

141 FERC ¶ 61,198
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 Nos. CP11-515-001
CP11-515-002

ORDER DENYING AND DISMISSING REQUESTS FOR REHEARING, DENYING
REQUEST TO REOPEN AND SUPPLEMENT THE RECORD, AND DENYING
REQUESTS FOR STAY

(Issued December 7, 2012)

1. On July 17, 2012, the Commission issued an order granting Millennium Pipeline Company, L.L.C. (Millennium) a certificate of public convenience and necessity under section 7 of the Natural Gas Act (NGA) authorizing it to construct and operate a compressor station and related facilities in the Town of Minisink, Orange County, New York (Minisink Compressor Project).¹ On August 15, 2012, the Minisink Residents for Environmental Preservation and Safety (MREPS) and Karen Gartenberg, Michael Mojica, and Pramilla Malick filed timely requests for rehearing.² Mr. Mojica's request for rehearing included a request for stay of the July 17 Order. On August 17, 2012, Evelyn Preuss filed an untimely request for rehearing. As discussed below, this order denies the requests for rehearing and the requests for stay and dismisses Ms. Preuss's request for rehearing.³

¹ *Millennium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045 (July 17 Order), *stay of notice to proceed denied*, 141 FERC ¶ 61,022 (2012).

² Herein identified individually or collectively as "Rehearing Applicants."

³ On November 8, 2012, MREPS filed a request for rehearing of the Commission's order issued October 9, 2012 denying motions for stay of construction filed by MREPS on August 23 and September 12, 2012. *Millennium Pipeline Company, L.L.C.*, 141 FERC ¶ 61,022 (2012). We dismiss this request for rehearing of the

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I. Background

2. Millennium operates an interstate natural gas pipeline that extends across southern New York from an interconnection in the west with National Fuel Gas Supply Corporation at Independence, New York to an interconnection in the east with Algonquin Gas Transmission, LLC (Algonquin) at Ramapo, New York.

3. In its application, Millennium requested authority to construct and operate a compressor station and ancillary facilities in the Town of Minisink, New York. Specifically, the Minisink Compressor Project will consist of two 6,130-horsepower gas-fired compressor units that will be housed in a new building, an access driveway, parking areas, a station control/auxiliary building, intake and exhaust silencers, turbine lube oil coolers, unit blowdown silencers, a filter-separator with a liquids tank, and an emergency electrical power generator. As part of the project, Millennium will also construct and operate approximately 545 feet of 36-inch diameter suction and discharge pipelines that will connect the compressor station to Millennium's existing interstate pipeline, as well as a new mainline valve assembly on the interstate pipeline. The Minisink Compressor Project will disturb about 10.6 acres within a 73.4-acre parcel of land owned by Millennium and through which Millennium's existing interstate pipeline passes.

4. The Minisink Compressor Project will enable Millennium to transport an additional 225,000 dekatherms of gas per day to its interconnection with Algonquin at Ramapo, as well as permit it to flow gas bi-directionally between its existing compressor station at Corning, New York and the proposed Minisink Compressor Station. The Minisink Compressor Project is fully subscribed under firm service agreements with primary terms of 10 years. Millennium's existing rates under its Part 284 Rate Schedules FT-1 and BH-1 were approved as initial recourse rates for project service. Revenues at this level are expected to exceed project costs by approximately \$16 million per year. Project shippers agreed to pay negotiated rates for their transportation service.

5. On August 17, 2011, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI). On December 22, 2011, Commission staff issued a supplemental NOI to solicit environmental comments on the Wagoner Alternative, an

October 9 Order because the Court of Appeals addressed and rejected the same arguments in its order of October 11, 2012 denying MREPS request for an emergency stay of construction. *In re: Minisink Residents for Environmental Preservation and Safety*, Case No. 12-1390 (D.C. Cir. October 11, 2012) (per curiam) (denying emergency stay and finding petitioners failed to demonstrate irreparable injury or likelihood of success on the merits).

alternative to the project suggested by some landowners. The Wagoner Alternative would involve the construction of a smaller 5,100-horsepower compressor station at a site adjacent to the existing 18.8 acre Wagoner Meter Station facility and the replacement of a 7.2-mile-long, 24-inch-diameter segment of Millennium's existing pipeline, known as the Neversink Segment, between the Huguenot and Westtown Meter Stations in Orange County, New York.

6. On March 2, 2012, Commission staff issued an environmental assessment (EA) for a 30-day comment period (which was subsequently extended for two weeks) and placed it into the public record. The EA addressed the comments regarding the NOI and supplemental NOI, alternatives, including the Wagoner Alternative, as well as geology, soils, water resources, wetlands, vegetation, wildlife, federally listed species, cultural resources, land use, recreation, visual resources, socioeconomics, air quality and noise, safety, cumulative impacts, and scoping comments. The EA concluded that approval of the proposed Minisink Compressor Project, with appropriate mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment.

7. The July 17 Order authorized Millennium to construct and operate the Minisink Compressor Project, subject to 21 environmental conditions recommended by Commission staff. As relevant here, the Commission stated in the July 17 Order that a finding that the public convenience and necessity requires approval of Millennium's proposal is consistent with the criteria discussed in the Certificate Policy Statement.⁴ Specifically, the order held that Millennium's proposal met the Certificate Policy Statement's threshold requirement that the project not result in subsidization by any existing customers. The July 17 Order further held that the Minisink Compressor Project would result in no adverse economic effects on existing customers, or on other existing pipelines and their captive customers, and that Millennium had taken steps to minimize any adverse impacts on the economic interests of landowners and surrounding communities, noting that the project will disturb only 10.6 acres of land and that Millennium acquired all the property necessary for its project through negotiation from a willing seller.⁵

⁴ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified* 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁵ July 17 Order, 140 FERC ¶ 61,045 at PP 10-15.

8. The July 17 Order also adopted the findings and recommendations of the EA. In regard to the Wagoner Alternative, the July 17 Order recognized that the Wagoner site would be further from noise-sensitive areas than the Minisink site and that there were no residences within 0.5 mile of the Wagoner compressor site. However, the July 17 Order also concurred with the EA's conclusion that the greater negative environmental and landowner impacts associated with replacing the Neversink Segment (such as the need to clear 47.61 acres of trees, the use of approximately 22 acres of cleared agricultural land for construction, impacting five special status species, and directly impacting 58 properties with residences) outweighed the Wagoner Alternative's advantages.⁶

9. 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.⁷ Similarly, Commissioner LaFleur stated that the environmental assessment (EA) prepared by Commission staff in this proceeding was incorrect in concluding that the short-term environmental consequences of the Wagoner Alternative outweighed the long-term impacts of the Minisink Compressor Project.⁸ Commissioner Clark concurred with the Commission order, asserting 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.⁹

II. Procedural Issues

10. On August 17, 2012, Evelyn Preuss filed a request for rehearing 31 days after the Commission issued its July 17 Order.¹⁰ Under section 19(a) of the NGA, a request for

⁶ As noted in the July 17 Order and discussed in the EA, if the source of project compression is moved to the Wagoner site, the 24-inch-diameter Neversink Segment, which operates as a constraint point on Millennium's system, would also have to be replaced to make delivery of the contemplated new volumes hydraulically feasible. July 17 Order, 140 FERC ¶ 61,045 at P 27, EA at 49-50.

⁷ 140 FERC ¶ 61,045 at 61,219.

⁸ *Id.* at 61,220.

⁹ *Id.* at 61,221.

¹⁰ Ms. Preuss's request for rehearing was received by the Commission on August 16, 2012, at 11:56 p.m. Pursuant to Commission Rule of Practice and Procedure 2001 (18 C.F.R. § 385.2001(a)(2) (2012)), any document received after regular business hours is considered filed on the next business day. The Commission's regular business hours

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rehearing must be filed within 30 days of the issuance of the Commission order. This is a statutory limitation that cannot be waived by the Commission. Thus, the Commission must reject Ms. Preuss's request for rehearing. Ms. Preuss raises an issue about the access road leading to the Ramapo Meter Station that is not raised by other parties, but that was addressed in *Texas Eastern Transmission, LP (Texas Eastern)*¹¹ and will be further discussed in the environmental section of this order. The other arguments that Ms. Preuss makes were raised by other parties on rehearing or were adequately discussed in the July 17 Order.¹²

11. On August 29, 2012, Millennium filed an answer to the requests for rehearing. Rule 213 of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing. However, in order to have a more complete record in this proceeding, the Commission will waive Rule 213 and allow consideration of Millennium's answer.¹³

12. On November 30, 2012, MREPS, Mr. Mojica, Ms. Gartenberg, and Ms. Malick (the Requesting Parties) filed a joint motion to reopen and supplement the record with an analysis of certain critical energy infrastructure information (CEII) and other non-publicly available information received pursuant to Freedom Of Information Act (FOIA) requests. The Requesting Parties assert that the proffered report by Mr. Richard Kuprewicz constitutes information that "compels or persuades a contrary result" to that reached by the Commission in its July 17 Order, suggesting that the report demonstrates that in order for the Minisink Compressor Project to provide the intended services, the Neversink Segment must be replaced.¹⁴

end at 5:00 p.m., U.S. Eastern Time. Therefore, the request for rehearing was filed on August 17, 2012.

¹¹ 141 FERC ¶ 61,043 at PP 29-32 (2012).

¹² July 17 Order, 140 FERC ¶ 61,045 at P 35.

¹³ 18 C.F.R. § 385.213 (2012).

¹⁴ "[T]he majority treated Neversink as the tie breaker, finding the Minisink Compressor environmentally preferable because it would not require replacement of Neversink, whereas the Wagoner Alternative would. [Citation omitted.] But if the Minisink Compressor Station also requires replacement of Neversink, there is no tie to break." MREPS' November 30, 2012 Motion at 16.

13. An agency is only required to reopen its record when there are “extraordinary circumstances.”¹⁵ Because of the need for finality in the administrative process, Commission policy is to grant a request to reopen the record of a proceeding only upon demonstration by the requesting party of a change in circumstances that is more than just material – it must be a change that goes to the very heart of the case.¹⁶ There has been no “change in circumstances” here. Rather, the Requesting Parties are simply seeking to buttress arguments they have already made. We have reviewed Mr. Kuprewicz’s report and as discussed below, find that it contains only general, unsupported assertions that do not compel a result contrary to that reached in the July 17 Order. Thus, we will deny the motion to reopen the record.¹⁷

¹⁵ See *California Independent System Operator Corp.*, 121 FERC ¶ 61,193, at P 14 (2007), and *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991), (citing *Southern Co. Services, Inc.*, 43 FERC ¶ 61,003, at 61,024, *reh’g denied*, 43 FERC ¶ 61,394 (1988), *aff’d (mem.) sub nom. Gulf States Utilities Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989). See also *Friends of the River v. FERC*, 720 F.2d 93, 98 n.6, 109 (D.C. Cir. 1983).

¹⁶ *California Independent System Operator Corp.*, 121 FERC ¶ 61,193 at P 14.

¹⁷ The Requesting Parties also allege that the July 17 Order’s finding of no significant impact was premised on Millennium creating a conservation easement and that Millennium’s commitment not to develop portions of its property is not the same as an easement. Thus, they contend that “the Commission must reopen the record and evaluate whether its [finding of no significant impact] remains valid if a conservation easement is not created.” November 30, 2012 Motion at 22. While the Commission did state its belief that “a conservation easement would provide important environmental benefits,” [July 17 Order, 140 FERC ¶ 61,045 at P 34.] contrary to the assertion in the Motion, the Commission did not require Millennium to enter into such an easement as a condition of the order. Instead, in recognition of the Town of Minisink’s concerns regarding creation of such an easement, Environmental Condition 18 only conditioned construction on Millennium’s providing an update on its plans regarding creation of an easement. As discussed below, we find that Millennium’s commitment to avoid development on specific portions of the site and to allow farming to continue in certain other areas appropriately balances the competing desires of various parties to the proceeding. We remain satisfied that construction and operation of the Minisink Compressor Project will not result in significant negative impacts on the environment.

III. Discussion

14. The Commission's analysis of whether a proposed project is required by the public convenience and necessity consists of three steps. As described more fully below, first we consider the proposal pursuant to the criteria of our Certificate Policy Statement, balancing the evidence of public benefits to be achieved against the adverse effects on specific economic interests. If the result of the balancing is a conclusion that the public benefits do not outweigh the adverse effects on the economic interests, we will deny the proposal.¹⁸

15. If, on the other hand, the result of the balancing is a conclusion that the public benefits do outweigh the adverse effects on the economic interests, the Commission proceeds to take a "hard look" at potential environmental impacts of the proposed action under the requirements of the National Environmental Policy Act of 1969 (NEPA).¹⁹ If

¹⁸ See *Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233 (2011) (*Turtle Bayou*), *reh'g rejected*, 136 FERC ¶ 61,052 (2011). The Commission denied Turtle Bayou's application to construct and operate a natural gas storage facility, finding that it failed to meet the criteria of the Certificate Policy Statement. As a new company with no existing customers, Turtle Bayou met the threshold requirement of no subsidization. However, as evidence of public benefits, Turtle Bayou presented only general assertions of a need for natural gas storage at the regional and national level. There was no evidence that any of the proposed capacity had been subscribed under precedent agreements. At the same time, the record showed that Turtle Bayou owned virtually none of the property rights which would be necessary to develop its project. Having been unable to acquire those rights through negotiation with the single landowner, it appeared that Turtle Bayou would have to obtain them through exercise of the right of eminent domain provided by a Commission certificate. Given these circumstances, the Commission found that "[t]he generalized showing [of project need] made by Turtle Bayou does not outweigh the impact on the landowner that holds the majority of property rights needed to develop the proposed project. . . Therefore, we cannot find that Turtle Bayou's proposed project is required by the public convenience and necessity, and we deny its request for certificate authority to construct and operate its project." *Turtle Bayou*, 135 FERC ¶ 61,233 at P 34. The decision to deny the application was based solely on the analysis of economic impacts under the Certificate Policy Statement. The Commission did not analyze or consider any potential environmental impacts related to the proposed project.

¹⁹ 42 U.S.C. §§ 4321-4347 (2006).

the Commission finds the potential environmental impact of the proposal to be unacceptable, it will deny authorization.²⁰

16. However, if the Commission determines, based on the environmental analysis and consideration of all comments submitted thereon, that the proposed project can be constructed and operated in an environmentally acceptable manner, the Commission will take the third step of issuing an order finding that the project is required by the public convenience and necessity. That order will contain the environmental conditions the Commission deems necessary and appropriate to ensure acceptable mitigation of potential environmental harms.

A. Certificate Policy Statement

17. The Rehearing Applicants contend that the Commission “misapplied” its Certificate Policy Statement and wrongly certificated the Minisink Compressor Project, asserting that the July 17 Order fails to recognize that the project’s adverse environmental effects outweigh the project’s benefits. We disagree.

18. As explained in the July 17 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of (1) the applicant’s existing customers, (2) existing pipelines in the market and their captive customers, and (3) landowners and communities affected by the construction. Application of the Certificate Policy Statement involves an examination solely of the economic effects of a proposed project. Only if the public benefits are found to outweigh any negative effects on economic interests, will the Commission proceed to the next step, its environmental analysis.²¹ Accordingly, it is incorrect to assert, as do the Rehearing Applicants, that the Commission misapplied the Certificate Policy Statement in this case by not looking at alternatives and environmental impacts. The Certificate Policy

²⁰ See, e.g., *KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (2005), *reh’g denied*, 114 FERC ¶ 61,054 (2006), where the Commission denied an application to convert an existing LNG storage facility into an LNG import terminal for safety reasons (because under Department of Transportation regulations providing for the “grandfathering” of existing facilities, the converted facility would not have been required to meet the same safety standards as a new terminal).

²¹ July 17 Order, 140 FERC ¶ 61,045 at P 11, Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,745. See also *Turtle Bayou*, 135 FERC ¶ 61,233 (2011), *reh’g rejected*, 136 FERC ¶ 61,052 (2011).

Statement establishes a purely economic test and the Commission applied it properly here.

19. The threshold requirement under the Certificate Policy Statement is that the project must be able to proceed without subsidies from existing shippers. After making a finding of no subsidization, the Commission next determines whether the applicant has made efforts to eliminate or minimize any potential adverse impacts to the three major protected economic interests: the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities. If residual adverse economic effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse economic effects. Under the Certificate Policy Statement, the more interests adversely affected or the more adverse impact a project would have on a particular economic interest, the greater the showing of public benefits from the project required to balance the adverse impact. Conversely, if a project would have no adverse effect on the three protected economic interests, the Certificate Policy Statement does not require a balancing of benefits against adverse effects.²²

20. Here, the July 17 Order concluded that the Minisink Compressor Project would have no adverse economic impacts on either Millennium's existing customers or on other existing pipelines or their captive customers. Further, the Commission found that Millennium had taken steps to minimize any adverse economic impacts on landowners and surrounding communities by acquiring all property necessary for its project from a willing seller.²³ The July 17 Order and the EA both acknowledged the potential for construction of the Minisink Compressor Station to negatively impact property values in the vicinity of the station.²⁴ However, the order noted that Millennium's 30-inch-

²² Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,745.

²³ July 17 Order, 140 FERC ¶ 61,045 at P 14. One goal of the Certificate Policy Statement was to protect the interests of landowners whose land might be condemned for right-of-way under the eminent domain rights conferred by the Commission's certificates from unnecessary construction. *See* 88 FERC ¶ 61,227 at 61,737, 61,746, 61,748, and 61,749.

²⁴ MREPS cites to findings in a University of Alberta, Canada, article that suggest that oil and sour gas facilities located within 4 km of rural residential properties significantly affect their sale price. *See The Impact of Oil and Natural Gas Facilities on Rural Residential Property Values: A Spatial Hedonic Analysis*, Peter Boxall and Wing H. Chan, *Resource and Energy Economics*, vol. 27, at pp. 248-269 (2004). Property

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diameter mainline is already located in the Town of Minisink and found that the visual and noise mitigation measures imposed as conditions of the certificate will mitigate for potential decreases in property values.²⁵ There is no credible evidence in the record that operation of the compressor station will negatively impact either conventional or organic agriculture on non-project property. To the extent roads are damaged by construction equipment, county and/or other appropriate authorities can pursue compensation from Millennium. Nothing in the Commission's authorization would require the Town of Minisink to remove the project property from its tax rolls. Expenses for compressor fuel usage will be borne by Millennium's customers, none of whom have protested the project. Based on these findings, the Commission found that the benefits of the project, which is fully subscribed under long-term agreements, would outweigh the residual adverse effects on the three protected economic interests.

21. The Commission has applied the Certificate Policy Statement in the manner described above in countless proceedings since its issuance in 1999. The Rehearing Applicants have not cited a single case in which it has been applied differently. MREPS contends that the July 17 Order improperly conflates project need and Millennium's private objectives with the present public convenience and necessity and fails to require a broader demonstration of public benefit than precedent agreements. While correctly noting that the Certificate Policy Statement eliminated the previous policy of using the percentage of capacity (at least 25 percent) under long-term contracts as the *only* acceptable measure of demand for a proposed project,²⁶ MREPS incorrectly asserts that the Certificate Policy Statement *requires*, as opposed to *allows*, some showing of public benefit beyond market need. Partially in recognition of the fact that "the industry has been moving to a practice of relying on short-term contracts," the Commission adopted a policy that would allow a project sponsor to provide evidence other than long-term contracts demonstrating the need for its project and stated that the Commission would weigh whatever evidence of public benefits to be achieved was presented against the

value issues are highly site specific and were acknowledged and considered by the Commission in the July 17 Order. In any event, because the cited article deals with oil and sour gas facilities, and not compressor stations, it is not probative here.

²⁵ July 17 Order, 140 FERC ¶ 61,045 at P 70. We note that Millennium has agreed to allow farming and to avoid development and permanent structures on portions of its property. This might further mitigate any negative impact on adjacent property values.

²⁶ See Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744.

effects the project would have on the identified interests in determining whether the project will serve the public interest.²⁷

22. The Rehearing Applicants contend that the record does not support a finding of need for the “specific project” proposed, citing the Commission’s order in *Turtle Bayou*. However, as noted above and in the July 17 Order, Millennium has executed agreements for firm service utilizing 100 percent of the Minisink Compressor Project’s design capacity with initial terms of 10 years.²⁸ The Commission further found the project would provide additional benefits by enabling bi-directional gas flow on Millennium’s system between its Corning and Minisink Compressor Stations, creating capacity that could be used for the transportation of market area production, and making additional supply options available to shippers connected to Millennium’s system. The Rehearing Applicants also suggest that the Minisink Compressor Project is somehow only a “short-term fix” to Millennium’s asserted need to increase its delivery capabilities.”²⁹ However, there is no basis to conclude that the additional 225,000 Dth/d of capacity created by the Minisink Compressor Project will not be permanent. Based upon the strong showing of public benefits (i.e., the creation of capacity necessary to provide a demonstrated market access to additional volumes of natural gas from diverse sources) and the localized and relatively minimal, though not non-existent, adverse impacts the project may have on the economic interests of landowners in the vicinity, the Commission found and continues to find that, on balance, pursuant to the criteria set forth in the Certificate Policy Statement, the Minisink Compressor Project will serve the public interest. Moreover, even after

²⁷ The terms “need” and “public benefits” are essentially used interchangeably in the Certificate Policy Statement (e.g., “Rather than relying only on one test for *need*, the Commission will consider all relevant factors reflecting on the *need* for the project. . . . The objective would be for the applicant to make a sufficient showing of the *public benefits* of its proposed project to outweigh any residual adverse effects discussed below.” 88 FERC ¶ 61,227 at 61,747. “Any relevant evidence could be presented to support any *public benefit* the applicant may identify. This is a change from the current policy which relies primarily on one test to establish the *need* for the project.” 88 FERC ¶ 61,227 at 61,748).

²⁸ A “project” generally consists of the specific proposed facilities necessary to enable the pipeline to transport a given volume of natural gas. If the sponsor wishes to add or delete facilities from its proposal, it constitutes an amendment of the project. See, e.g., *PetroLogistics Natural Gas Storage, LLC*, 139 FERC ¶ 61,225 (2012) and *Texas Eastern Transmission, LP*, 137 FERC ¶ 61,140, at P 8 and n. 6 (2011).

²⁹ MREPS’ Request for Rehearing at 1.

performing the balancing urged by the Rehearing Applicants, we find that the public benefits of the proposed project outweigh the project's minimal adverse impacts on both economic interests and the environment, thus supporting our finding in the July 17 Order that the proposed project is required by the public convenience and necessity. Indeed, it is difficult to envision a sustainable basis for a Commission decision not to authorize a fully-subscribed project that it has found to have no significant negative economic or environmental impacts.

23. MREPS asserts that the July 17 Order did not address the “future” public convenience and necessity as required under NGA section 7(e). Rather, it contends the order focused on Millennium’s “short term need” to make deliveries under precedent agreements with two customers instead of the long-term problem of the constrained Neversink Segment. MREPS states that future public convenience and necessity obligated the Commission to address the constrained Neversink Segment and not authorize the Minisink station. MREPS relies on *City of Pittsburgh v. FPC*³⁰ to support its assertion that the Commission failed to sufficiently consider Millennium’s future expansion plans and the Wagoner Alternative.

24. At the time of the proceeding underlying the *City of Pittsburgh* decision, Texas Eastern Transmission Corporation’s (Texas Eastern) system consisted of three principal pipelines: the 24-inch-diameter “Big Inch” line, the 20-inch-diameter “Little Inch” line, and the 30-inch-diameter Kosciusko line, all three feeding into the Appalachian region in the neighborhood of Pittsburgh, Pennsylvania. The Kosciusko line, originating in central Mississippi, was the only one of the three lines not operating at capacity. The Commission authorized a proposal by Texas Eastern to abandon its Little Inch pipeline from natural gas service and to transfer its load to the Kosciusko line through a newly authorized pipeline to be constructed between Texas Eastern’s supply sources in Texas and the Kosciusko pipeline in Mississippi.³¹ The City of Pittsburgh, among others, protested the proposed abandonment, claiming that while abandonment of the Little Inch line might not adversely affect Texas Eastern’s ability to maintain its current level of service, abandonment would eliminate Texas Eastern’s ability to expand its level of service without looping the Kosciusko line. If the Little Inch line were not abandoned, the excess capacity then-existing on the Kosciusko line would remain available to accommodate expanded service levels. Thus, argued Pittsburgh, authorization of the abandonment was not in the public interest because abandonment of the Little Inch line would necessarily make the next expansion of Texas Eastern’s system more expensive

³⁰ 237 F.2d 741 (D.C. Cir. 1956) (*City of Pittsburgh*).

³¹ *Id.* at 750.

than it would be without the abandonment (i.e., the cost of constructing looping and building a tie-line vs. the cost of building a tie-line alone). In ruling on Texas Eastern's abandonment proposal, the Commission did not address Pittsburgh's concerns, finding that future expansion was not an issue in the abandonment case, that Texas Eastern had not filed an application for expansion, and that Pittsburgh could raise concerns it may have about the costs of any expansion when an application for one was filed. The court reversed and remanded the Commission's order, holding that the Commission erred in not considering future expansion in determining whether the public convenience and necessity permitted the proposed abandonment.

25. As described above, abandonment of the Little Inch line would have permanently eliminated existing, unutilized capacity from the Texas Eastern system, foreclosing the use of that capacity for any future expansion. There was testimony in the proceeding that demand for gas was "ever increasing" and that the company would soon apply for authority to expand its facilities. In that context, the court held that the Commission must consider the potential impacts of the proposed abandonment on such future expansions. Here, there is no proposal by Millennium to abandon existing capacity which would have to be replaced to accommodate future expansion. Moreover, we have considered Millennium's future plans to the extent feasible and find that approval of the proposed Minisink Compressor Station should neither foreclose nor necessitate any specific future expansion options.³² The Commission found that construction and operation of the Millennium system with the inclusion of the Neversink Segment to be in the public interest.³³ Whether or not the Neversink Segment will someday need to be replaced will depend on the as-of-now-unknowable needs of future unknown customers. There are numerous possibilities for expanding service on the Millennium system that would not require replacement or looping of the Neversink Segment;³⁴ by the same token,

³² It is worth noting that the Little Inch abandonment proceeding significantly predated unbundling and the implementation of open-access transportation. At the time, Texas Eastern was a merchant of natural gas, making bundled sales at the city gate. As such, it was able to exercise much more control over the expansion and ultimate design of its system than a transportation-only pipeline can today. Moreover, at the time, all construction was priced on a rolled-in basis, requiring existing customers to support expansion capacity, even where they received no benefit.

³³ See *Millennium Pipeline Co., LLC*, 97 FERC ¶ 61,292 (2001) and 117 FERC ¶ 61,319 (2006).

³⁴ Millennium's recently filed Hancock Compressor Project (Docket No. CP13-14-000) would not require replacement of the Neversink Segment. Moreover, as discussed

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replacement of the Neversink Segment would not be a one-time, “permanent” means of addressing all future needs for expansion. We find there is no inconsistency between the Commission’s actions in this proceeding and *City of Pittsburgh*.

B. Environmental Issues

26. If a project passes muster under the Certificate Policy Statement, the Commission turns to completion of the analysis and consideration of the environmental impacts of a project pursuant to the requirements of the NEPA. While the interests of landowners are considered throughout the process, the interests considered in the two analyses are somewhat different.³⁵ Under the Certificate Policy Statement, as noted, the Commission determines whether the public benefits of a proposed project outweigh its adverse economic impacts, including those on landowners. In a NEPA analysis, the Commission takes a hard look at the impacts of the project on environmental resources, determines whether those impacts can be mitigated, and looks at reasonable alternatives to the proposal.

27. Commission practice has been that if it concludes that the proposed project can be constructed and operated in an environmentally acceptable manner, the Commission will

in the July 17 Order and the EA, it is not clear that modifications to the Neversink Segment would be required to accommodate potential service to a planned CPV Valley LLC power plant in Wawayanda, New York. In any event, our actions in approving the Minisink Compressor Project would not preclude consideration of any proposals which might be made in the future.

³⁵ “Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis, where *other interests* are considered.” 88 FERC ¶ 61,227 at 61,745 (emphasis added). “Landowner property rights issues are different in character from the other environmental issues considered under the National Environmental Policy Act of 1969 (NEPA).” 88 FERC ¶ 61,227 at 61,748. “Of course, the Commission will continue to do an independent environmental review of projects, even if the project does not rely on the use of eminent domain and the applicant structures the project to avoid or minimize adverse impacts on any of the identified interests. The Commission anticipates no change to this aspect of its certificate policies. . . The balancing of interests and benefits that will proceed the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis.” 88 FERC ¶ 61,227 at 61,749.

grant the requested authorizations, conditioned as it finds necessary to ensure an environmentally acceptable result, as being required by the public convenience and necessity. This practice is consistent with a major purpose of the Certificate Policy Statement, i.e., “to provide certainty about the decisionmaking process.”³⁶ As set forth in the EA and the July 17 Order and affirmed below, the Commission does not find that the Minisink Compressor Project will result in significant environmental impacts, nor does it find the Wagoner Alternative to be preferable, on an environmental basis, to the proposed project, as conditioned.

28. The Rehearing Applicants contend that the July 17 Order failed to take a sufficiently “hard look” at the project’s environmental impacts, as NEPA requires. The primary thrust of their arguments is that the Commission erred in approving the proposed Minisink Compressor Project in light of the existence of what they perceive to be an environmentally preferable alternative. As discussed in the EA and the July 17 Order, the Commission disagrees with the assessment that the Wagoner Alternative, on balance, provides a significant environmental advantage over the proposed project. But in any event, even if we were to accept that the Wagoner Alternative was environmentally preferable to the proposed project, which we do not, neither NEPA nor Commission policy and precedent would require that we deny authorization of the proposed Minisink compressor.

29. NEPA requires that agencies take a “hard look” at the environmental impacts of proposed actions. The requirement that an agency analyze alternatives to the proposed action provides context for the agency’s assessment of the impacts of its actions. For example, if the Commission’s analysis were to indicate that a proposed action would have significant negative impacts on the environment, the Commission might nevertheless determine that the proposed project should be authorized if its analysis also showed that all reasonable alternatives would result in even greater environmental harm. Conversely, if the environmental analysis indicated that a proposed project would have more moderate environmental impacts, the Commission might deny authorization if its environmental analysis revealed an alternative that could meet the project objectives (including costs and timing), with no adverse environmental impacts. However,

it is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, NEPA simply sets forth procedures that agencies must follow to determine what the environmental impacts of a proposed action are likely to be. If an agency adequately identifies and evaluates the adverse

³⁶ 88 FERC ¶ 61,227 at 61,751.

environmental effects of a proposed action, ‘the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.’³⁷

30. The record in this proceeding establishes that the permanent environmental impacts which will be imposed by the Minisink Compressor Project as conditioned by the Commission, while not nonexistent, are not objectively unacceptable. The compressor station, which will permanently occupy approximately 4.5 acres, will be located within a 73.4 acre parcel of land, screened by topography and, as required by the July 17 Order, deciduous and evergreen trees. Nevertheless, it will remain within the view of several residences and will be visible intermittently by those driving on Jacobs Road. This admitted impact will be further mitigated, though not eliminated, by the building design and coloration, which will resemble, as much as practicable, that of rural farm structures.³⁸ When in operation, the station will increase the ambient noise level in what is a relatively quiet rural setting. However, the potential increase in ambient noise is projected to be about 1.7 decibels (dB) at the nearest noise sensitive area. The noticeable noise increase threshold for humans is about 3 dB; thus, the increase associated with the proposed project will be barely, if at all, noticeable. In addition, as proposed by the applicant and required by the July 17 Order in recognition of the low existing levels of ambient noise, the noise attributable to the Minisink Compressor Project must be held on an on-going basis to significantly below the Commission’s standard requirement of 55 dBA (decibels on the A-weighted scale).³⁹ While operation of the Minisink Compressor Station will result in increased air emissions, as discussed in the EA, the project will not be a major source of air emissions under federal air quality permitting programs and the total potential emissions from the station will comply with the Environmental Protection Agency’s National Ambient Air Quality Standards (NAAQS), in accordance with the Clean Air Act of 1970.

31. The remainder of the project site, where trees are not planted for screening, is not precluded from being used for agriculture and there is no credible evidence that operation of the Minisink Compressor Station will negatively impact either organic or conventional agriculture on non-project land.

32. MREPS asserts that the July 17 Order allowed “improper segmentation” of a single larger overall project consisting of three parts – the Minisink Compressor Project,

³⁷ *KN Wattenberg Transmission LLC*, 90 FERC ¶ 61,322, at 62,083 (2000), (citing and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

³⁸ EA at 18-22 and Environmental Conditions 13 and 14.

³⁹ EA at 33-34 and Environmental Condition 15.

Hancock Compressor Project,⁴⁰ and replacement of the Neversink Segment⁴¹ – and failed to require a consolidated environmental review of all three as “connected actions” pursuant to Council on Environmental Quality (CEQ) regulations in 40 C.F.R. § 158.25(a) (2012). The Rehearing Applicants also rely on CEQ regulations that provide that “[s]ignificance cannot be avoided by ... breaking [an action] down into small component parts.”⁴²

33. As defined in CEQ regulations, connected actions are “closely related” because they “automatically trigger other actions” that may require environmental review, cannot or will not proceed “unless other actions are taken previously or simultaneously,” and are “interdependent parts of a larger action and depend on the larger action for their justification.” The July 17 Order correctly concluded that the Minisink Compressor Station had independent utility that warranted its own environmental review. These three projects are not connected actions under CEQ regulations because the Minisink Compressor Project is independent and separable from the proposed Hancock Compressor Station and any potential, eventual replacement of the Neversink Segment. Any one of the projects could proceed – or not – independent of the others. Indeed, given that the company has not proposed to replace the Neversink Segment, there is no way to consider that purely speculative action as connected to the Minisink Project.

⁴⁰ On November 1, 2012, Millennium filed an application in Docket No. CP13-14-000 to construct a new 15,000 horsepower compressor station in Hancock, New York.

⁴¹ MREPS relies on the September 27, 2011 powerpoint presentation for its assertion that Millennium has present plans to replace the Neversink Segment. However, the referenced presentation appears merely to be a marketing document (presented by Millennium’s Manager of Capacity Optimization). “Replacement of the Neversink” is included with “additional compression” as elements of a “Next Expansion Opportunity.” While indicating that there exists the potential for increasing the then-current capacity of Millennium’s system by up to 1.2 Bcf through the construction of both additional compression (beyond the proposed Minisink project) and replacement of the Neversink Segment, the document is not, as suggested by the Rehearing Applicants, evidence of an intent by Millennium to pursue an integrated, three-phase expansion of its system. There is no indication that Millennium had or has actual customers (and hence, plans) for such a system expansion. In any event, the document indicates that such an expansion would proceed no earlier than 2014. The marketing presentation does not represent any firm decision by Millennium as to future construction and thus has little substantive weight here.

⁴² See 40 C.F.R. § 1508.27(b)(7) (2012).

34. There is no indication in Millennium's 2011 marketing presentation that the three projects are so interconnected in operation, geography, and timing that any one is dependent on the other.⁴³ Accordingly, there was no reason to consider all three projects together for environmental review.

35. MREPS cites three cases to support its position that the three projects were improperly segmented. However, none of these cases support MREPS. In *Hammond v. Norton*, the court found that the Bureau of Land Management should have evaluated two proposed physically connected oil products pipeline segments in a single EIS as a connected action.⁴⁴ In *Florida Wildlife Fed'n v. Corps of Engineers*, the court held that the Corps of Engineers should have evaluated the 1,919 acres planned for an integrated development, rather than issuing a permit to develop 535 acres.⁴⁵ The *Hammond* and *Florida Wildlife* cases involve breaking down a larger project into component parts, a situation not present here, as discussed above. In *South Carolina v. O'Leary*, the court found that the importation of 409 spent fuel rods on an urgent basis into existing storage facilities was not "connected" or "similar" to the possible future shipment of 24,000 rods into an storage facility that was not yet constructed.⁴⁶ The *South Carolina* case found independent, stand alone utility of separate actions because the importation of 409 spent fuel rods would not influence or determine the Department of Energy's decision on the possible future shipment.⁴⁷ The Minisink Compressor Project has independent utility because it would be constructed to provide service to project customers even if the Hancock Compressor Project were not constructed or without the replacement of the

⁴³ Of course, existing infrastructure will have an impact on the design of subsequent capacity, such that the Minisink Compressor Station having been approved will now have an impact on the design of the Hancock project. However, there is no basis to believe that if the Minisink project had not been authorized, some project to provide the 107,500 Dth/d of demand subscribed in the Hancock project would not have been proposed.

⁴⁴ 370 F. Supp. 2d 266 (2005) (D.D.C.).

⁴⁵ 401 F. Supp. 2d 1298, 1317 (S.D. Fla. 2005).

⁴⁶ 64 F.3d 892 (4th Cir. 1995).

⁴⁷ *Id.* at 899.

Neversink Segment. There is no indication that Millennium conceptualized all three projects as an integrated whole that would progress in phases.⁴⁸

36. Mr. Mojica objects to the siting of Millennium's proposed project at a "new greenfield site" in a residential/agricultural area. The record indicates that the selected site was driven by engineering requirements. In order to provide the level of service contracted for by the project's shippers while minimizing horsepower requirements, the compression needed to be located as close to the eastern end of the Neversink Segment as possible to compensate for the constraint at Neversink.⁴⁹ The proposed site was authorized by the Commission only after a thorough environmental analysis which indicated that approval of the proposed project would not have a significant impact on the human environment. The environmental conditions of the July 17 Order will further mitigate the impacts associated with the presence of the project in the Town of Minisink. Millennium and the Town of Minisink have consulted on the future land use of the approximately 70 acres of Millennium's land not needed for the project that will buffer the 4.5 acre of land permanently affected by the operation of the compressor station. Millennium has agreed to permit farming to continue on the existing farmland south of the project site, to not develop the currently wooded portions that are not expected to be impacted by the construction of the project, and to allow the farmland to the east and west of the project site to revert to their natural state.⁵⁰ This agreement will maintain agricultural use on a portion of Millennium's land that is not permanently affected by the operation of the Minisink Compressor Station and will help blend the facility into the rural countryside.

37. Mr. Mojica also contends that the Commission disregarded its own precedent which encourages pipeline construction on existing right-of-way or already disturbed

⁴⁸ An agency need not evaluate an entire universe in a single environmental document. "[J]ust because the [new highway] project at issue connects existing highways does not mean that it must be considered as part of a larger highway project; all roads must begin and end somewhere [citations omitted]." *Preserve Endangered Areas of Cobb's History, Inc. v. Army Corps of Engineers*, 87 F.3d 1242, 1247 (11th Cir. 1996).

⁴⁹ The existing Wagoner Meter Station site is located at the western end of the Neversink segment.

⁵⁰ Millennium's August 29, 2012 Answer at n.70 (citing Millennium's Implementation Plan (Appendix C) (filed August 24, 2012)).

land before undertaking greenfield construction.⁵¹ The Commission does encourage pipeline construction on existing right-of-way as a means of minimizing environmental disturbance, but that preference does not provide a rationale in and of itself for rejecting a proposal which would not have an unacceptable environmental impact.⁵² The cases cited by MREPS are examples of where the Commission approved use of an existing or adjacent right-of-way to minimize land acquisition and disturbance. In *Florida Gas*, the Commission approved Florida Gas' proposal to remove previously abandoned segments of 24-inch diameter pipeline and install the proposed 36-inch diameter pipeline loop in the area previously occupied by the 24-inch diameter pipeline, limiting the number of additional permanent easements required. In *Dominion Transmission*, the Commission accepted a landowner's route variation that would move the proposed route approximately 190 feet to the southeast so it would parallel three existing Texas Eastern rights-of-way located on an adjacent property. Millennium's proposal does not include the construction of additional pipeline mainline or require off-site pipeline right-of-way.

⁵¹ MREPS relies on *Dominion Transmission, Inc.*, 135 FERC ¶ 61,239, at P 73 (2012) (authorized a route variation paralleling existing pipeline right-of-way on adjacent property) and *Florida Gas Transmission Co., LLC.*, 129 FERC ¶ 61,150, at P 29 (2004) (authorized the proposed construction and operation of facilities within or adjacent to the pipeline's existing right-of-way).

⁵² Our action here is consistent with our recent order in *National Fuel Gas Supply Corp.*, 137 FERC ¶ 61,054 (2011), *reh'g denied*, 139 FERC ¶ 61,037 (2012). In that case, opponents of a proposed new compressor station advocated an alternative that added compression at an existing compressor station and required the construction of 14.7 miles of new pipeline. The Commission stated on rehearing of its order approving the proposed project that

[T]he [landowners' comparison of the proposed and alternative sites] does not take into account the impacts associated with the construction of approximately 14.7 miles of additional pipeline that would be required ... Although the new pipeline would run parallel to the existing Line X, it would need to be offset by 25 feet to avoid interrupting service on the existing line, hence requiring additional permanent easements across 115 land parcels. Moreover, there is no evidence to support [landowners'] assertion that the existing pipeline will need to be replaced at some point in the foreseeable future. Even if that were the case, it does not account for the need to obtain additional easements to construct a parallel line to avoid service interruption. 139 FERC ¶ 61,037 at P 12.

38. On rehearing, Mr. Mojica contends that the Commission erred in failing to ascertain whether Millennium's recently-filed Hancock Compressor Station project would eliminate the need for a compressor station at Minisink, with or without the Neversink Segment replacement. As the Commission pointed out in the July 17 Order,⁵³ and above, the Hancock Compressor Project is a discrete proposal, unrelated to the project under consideration here. Nevertheless, review of various data filed by Millennium⁵⁴ indicates that construction of the proposed new 15,900 horsepower Hancock Compressor Station, even with replacement of the Neversink Segment, would not enable Millennium to meet the minimum pressures at the Algonquin delivery point near the eastern terminus of the Millennium pipeline system required to provide the services contemplated in both the Minisink and Hancock projects without the construction of compression, albeit a reduced amount, at Minisink. Thus, the contemplated Hancock Compressor Station is not a feasible, stand-alone substitute for satisfying the already-subscribed demand which the Minisink Compressor Project has been authorized to address.⁵⁵

39. MREPS contends that the July 17 Order failed to conduct an adequate cost/benefit analysis, including compressor fuel costs and noise and air pollution levels, for the Minisink Compressor Project and the Wagoner Alternative, as required by CEQ regulations.⁵⁶ Ms. Gartenberg contends that the July 17 Order failed to "rigorously explore and objectively evaluate all reasonable alternatives" to the same extent as

⁵³ July 17 Order, 140 FERC ¶ 61,045 at P 65.

⁵⁴ Staff utilized two pipeline simulation software packages generally recognized within the industry, SynerGEE Gas and Gregg Engineering, to analyze and verify the data and representations in the Exhibit G flow diagrams and hydraulic flow models filed by Millennium on July 14, 2011, with its application and the Exhibit G, flow diagrams, flow models, and other data filed by Millennium on September 30, 2011, on October 17 and 24, 2011, and on November 4, 2011, in response to various staff data requests.

⁵⁵ We note that Millennium's application for authorization to construct and operate the Hancock project was filed November 1, 2012. Thus, it would not be possible for that project to complete the regulatory process, be constructed, and go into service in time to meet the commitments in the Minisink Compressor Project service agreements.

⁵⁶ See 40 C.F.R. § 1502.23 (2012). These regulations provide that if a cost-benefit analysis is developed, "it shall be incorporated by reference or appended to the [environmental] statement as an aid in evaluating the environmental consequences."

Millennium's proposal, as required by CEQ regulations,⁵⁷ and without priority to the pipeline's proposal.

40. Table 13 in the EA compared various environmental parameters of the Minisink Compressor Project and the Wagoner Alternative.⁵⁸ Specifically, the EA indicates that the Wagoner Alternative would cost approximately double that of Millennium's proposal and that no customers have indicated a willingness to subscribe to a level of service that would warrant replacement of the Neversink Segment. While Millennium's 12,260 horsepower Minisink compressor project is expected to burn more natural gas fuel than a 5,100 horsepower compressor added to the Wagoner meter station, air emissions from Millennium's proposal are within NAAQS standards. The replacement of the Neversink Segment would resolve the existing Maximum Allowable Operating Pressure (MAOP) constraint on that segment,⁵⁹ but there is no evidence that the existing Neversink Segment cannot continue to be operated safely in conjunction with the Minisink Compressor Station. In addition, the replacement of the Neversink Segment would be environmentally challenging and is not environmentally preferable to Millennium's proposal. The analysis in the EA is consistent with CEQ regulations that require "substantial treatment of each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."⁶⁰

41. The July 17 Order also discussed the reasons for eliminating the Wagoner Alternative from further environmental review.⁶¹ The July 17 Order's comparison of the relative merits of the Minisink Compressor Project and Wagoner Alternative and reasons for eliminating the Wagoner Alternative from further environmental analysis are adequate under CEQ regulations.

42. The Rehearing Applicants assert that the Minisink Compressor Project, with its adverse environmental consequences, is not needed because of the availability of the Wagoner Alternative. Ms. Gartenberg asserts that because the Wagoner Alternative

⁵⁷ See 40 C.F.R. § 1500(2)(e) (2012) and 40 C.F.R. § 1502.14(a) (2012).

⁵⁸ EA at 51.

⁵⁹ The Neversink Segment's Maximum Allowable Operating Pressure of 900 pounds per square inch gauge (psig) is several hundred psig less than the rest of Millennium's mainline.

⁶⁰ See 40 C.F.R. § 1502.14(b) (2012).

⁶¹ July 17 Order, 140 FERC ¶ 61,045 at PP 26-27.

offers operational and environmental advantages, the Commission should have a third option, after acceptance or rejection of Millennium's proposal, to choose a reasonable alternative, such as the Wagoner Alternative.

43. The Commission considers alternatives when determining whether a particular proposal would serve the public convenience and necessity.⁶² While the Commission can reject a proposal if it does not satisfy the public convenience and necessity, the Commission has no authority to compel companies to construct gas facilities.⁶³

44. As noted above, NEPA requires the Commission to consider and disclose all significant aspects of the environmental impact of a proposal, but NEPA does not mandate particular results.⁶⁴ Under NEPA, the Commission takes a hard look at alternative means to fulfill the purpose and need of the project and assesses, as in this proceeding, the environmental impacts of each alternative. If the Commission finds a proposed project to be environmentally unacceptable, the Commission would reject the application. If the Commission finds the project to be environmentally acceptable, the Commission will approve it, provided it is otherwise required by the public convenience and necessity.

45. The Commission does not direct the development of the gas industry's infrastructure regionally or on a project-by-project basis. The Commission analyzes the pipeline's filed application. The Commission's procedures, requirements, and criteria for evaluating applications are well-known by the industry, and they discourage project

⁶² See, e.g., *Texas Eastern*, 141 FERC ¶ 61,043 at P 26.

⁶³ *Id.* P 28, n.44. There are minor exceptions to the Commission's lack of authority to compel construction under the NGA. They include the Commission's authority under NGA section 5 to compel companies to construct interconnections to remedy undue discrimination (see *Tennessee Gas Pipeline Co. v. Columbia Gulf Transmission Co.*, 113 FERC ¶ 61,200, at PP 25-26 (2005)); NGA section 7(a)'s provision for the Commission to direct a company to extend facilities to serve a municipality or local distribution company where the extension will not unduly burden the natural gas company; and the dormant exception of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(f)(B)(2006), which conditionally permits the Commission to order the expansion of capacity on an existing pipeline.

⁶⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.").

sponsors from filing incomplete or insufficiently vetted applications. Given the significant expense sponsors incur to prepare applications, there is no incentive for a project sponsor to present an application that cannot meet our standards for approval. However, virtually every project that is filed is modified in some aspect by the applicant or Commission staff through the review process to address environmental and other concerns. As the Commission observed in *Texas Eastern*, the high approval rate for pipeline proposals “demonstrates prudence on the part of the industry and consistency on the part of the Commission, resulting in a process which weeds out marginal projects and leaves us to consider only those that merit serious consideration.”⁶⁵

46. The Rehearing Applicants assert that much of the environmental disturbance under the Wagoner Alternative would be “temporary” and not equivalent to the “permanent” impacts experienced at the Minisink location. Mr. Mojica asserts that the July 17 Order’s reliance on greater temporary environmental and landowner impacts as an argument against replacing the Neversink Segment is inconsistent with the rationale in *Central New York Oil and Gas Co. LLC (Central New York)*⁶⁶ in which the Commission found that construction in “sparsely populated, rural areas” had limited environmental impact on landowners and communities.⁶⁷ There is no inconsistency between our decision in *Central New York* and our ruling here. As suggested above, the hydraulic requirements for providing the contemplated service are one of the primary considerations in siting additions, particularly of compression, to existing pipeline infrastructure. Once the engineering bounds have been determined, environmental issues are considered. It is true, as a general principle, that construction in sparsely populated, rural areas is likely to have less impact on landowners and communities because there are likely to be fewer landowners and communities in the vicinity to be impacted.⁶⁸ However, environmental impact is very site specific, and while construction in sparsely populated areas may be expected to have comparatively less impact on landowners and communities, it may well have greater potential to impact natural resources, including water resources, flora and fauna. The relevant factor here is our finding that construction

⁶⁵ *Texas Eastern*, 141 FERC ¶ 61,043 at P 24.

⁶⁶ 137 FERC ¶ 61,121, at P 17 (2011), *reh’g denied* 138 FERC ¶ 61,104, at P 29 (2012).

⁶⁷ In *Central New York*, the Commission authorized a 39-mile long pipeline and compression facilities in a sparsely populated, rural, forested area affecting 591 acres.

⁶⁸ We note, as the commenters to this proceeding have frequently pointed out, that the Town of Minisink is a relatively rural, agricultural setting.

and operation of the Minisink Compressor Station will not result in unacceptable environmental impacts. As discussed above, even if it were the case that the Wagoner Alternative would result in fewer environmental impacts, which we do not find that it is, the Commission is not required to reject the environmentally acceptable Minisink Compressor proposal.

47. As noted above, CPV Valley LLC is contemplating obtaining transportation service from Millennium for natural gas to fire its planned power plant in Wawayanda, New York. Mr. Mojica and Ms. Gartenberg assert that the Neversink Segment will have to be replaced in order for Millennium to provide that service, so the environmental impacts associated with such a replacement are going to occur anyway. However, depending on ultimate timing and volume of the service to CPV Valley, it may or may not require replacement of the Neversink Segment.⁶⁹ Millennium has stated that it has no intention to file an application to replace the Neversink Segment before 2014.;⁷⁰ The Commission will analyze and consider the environmental impacts of any future application to construct facilities to serve the CPV Valley power plant when and if one is filed.

48. Ms. Gartenberg asserts that the July 17 Order did not “rigorously explore and objectively evaluate” the alternative of installing electric-driven compressors at Minisink. Ms. Gartenberg states that there is no indication in the record that Millennium communicated with the New York Power Authority about using its 345 kV transmission line located a “short distance” from the Minisink Compressor Station site to power electric-driven compressors. Ms. Gartenberg contends that if Millennium had entered into the pre-filing process, the issue of electric compression could have been explored earlier.⁷¹ The July 17 Order reflects the Commission’s belief that Millennium’s responses to staff’s data requests dated September 21 and November 11, 2011, concerning the lack of feasibility of electric-powered compression at Minisink were reasonable. We continue to believe that electric compression at the Minisink location would likely result in more environmental and property owner-related concerns and would unreasonably delay the project.

⁶⁹ The configuration of the Millennium system at the time any such application is filed will be a factor in what specific additional facilities may be needed.

⁷⁰ Millennium’s December 9, 2011 Data response No. 1.

⁷¹ Millennium did not request to enter into pre-filing procedures in this proceeding.

49. MREPS and Ms. Gartenberg contend that the July 17 Order ignores the Commission's siting regulation for "unobtrusive" locations for surface facilities.⁷² They assert that the siting regulation, properly applied, would have left Millennium's 73 acres in Minisink for future agricultural use, would have avoided the construction of permanent compressor station facilities, and would have located smaller compression facilities at the unobtrusive Wagoner location.

50. For the construction of aboveground facilities, section 380.15(f) of the regulations prefers the selection of unobtrusive sites covering the minimum area practicable and considering the noise potential for facilities. Millennium identified its site selection process and the criteria for selecting the Minisink site in its application. Millennium proposes to construct facilities on a large parcel of land that it owns and will plant trees and vegetation to make the compressor building harmonious with surrounding properties. Millennium has agreed to allow farming to continue on the site and to return much of the land to its natural state. The noise mitigation requirements for operation of the Minisink Compressor Project will minimize the noise potential of the site. These mitigating conditions will make the Minisink location as unobtrusive as possible.

51. The Rehearing Applicants claim the Commission's decision is arbitrary and capricious. Our analysis of Millennium's proposal and the Wagoner Alternative in the July 17 Order and the EA was thorough and addressed comments that were submitted in response to an initial and supplemental comment period on the EA.⁷³ In the supplemental comment period, the Commission provided landowners an opportunity to comment specifically on the Wagoner Alternative. As discussed above, the July 17 Order concluded that the Wagoner Alternative did not provide a significant environmental advantage over Millennium's proposal. Contrary to the position of the Rehearing

⁷² 18 C.F.R § 380.15(f) (2012).

⁷³ MREPS cites *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 621 (2nd Cir. 1965), contending that the Commission failed to comply with its affirmative duty to inquire into and consider all relevant facts related to alternatives. In *Scenic Hudson*, the court set aside and remanded an order licensing a pumped storage hydroelectric project and two orders denying the introduction of additional evidence, as well as denying requests to hold supplemental hearings. The court held that the Commission had improperly rejected evidence of a natural gas turbine alternative and failed to complete the record on the electric interconnection alternative. Unlike *Scenic Hudson*, the Commission here did not reject evidentiary submissions from landowners. In fact, the Commission extended the period of time for filing environmental comments on the EA to allow the public to address the Wagoner Alternative.

Applicants, the record does not indicate that the benefits of the Wagoner Alternative outweigh its potential adverse impacts. While the Rehearing Applicants disagree with the Commission's environmental conclusions, their disagreement does not make the conclusions reached by the Commission and supported by the EA arbitrary or capricious.

52. As discussed in the July 17 Order and above, we find that Millennium has proposed an environmentally acceptable means of meeting the demands of its shippers that will not result in any significant adverse environmental impacts. Environmental issues associated with the replacement of the Neversink Segment have long been recognized. In the Interim Order originally addressing the construction and operation of the Millennium Pipeline system, replacement of the 24-inch Neversink Segment with a larger diameter pipeline was authorized, conditioned upon a successful bore of the Neversink River.⁷⁴ Prior to constructing under its original authorization,⁷⁵ Millennium filed to amend its certificate, proposing, among other things, to acquire from Columbia and operate as part of its system the existing Neversink Segment instead of replacing it with larger diameter pipeline. The Commission found the amended proposal to be in the public interest, recognizing that it would "avoid direct disturbance to the Neversink River, which is considered a sensitive waterbody due to the possible presence of federally endangered species."⁷⁶ The Commission even conditioned its order on Millennium acquiring and continuing to use the smaller-diameter segment.⁷⁷ In light of this history, we do not agree that it is somehow unreasonable for Millennium not to have chosen this proceeding as the one in which to address the constraint at Neversink.

53. Ms. Malick asserts that the July 17 Order failed to identify certain adverse environmental impacts, including noise impacts on animals in the nearby Dawn Animal Shelter and on Bald and Golden Eagles, the effect of night light pollution on migratory birds, the effect of air pollution on honeybees' sense of smell, NORM (Naturally Occurring Radioactive Material) contamination, the potential for formaldehyde poisoning, the Stuxnet virus in relation to emergency response, the Lewis Lee House and Lain stone farm house historical sites, the risks and Environmental Protection Agency (EPA) regulations applicable to the one public water well within 1.5 miles of the project,

⁷⁴ See *Millennium*, 97 FERC ¶ 61,292 at Environmental Conditions 33 and 34.

⁷⁵ The originally-authorized configuration was never constructed due to Millennium's inability to obtain a necessary Coastal Zone Management Act consistency determination for a portion of the system unrelated to those being considered here.

⁷⁶ *Millennium*, 117 FERC ¶ 61,319 at P 242. See also PP 297 and 309.

⁷⁷ *Id.* at Environmental Condition 19.

constant low frequency and high frequency noise levels, and Dr. Wilma Subra's opinion (dated September 16, 2011) that the released toxic chemicals (methane, Volatile Organic Compounds), nitrogen oxide, carbon monoxide, and particulate matter) can have serious health impacts to residents.

54. The July 17 Order relies on Millennium's compliance with New York's clean air permit and National Ambient Air Quality Standards (NAAQS) to conclude that the level of emissions from the compressor station will be within legal standards. The EA observes that the compressor station will not be a major source that requires a Prevention of Significant Deterioration review.⁷⁸ The July 17 Order adopts the EA's findings that the compressor station project, constructed in compliance with the order's environmental conditions, will adequately protect special status species, e.g., the Bald Eagle and the Indiana Bat.⁷⁹ The July 17 Order found there was no evidence in the record to support a finding regarding the potential for low frequency noise to negatively affect honeybees.⁸⁰ We similarly find there is insufficient evidence in the record to warrant further examination of the potential for the emissions from the authorized compressor station to have a significant negative impact on bees. We do not believe that indoor radon concentrations from the use of natural gas in the home are likely to pose a radiological hazard to domestic users. Lead, the ultimate decay product of radon, will accumulate on the inside wall of a pipeline, but long before the pipeline reaches any customer's residence and will not pose a health risk to end-users. Millennium is required to protect its facilities in accordance with all applicable federal and state cyber-security requirements. We find no need to impose additional requirements to address the risk of the Stuxnet virus. The July 17 Order, based on the EA's analysis,⁸¹ requires Millennium to ensure that the Minisink Compressor Station operates at Millennium's predicted noise levels. Commission staff will monitor operation of the compressor station for compliance with the noise and vibration-related environmental conditions of the July 17 Order. As to the protection of cultural resources, Millennium completed a cultural resources survey for the compressor project and the Commission is satisfied that Millennium has taken steps to avoid impairment of cultural resources and adjacent historic farm buildings. The EA recognized that the Minisink Project would be constructed over a Sole Source Aquifer (SSA) as mapped by the EPA. It also noted that

⁷⁸ EA at 23-31.

⁷⁹ EA at 14-16.

⁸⁰ July 17 Order, 140 FERC ¶ 61,045 at P 41.

⁸¹ *Id.* PP 77-78 and EA at 32-36.

EPA had stated the project was not subject to a SSA review under the Safe Drinking Water Act because of the absence of federal funding.⁸² Nevertheless, as discussed in the July 17 Order,⁸³ we believe that with Millennium's implementation of the erosion controls measures in our Plan and Procedures and Millennium's Spill Prevention Control and Containment Plan, construction of the Minisink Compressor Station should not have any impacts on the identified water wells in the area. There is no evidence in the record to suggest otherwise.

55. Ms. Malick and Mr. Mojica assert that the July 17 Order relied on facts and assertions that were incorrect, i.e., that there are no streams within .25 miles of the proposed site that could provide nearby habitats for Indiana Bats, that there are five special status species in areas affected by the Wagoner Alternative,⁸⁴ and that there are 86 existing residences within one-half mile of the proposed project (as compared to Mr. Mojica's count of 190 residences within a .7-mile radius). Disagreements about these aspects of the proposed project, even if the Rehearing Applicants' assertions are correct, would not change the result of our overall environmental review of Millennium's proposal. Regardless of the exact location of streams that might support insects which could serve as food for bats, Millennium has developed an appropriate study plan including bat roost tree exit counts and acoustical monitoring. While the July 17 Order did repeat the statement in the EA that the Wagoner Alternative has the potential to impact five special status species,⁸⁵ the EA went on to acknowledge that two of the species, the bog turtle and the small whorled pogonia, were unlikely to be impacted. Nevertheless, the EA and July 17 Order found, and we affirm, that the Wagoner Alternative has the potential to impact more special status species than does the proposed Minisink Compressor Project. Finally, our finding that the Minisink Compressor Project, as conditioned – especially with respect to noise, will have limited permanent impacts on near-by residences and communities is not dependent on the exact number of residences nearby. The mitigation we have required will be effective regardless of which number is used.

⁸² EA at 11.

⁸³ 140 FERC ¶ 61,045 at P 50.

⁸⁴ The area has the potential for having the Indiana bat, bog turtle, dwarf wedge mussel, small whorled pogonia, and the spreading globeflower. EA at 54.

⁸⁵ July 17 Order, 140 FERC ¶ 61,045 at P 27.

Clarifications to Environmental Conditions

56. On August 24, 2012, the Town of Minisink filed a letter stating that even though it had an “agreement” with Millennium on issues of building design, site screening, limitations on development, and the notification process for blowdown events, the Town interprets the July 17 Order as having rejected three of those agreements.. The Town of Minisink asks the Commission to revise or clarify Environmental Conditions 13, 14, and 18. MREPS opposes the Town of Minisink’s request. As discussed below, we believe our requirements incorporate the spirit of the Town of Minisink’s agreements with Millennium, while at the same time acknowledging the concerns of other members of the community.

57. Environmental Condition 13 of the July 17 Order requires the final building design to include specific elements designed to blend the buildings and equipment with surrounding rural residential agricultural landscape and structures. The condition suggests, but does not require, elements “*such as* designing the building façade to resemble a historic farm structure and the exhaust stacks to resemble dome-topped silos.” (Emphasis added.) The Town of Minisink believes, however, that historic barn designs (mostly pole barns in the vicinity of the project) are likely to be more visibly intrusive than the design it agreed upon with Millennium, which minimizes the height of the buildings and colors them in a way that makes them less visible behind the natural and proposed screening.

58. Environmental staff considered the building design which was current at the time of the issuance of the EA and found that it lacked any features that would make it blend in with the rural residential agricultural landscape surrounding it. The intent of Environmental Condition 13 was not to make the compressor station more visually prominent, but rather to make it less so. The design elements incorporated by Millennium, and approved by the Commission include rounded covers for the exhaust stacks, a cupola, and changes in door style. These design elements do not change the height of the buildings and neither Environmental Condition 13 nor the approved design⁸⁶ specifies a particular color. Therefore, the Commission believes that the overall effect of implementing Environmental Condition 13 is consistent with the Town of Minisink’s primary concern expressed in its letter and is also consistent with comments received from other stakeholders regarding reducing the aesthetic impact of the compressor station.

⁸⁶ The approved design includes barn-like doors and silo domes were added to conceal the exhaust stacks.

59. Environmental Condition 14 requires Millennium to file a final landscaping and site screening plan that includes trees “native to the project area including the white pine, red pine, and red spruce.” The Town of Minisink states that its agreement with Millennium concerning landscaping and screen plan is more appropriate because it includes non-native trees that provide better screening. The Town of Minisink would not object, however, if Millennium added some native trees to the screening trees Millennium proposes for the front of the compressor building. The Commission believes that the final landscaping plan filed by Millennium and approved by the Director of the Office of Energy Projects, which includes both native and non-native trees, meets the intent of Environmental Condition 14 and provides screening in a manner consistent with the Town of Minisink’s comments.

60. Environmental Condition 18 requires Millennium to update the Commission on the status of its plans to enter 42.5 acres of the project site into a conservation easement. The Town of Minisink opposes a conservation easement on the project property because it would reduce the assessed value of the property. In compliance with Environmental Condition 18, Millennium provided an update regarding the status of its plans for the entire parcel, including the portion that had been considered for a conservation easement. Appendix C of its implementation plan, filed August 24, 2012, includes a map reflecting Millennium’s agreement to limit its rights with regard to the future use of the property on which the compressor station will be located. While agreeing with the Town not to establish a conservation easement on the project site, Millennium states it has committed to avoiding development on specific portions of the site and to allowing farming to continue in certain other areas. We find that Millennium’s filed update fulfills Environmental Condition 18 and balances the desires of various parties to the proceeding that development of the property be limited, but without establishment of a formal conservation easement.

61. Ms. Malick requests that the Commission clarify its general requirement in Environmental Condition 15 that Millennium should make “all reasonable efforts” to achieve its predicted noise levels. Mr. Mojica contends that the July 17 Order’s conclusion that there would potentially be a 1.7 dB incremental increase in noise levels significantly underestimates the noise that will result from the Minisink Compressor Station, based on current experience at Iroquois Pipeline Company’s (Iroquois) Brookfield Compressor Station, a similar facility in Connecticut. Mr. Mojica asserts that there is an “echo” aspect to noise that the July 17 Order does not address. He states the Wagoner Alternative, located in a more remote location for compression, would avoid Minisink’s noise issue which, he asserts, Environmental Condition 15 will be unable to adequately mitigate.

62. The Minisink Compressor Project will generally only run during the winter months and would not increase ambient noise levels during most of the year. Environmental Condition 15 requires Millennium to monitor, report to the Commission,

and remediate noise levels greater than predicted noise levels. The Commission is aware that the Brookfield Compressor Station has had noise issues which Iroquois has endeavored to address, but there is no demonstrated reason why the same noise issues should exist at the Minisink location. Also, if there are vibration issues at any nearby noise sensitive area at the Minisink location, Environmental Condition 16 requires Millennium to implement/install vibration control measures. Mr. Mojica is concerned about the possibility of an echo effect. Should an echo effect develop during operation of the compressor station, residents should notify Commission staff which will monitor the operation of the facility.

63. Environmental Condition 17 requires Millennium to file a notification plan for blowdown events with procedures developed “in consultation with” with the Town of Minisink and nearby residents. Millennium’s notification plan must give residents at least two days’ notice of a planned event. Ms. Malick requests that the Commission explain the process for “consulting” with the Town of Minisink over blowdown events, if there is a disagreement about a planned blowdown or determining who bears any costs for consulting with landowners on blowdown events. Blowdown events are part of normal system maintenance, which the pipeline must have the discretion to arrange in advance. Residents do not have the option to veto the planned event which could jeopardize station maintenance. The filed notification plan should include an agreement on the appropriate method of advance notification, and Millennium should bear the costs associated with notifying residents.

64. Ms. Preuss, a resident living near the Ramapo Meter Station, argues that the current means by which Millennium accesses its Ramapo Meter Station is inconsistent with provisions of the U.S. Department of Transportation (DOT) safety regulations and the Pipeline Safety Act⁸⁷ because the route is subject to flooding, includes transit over the unrated Sky Meadow bridge, and access to the route is constrained by her private driveway. She asks the Commission to require the pipeline operators at Ramapo⁸⁸ to provide an alternative, continuous flood-safe access road for maintenance employees and emergency responders. Ms. Preuss asserts that Route 202 could serve as such an alternate access road with the construction of an access bridge.

⁸⁷ 49 U.S.C. §§ 60,101-60,137 (2006).

⁸⁸ Ms. Preuss states that Millennium and Algonquin Gas Transmission, LLC operate the Ramapo Station, which serves as an interconnect point for six pipelines.

65. Ms. Preuss raised the same concerns in *Texas Eastern Transmission, LP*.⁸⁹ There, Ms. Preuss wanted the Commission to make permanent a temporary access route and temporary bridge which were to be used for construction at the Ramapo station. The Commission rejected this request on the grounds that permitting the bridge to remain in place would be inconsistent with the Commission's determination requiring post-construction restoration of the river banks. The Commission noted that the temporary access route comes within 100 feet of another landowner's house and concluded that making the temporary route permanent would not eliminate the adverse impacts imposed by the access road, but merely shift them from one residence to another. The Commission also observed that its certificate conditions require applicants to adhere to DOT's safety standards and that the pipeline will be compelled to establish alternate access if the road now in use does not comply with those standards.

C. Other Arguments

66. MREPS asserts that the July 17 Order violated the Administrative Procedure Act (APA), contending that the Commission failed to respond to the Commissioners' dissenting opinions concerning the benefits of the Wagoner Alternative, i.e., increased reliability, avoidance of the loss of farmland, reduced air emissions, and reduced fuel costs.⁹⁰ The July 17 Order did not specifically address the arguments raised in the dissents; however, the order and EA did compare at length Millennium's proposal with the Wagoner Alternative. The EA recognized that a smaller Wagoner compressor would result in lower emissions, but found that either station would be a minor source with regards to the Title V Operating Permit Program and Prevention of Significant Deterioration regulations.⁹¹ We also acknowledge that a smaller compressor station will likely consume less fuel; the dissent approximated an annual cost savings related to fuel of \$1,628,787.⁹² However, the Wagoner Alternative would still involve significantly greater capital investment and we note the customers of Millennium have not commented

⁸⁹ 141 FERC ¶ 61,043 at PP 29-32.

⁹⁰ MREPS cites *American Gas Association v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) (“[W]hile [the Commission] is not required to agree with arguments raised by a dissenting Commissioner..., it must, at a minimum, acknowledge and consider them.”).

⁹¹ EA at 52.

⁹² These calculations appear to be based on the compressors running at a 100 percent load factor. However, as noted, the Minisink Compressor Station will be utilized primarily in the winter and thus, at least in the near term, is not expected to operate at 100 percent load factor.

negatively about the associated cost of the proposed compressor station. In addition, we still find that the Wagoner Alternative does not provide a significant environmental advantage over the proposed project. While it is asserted that “none of the 58 landowners directly impacted by the [Wagoner Alternative] opposed it,” the fact is that the alternative was not before the Commission as a proposed project to be approved or disapproved. Rather, it was being reviewed as an environmental alternative, giving context to the Commission’s consideration of the Minisink Compressor Project which was before it for decision. Further, as discussed above, the Commission has previously found that operation of the Millennium Pipeline with the current Neversink Segment in place is not an inherently unreasonable alternative.⁹³ The Minisink Compressor will only disturb about 10.6 acres within a 73.4-acre site. We have also conditioned our authorization to require the planting of trees for visual screening purposes. However, much of the remainder of the parcel could still be made available for farming, thus limiting the permanent loss of agricultural land.

67. Construction of the Wagoner Alternative would impact more than 10 times as much land as the Minisink Compressor Project; require the clearance of 47.61 acres of trees (as opposed to 0.4 acres for the Minisink project and the use of 22 acres of cleared agricultural land (compared with 9.8 acres for Minisink); would directly impact some 58 properties with residences (Minisink would affect none); would cross eleven wetlands and twelve waterbodies (as opposed to none for Minisink); and could impact five special species, instead of one.⁹⁴ In light of these facts, we think that the selection of the Minisink Alternative as opposed to the Wagoner Alternative is eminently reasonable.

68. Ms. Malick asserts that the July 17 Order erred in concluding that the NGA preempted local zoning ordinances that “prohibit,” and thus do not “regulate,” interstate natural gas facilities. It is well established law that the NGA preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities or the siting of those facilities.⁹⁵ State or local agencies may not prohibit or unreasonably

⁹³ Our authorization of the proposed Minisink Compressor Project and finding that the Wagoner Alternative is not an environmentally preferable alternative to the proposed project should not be interpreted as a prejudgment of any future proposal to upgrade the Neversink Segment. Such a proposal, if made, will be judged on the basis of the record in that proceeding.

⁹⁴ See July 17 Order, 140 FERC ¶ 61,045 at P 27.

⁹⁵ *National Fuel Gas Supply Corp. v. Pub. Serv. Comm’n of New York*, 894 F.2d 571 (2nd Cir. 1990).

delay the construction of facilities approved by the Commission.⁹⁶ Preemption applies to the Town of Minisink's local zoning ordinances that prohibit natural gas facilities.

69. MREPS asserts that the July 17 Order failed to make the statutory finding under NGA section 7(e) that Millennium is "able and willing" to carry out the activities authorized in the certificate. Millennium filed an application to construct and operate the Minisink Compressor Project and accepted the certificate that the Commission issued in this proceeding. Further, notwithstanding the fact that Millennium was reportedly fined by the New York Department of Environmental Conservation for various alleged violations in conjunction with the construction of its pipeline, there is nothing in the record objectively calling into question the ability of Millennium, an established interstate natural gas pipeline, to perform the activities authorized. Therefore, we hereby find that Millennium is able and willing to perform the activities authorized by the certificate.

70. MREPS and some of its members contend that the Commission's CEII procedures denied MREPS and individual members their due process right to timely access information.⁹⁷ They assert that this information would have allowed them to make meaningful comments on their suggestion that the Minisink Compressor Station will require replacement of the Neversink Segment. Ms. Malick asserts that she did not receive responses to her CEII requests before the due date for requests for rehearing. MREPS acknowledges, however, that its engineers received CEII information (Exhibit G materials⁹⁸ and some hydraulic studies) under a non-disclosure agreement a week before the requests for rehearing were due and that Mr. Mojica and Ms. Gartenberg received determinations regarding their requests for CEII information a few days before the

⁹⁶ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

⁹⁷ These procedures are set out in Commission regulations. *See* 18 C.F.R. § 388.113 (2012).

⁹⁸ Exhibits G and G-II consist of hydraulic flow diagrams and flow diagram data.

deadline for filing requests for rehearing.⁹⁹ Other MREPS members requested and timely received access to hydraulic information many months earlier.¹⁰⁰

71. The Commission sees no unfairness or denial of due process of law in the processing of the landowners' requests for information. MREPS and its members had ample opportunity to seek access to CEII information well in advance of the rehearing deadline. Once a requesting landowner executed a non-disclosure agreement and stated a particular need for the information, staff or Millennium made the information available to the requesting landowner.¹⁰¹ Specifically, MREPS members received various CEII material (Exhibit G) under non-disclosure agreements through the CEII request process before the due date for filing requests for rehearing.¹⁰² Millennium made this information available to MREPS' counsel in June 2012 and to its engineer two weeks before the time

⁹⁹ Both Mr. Mojica and Ms. Gartenberg received determination letters about a month after filing a request. On July 5, 2012, Mr. Mojica filed a request for CEII information, some of which the Commission granted by letters dated August 3 and 15, 2012. On July 2, 2012, the Commission received Ms. Gartenberg's request for CEII information which the Commission granted, in part, on August 3 and 15, 2012.

¹⁰⁰ In January 2012, the Commission released information to an attorney associated with Ms. Laurie Arias, an MREPS member. Ms. Arias and Mr. John Odland received certain hydraulic information in advance of the August 16, 2012 due date for requests for rehearing.

¹⁰¹ Compare *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), relied on by MREPS, in which an agency denied access to available information that the applicable statute required to be publically filed. *Gerber* is not helpful to MREPS' argument as the Commission has not prevented access to information required to be made public.

¹⁰² In processing the requests for CEII, Commission staff adhered to CEII request regulations and required each requesting landowner to execute a non-disclosure agreement. Final Rule, *Critical Energy Infrastructure Information*, Order No. 683, FERC Stats. and Regs. ¶ 31,228 (2006). ("A CEII request will not be accepted until the Commission receives an executed [non-disclosure agreement].") Further, when the Commission first adopted the CEII request rules, the Commission chose not to clear entire entities, deciding instead that each individual requester must execute a non-disclosure agreement. Final Rule, *Critical Energy Infrastructure Information*, Order No. 649, FERC Stats. and Regs. ¶ 31,167 (2004).

for filing requests for rehearing.¹⁰³ While Ms. Malick did not receive the Commission's second response to her CEII request before the due date for filing requests for rehearing, other members of MREPS, of which she is a part, did receive responses in time to allow for an opportunity comment on rehearing. They elected not to comment on or dispute Millennium's flow diagram analysis included in the material designated as CEII and made available to MREPS' engineer.

72. The Commission based its July 17 Order on the record in this proceeding. The Commission appropriately withheld from public release privileged and confidential, proprietary CEII information that could cause competitive harm to Millennium (Millennium's system flow models and its "working files" about hydraulic data) and its contractors (compressor manufacturer's spreadsheets and programs underlying Exhibit G).¹⁰⁴ The Commission did release other CEII information under non-disclosure agreements. Because of the release of Exhibit G information under non-disclosure agreements and ample public information in the record, including engineering-related data responses, the July 17 Order concluded that the proprietary documents were not necessary for the landowners' meaningful participation in this proceeding.¹⁰⁵

73. MREPS and Mr. Mojica maintain that NEPA requires disclosure of staff documents, studies, and analyses encompassing staff's "independent verification" in the EA of Millennium's hydraulic flow analysis for the proposed and alternative sites, mentioned in the July 17 Order.¹⁰⁶ Mr. Mojica and the other MREPS members never indicate what specific arguments they would have made if they had the requested material, beyond vaguely stating that the material might show that Millennium will need to upgrade the Neversink Segment in order to provide project service. The July 17 Order

¹⁰³ On July 16, 2012, MREPS' engineer filed his CEII request with the Commission. After MREPS' engineer executed Millennium's non-disclosure agreement, Millennium provided the protected material directly to the engineer. On August 9, 2012, the engineer withdrew the CEII request and stated "we should be fine on these data." See Engineer Michel Boufadel's e-mail to Commission attorney Christopher MacFarlane, dated August 9, 2012:12:06 p.m.

¹⁰⁴ FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." See 5 U.S.C. § 552(b)(4); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁰⁵ July 17 Order, 140 FERC ¶ 61,045 at P 87, n.56.

¹⁰⁶ *Id.* PP 74 and 87, n.56.

found that replacement of the Neversink Segment is not needed for project service.¹⁰⁷ This finding is based solely on the evidence filed in the record of this proceeding.¹⁰⁸ As is discussed below, Rehearing Applicants make no arguments that have persuaded the Commission to change this finding. On November 20, 2012, the Director of the Office of External Affairs issued Mr. Mojica a determination under FOIA exempting certain staff information from mandatory disclosure pursuant to the deliberative process privilege of FOIA Exemption 5.¹⁰⁹ On November 8, 2012, the Director of External Affairs issued Mr. Odland, another member of MREPS, a separate determination under the FOIA¹¹⁰ withholding various internal and pre-decisional drafts, reports and documents under the deliberative process privilege.¹¹¹ The Rehearing Applicants provide no justification, under NEPA or other authority, for the mandatory disclosure of staff's internal,

¹⁰⁷ *Id.* P 65.

¹⁰⁸ *See, e.g.*, Exhibit G to Millennium's July 14, 2011 application and Millennium's October 17, October 24, and November 4, 2011 Data Responses.

¹⁰⁹ FOIA Exemption 5 exempts from disclosure information protected from release under the deliberative process privilege including "intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

¹¹⁰ Considering the volume and nature of the information requested under FOIA, staff followed the established practice of providing determinations on a rolling basis. *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845, 2008 U.S. Dist. LEXIS 107177, *47 (E.D. Cal. June 20, 2008) and *Hinton v. Fed. Bureau of Investigation*, 527 F. Supp. 223, 225 (E.D. Penn. 1981).

¹¹¹ While Commission staff in this case reviewed and analyzed all information filed by project sponsors and other participants to the proceeding to assess its accuracy, beyond production of environmental documents in compliance with NEPA, Commission advisory staff did not produce independent "evidence" to be used by the Commission as a basis for its decisions.

predecisional documents which is exactly what the deliberative process privilege is intended to protect from public release.¹¹²

74. Mr. Mojica claims that the Commission engaged in an *ex parte* communication with Millennium in a meeting held on October 11, 2011. The October 11 meeting between staff and Millennium was limited to a discussion of whether Millennium should use the pre-filing process for its discrete Hancock Compressor Station project. This does not constitute an *ex parte* communication about the Minisink Compressor Station project.

D. Mr. Kuprewicz's Report

75. As noted above, on November 30, 2012, MREPS filed a motion to reopen and supplement the record with an analysis by Mr. Richard Kuprewicz. Mr. Kuprewicz asserts that based upon his analysis of information filed by Millennium, the Minisink Compressor Project, as approved, will result in “extremely high actual gas velocities” of approximately 60 feet per second (ft/s)¹¹³ on the 24-inch diameter Neversink Segment of Millennium’s pipeline system, which he describes as a bottleneck on Millennium’s system. Mr. Kuprewicz claims these velocities will exceed “prudent design standards” and safety margins “that are intended to avoid gas transmission pipeline rupture,” and thus raises questions about the adequacy or completeness of any previous hydraulic study used to approve the Minisink Compressor Project.

76. Mr. Kuprewicz’s analysis suffers from several flaws. First, although the gas velocities he hypothesizes are higher than those on most of the remainder of the Millennium pipeline system, Mr. Kuprewicz provides no support, such as citations to industry standards, regulations, or published papers, for his assertion that 60 ft/s gas

¹¹² See *Missouri ex rel Shorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998) (protecting intra-agency material regarding a draft EIS and finding that NEPA disclosures are to be in accord with FOIA, which includes Exemption 5); *Nat’l Wildlife Fed’n v. United States Forest Service*, 861 F.2d 1114, 1117 (9th Cir. 1988) (Exemption 5 protects the “confidentiality of the give-and-take ... [and] encourages frank and open discussions of ideas, and, hence, improves the decisionmaking processing”) and *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (finding draft document properly withheld).

¹¹³ As described in his analysis, Mr. Kuprewicz “developed a simple milepost diagram showing major gas additions and takeoffs along the Millennium Pipeline” in order to derive a gas velocity of 60 ft/s. “Summary of Accufacts Exhibits (CEII)” Exhibit 1 – “Millennium Pipeline Major Connection Approximate Milepost from Corning Compressor Station.”

velocities are inconsistent with prudent design standards and safety margins.¹¹⁴ Also, it appears that Mr. Kuprewicz assumed that gas velocities would be constant throughout the year – he did not evaluate pipeline operations under different scenarios that will occur, such as summer and winter operations both with and without backhaul volumes. Further, his analysis was based on the unsupported assumption that during periods of high demand, customers will choose to flow all of their contractual gas volumes through the Neversink Segment and the Minisink Compressor Station.¹¹⁵

77. In addition, while we agree with Mr. Kuprewicz that the Neversink Segment could act as a bottleneck for future expansions to move gas eastward on Millennium’s system, this possibility does not change our conclusion that approval of the Minisink Project, with no alterations being made to the Neversink Segment, will allow the transportation of the volumes associated with the Minisink Compressor Project while meeting all of Millennium’s existing contractual obligations and design assumptions.¹¹⁶ Accordingly, potential concerns about possible future expansions are not relevant here.

78. It is possible that, as Mr. Kuprewicz asserts, Millennium’s proposed Hancock Compressor Project may introduce additional gas volumes through the Neversink Segment, possibly increasing gas velocities (depending on shipper nominations). It is

¹¹⁴ Mr. Kuprewicz admits, in the CEII portion of his report, that the actual gas velocities in the 24-inch pipe at flow conditions are not “illegal.” *See* Summary of Accufacts Exhibits (CEII) Exhibit 2 – “24-inch Existing Neversink Segment with Proposed Minisink Compressor Station.” In other words, the velocities he postulates are not inconsistent with any law, regulation, or order. Given this, there is no reason to accept Mr. Kuprewicz’s assertion that the Neversink Segment must be removed from service.

¹¹⁵ This situation would only occur when shipper nominations minimize gas volumes delivered to western markets, via backhaul contracts, and simultaneously maximize deliveries to eastern markets. In fact, on most days the gas velocities through the Neversink Segment will be below the 60 ft/s gas velocity calculated by Mr. Kuprewicz because gas flow through the Neversink Segment will be less than he assumes.

¹¹⁶ Mr. Kuprewicz asserts that neither the proposed Minisink Compressor Project nor the identified Wagoner Alternatives are appropriate for meeting the project volumes. As discussed above, he provides no support for his contention that gas velocity – the only operational issue he raises – will prevent the Millennium system from operating in a safe, effective manner.

also possible that Mr. Kuprewicz is correct that replacement of the Neversink Segment would afford greater design flexibility for the proposed Hancock compressor station. However, this proceeding deals solely with the Minisink Compressor Project, which we have concluded can be built and operated safely. Any concerns about the impact of the Hancock Project on the Neversink Segment will have to be evaluated and dealt with in the proceeding regarding that project.¹¹⁷

79. Finally, we do not agree with Mr. Kuprewicz's assertion that replacement of the Neversink Segment with a 30-inch-diameter pipeline would permit the Hancock Compressor Project to meet Millennium's capacity needs for the Minisink Compressor Project without the construction of compression at either the Minisink or the Wagoner locations. Mr. Kuprewicz has provided no support for his assertion. Commission staff, on the contrary, has confirmed that additional compression, albeit in a reduced amount, would still be required on the eastern portion of Millennium's pipeline system even after the installation of the Hancock Compressor Station.

80. In sum, we conclude that Mr. Kuprewicz's study provides no basis for reversing our approval of the Minisink Project.

E. Requests for Stay

81. In his request for August 15, 2012 request for rehearing, Mr. Mojica also requested a stay of the July 17 Order pending the issuance of an order on rehearing and the completion of judicial review.¹¹⁸ On August 24, 2012, Millennium filed a request to commence construction. On August 28, 2012, MREPS filed a motion for stay of construction. On September 18, 2012, the Commission issued Millennium a notice to proceed with construction. On September 19, 2012, MREPS renewed its motion for a stay¹¹⁹ and on October 9, 2012, the Commission issued an order denying MREPS' requests for stay in *Millennium Pipeline Company, L.L.C.*¹²⁰ MREPS filed a motion for

¹¹⁷ For example, the Commission might conclude based on the record developed in the Hancock Project proceeding that that proposed project will not result in unsafe conditions. Even if we found to the contrary, that finding would be germane to our resolution of that proceeding, but is not relevant here.

¹¹⁸ Mr. Mojica's Rehearing Request at 7.

¹¹⁹ On October 1, 2012, New York State Senator Tony Avella filed comments requesting a stay of construction.

¹²⁰ 141 FERC ¶ 61,022 (2012).

an emergency stay before the United States Court of Appeals for the District of Columbia, which the court denied in a per curiam order on October 11, 2012. On November 8, 2012, MREPS filed a request for rehearing of the Commission's October 9, 2012 order.

82. Mr. Mojica's August 15, 2012 request for stay raises the same issues which the Commission considered in its October 9, 2012 order and MREPS November 8, 2012 request for rehearing adds nothing new. These issues were considered and decided in the Court of Appeals' order filed on October 11, 2012. The court's order acknowledged MREPS' brief which the court construed as a request for emergency relief under the All Writs Act and Millennium's response. The court dissolved its administrative stay of Millennium's construction activities that was effective on October 5, 2012. Citing applicable standards for granting a stay request in *Reynolds Metals Co. v. FERC*¹²¹ and *Virginia Petroleum Jobbers Ass'n v. FPC*,¹²² the court stated that MREPS had not demonstrated the irreparable injury or likelihood of success on the merits requisite for the preliminary relief sought and had not demonstrated a "clear and indisputable" right to the writ. We concur with the court's ruling. There is no need to address these requests for stay and/or rehearing any further.

83. On November 30, 2012, concurrent with its request to reopen and supplement the record, MREPS filed another request that the Commission stay construction of the Minisink Compressor Project pending rehearing and judicial review. As discussed above, we continue to find that construction and operation of the Minisink Compressor Project is required by the public convenience and necessity. For the same reasons stated in our October 9, 2012 order, we continue to find 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. Accordingly, the November 8, 2012 request for rehearing and the November 30, 2012 motion for stay are denied.

The Commission orders:

(A) The requests for rehearing and stay of the July 17 Order are denied, as discussed in the body of this order.

(B) The MREPS request for rehearing in Docket No. CP11-515-002 of the Commission's order issued October 9, 2012 denying its motions for stay of construction and its November 30, 2012 motion for stay are denied.

¹²¹ 777 F.2d 760, 762 (D.C. Cir. 1985).

¹²² 259 F.2d 921, 925 (D.C. Cir. 1958).

(C) The Requesting Parties November 30, 2012 motion to reopen and supplement the record is denied.

By the Commission. Chairman Wellinghoff and Commissioner LaFleur are dissenting with a joint separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Millennium Pipeline Company, L.L.C.

Docket Nos. CP11-515-001
CP11-515-002

(Issued December 7, 2012)

WELLINGHOFF, Chairman, and LaFLEUR, Commissioner, *dissenting*:

We dissent from today's rehearing order. The majority acknowledges that NEPA requires an agency to analyze alternatives to the proposed action to provide context for the agency's assessment of the impacts of its actions.¹²³ By way of example, the majority concedes that if a proposed project has even moderate environmental impacts, the Commission can deny authorization if its environmental analysis reveals an alternative that could meet the project objectives with no adverse environmental impacts.¹²⁴

For the reasons fully set forth in our respective dissents on the underlying order, we continue to believe that, even after mitigation, the Minisink project will have significant adverse environmental consequences.¹²⁵ Further, we believe that the Wagoner Alternative would create significantly fewer and less enduring environmental impacts and is therefore an environmentally preferable alternative. Although the majority states that neither NEPA nor Commission policy and precedent requires the Commission to deny authorization of an environmentally acceptable project in the face of an environmentally preferable alternative,¹²⁶ given the facts presented in this case, we believe the Commission should have exercised its discretion to deny Millennium's application.

¹²³ *Millennium Pipeline Company, L.L.C.*, 141 FERC ¶ 61,198, at P 29 (2012).

¹²⁴ *Id.*

¹²⁵ *Millennium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045, at 61,219 (2012) (Wellinghoff, Chairman, dissenting); *Millennium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045, at 61,220 (2012) (LaFleur, Comm'r, dissenting).

¹²⁶ *Millennium Pipeline Company, L.L.C.*, 141 FERC ¶ 61,198 at P 28, 46 (emphasis added).

Accordingly, we respectfully dissent.

Cheryl A. LaFleur
Commissioner

Jon Wellinghoff
Chairman