

141 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Millennium Pipeline Company, L.L.C.

Docket No. CP11-515-001

ORDER DENYING STAY

(Issued October 9, 2012)

1. Minisink Residents for Environmental Preservation and Safety (MREPS) has filed two motions for stay with respect to the authorization and construction of Millennium Pipeline Company's Minisink Compressor Project, to be located in the Town of Minisink, Orange County, New York. As discussed below, we deny the motions, because we conclude that justice does not require a stay.

Background

2. On July 14, 2011, Millennium filed an application, pursuant to section 7(c) of the Natural Gas Act¹ and Part 157 of the Commission's regulations,² seeking authorization to construct and operate a 12,260-horsepower compressor station and ancillary facilities. Millennium stated that the compressor station, which was to be constructed on a 75-acre tract of land already owned by the company, would allow Millennium to transport an additional 225,000 decatherms of natural gas to Millennium's Ramapo, New York interconnection with Algonquin Gas Transmission.³ From there, the gas would be delivered to Algonquin's customers in the northeast. The new facilities would also allow

¹ 15 U.S.C. § 717(c) (2006).

² 18 C.F.R. Part 157 (2012).

³ See *Millennium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045, at P 3-4 (2012).

Millennium to flow gas bi-directionally between its existing compressor station in Corning, New York and the new station,⁴ allowing Millennium additional flexibility to meet market demand.

3. In the course of the proceeding, some commenters, including MREPS, expressed a preference for an alternative to the proposed project. That option, referred to as the Wagoner Alternative, would involve, in lieu of building the Minisink Compressor Station, the construction of a smaller compressor station at Millennium's existing Wagoner Meter Station and the replacement of the 7.5-mile-long Neversink segment of the Millennium pipeline, located to west of Minisink.
4. On July 17, 2012, the Commission issued an order authorizing the construction and operation of the proposed Minisink Compressor Project.⁵ The order concluded that the project, if constructed and operated in accordance with Millennium's application and with the environmental conditions imposed by the Commission, would not constitute a major federal action affecting the quality of the human environment.⁶ As to the Wagoner alternative, the Commission held that the greater environmental impacts of replacing the Neversink pipeline segment outweighed the benefits of the alternative compressor station (primarily, its greater distance from the nearest noise-sensitive areas and residences).⁷
5. Chairman Wellinghoff and Commissioner LaFleur dissented. Chairman Wellinghoff concluded that Millennium should have considered the long-term benefits of the Wagoner Alternative as compared to the Minisink Compressor Project.⁸ Similarly, Commissioner LaFleur stated that the environmental assessment (EA) prepared by Commission staff in this proceeding⁹ was incorrect in concluding that the short-term environmental consequences of the Wagoner Alternative outweighed the long-term impacts of the Minisink Compressor Project.¹⁰ Commissioner Clark concurred with the Commission order, asserting

⁴ *Id.* P 4.

⁵ *Millennium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045 (2012).

⁶ *Id.* P 83.

⁷ *Id.* P 27.

⁸ 140 FERC at 61,219.

⁹ Environmental Assessment for the Proposed Minisink Compressor Project (issued March 2, 2012).

¹⁰ 140 FERC at 61,220.

that the Commission has appropriately selected a site that would produce minimal environmental impacts, and that it is not required to determine the site with the least impact.¹¹

6. MREPS filed a timely request for rehearing on August 15, 2012, as did four individuals. Those requests are pending before the Commission.
7. On August 24, 2012, Millennium filed a request that the Commission authorize it to commence project construction. The company appended documentation that it had satisfied all of the pre-construction requirements set forth in the July 17 order, including obtaining all authorizations required under federal law – i.e., meeting, among other things, Endangered Species Act (ESA) and National Historic Preservation Act requirements.
8. On August 28, 2012, MREPS filed an opposition to the request to commence construction and a motion for stay. MREPS asserted that Millennium had not completed ESA consultation regarding the federally listed Indiana bat and that the company's bald eagle nesting survey was cursory. MREPS also asserted that Millennium had not provided details regarding its plan to execute a conservation easement regarding 42.5 acres of the project site.¹² MREPS further argued that the Commission should stay construction because the clearance of dozens of trees would adversely impact the Indiana bat and permanently damage agricultural land.¹³ In addition, MREPS asserted that, if the certificate was vacated, it is not clear whether Millennium could be required to remove the compressor station from its property, and that community members might face reduced property values.¹⁴ MREPS stated that Millennium would not face any harm if a stay was granted and that MREPS has a strong likelihood of success on the merits because of the divided nature of the Commission's decision.¹⁵
9. On August 30, 2012, Millennium filed an answer opposing the motion for stay. Millennium asserted that the project will not result in irreparable harm to MREPS, given that the company owns the entire project site, and thus will be clearing its own trees. Millennium further stated that any impact on farming occurred when it obtained the land, not as a result of project construction, and that, while economic

¹¹ *Id.* at 61,221.

¹² MREPS August 28 motion for stay at 4-5.

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 7-8

¹⁵ *Id.* at 8-9.

harm is generally insufficient to support a stay, MREPS has in any case shown no economic harm resulting from construction.¹⁶ Millennium argues that a stay will harm it and its shippers, who are relying on the new gas supplies to be delivered as a result of the project.¹⁷ The company disputed MREPS contention that the group is likely to succeed on the merits.¹⁸ As to MREPS' contentions that the company has not satisfied pre-construction conditions, Millennium states that it has: performed all work necessary to complete ESA consultation; completed an appropriate bald eagle study, conducted by an expert, in areas where the birds are likely to nest; and kept the Commission apprised of its plans for the 42.5 acres.

10. On September 14, 2012, the United States Fish and Wildlife Service (FWS) sent a letter to Commission staff stating that FWS did not anticipate that the project would cause any measurable impacts to the Indiana bat and that no further coordination with FWS was required under the ESA. FWS also noted Commission staff's determination that the project would result in no impacts to the bald eagle, and recommended that, if eagles were found within the project area, Millennium follow guidelines found on FWS' website.¹⁹
11. On September 18, 2012, Commission staff issued a letter authorizing Millennium to commence construction, based on staff's verification that Millennium had met pre-construction requirements, and reminding the company that all construction activities must be consistent with the terms and conditions of the July 17 order.²⁰
12. On September 19, 2012, MREPS filed a renewed motion for stay. The group made no new arguments, but rather referred to, and appended, its August 28 motion.

Discussion

¹⁶ Millennium August 30 answer at 5-7.

¹⁷ *Id.* at 7-9.

¹⁸ *Id.* at 10.

¹⁹ Letter from David A. Stilwell (FWS) to Rich McGuire (Commission staff).

²⁰ *See* letter from J. Rich McGuire to Gary A. Kruse (Millennium).

13. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act,²¹ and grants a stay when “justice so requires.”²² In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.²³ Our general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.²⁴
14. In *Wisconsin Gas Co. v. FERC*,²⁵ the D.C. Circuit recognized that although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that the injury must be both certain and great, it must be actual and not theoretical; and injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time.²⁶ Implicit in these principles is the further requirement that the movant substantiate the claim that irreparable injury is “likely” to occur.²⁷ Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.²⁸ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.²⁹ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.³⁰ If the party requesting the stay is

²¹ 5 U.S.C. § 705 (2006).

²² See, e.g., *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103 at P 17 (2011); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009); *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001).

²³ *Id.*

²⁴ See, e.g., *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

²⁵ 758 F.2d 669 (D.C. Cir. 1985).

²⁶ *Id.* at 674 (citation omitted).

²⁷ *Id.* (citation omitted).

²⁸ *Id.* (emphasis in original).

²⁹ *Id.*

³⁰ *Id.*

unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.³¹

15. MREPS has not demonstrated that justice requires a stay here. It argues that it will suffer irreparable harm in the absence of a stay because “Millennium will clear dozens of trees to make way for the compressor station, which will adversely impact the Indiana bat” and that “[c]onstruction will permanently damage agricultural land.”³² Yet, as noted above, FWS has concluded that the project will not have any measurable impacts on the Indiana bat. As to agricultural lands, the EA concluded that only 4.49 acres of land (4.05 acres which is currently agricultural) would be permanently affected by the project.³³ The loss of such a small amount of acreage does not constitute irreparable injury, particularly given that none of this land is held by MREPS or its members, but rather is owned by Millennium, which has no obligation to devote any part of the site to agricultural use. Moreover, MREPS has provided no evidence to show that, should the compressor station at some point be removed from service, the lands it occupies could not be returned to agricultural use.
16. MREPS also contends that if the certificate is vacated, the Commission would lack authority to require Millennium to remove an already-constructed compressor station from its property, such that the Minisink community “would remain saddled with a non-functioning compressor station and the concomitant reduced property values flowing from proximity to an industrial eyesore.”³⁴
17. We disagree with MREPS contentions in this regard. The Commission has broad authority under the Natural Gas Act,³⁵ sufficient to require Millennium to take whatever steps we deemed appropriate in the event that the certificate was vacated. In addition, the environmental assessment (EA) prepared by Commission staff in this proceeding concluded, and the Commission agreed, that Millennium will address visual impacts by, among other measures, planting 155 trees along the

³¹ *Supra* note 17.

³² MREPS August 28 motion for stay at 6-7.

³³ *See* EA at 18-19; 51.

³⁴ August 28 motion at 6-7.

³⁵ *See* 16 U.S.C. 717(o) (2006) (providing, in pertinent part that “the Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter”).

property boundary to minimize visual impacts over time.³⁶ Finally, while the Commission recognizes the general potential for property values to be negatively impacted by the construction of nearby energy infrastructure, such potential impacts are indicative of only economic harm, which, without more, is not considered irreparable injury that is sufficient to support granting the extraordinary remedy of a stay.³⁷

18. MREPS also argues that it has a substantial chance of success on the merits, largely because two Commissioners dissented from the majority holding. The Commission generally does not consider a movant's likelihood of success on the merits in a pending judicial appeal as a relevant factor in determining whether to grant a stay.³⁸ We note, moreover, that the presence or absence of dissents is not necessarily a predictor of the result of appellate review, and MREPS does not point to any deficiency in the July 17 order that would make reversal likely.
19. MREPS contends that Millennium will not be adversely affected if a stay is granted, because, it says, the company will face no financial harm if it does not meet the in-service date set forth in its precedent agreements.³⁹ For its part, Millennium cites statements by shippers who need the capacity to be added by the project this winter to serve growing markets in the northeast, as well as a comment by the Public Service Commission of the State of New York to the effect that the project will improve the reliability of New York City's natural gas supply, which feeds electric generation, and that expansions on the Millennium system could lower both gas and electricity prices.⁴⁰ On balance, it appears that the public interest favors denying the stay.
20. As can be discerned from the July 17 order, we were not in accord as to the substantive result in this case. As explained in detail in P 5, Chairman Wellinghoff and Commissioner LaFleur dissented, based at least in part on their belief that the Wagoner Alternative was preferable to the selected route.

³⁶ See EA at 21-22; 140 FERC ¶ 61,040 at P 30-32.

³⁷ See, e.g., *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 10 (2008); *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037, at P 19 (2008); *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 11 (2005).

³⁸ See *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at P 16 (2011).

³⁹ MREPS August 28 motion at 8.

⁴⁰ Millennium August 30 answer at 7-9.

21. Nevertheless, the Commission here concludes unanimously that a stay is not required by the public interest. As noted above, the compressor station is being constructed on land that the company has owned for some time, so that no landowner's property is being directly affected. Further, the company has obtained all of the federal permits it needs, including ESA clearance from FWS, and has provided the Commission with details regarding its plans to establish a conservation easement covering 42.5 acres of the project site.⁴¹ Finally, we have not yet considered the merits of the petitions on rehearing, nor has the court reviewed our orders. Thus, to the extent that the company elects to proceed with construction, it may have some litigation risk. For example, if the Commission was to modify its decision on rehearing or if the court eventually remanded this matter to the Commission for further proceedings or otherwise ruled in favor of petitioners, the company would not be able to utilize the new facilities, and in the worst case could be required to remove them.
22. As a general matter, we do not favor stays, which can result in regulatory uncertainty. Given that MREPS has not demonstrated the likelihood of irreparable injury in the absence of a stay or that justice otherwise requires issuance of a stay, and that the group will have the opportunity to make its case at both the administrative and appellate levels, we conclude that a stay is not required here, and we therefore deny MREPS' motions.

The Commission orders:

The motions for stay filed on August 28, 2012, and September 19, 2012, by the Minisink Residents for Environmental Preservation and Safety are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴¹ See Millennium August 24, 2012 compliance filing and request for authorization to construct at Appendix C.

