

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**Case Nos. 23-1064, et al. (consolidated)**

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

NEW JERSEY CONSERVATION FOUNDATION, *et al.*,
Petitioners,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS ISSUED BY
FEDERAL ENERGY REGULATORY COMMISSION
CASE NOS. 23-1064, ET AL. (CONSOLIDATED)

**BRIEF FOR *AMICUS CURIAE*
NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION**

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September 20, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the New Jersey

Business and Industry Association certifies the following:

(A) Parties and Amici

All parties and intervenors appearing in this case are listed in Intervenor Transcontinental Gas Pipe Line Company, LLC's Petition for Panel Rehearing and Rehearing En Banc.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Respondent Federal Energy Regulatory Commission.

(C) Related Cases

References to related cases, if any, appear in the Petitioner's opening brief.

Dated: September 20, 2024

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* the New Jersey Business and Industry Association (“NJBIA”) hereby submits the following corporate disclosure statement:

NJBIA is an incorporated trade association representing nearly 6,000 New Jersey business members. NJBIA has no parent companies, subsidiaries or affiliates that have issued publicly traded stock. Some members of NJBIA are corporations with publicly-traded stock. No party’s counsel authored this brief in whole or in part, and no person other than *amicus curiae*, its members or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Dated: September 20, 2024

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STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 35(f), *amicus curiae* the New Jersey Business and Industry Association has filed a motion for an invitation to file this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* the New Jersey Business and Industry Association certifies that a separate brief is necessary to provide the unique perspective of its nearly 6,000 New Jersey business and industry members. The accompanying motion provides further detail regarding the interests and members of New Jersey Business and Industry Association.

Dated: September 20, 2024

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GLOSSARY

Application for a Temporary Emergency Certificate means the Application for Temporary Emergency Certificate, No. 20240906-5218, *Transcontinental Gas Pipe Line Co.*, FERC Dkt. No. CP21-94 (Sept. 6, 2024);

Certificate Order means *Transcontinental Gas Pipe Line Co. LLC*, 182 FERC ¶ 61,006 (2023);

FERC means the Federal Energy Regulatory Commission;

NGA means the Natural Gas Act, 15 U.S.C. § 717 et seq.;

NJ Agencies Study means the London Econ. Int'l Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers (Nov. 5., 2021), filed as an attachment to New Jersey Parties' Mot. To Intervene & Lodge, *Transcontinental Gas Pipe Line Co.*, Doc. Accession No. 20220711-5186, FERC Dkt. No. CP21-94 (July 11, 2022);

NJBIA mean The New Jersey Business & Industry Association;

The **Panel Opinion** means *New Jersey Conservation Foundation v. Federal Energy Regulatory Commission*, 111 F.4th 42 (D.C. Cir. 2024)

The **Project** means Transcontinental Gas Pipe Line Company, LLC's Regional Energy Access Expansion;

Rehearing Order means *Transcontinental Gas Pipe Line Co. LLC*, 182 FERC ¶ 61,148 (2023).

INTEREST OF *AMICUS CURIAE*

Located in Trenton, New Jersey, the New Jersey Business & Industry Association (“NJBIA”) is the nation’s largest statewide employer association. Its nearly 6,000 members employ more than a million people and represent every industry in New Jersey, including manufacturers, contractors, retailers, and service providers. For over 100 years, the NJBIA has championed a competitive business climate, both locally and globally, and facilitated partnerships among business, government, and academia.

New Jersey, which does not produce natural gas and has no natural gas reserves of its own, depends on interstate pipelines like Transco’s Regional Energy Access Expansion Project (the “Project”) to import its entire supply of natural gas from Pennsylvania. Consequently, NJBIA and its members can offer a unique perspective on the impact that disruption of the nation’s energy supply would have if the panel decision of this Court, vacating the Federal Energy Regulatory Commission (“FERC”) Certificate Order¹ approving the Project based upon its detailed analysis of the evidence, were allowed to stand.

¹ *Transcontinental Gas Pipe Line Co. LLC*, 182 FERC ¶ 61,006 (2023).

ARGUMENT

I. **The Panel Decision Threatens Both The United States’ and New Jersey’s Economy and Energy Security**

The Natural Gas Act (“NGA”) was enacted with the primary purpose of “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669-70 (1976). The NGA has enabled the natural gas industry to avoid “[i]nconsistent regulation at the hands of states as a result of the existing framework of natural gas regulation,” which in turn “has given the natural gas industry the flexibility to respond to changing market pressures.” Wright, *Sighting Natural Gas Pipelines Post-PennEast*, 105 Minn. L. Rev. at 1062. “The federal-level regulatory scheme for natural gas has enabled consistent industry growth since its implementation.” *Id.* at 1063.

As a result of this consistent growth, natural gas has surpassed coal as electrical facilities’ main fuel source nationwide since 2018. Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 Mich. J. of Env’tl. & Admin. L. 319, 336 (2020). Natural gas supplies about 30 percent of the energy consumed in the United States. One study projects that the demand for natural gas in the United States and Canada (including natural gas and pipeline exports to Mexico) will increase from 91 billion cubic feet per day in 2017 to 130 billion cubic feet per day in 2035. ICF, *North American Midstream Infrastructure*

Through 2035: Significant Development Continues, June 18, 2018, at 4, <https://www.ingaa.org/File.aspx?id-34703>.

Amicus curiae represents manufacturers and other businesses in New Jersey. According to the New Jersey Economic Development Authority, an agency created by the State government, advanced manufacturing companies “are critical to the future of New Jersey’s economy. They create high-value added, high-wage jobs that leverage New Jersey’s unique assets to create innovative products.” New Jersey Economic Development Authority, *Advanced Manufacturing*, <https://www.njeda.gov/advanced-manufacturing/>. Today, New Jersey’s manufacturing sector is composed of more than 9,000 manufacturers, employs more than 236,000 New Jerseyans, and contributes approximately \$54 billion to the state’s economy, according to statistics from the New Jersey Department of Labor. Jim Pytell, *New Jersey: The State of Manufacturing*, N.J. Business Magazine, July 1, 2024, <https://njbmagazine.com/monthly-articles/new-jersey-the-state-of-manufacturing/>. “Energy security, resilience, and affordability are important factors for business competitiveness, and each influences how and where companies locate manufacturing facilities.” Jane Nakano and Joseph Majkut, *Strategic Equilibrium: The United States’ Manufacturing Resurgence and the Role of Natural Gas in a Carbon-Competitive World*, Center for Strategic and International Studies, Sept. 10,

2024, <https://www.csis.org/analysis/strategic-equilibrium-united-states-manufacturing-resurgence-and-role-natural-gas-carbon>.

New Jersey “does not produce natural gas, nor does the state have any natural gas reserves.” U.S. Energy Information Admin., *New Jersey State Energy Profile*, Dec. 21, 2023, <https://www.eia.gov/state/analysis.php?sid-NJ>. “New Jersey also does not have any natural gas storage fields.” *Id.* All of the state’s natural gas supply enters New Jersey from Pennsylvania, and nearly half of that natural gas is then shipped on to other states.² *Id.* New Jersey is the nation’s 14th-largest natural gas consumer. *Id.* About 33 percent of the State’s natural gas consumption comes from the residential sector, and about 32 percent from the industrial and commercial sectors combined. *Id.* “Inexpensive natural gas from Pennsylvania has been a boon to both customers who heat their homes with the fuel and to businesses that rely on it as a basic building block of their manufacturing processes.” Tom Johnson, *Is New Jersey Becoming the Pipeline Capital of the Northeast?*, NJ Spotlight News, May 28, 2015, <https://www.njspotlight.com/2015/05/15-05-28-is-new-jersey-becoming-the-pipeline-capital-of-the-northeast/>. The largest segment of the manufacturing

² As noted in the Application for a Temporary Emergency Certificate, the Project would connect New Jersey consumers to “low-cost supplies of natural gas produced in [Pennsylvania’s] Marcellus Shale region, which, due to pipeline bottlenecks in the area, would not have been available without the Project.” Application for Temporary Emergency Certificate at 26.

industry in New Jersey is chemical manufacturing. *See* New Jersey Industry Facts, Chemistry Council of New Jersey, <https://www.chemistrycouncilnj.org/About/New-Jersey-Industry-Facts.aspx#:~:text=Contributing%20significantly%20to%20the%20state's,%24604%20million%20in%20federal%20taxes.>

. Because chemical manufacturing is particularly energy intensive, a reliable and affordable supply of natural gas is critical to this vital industry. *Natural Gas: Its Key Role in a Strong Economy and a Lower Emissions Future*, American Chemistry Council, Apr. 19, 2023, <https://www.americanchemistry.com/better-policy-regulation/energy/resources/natural-gas-its-key-role-in-a-strong-economy-and-a-lower-emissions-future>.

Even the NJ Agencies Study³—considered and ultimately rejected by FERC in its Rehearing Order, *see Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,148, ¶ 37 (2023) (“Rehearing Order”)—noted that “[n]atural gas demand in New Jersey has been growing over the past few years.” *Id.* at n.119 (quoting NJ Agencies Study at 37). This growth has been “driven by increased deliveries to . . . industrial customers.” *Id.*

³ London Econ. Int’l Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers (Nov. 5., 2021), filed as an attachment to New Jersey Parties’ Mot. To Intervene & Lodge, *Transcontinental Gas Pipe Line Col.*, Doc. Accession No. 20220711-5186, FERC Dkt. No. CP21-94 (July 11, 2022).

Against this backdrop, it is clear that the Panel Opinion will detrimentally impact the country's energy security and economy, and particularly New Jersey's. The Panel Opinion prioritizes the New Jersey Board of Public Utilities' calculations and analysis over FERC's, and sides with State *amici* (led by the New Jersey Attorney General's Office) in overturning FERC's reasoned judgment. The Panel Opinion thus effectively afforded individual State governments the ability to block construction of interstate gas pipelines. Departing from this Court's well-established precedent requiring the Court affirm a FERC order if FERC examined the evidence and there is a rational basis for its choice, *see, e.g., Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008), and analyzing FERC's decision making in this manner, threatens to rob businesses and residential consumers of a steady, market-priced supply of energy by stranding large quantities of natural gas. Businesses and residents in states like New Jersey that do not produce any natural gas depend on interstate pipelines to deliver energy. "With a pipeline shortage, a natural gas shortage is created, prices for natural gas and electricity skyrocket, and CO2 emissions go up because more carbon-intensive fuels are forced to compensate." Jude Clemente, *What Happens When You Don't Build Natural Gas Pipelines*, Forbes.com, Jan. 7, 2018, <https://www.forbes.com/sites/judeclemente/2018/01/07/what-happens-when-you-dont-build-natural-gas-pipelines/?sh=6ccc9b995fd6>. "While regions with highly

interconnected pipeline systems are less vulnerable to supply disruptions, regions such as the northeast are less interconnected and more susceptible to supply disruptions and power outages.” Kalen, *A Bridge to Nowhere?*, 9 Mich. J. of Env'tl. & Admin. Law at 320-21.

In particular, the absence of the Project will negatively impact New Jersey consumers and business on “design days.” A design day “reflects the highest gas demand a [utility] expects to be obligated to serve on an extremely cold winter day.” Panel Op., 111 F.4th 42, 60 n.7. In the event of a sudden cold snap, New Jersey natural gas consumers—both residential and business customers—could collectively lose 608,000 dekatherms per day. See Application for Temporary Emergency Certificate, No. 20240906-5218, *Transcontinental Gas Pipe Line Co.*, FERC Dkt. No. CP21-94 at 20 (2024). Homes and businesses could lose natural gas service on the coldest days of the year. *Id.* The economic costs associated with a loss of energy are substantially borne by commercial customers, including NJBIA’s members. Macmillan et al., *Shedding Light on the Economic Costs of Long-Duration Power Outages*, J. Energy Research & Social Science, May 2023, at 7 (estimating that commercial sector suffers 70% of costs of short term outages).

As noted in the Application for Temporary Emergency Certificate, such a scenario is not a hypothetical. Winter Storm Elliott in December 2022 led to “increased demand for natural gas and electricity, widespread power outages,” and

“placed the electric grid under extreme strain.” Application for Temporary Emergency Certificate at 21. If the Project had been in place during Winter Storm Elliott, the additional natural gas capacity it would have added to the system could have lessened the storm’s impact by increasing the natural gas system’s overall resilience⁴ and reliability. *See Transcontinental Gas Pipe Line Co. LLC*, 182 FERC ¶ 61,006, ¶ 35 n.78 (2023) (citing comments from South Jersey Resources Group LLC, which asserted “that the project will help address current challenges including increased natural gas prices during the winter months for consumers in the Northeast and limited power generation supplies in some regions that hinder the ability to respond to extreme weather events”). But the Panel Opinion only briefly considers the threat of a design day on New Jersey natural gas consumers, ignoring the critical resources the Project could provide this winter to both individuals and businesses who rely on Pennsylvania’s natural gas.

Finally, the elimination of the Project will materially increase costs for New Jersey’s consumers of natural gas, including New Jersey’s manufacturers and other businesses. As noted in the Application for a Temporary Emergency Certificate, the Project allowed customers to save about \$280 million in natural gas costs during the

⁴ FERC has defined “resilience” as “[t]he ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event.” *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 ¶ 23 (2018)..

winter of 2023-2024. *See* Application for Temporary Emergency Certificate at 25-26. A fully operational Project would result in even greater savings. *Id.* at 27. A corollary of that analysis is that the removal of the facilities would have the opposite effect, raising gas prices for consumers in the region, particularly during coldest periods of the year, when prices are most volatile. *Id.* The impending winter months and the risk of a cold snap provide further support for, at the very least, remanding without vacatur—thus permitting the Project to remain in service and provide critical natural gas supply to New Jersey consumers, and mitigating the risk of a potentially catastrophic supply shortage.

CONCLUSION

For the foregoing reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that:

1. This brief complies with the type-volume limit of Fed. R. App. 29(b) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 1,822 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and D.C. Circuit Rule 32(b), 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 2016 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rules 15(c)(2) and 25(d) of the Federal Rules of Appellate Procedure and Circuit Court Rule 15, I hereby certify that the foregoing document was electronically filed through this Court's CM/ECF system, which will send a notice of filing to counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Respectfully Submitted,

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