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Admitted in NY, MD, DC

November 30, 2012

Kimberly Bose
Secretary,
Federal Energy Regulatory Commission
888 First Street N.E.
Washington D.C. 20037

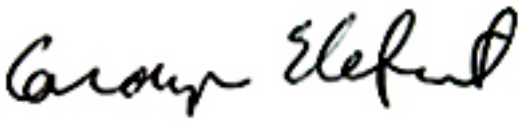
Re: Minisink Compressor Station Docket No. CP11-515
Millennium Pipeline
Motion to Reopen – PUBLIC VERSION

Dear Secretary Bose,

Attached for filing, please find the PUBLIC version of the *Motion to Reopen to Supplement the Record With Expert Report Based on Previously Undisclosed CEII and FOIA Information* hereby filed on behalf of the Minisink Residents for Environmental Preservation and Safety. The privileged version, which contains several attachments that incorporate CEII information is being filed under separate cover pursuant to the Commission's regulations governing filing of CEII information.

Please let me know if you have any questions regarding this matter. I may be reached at 202-297-6100.

Respectfully submitted,



Carolyn Elefant

BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

JOINT MOTION OF MINISINK RESIDENTS FOR ENVIRONMENTAL PRESERVATION AND SAFETY (MREPS) AND MOJICA, GARTENBERG AND MALICK (INDIVIDUALLY) TO REOPEN AND SUPPLEMENT THE RECORD WITH (1) EXPERT ANALYSIS OF PREVIOUSLY UNDISCLOSED CEII AND FOIA RESPONSES AND (2) MILLENNIUM'S UPDATED PLANS REGARDING CREATION OF A CONSERVATION EASEMENT

Pursuant to Rule 716 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715, the Minisink Residents for Environmental Preservation and Safety (MREPS), as a group, and Michael Mojica, Karen Gartenberg and Pramilla Malick, individually,[1] all intervenors who have filed timely rehearing requests of the certificate issued for the Minisink Compressor Station[2] file this joint motion to reopen and supplement the record with an expert report prepared by Richard Kuprewicz, analyzing previously undisclosed Critical Energy Infrastructure Information (CEII) and Freedom of Information Act (FOIA) responses that collectively were not available until November 20, 2012.[3] The Kuprewicz report shows that the assumptions underlying the

[1] Mr. Mojica, Ms. Gartenberg and Ms. Malick are all MREPS members. However, in addition to joining in the MREPS rehearing request, each filed a separate rehearing request raising additional challenges to the Certificate Order.

[2] *Order Issuing Certificate*, Millennium Pipeline, 140 FERC ¶61,045 (July 17, 2012) (Certificate Order).

[3] The CEII information was made available to MREPS counsel, an expert (who lacked the expertise to analyze the data) and two MREPS members a scant week before the rehearing deadline, while Mr. Mojica, Ms. Gartenberg and Ms. Malick did not gain access to CEII materials until late August, after the deadline for filing rehearing had closed. Moreover, the Commission's final responses to FOIA requests filed by MREPS members John Odland and Michael Mojica, seeking Millennium's hydraulic studies and

order issuing a certificate in the above captioned proceeding are not supported by substantial evidence and therefore, are not entitled to deference by a reviewing court and are arbitrary and capricious. Based on the Kuprewicz report (along with the myriad of arguments already raised on rehearing), the Commission must vacate the Certificate Order. Along with this motion, MREPS has filed a separate request for a stay of this proceeding to allow the Commission sufficient opportunity to consider this new evidence.

Good cause exists for supplementing the record. MREPS could not obtain the underlying data that Mr. Kuprewicz ultimately analyzed despite persistent efforts and multiple requests over an eight-month period. More importantly, Mr. Kuprewicz's analysis — which concludes that the Minisink Compressor Station, like the Wagoner Alternative, will necessitate an upgrade to the Neversink Segment and is "a very poor" approach for Millennium to meet its Ramapo deliveries because it increases gas velocities to very high levels above prudent design standards — "will compel or persuade a contrary result" to the result reached in the Commission's initial Certificate Order.[4] As such, the Commission has no choice but to reopen the record and consider Mr. Kuprewicz's report.

The Commission must reopen the record for a second, independent reason. Since the issuance of the Certificate Order, Millennium has suggested that the certificate does not in fact require it to create a legally enforceable conservation easement to

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the Commission's "independent verification" thereof, were not issued until November 8 and November 20, 2012 respectively. *See* FOIA No. 12-33 (Final Rolling Response to John Odland) and FOIA No. 12-66 (Final Response to Michael Mojica. Among other things, the final FOIA response to Mr. Mojica denied access to the Commission's "independent verification" which MREPS had wanted so that its expert could review and evaluate.

[4] *Friends of the River v. FERC*, 720 F.2d 93, 98 n. 6 (D.C. Cir. 1983)(establishing standard for reopening the record).

mitigate for some of the compressor station's adverse impacts. Given Millennium's change of heart regarding the conservation easement — a requirement that Millennium did not challenge on rehearing—the majority must now reconsider its original finding of no significant impact (FONSI) which rests on the expectation that a conservation easement would be established.

The 30-day statutory deadline for rehearing under the Natural Gas Act does not bar MREPS from supplementing the record even though the time for filing a rehearing request has passed. The CEII information reviewed by Mr. Kuprewicz and the FOIA materials requested were not available prior to the deadline for rehearing and therefore, an expert report could not have been prepared. *See supra* note 2. In any event, the Commission has ample discretion to (1) treat this motion to supplement as a request for reconsideration or to (2) modify the order on its own motion.[5]

Having faithfully adhered to the Commission's rules since the inception of this proceeding, MREPS recognizes that reopening the record after a decision has issued represents extraordinary relief. We emphasizes that we do not make this request lightly or for purposes of delay (which after all, harms MREPS more than Millennium, since construction is pressing on, full steam ahead). Nevertheless, we anticipate that Millennium will characterize this motion as obstructionist or blame MREPS for not having been more diligent — an accusation belied by the extensive record with thousands of pages of comments, challenges and multiple demands for CEII and FOIA information. MREPS urges the Commission to distance itself from Millennium's efforts

[5] *Tennessee Gas v. FERC*, 871 F.2d 1099, 1107 n.12 (D.C. Cir. 1989)(observing that Commission "frequently treats untimely petitions for rehearing as reconsideration motions" and has authority under Section 19 of the NGA to sua sponte modify orders up until petition for judicial review is filed).

to cow the Commission into affirming the certificate to spare Millennium the cost of reversing construction and loss of its open season customers if the certificate is vacated on rehearing and the compressor station does not go into service.[6] Instead, the Commission must consider all relevant facts and arrive at a decision consistent with the public interest.

I. FACTUAL BACKGROUND

MREPS is an unincorporated association comprised of ten residents of Minisink, New York who are directly and adversely impacted by Millennium Pipeline's Minisink Compressor Station. Just a stone's throw from dozens of family residences, many with young children, the compressor station is currently under construction, having barely eked out a certificate by a slim 3-2 Commission majority. *Order Issuing Certificate*, *Millennium Pipeline*, 140 FERC ¶61,048 (July 17, 2012) (Certificate Order). The factual history of this lengthy proceeding has been described in multiple pleadings filed by MREPS[7] and, except for salient facts relevant to this Motion to Reopen, will not be repeated here.

[6] MREPS reminds the Commission that in its order denying a stay, it asserted that it has authority to require Millennium to remove the compressor station from the site in the event the certificate is reversed. Although MREPS is filing a separate renewal of its stay request to enable the Commission to consider the new evidence submitted herein, MREPS expects that if the stay request is denied but the certificate is ultimately reversed, that the Commission will order Millennium to remove the compressor station and remediate the site.

[7] *See MREPS Motion to Intervene, Protest and Comments on EA*, Accession No. 20120416-5292 (April 16, 2012), MREPS Petition for Rehearing, Accession No. 20120815-5160 (August 15, 2012), MREPS Petition for a Stay, Accession No. 20120828-5021 (August 28, 2012).

A. Millennium's application and environmental review of Minisink versus Wagoner options

On July 14, 2011, Millennium filed an application for a certificate of public convenience and necessity to construct and operate the 12,600 horsepower Minisink Compressor station at a site owned by Millennium in Minisink, New York. As a result of intense participation by Minisink residents, a viable project alternative — the Wagoner Alternative, comprised of a 5,100 horsepower compressor station that would be located on a remote site that previously housed a temporary station — emerged. Millennium objected, asserting that the Wagoner Alternative would necessitate a costly replacement of the 7.2-mile Neversink pipeline segment, whereas the Minisink Compressor Station would not.

On February 29, 2012, the Commission issued an environmental assessment (EA) for the project. The EA concluded that although there are certain advantages to the Wagoner Alternative, primarily, remote location a greater distance from noise sensitive areas and residences, the greater environmental issues and landowner impacts of replacing Neversink outweigh those advantages. *See Certificate Order*, 140 FERC ¶61,045, ¶ 27 (discussing EA findings). The EA also found that with the recommended conditions, including establishment of a conservation easement, the Minisink Compressor Station would have no significant environmental impacts.

B. MREPS and residents' first efforts to obtain CEII information

By letter dated March 8, 2012, a week after the issuance of the EA, MREPS member John Odland filed a request under the Commission's CEII rules and Freedom of Information Act (FOIA) seeking CEII information submitted in support of Millennium's application and other relevant communications and filings. MREPS member Laurie Arias filed a CEII request in November 2011, four months earlier,

without response.[8] By April 16, 2012, the CEII information still had not been produced, leaving MREPS and its members no choice but to file comments on the EA without the benefit of reviewing all of the underlying data. On May 9, 2012, with the clock ticking down towards a Commission decision on Millennium's application, undersigned counsel wrote Commission staff, reiterating the request for the CEII and FOIA materials and complaining of due process violations resulting from lack of access to record evidence.

Finally, on June 4, 2012, the Commission issued notice of intent to release CEII information to Mr. Odland. Even though Mr. Odland requested CEII materials on behalf of MREPS, Millennium would not allow the other MREPS members to access the information by executing a non-disclosure agreement (NDA) (although Millennium did grant undersigned counsel permission to view the materials immediately after signing an NDA). Those MREPS members wishing to review the CEII were all forced to file their own separate requests at the Commission. It was not until two months later — August 3, 2012, that the Commission approved the remaining CEII requests filed by MREPS members.

C. The Commission's Certificate Order

Meanwhile, on July 17, 2012, the Commission, by a 3-2 decision, approved the Minisink Compressor Station. As relevant to this Motion to Reopen, the Certificate Order:

- Adopted the EA's conclusions that the Minisink Compressor Station was environmentally preferable to the Wagoner Alternative, which would necessitate replacement of the Neversink pipeline segment and have "greater environmental issues and landowner impacts." *Certificate Order*, ¶ 27;

[8] Commission staff claims that Ms. Arias was provided with a non-disclosure agreement to complete in order to receive the information, but Ms. Arias never received it.

- Directed Millennium to develop a conservation easement for the unused portion of the compressor station site, which "would provide important environmental benefits, such as preserving existing vegetation and maintain a sufficient buffer for noise and visual impacts. *Certificate Order*, ¶ 34;

- Ruled that MREPS' inability to obtain CEII and FOIA information, including engineering and hydraulic studies *prior* to commenting on EA "did not negatively impact MREPS because the Commission independently verified the engineering requirement of each alternative studied." *Certificate Order* at ¶ 87.

D. MREPS' rehearing request and second round of FOIA

On August 10, 2012, Michael Mojica filed a FOIA request seeking various documents, including the data relied on and related to the "independent verification" referenced by the Commission.[9] On November 3 and 20, 2012 respectively, the Commission issued a Final FOIA response to Mr. Odland's FOIA requests (first filed in March 2012) and Mr. Mojica's August 2012 request, partially granting the requests.[10]

Even though Mr. Mojica's August 2012 FOIA requests and Mr. Odland's March 2012 requests were outstanding, and remaining CEII information was released on August 3, MREPS had no choice but to move forward with rehearing requests on August 15, 2012 to avoid waiver under the Natural Gas Act's 30-day statutory deadline. MREPS and individual members Michael Mojica, Karen Gartenberg and Pramilla Malick, jointly and individually, sought timely rehearing of the Commission's order.

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[9] *Certificate Order*, ¶ 68. In discussing the concerns raised regarding the hydraulic feasibility study, the Certificate Order states that the Commission staff "ndependently evaluated the hydraulic feasibility of the Minisink Compressor Station and completed an engineering analysis of Millennium's pipeline system to conclude that Millennium's pipeline system."

[10] With regard to the hydraulic studies, the Commission determined that this information constituted CEII and had been released in response to earlier CEII requests. With regard to the data underlying the "independent verification," the Commission determined that some was CEII, some was included in the original application and some constituted pre-decisional, deliberative information exempt from release under FOIA Exemption 5. Both Mr. Odland and Mr. Mojica intend to appeal the FOIA determinations.

As relevant here, the rehearing requests challenged the Commission's conclusion that Minisink Compressor Station was environmentally preferable, asserting that Millennium's *own* PowerPoint presentations showed that Millennium intended to replace the Neversink pipeline in 2014. Because a Neversink replacement was inevitable in either scenario, Commission should not have segmented review and instead should have compared a Minisink/Neversink combination to a Wagoner/Neversink combination. Had the Commission done so, the Wagoner Alternative would have emerged as the superior choice.[11] MREPS also argued that the Commission's independent verification of Millennium's study did not cure underlying due process violations resulting from lack of access to CEII and FOIA materials.[12]

E. Post-certificate compliance issues related to conservation easement

On August 24, 2012, Millennium sought approval to commence construction, asserting that it had complied with all pre-construction conditions in the certificate. Four days later, MREPS moved for a stay of construction and also challenged Millennium's compliance claims, arguing that Millennium's mere promise to refrain from developing 42.5 acres of the project site did not satisfy the certificate's condition to establish a conservation easement. On September 18, 2012, without addressing any of MREPS's arguments, the Commission Office of Energy Projects gave Millennium permission to commence construction.

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[11] MREPS and its members also argued that the Commission improperly segmented the three phases of Millennium's proposed Minisink-Hancock-Neversink expansion project.

[12] MREPS also argued that any methodologies relied upon by agencies must be "sufficient to enable those who did not have a part in its compilation to under the factors involved" is required by NEPA and the Administrative Procedure Act, and that the Commission's vague references to "independent verification" fell far short of the statutory standard. MREPS Rehearing Request at 43-44.

On October 9, 2012, after MREPS was forced to seek a stay at the D.C. Circuit under the All-Writs Act because of the Commission's inaction, the Commission denied the stay, finding that MREPS failed to demonstrate irreparable harm. The Commission did not address MREPS' claims regarding Millennium's non-compliance with the certificate's conservation easement condition.

Accordingly, on November 8, 2012, MREPS sought rehearing of the Commission's order denying the stay, reiterating that Millennium's promise to refrain from development did not amount to a legally enforceable conservation easement. Citing New York's statute governing creation of conservation easements, MREPS explained that a valid conservation easement must be in writing, recorded in the county where the land is located, and managed by a third-party.

On November 16, 2012, Millennium answered MREPS' rehearing request, reiterating that its "plan" for the conservation easement consists of a commitment to permit farming to continue on existing farmland and not to develop the remainder of the property. Given that Millennium's described plan does not amount to a conservation easement, the Commission must reopen the record to consider (1) whether Millennium's update satisfies the pre-construction condition and (2) whether the certificate continues to afford adequate mitigation for purposes of the EA's finding of no significant impact (FONSI) given Millennium's admission that it does not intend to establish an easement at all.

F. The Accufacts/Kuprewicz report

When the CEII information was first released to Mr. Odland, Ms. Arias, and undersigned counsel in June 2012, it became apparent that an expert would be needed to review the information. MREPS initiated a search for an expert, eventually

contacting Mr. Richard Kuprewicz, president of Accufacts in August 2012.[13] As evidenced by his Curriculum Vitae (*See* Attachment 2), Mr. Kuprewicz is a seasoned pipeline regulatory advisor and expert on gas facility siting, design and operation. Not surprisingly, his services are in high demand. Consequently, MREPS was unable to interview and retain Mr. Kuprewicz until October 2012. Although FOIA requests pertaining to the Commission's "independent verification" were still outstanding at that time, MREPS anticipated that Mr. Kuprewicz could at least begin with an evaluation of the CEII information and move on to the FOIA data when it was produced.[14]

Within short order, Mr. Kuprewicz reviewed and analyzed the CEII information and prepared a report that has been filed as Attachment 1.[15] The Report concludes that:

- The Neversink pipeline is the major obstacle to Millennium's ability to expand its system and should be replaced *before* the Minisink Compressor Station;
- Minisink Compressor Station is a "very poor" attempt to increase eastward flow on the Millennium line as it will introduce very high gas velocities in the

[13] In July 2012, after the certificate issued, MREPS preliminarily identified another expert, a university professor and engineer with an environmental background whom Millennium permitted to review the CEII materials. However, it was determined that he lacked the specific expertise in pipeline safety and hydraulics to analyze and offer an opinion on the flow diagrams.

[14] As it turned out, the FOIA requests did not yield any additional information beyond that provided in CEII because studies related to the Commission's independent verification were deemed exempt from disclosure as deliberative process under FOIA Exemption 5.

[15] The appendices to the reports have been filed as privileged CEII materials because they are based on the CEII flow diagrams produced by Millennium. The Commission should review the privileged analysis and supporting work papers because they make clear that the Commission did not consider several key issues in its analysis, and therefore, its conclusions are unsupported by substantial evidence and not entitled to deference by a court.

Neversink Pipeline, so much so that it exceeds design standards[16] and raises significant questions about the adequacy of previous hydraulic studies used to justify approval of the Minisink Project; and

- Once the Neversink bottleneck is remedied, Millennium has a variety of options for meeting its delivery obligations at Ramapo, including the Wagoner Alternative.

As will be discussed, Mr. Kuprewicz's analysis of the previously undisclosed CEII information "compels or persuades a contrary result" to that reached by the Commission. Accordingly, the Commission has no choice but to reopen the record to consider the Kuprewicz Report and grant rehearing and vacate the certificate in light of the report's conclusions (in addition to other arguments already pending on rehearing).

II. ARGUMENT

A. The Commission must reopen the record to consider the Kuprewicz Report and reverse its decision in light of the report's conclusions.

The Commission has ample authority to consider the Kuprewicz Report even though it is submitted after the issuance of the certificate. Rule 716 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.716, permit the Commission to reopen the record to consider new evidence upon motion by a party with good cause shown. When the proffered evidence "compels or persuades a contrary result" to that reached by the Commission, it is an abuse of discretion to ignore it.[17]

[16] In one recent natural gas certificate proceeding, the Commission rejected a proposed system alternative because it would cause gas velocities in a 24-inch pipeline to exceed design standards. Tennessee Gas, 139 F.E.R.C. ¶ 61,161, ¶ 86 (2012).

[17] *Friends of the River v. FERC*, 720 F.2d 93, 98 n. 6 (D.C. Cir. 1983); *E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 103 (D.C. Cir. 1985 ("[We] normally reverse an agency's decision not to reopen the record only for abuse of discretion."); *Jordan Cove Energy*, 139 FERC ¶ 61,040 (2012)(vacating certificate for LNG facility where new post-certificate evidence shows change in project purpose from import facility, as certificated, to export).

1. Good cause exists to reopen the record and include Mr. Kuprewicz's report

Good cause exists for MREPS' motion to reopen the record. Throughout this proceeding, MREPS participation has been stymied by its inability to timely obtain CEII and FOIA information, despite diligent and persistent requests. The Commission's non-disclosure of materials justifies late filing of evidence. In *Steuben Gas Storage Co.*, 57 FERC ¶61,005, ¶ 9 (1991), the Commission, without discussion, granted an intervenor's motion to supplement the record with the applicant's working papers after the deadline for rehearing passed because the intervenor, which had requested the documents in a September 1990 FOIA request, did not receive them until January 1991. As discussed below, the delays experienced by MREPS in obtaining CEII and FOIA data have been far more egregious, and prevented MREPS from submitting this report at an earlier date.

a. Delays in CEII

MREPS' difficulties in accessing CEII information have been well documented throughout this proceeding. As discussed in MREPS' EA comments and petition for rehearing, MREPS member Laurie Arias initially requested CEII information in November 2011, even before the EA was issued, while John Odland filed a CEII request in March 2012, immediately after.[18] And although Ms. Arias, Mr. Odland, and undersigned counsel, gained access to CEII in June 2012, Millennium would not permit

[18] As an aside, there is no obligation for parties to seek CEII information right at the outset of the proceeding. As intervenors in a public, on the record proceeding, MREPS members, who did not retain counsel until late March 2012 reasonably believed that they would have access to all information submitted by the applicant to the Commission. Moreover, residents never expected that the Commission would need between two and eight months to process CEII requests. And in those situations where the time frame for processing requests was shorter, it was only because of persistent follow-up by MREPS' members or counsel.

MREPS' other members to view the data, thus necessitating another round of CEII requests (further delayed by technical glitch in the Commission's processing so the requests were lost and had to be re-filed). It was not until August 2012 that all MREPS members had access to the CEII information — and within four months, retained Mr. Kuprewicz to prepare this report.

b. FOIA requests

Although four months can hardly be deemed as lacking diligence, there is another reason that the expert report was not prepared even sooner after MREPS obtained the CEII information. On August 10, 2012, Michael Mojica filed a FOIA request seeking the analysis and underlying data related to the Commission's "independent verification" of Millennium's engineering studies referenced in the certificate order. *Certificate Order*, ¶ 87 and n.56. The Commission said that its "independent verification" showed that the Minisink Compressor Station (1) was capable of meeting Millennium's delivery requirements for Ramapo customers and (2) would not require an upgrade to Neversink segment. Without additional explanation of the methodology and data underlying its verification (which is required by NEPA and the Administrative Procedure Act),[19] MREPS could not challenge the Commission's findings, so Mr. Mojica sought disclosure through FOIA. The Commission did not issue a final FOIA response until November 20, 2012,[20] at which point MREPS was able to finalize the report.[21]

[19] *See* MREPS Rehearing Request at 43-44, citing *Itzaak Walton League v. Marsh*, 655 F.2d 246, 252 (5th Cir. 1981)("without full disclosure the public would not be able to make independent judgments about the agency's action.")

[20] The Commission first told Mr. Mojica that Millennium's application was responsive to his request for data related to the Commission's independent verification.

Because MREPS, despite diligent and documented efforts, was unable to access CEII information until a week before the rehearing deadline, and did not, until just last week, obtain final FOIA responses to requests filed in March and August 2012, good cause exists for reopening the record to include the Kuprewicz Report.

2. The Commission must consider the Kuprewicz Report because it "persuades and compels" a different result

The Commission *must* consider new evidence that "persuades or compels" a contrary result to the initial decision. To do otherwise constitutes an abuse of discretion, exposing the Commission to reversal on judicial review.[22] Moreover, not only must the Commission merely reopen the record to consider this new evidence, but in light of the evidence, it must grant rehearing and vacate the certificate.

The Kuprewicz Report persuades and compels a contrary result to that arrived at by the majority.[23] The Report contradicts most of the majority's conclusions and further, calls into question the sufficiency of the majority's claims of independent verification of the engineering requirements of each alternative.

In the final FOIA letter, the Commission held that any additional analysis performed by the Commission was exempt from disclosure under FOIA Exemption 5.

[21] It also bears noting that John Odland's FOIA requests, first filed in March 2012, were still outstanding when the rehearing deadline passed and were not resolved until November 3, 2012.

[22] *Friends of the River v. FERC*, 720 F.2d 93, 98 n. 6 (D.C. Cir. 1983), *E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 103 (D.C. Cir. 1985 ("[We] normally reverse an agency's decision not to reopen the record only for abuse of discretion."); *Jordan Cove Energy*, 139 FERC ¶ 61,040 (2012)(vacating certificate for LNG facility where new post-certificate evidence shows change in project purpose from import facility, as certificated, to export), *City of Fall River v. FERC* 507 F.3d 1, 8 (1st Cir, 2007).

[23] It bears noting that the Report's findings dovetail the dissenting opinions, particularly that of Chairman Wellinghoff, who concluded that the Minisink Compressor Station was a quick fix while replacing the Neversink segment would greatly increase Millennium's operating flexibility.

a. The Report undermines the majority's conclusions and compels a different result

The Kuprewicz Report demonstrates that the majority's factual assumptions about the project are mistaken and, as such, eviscerates the majority's conclusions. As relevant here, the majority found that:

1. The Minisink Compressor Station was environmentally preferable to the Wagoner Alternative which would necessitate replacement of the Neversink pipeline segment and have "greater environmental issues and landowner impacts." *Certificate Order*, ¶ 27.

2. There is "no basis for MREPS' suggestion that 'the hydraulic studies may show that the Minisink Compressor will in fact require an upgrade to Neversink.'" *Certificate Order*, n. 56.

Mr. Kuprewicz's review of the CEII data shows that these findings are wrong.[24]

Mr. Kuprewicz found that the 24-inch Neversink segment of Millennium's overall 182-mile 30-inch pipe rather than the lack of compression station is the critical constraint to Millennium's ability to expand delivery options because of its smaller maximum allowable operating pressure (MAOP) (920 psi compared to the 1200 psi at which the rest of the system operates). The Neversink constraints also lead to potently new high gas velocities that exceed prudent design capacity.[25] This is because the Minisink compressor station location downstream of the Neversink segment means that the compressor station and the downside segment of the 24 –inch Neversink is going to have the highest velocities since it will be the lowest pressure for the stated flow within

[24] All references to the report pertain to the public summary provided by Kuprewicz. The public summary is supported by working papers and discussions that reference the CEII materials and have been filed as privileged. In reviewing these arguments, the Commission must consider both the summary as well as the underlying documentation gleaned from Millennium's CEII.

[25] In previous cases, the Commission has expressed concern over gas velocities, going so far as to reject a system alternative to a controversial pipeline which would have resulted in gas velocities in excess of design standards. Tennessee Gas, 139 F.E.R.C. ¶ 61,161, ¶ 86 (2012).

the Millennium System (see Exhibit 2 – filed as privileged). If the Neversink 24-inch pipe did not have the 920 MAOP max, the operator would raise the pressure much higher than 920 psi to reduce the gas velocities on the downstream side of this segment, but with the Neversink constraints, this mode of operation is not possible.

Given these safety and operational considerations, Mr. Kuprewicz concluded that the Neversink Bottleneck should be replaced before the Minisink Compressor Station is installed. Thus, the report directly contradicts the majority's finding that there is no basis for MREPS' suggestion that "the hydraulic studies may show that the Minisink Compressor Station will in fact require an upgrade to Neversink." Indeed, the Kuprewicz report confirms that MREPS' initial believe that the CEII data might show that the Minisink Compressor Station would require an upgrade was, in fact, right all along.

The Report's finding that the Minisink Compressor Station will necessitate a Neversink upgrade completely negates the reason for the majority's choice of the Minisink Compressor Station over the Wagoner Alternative. Describing the reason for approving the Minisink Compressor Station over Wagoner, the 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.[26] But if the Minisink Compressor Station also requires replacement of Neversink, there is no tie to break. In direct comparison between the

[26] MREPS emphasizes that even if the Minisink option *did not* require the Neversink upgrade, the Wagoner Alternative is *still* the better choice because of its remote location and minimal impacts on residences. The dissenters, particularly Commissioner LaFleur agreed.

Minisink/Neversink combination and the Wagoner/Neversink combination, the Wagoner Alternative emerges as the unequivocal victor.[27]

b. The report reveals the presence of safety considerations that have lead to rejection of a project alternative in another case

The high pressures introduced by Minisink into the Neversink pipeline create safety risks that have previously concerned the Commission. The Kuprewicz Report shows that the increased very high-speed velocities will exceed the Neversink design capacity. In another certificate case, *Tennessee Gas*, 139 FERC ¶ 61,161, the Commission considered, but ultimately rejected as infeasible, a system alternative to the proposed pipeline project because:

> It would have potentially resulted in a situation where the velocity of the natural gas in the single 24-inch diameter pipeline across the Delaware Water Gap NRA would have to exceed design standards to transport the same volume of natural gas that would be carried by the existing pipeline and proposed larger diameter loop.

Tennessee Gas at ¶. 86. By contrast, the Commission determined, based on its engineering review, that the proposed project will not result in an increase of natural gas velocity above safety design standards in the existing or proposed pipelines.

Tennessee Gas involved a 24-inch pipe segment, just like Neversink, and shows that the Commission views high gas velocities in excess of design capacity as a reason not to grant a certificate. Here, the Commission's "independent verification" apparently did not address gas velocity -- because if it had, the Commission's ruling in *Tennessee Gas* would have compelled rejection of the Minisink Compressor Station.

[27] To the extent that the majority harbors concerns about the environmental impacts of replacing Neversink the expert report suggests that the environment will be damaged far more if the pipe is not replaced because of erosion and noise attributed to high velocity.

c. The report undermines the majority's conclusion that the Minsink project will serve the delivery goals.

The majority also asserts that no one "has questioned the sufficiency of the proposed facilities to provide the service contemplated." The majority's observation does not surprise since without CEII, MREPS and its members, who are the predominant project opponents, could not challenge whether the Minisink Compressor Station will address Millennium's asserted need. In any event, the Kuprewicz Report suggests that the Minisink Compressor Station is not optimal for satisfying the project goals, *i.e.*, new delivery of an additional 225,000 decatherms per day to customers at Ramapo.

First, as already discussed, the expert report found that the Neversink pipeline should be replaced before the Minisink Compressor can be built. Therefore, it follows that as a stand-alone project (*i.e.*, without the Neversink replacement), the Minisink Compressor Station will not meet the project's goals.

But even assuming for the sake of argument that the Minsink Compressor Station does not require a Neversink replacement (which MREPS does not concede), the report also concludes that the Minisink Compressor Station is not optimal because its discharge pressure falls far short of the 1200 MAOP needed to assure adequate delivery at Algonquin.[28] In short, the Report undermines the majority's conclusion that the Minisink Compressor Station meets the project goals and will satisfy Millennium's and its customers' needs.

[28] *See* Confidential Submissions summary and Exhibit 2.

d. The report calls into question the adequacy of the Commission's purported review and independent verification of Millennium's studies

Despite the majority's insistence that the Commission independently verified the engineering models submitted by Millennium, the report draws a contrary conclusion. In fact, Mr. Kuprewicz states that:

> [S]uch high gas velocities [resulting from the Neversink constraint] raise serious questions as to the adequacy or completeness of any previous hydraulic studies or decisions that may have been used to justify approval of the Minsink Compressor project.

Kuprewicz's report does not elaborate further regarding the inadequacies of the Commission's analysis because unfortunately, the Commission's certificate order does not disclose the methodology applied to review the engineering studies -- notwithstanding that MREPS sought this information under FOIA and both NEPA and the APA require such disclosure in the interest of transparent decision-making. *Itzaak Walton League v. Marsh*, 655 F.2d 246, 252 (5th Cir. 1981)("without full disclosure the public would not be able to make independent judgments about the agency's action.") However, even without access to the Commission analysis, Mr. Kuprewicz was able to determine that the proposed project, as described in the CEII information, makes so little sense from an engineering and operational standpoint that it raises questions about the scope and quality of the Commission's scrutiny of Millennium's proposal.

e. The report shows that access to CEII *would* have made a difference

The majority concluded that "the fact that MREPS did not have access to Millennium's hydraulic models did not negatively impact MREPS." Not so. The Kuprewicz Report, which is based entirely on review of previously undisclosed information shows that with access to CEII data, MREPS could have raised safety

issues related to high gas velocities early on in the proceeding. Instead of simply relying on Millennium's PowerPoint to show that a Neversink upgrade was inevitable even with the Millennium proposal,[29] MREPS could have bolstered its argument with data directly from Millennium's own submissions to the Commission, filed under oath. Without access to the CEII, MREPS managed to sway the Commission Chairman and Commissioner LaFleur to support the Wagoner Alternative. Had the CEII been available earlier, the entire course of the case would have changed.

Because the Kuprewicz Report would compel and persuade a contrary result to the one reached by the majority, the Commission has no choice but to reopen the record and accept the report. To do otherwise would constitute an abuse of discretion. But merely reopening the record to supplement it with the report does not go far enough. The Commission must also vacate the Certificate Order in light of the arguments raised on rehearing along with this new evidence.

3. The Natural Gas Act's 30-day deadline for filing rehearing does not bar submission of the report

Millennium is likely to argue that the 30-day deadline for rehearing bars the Commission from considering evidence presented after the deadline expires. The statutory deadline does not apply to arguments that could not have been raised at the time the rehearing requests were filed because the evidence needed to discover or raise those arguments was unavailable.

In any event, notwithstanding the Natural Gas Act's deadlines, the

[29] Millennium minimized the relevance of the Currie PowerPoint, characterizing it as nothing more than a sales presentation and not reflective of Millennium's actual plans.

Commission has ample discretion to consider issues raised after the time for filing rehearing has passed. In this instance, the Commission may treat this motion to reopen the record as a request for reconsideration or alternatively, in light of the evidence presented, may reopen the record *sua sponte*.[30] In fact, in April 2012, the Commission used its authority to reopen the Jordan Cove LNG proceeding to consider new challenges after a certificate was granted and the deadline for rehearing had passed.[31] The challengers argued that new evidence, unavailable at the time of rehearing, showed that the company intended to operate the certificated facility for LNG exports. As a result, the certificate order, which was predicated on the assumption that the applicant would operate an LNG import facility, was no longer valid and as such, was vacated by the Commission.

The Commission accepted new evidence in *Jordan Cove* even though the proceeding had taken place over a period of five years, with significant investment by the applicant and stakeholders. By contrast, here, the stakes are not as high. The certificate proceeding just concluded in July and the Commission can also issue a stay to prevent Millennium from moving ahead with further construction. Moreover, Millennium has an immediate solution to serve its customers in the form of the Wagoner Alternative, whereas the *Jordan Cove* developers had no comparable fallback. Accordingly, just as the

[30] *Tennessee Gas v. FERC*, 871 F.2d 1099, 1107 n.12 (D.C. Cir. 1989) (observing that Commission "frequently treats untimely petitions for rehearing as reconsideration motions" and has authority under Section 19 of the NGA to *sua sponte* modify orders up until petition for judicial review is filed).

[31] *Jordan Cove Energy*, 139 FERC ¶ 61,040 (2012)(vacating certificate for LNG facility where new post-certificate evidence shows change in project purpose from import facility, as certificated, to export).

Commission reopened the record in *Jordan Cove*, similar relief is warranted here.

B. The Commission must reconsider its FONSI because Millennium's plans do refrain from developing the unused portions of the compressor station site do not amount to a legally enforceable conservation easement.

1. The Commission order requires Millennium to establish a conservation easement.

The Certificate Order requires Millennium to create a conservation easement. As described in the order issuing the certificate:

> The OCDP recommends that the Commission require Millennium to finalize plans to reserve 42.5 acres of the project site as a conservation easement. As discussed in the EA, Millennium stated that it would consider such an easement. In general, the Commission believes it is appropriate for applicants to purchase additional land surrounding compressor stations to serve as a buffer between residences and such stations…*we believe that such a conservation easement would provide important environmental benefits, such as preserving existing vegetation and maintaining a sufficient buffer for noise and visual impacts. For these reasons, we have added Environmental Condition 18 to require Millennium to provide the Commission with information on its efforts to develop a conservation easement for the unused portion of its property.*[32]

Moreover, the conservation easement is not simply a discretionary "extra" that Millennium can simply disregard but rather, a necessary element of mitigation integral to the EA's ultimate finding of no significant impact.

2. Millennium's recent filings demonstrate that it does not intend to create a conservation easement as required by the Certificate Order.

Even though the creation of a conservation easement is the evidentiary lynchpin of the Commission's FONSI, Millennium's recent filings indicate that it does not intend to create a legally enforceable conservation easement. *See* Part I.F, *supra* (describing Millennium's filings). Millennium's August 2012 "update" on its plans for a

[32] Certificate Order, at ¶ 34 (emphasis added).

conservation easement reported that Millennium would refrain from developing the 42.5-acre unused portion of the compressor station site and allow farming to continue. Likewise, Millennium's November 16, 2012 answer to MREPS' renewed stay merely reiterating that it will commit to not develop the property.

A mere commitment to refrain from developing unused land is not even remotely close to what is required to establish a legally enforceable conservation easement under New York law. As MREPS explained in its November 8, 2012 rehearing of the Commission order denying a stay:

> Under New York law, a valid conservation easement must be created by a written instrument that:
>
> > "describe[s] the property encumbered by the easement by adequate legal description or by reference to a recorded map showing its boundaries and bearing the seal and signature of a licensed land surveyor, or if the easement encumbers the entire property described in a deed of record, the easement may incorporate by reference the description in such deed, otherwise it shall refer to the liber and page of the deed or deeds of the record owner or owners of the real property burdened by the conservation easement."[33]
> >
> > Once created, the easement instrument must then be recorded and indexed in the office of the recording office in the county in which the land is located.[34] Unless properly recorded, a conservation easement has no legal effect. The easement may be held by a public body or a not-for-profit.[35]

Without the formality of a written and recorded instrument and third-party oversight, the conservation easement would lapse once the property changed hands or a developer changes its mind. In the absence of a formal conservation easement, there is nothing to prevent Millennium from expanding its facility whenever it wants. Even if Millennium genuinely intends to refrain from development, there is nothing to

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[33] *See* N.Y. Env. Law § 49-0305(4); N.Y. Env. Law § 5-703.

[34] *Id.*

[35] N.Y. Env. Law § 49-0305(3)(a).

preclude Millennium from transferring the property to an affiliate or developer that would not be similarly bound.

Millennium's updates show that it has not taken even the most minimal steps to create a conservation easement. Millennium has not drafted or filed an easement instrument or started the process of identifying a third party to hold the easement. These steps do not require much effort, and Millennium would surely have undertaken them if it planned to establish an easement.

Given that Millennium's most recent submissions demonstrate that it intends to ignore the conservation easement requirement, the Commission must reopen the record to consider whether its FONSI remains valid. The Commission has discretion to reopen the record if warranted by changed conditions in law or fact.[36] Here, the facts have changed in light of Millennium's recent disclosures. The Commission's FONSI rested on the expectation that the conservation easement would serve as a buffer to minimize noise and visual impacts and offset the loss of agricultural land. Without the easement, however, these adverse impacts will go unaddressed and result in significant adverse impacts to the environment in violation of NEPA.

MREPS recognizes that Millennium owns the site and quite naturally, opposes any added encumbrances on its property. But what Millennium fails to recognize is that all property owners are subject to laws and regulations governing use. Indeed, if Millennium had wanted to use its site for an industrial, emission-spewing facility other than a FERC-regulated natural gas facility, it would likely have been barred from doing so under local zoning laws, which are preempted here. In any event, if Millennium did

[36] *Public Utility District No. 1 of Pend Oreille County, Washington*, 117 F.E.R.C. ¶ 61,205, ¶ (2006).

not agree with the conservation easement requirement, the appropriate remedy would have been to challenge the requirement on rehearing, not to ignore it.

Because Millennium has made clear that it does not intend to establish a legally enforceable conservation trust under state law as required by the Certificate Order, the Commission must reopen the record and evaluate whether its FONSI remains valid if a conservation easement is not created to offset adverse impacts.

III. CONCLUSION

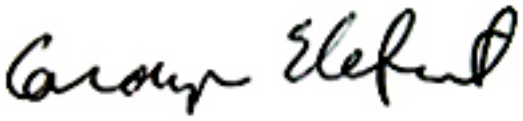
Wherefore, for the foregoing reasons, MREPS respectfully requests that the Commission:

1. GRANT this motion to reopen the record to include the Kuprewicz Report and VACATE the certificate order in light of the new evidence submitted;

2. REVISE the finding of no significant impact in light of recent filings indicating Millennium's intent to ignore the conservation easement requirement and VACATE the certificate order for violating NEPA; and

3. GRANT the third renewed stay request filed along with this motion to afford the Commission sufficient opportunity to consider the issues raised in this motion.

Respectfully submitted,



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Dated November 30, 2012

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November 29, 2012

To: Carolyn Elefant
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Re: Findings from Analysis of CEII Confidential Data Supplied to Accufacts Concerning the Millennium Pipeline Company L.L.C. Minisink Compressor Project Application to FERC, Docket No. CP11-515-000

Accufacts was asked to provide an independent analysis related to the above application from information provided to Accufacts under a CEII Confidential Agreement with FERC. A review of Appendix A (brief CV of Richard B. Kuprewicz) will easily demonstrate my experience to expertly comment on this important pipeline matter. Accufacts makes the following key findings based on my analysis:

1. The approximately 7.5 mile long 24-inch diameter mainline pipe section known as the Neversink segment ("Neversink"), severely restricts, or bottlenecks the capability of the Millennium Pipeline system to move additional gas eastward, such as to the Algonquin Gas Transmission ("AGT") connection. The limitation of approximately 900 psig MAOP for Neversink, well below the remainder of the 30-inch pipeline MAOP of 1200 psig in the system, is the main obstacle to the system's expansion.[1, 2]

2. The Minisink Compressor Project requires extremely high actual gas velocities on the 24-inch Neversink segment (the segment of the Millennium Pipeline system with the highest or nearly the highest flow requirements with the lowest pressure, generating the highest actual velocities). The velocities on the 24-inch Neversink segment clearly exceed prudent design standards and safety margins establishing much lower actual gas velocities on pipelines that are intended to avoid gas transmission pipeline rupture. Such high actual gas velocities for a natural gas transmission pipeline raise serious questions as to the adequacy or completeness of any previous hydraulic studies or decisions that may have been used to justify approval of the Minisink

[1] Federal Energy Regulatory Commission ("FERC"), "Order Issuing Certificate, Docket No. CP11-515-000," issued July 17, 2012, p. 24.
[2] The Millennium Pipeline consists of, with the exception of mainly the Neversink segment, 30-inch pipe with a Maximum Allowable Operating Pressure, or MAOP, of 1200 psig.

Compressor Project. The Minisink Compressor Project is a very poor proposal and should be rejected.

3. The recently proposed Millennium Pipeline Company, L.L.C. Hancock Compressor Project, FERC Docket No. PF12-10-000 will introduce even higher actual gas velocities on the existing Neversink than those indicated in the CEII documents for the Minisink Compressor Project.[3]

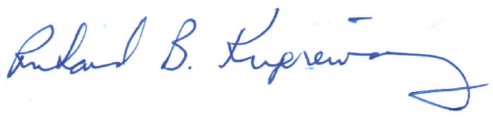
4. Because of these extremely high gas velocities, exceeding design prudent design standards, the existing Neversink bottleneck should be removed to substantially lower actual gas velocities before either the Minisink or Hancock Compressor Projects are allowed to move additional gas eastward.

5. With the existing Neversink bottleneck, neither the Minisink Compressor Project, nor an alternate proposal referred to as the Wagoner Compressor station option, are appropriate for meeting claimed eastward capacity needs to AGP.

6. Removal of the existing Neversink bottleneck would permit Millennium more flexibility in optimizing compressor locations at or east of the Hancock station location.

7. Removal of the existing Neversink bottleneck would also permit the Hancock Compressor Project proposal to meet Millennium capacity needs without either the Minisink or Wagoner Compressor station locations, and increase the system's efficiency.

The above findings are supported by additional Accufacts' documents (Exhibits 1 through 5) that are redacted from public view as they contain information that might be considered covered under the CEII Confidentiality Agreement in this matter. All of my opinions rendered above are based on reasonable engineering and scientific certainty.



Richard B. Kuprewicz
President,
Accufacts Inc.

[3] Jerrod L. Harrision letter to Kimberly D. Bose (FERC), "Millennium Pipeline Company, L.L.C. Hancock Compressor Project Docket No. PF12-10-000," September 5, 1012.