoiding unnecessary investments whose costs would ultimately fall on New Jersey ratepayers. And until the Commission exercises its statutory authority under the Natural Gas Act to develop a regulatory framework designed to inform questions of public need in a data-driven manner, FERC should strongly weight such a study. It did

the opposite here, choosing to rely on precedent agreements between private companies and studies commissioned *by those very* companies. FERC's actions flout its statutory mandate to act in the public interest. This Court should not endorse such unreasoned decisionmaking.

CONCLUSION

For the foregoing reasons, this Court should vacate FERC's order for the lack of substantial evidence showing that the challenged pipeline serves the public interest.

August 8, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This *amicus curiae* brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 5,230 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by counsel's word processing system.

This *amicus curiae* 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2023, a true and correct copy of the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Petitioners was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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