

BEFORE THE UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Millennium Pipeline Company, LLC                    )  
Minisink Compressor Station                        ) Docket No. CP11-515

MINSINK RESIDENTS FOR ENVIRONMENTAL  
PRESERVATION AND SAFETY (MREPS) RENEWED  
EMERGENCY MOTION FOR STAY OF CONSTRUCTION OF  
MINISINK COMPRESSOR STATION AGAINST  
MILLENNIUM PIPELINE

On September 18, 2012, the Office of Energy Projects (OEP), Gas Division granted Millennium’s August 29, 2012 request to commence construction over the objections filed by the Minisink Residents for Environmental Preservation and Safety (MREPS). Although MREPS continues to maintain that Millennium did not satisfy the prerequisites for commencement of construction required by the terms of its certificate, MREPS will reserve these challenges for another day. For now, MREPS renews its emergency motion for a stay of construction, and asks the Commission to preserve the status quo until MREPS’ pending rehearing request is resolved, as well as any judicial appeals that may follow.

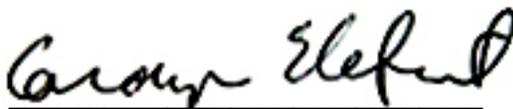
As discussed in MREP’s original stay request (attached to this renewed motion), MREPS members will suffer irreparable harm if Millennium is permitted to commence construction. In the absence of a stay, Millennium will likely complete construction of the compressor station before the Commission rules on MREPS’ rehearing request or before a court has an opportunity for judicial review. If the Commission or a court ultimately vacate the certificate, Millennium will not be able to operate its Compressor

Station. However, because the station is located on Millennium's property, it is not clear whether the Commission can require Millennium to remove the compressor station, thus leaving MREPS members in close proximity to an industrial eyesore. Likewise, once Millennium commences gas delivery to its customers, it is unclear whether the Commission can require those deliveries to cease without conducting an abandonment proceeding.

Because the Commission may not have the power to undo a compressor station in the event that the certificate is invalidated, the Commission must stay the proceeding so that MREPS members will have an opportunity to continue with their challenge on rehearing and if necessary, on judicial review. In the event that the Commission will not stay the proceeding, MREPS will have no choice but to seek relief from a federal circuit court.

WHEREFORE for the foregoing reasons (and those articulated in the attached motion), MREPS respectfully requests that the Commission stay all construction by Millennium, including (but not limited to) tree clearing and ground-breaking activity.

Respectfully submitted,



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Dated September 18, 2012





its members will suffer immediate and irreparable harm as dozens of trees are cut and productive farmland is destroyed to make way for a compressor station approved by a Commission order by the slimmest of margins based on “independent analysis” and documents still obscured from public disclosure and which will almost inevitably be reversed on judicial review if not rehearing. Moreover, when Millennium’s certificate is vacated, it is unclear whether the Commission would have the authority to order Millennium to remove a fully constructed but non-operational compressor station from property which it owns (indeed, the Section 7 certificate does not provide for decommissioning), which means that adverse impacts would never be redressed. Finally, a stay will not prejudice Millennium, which does not face any liability for missing the November 1, 2012 commitment deadline under its Precedent Agreements.<sup>1</sup>

## I. BACKGROUND

On July 16, 2012, a divided Commission granted Millennium Pipeline’s application for a certificate under Section 7 of the Natural Gas Act (NGA) for the Minisink Compressor. Although three Commissioners voted (with one vote as a concurrence) to issue a certificate to Millennium, both Chairman Wellinghoff and Commissioner LaFleur dissented, finding that the

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<sup>1</sup> Millennium attached to its certificate application a copy of its open season announcement and a sample Precedent Agreement. The Agreement states that “Millennium will undertake good faith, commercially reasonable efforts to place the Expansion Facilities in service by no later than November 1, 2012, provided, however, under no circumstances whatsoever will Millennium be liable to Shipper if such in-service date has not occurred by then.

Minisink Compressor does not serve the public convenience and necessity under the Commission's *Certificate Policy*,<sup>2</sup> particularly in light of the economically and environmentally preferable Wagoner Alternative. The Wagoner Alternative consists of a smaller compressor station that would be located at a site owned by Millennium that previously housed a compressor station along with replacement of the aging, 24-inch 7.2 mile Neversink pipeline which currently Millennium's entire system.

On July 31, 2012, Millennium accepted the certificate and subsequently, filed with the Commission its plan for implementing the various conditions imposed by the certificate. As with many of the submissions in this proceeding, some of Millennium's compliance filings have been classified as privileged so MREPS has no way of verifying whether they satisfy the certificate conditions. As for the other filings, some were made as recently as August 24, 2012 and therefore, MREPS has not had sufficient time to determine whether they meet the certificate requirements.

Finally, the Town of Minisink has since objected to Condition 13, which requires Millennium to design the compressor station to blend with the rural agricultural style of the area, Condition 14 which requires Millennium to plant native trees to conceal the compressor and to design the compressor station in the style of an historic farm) and the condition requiring Millennium to establish a conservation easement over the portion of the property not used for the compression station. It is unclear whether the Commission will require these changes or not, but if it does, Millennium will

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<sup>2</sup> 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶61,128, *order on clarification*, 92 FERC ¶61,094 (2000).

need to revise and resubmit its plans. For the record, MREPS opposes the changes proposed by the Town.

On August 15, 2012, MREPS filed a timely request for rehearing of the Commission's order, as did individual members Karen Gartenberg, Michael Mojica and Pramilla Malick. Collectively, the rehearing requests contend that the Commission order violates the Natural Gas Act (NGA), the Commission's *Certificate Policy* and the National Environmental Policy Act (NEPA) and further, was based on undisclosed confidential and proprietary information that deprived MREPS of its due process rights to comment. MREPS further argued that the Commission could cure the deficiencies in its order by adopting the approach of dissenting Chairman Wellinghoff and Commissioner LaFleur who would have denied the certificate because the project is not in the "present and future public convenience and necessity."

On August 24, 2012, Millennium advised that it had satisfied all pre-construction obligations under its certificate and requested written authorization from the Commission to commence construction of the Minisink Compressor station by August 29, 2012. For the reasons discussed below, MREPS moves the Commission to stay construction pending resolution of this case on rehearing and judicial review.

## II. ARGUMENT

### A. **The Commission should deny Millennium's request to commence construction because it has not satisfied its pre-construction obligations**

The Commission should deny Millennium's request to commence construction because Millennium has not satisfied the pre-construction conditions. Among other things, the Endangered Species Act consultations

for the Indiana Bat required prior to commencement of construction have not been completed as required by Condition 11. The Bald Eagle nesting survey was completed in a few hours, hardly adequate and the results seem inconsistent with the bald eagle sightings described in MREPS' members' comments.

Nor has Millennium offered any details on the status of its plans to enter 42.5 acres of the project site into a conservation easement. Agreeing to limit development rights on certain portions of the project site, as Millennium has proposed in its implementation plan, is a far cry from transferring property into a conservation easement where it is held and managed by a third party public entity or NGO pursuant to a legally enforceable land preservation agreement.<sup>3</sup>

Because Millennium has not complied with the pre-construction obligations imposed by the certificate, the Commission should deny Millennium's request to commence construction on August 29, 2012.

**B. Even if the Commission finds that Millennium has satisfied the pre-construction conditions, the interest of justice requires that the commencement of construction be stayed pending rehearing and judicial review.**

**1. Standard for a stay**

The Commission reviews requests for a stay under the standard established by the Administrative Procedure Act, 5 U.S.C. §705, and will

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<sup>3</sup> See Wikipedia, [http://en.wikipedia.org/wiki/Conservation\\_easement](http://en.wikipedia.org/wiki/Conservation_easement).

grant a stay when "justice so requires."<sup>4</sup> In assessing a request for a stay, the Commission considers 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. In addition to these factors, courts also take into account availability of a legal remedy to address the harm done, and likelihood of success on the merits. The basis for a stay is fact specific and involves a balancing of all of these factors.<sup>5</sup> As discussed below, MREPS satisfies the criteria for a stay under the APA and Commission precedent.

1. **MREPS will suffer irreparable harm for which there is no adequate legal remedy if it prevails on appeal**

The D.C. Circuit holds that “that basis for injunctive relief in the federal courts has always been **irreparable harm** and **inadequacy of legal remedies**.”<sup>6</sup> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a **stay**, are not enough. However, the possibility that other corrective relief will not be available at a later date weighs heavily in favor of a finding of irreparable harm.<sup>7</sup> Millennium will clear dozens of trees to make way for the compressor station, which will adversely impact the Indiana bat. Construction will also

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<sup>4</sup> *National Fuel*, 139 FERC ¶ 61,307 (2012)(denying stay where no showing made of irreparable harm).

<sup>5</sup> *Virginia Petroleum Jobbers v. FERC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>6</sup> *Wisconsin Gas v. FERC*, 758 F.2d 669 (D.C. Cir. 1985), *cited with approval* by *National Fuel*, 139 FERC ¶61,307.

<sup>7</sup> *Virginia Petroleum Jobbers*, 259 F.2d at 925.

permanently damage agricultural land which is why the New York State Department of Agriculture and Markets and the Orange County Planning Board strongly oppose construction on the property.

The damage to trees and loss of agricultural land is not redressed by conditions in the certificate, as it was in *National Fuel*.<sup>8</sup> Here, both the EA (at p. 22) and certificate order acknowledge that replanting of trees will somewhat minimize adverse visual impacts but only over a long period of time. And both Chairman Wellinghoff and Commissioner LaFleur, in their respective dissents, emphasize that the loss of agricultural lands is a long-term and lasting impact. Because certificate does not fully mitigate loss of trees and agricultural land, the harm caused by Millennium's compressor station is irreparable.

However, the irreparable nature of the harm resulting from Millennium moving forward with a compressor station is even worse than simply loss of trees and lands. Just as the proverbial genie cannot be put back in the bottle, once Millennium's compressor station is built, the Commission lacks the authority to undo the damage in the event that the certificate is vacated. Without a certificate, Millennium cannot *operate* its compressor station. But because Millennium owns the project site, it is unclear whether it can be forced to remove the compressor station from its property. The certificate does not contain any provisions by which the Commission could

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<sup>8</sup> In *National Fuel*, a citizens group sought a stay of construction of a compressor station, arguing that impacts on air and water quality constituted irreparable harm. However, the Commission explained that even if the compressor station were built, so long as the developer complied with the terms of the certificate, the anticipated harm would be fully mitigated. By contrast, in this case, the certificate does not fully mitigate tree and land losses.

force Millennium to remove a non-operational compressor station from the site. As a result, even if MREPS prevails on appeal, its members and 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.

Because the potential harm to MREPS and the environment is substantial and cannot be reversed even if MREPs prevails on appeal, MREPS satisfies the “irreparable harm” prong of the Commission’s criteria for a stay.

## **2. Millennium does not face any harm if a stay is granted**

While the harm to MREPS is irreparable in the absence of a stay, Millennium would not be prejudiced if a stay is granted. Millennium seeks to plow ahead with construction to meet the November 1, 2012 in-service date under its precedent agreements. But even if Millennium fails to make the in-service date, under the terms of the precedent agreement, Millennium does not face any financial liability.<sup>9</sup> In any event, any potential harm to Millennium (or its customers) from breach of the agreement is purely an economic loss which in and of itself does not constitute irreparable harm.<sup>10</sup>

## **3. MREPS faces a strong likelihood of success on appeal**

MREPs faces a strong likelihood of success on the merits. Millennium’s certificate was approved by the slimmest of margins; a three-Commission majority, with Commissioner Clark concurring. Chairman Wellinghoff and Commissioner LaFleur dissented, finding that the Minisink Compressor was not in the public convenience and necessity in light of the

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<sup>9</sup> See n.1, *supra* (describing terms of Precedent Agreements).

<sup>10</sup> *Wisconsin v. FERC, supra*.

preferable Wagoner Alternative. Though generally an administrative agency's findings are entitled to deference, an appellate court will find itself hard-pressed to defer to a divided Commission. Indeed, the Commission's orders are most frequently overturned on appeal where at least one Commissioner dissents.<sup>11</sup> Because MREPS are likely to prevail on the merits, a stay is justified.

#### 4. Justice requires a stay

MREPs meets the criteria for a stay under the Commission's standards. The potential harm – tree cuts and damage to agricultural land – is irreparable and cannot be reversed if MPREPs prevails. Meanwhile, a stay does not damage MREPS. Finally, MREPS is likely to succeed on appeal; already Chair Wellinghoff and Commissioner LaFleur have adopted MREPS' arguments and MREPS is confident that a reviewing court will do the same.

Justice requires a stay. MREPS and its members have been involved in this case for two years. They have assisted in identifying a viable project alternative, developing the record with fact gathering and gained the support of two Commissioners for their position. Moreover, MREPS has participated in this proceeding even though it was hobbled by its inability to quickly

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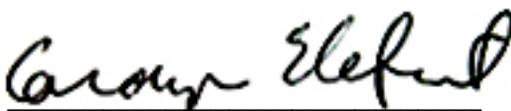
<sup>11</sup> See, e.g., *City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011)(vacating Commission order related to annual charges where Commissioner dissented below); *Piedmont Environmental Council v. FERC*, 558 F.3d 307 (4<sup>th</sup> Cir. 2008)(overturning Commission rule on authority for backstop siting where Commissioner dissented in issuance), *American Gas Association v. FERC*, 593 F.3d 14 (D.C. Cir. 2010)(remanding case to consider dissenting views of Chair Wellinghoff); *Public Utility District v. FERC*, 471 F.3d 1053 (D.C. Cir. 2004)(reversing Commission order based on vigorous dissent of Commissioner Massey); *City of Centralia v. FERC*, 213 F.3d 742 (D.C. Cir. 2000)(vacating hydro order following 3-2 vote by Commission).

obtain CEII or FOIA information relied upon by the Commission in its decision. Yet none of MREPS' actions will matter if Millennium is allowed to go forward with construction, because once it does, the damage will never be undone.

## II. CONCLUSION

**WHEREFORE**, for the foregoing reasons MREPS asks the Commission to deny Millennium's request to move ahead with construction and grant this emergency request to STAY Millennium as well as and its agents and contractors from commencing construction of the Minsink Compressor Station, or initiating any preliminary or preparatory groundbreaking or tree clearing activity throughout the pendency of the rehearing request and until such time as a final decision is issued judicial review. Further, MREPS urges the Commission to rule promptly on this stay request in light of Millennium's requested August 29, 2012 deadline to commence construction.

Respectfully submitted,



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Dated August 28, 2012



Document Content(s)

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