BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING BY THE MINSINK RESIDENTS FOR ENVIRONMENTAL PRESERVATION AND SAFETY (MREPS) OF COMMISSION ORDER ISSUING SECTION 7 CERTIFICATE FOR MINISINK COMPRESSOR STATION

I. CONCISE STATEMENT OF ERROR

On July 16, 2012, the Federal Energy Regulatory Commission (Commission), over the dissent of Chairman Wellinghoff and Commissioner LaFleur, granted the Millennium Pipeline Company's application for a certificate under Section 7 of the Natural Gas Act (NGA) for the Minisink Compressor Station in the above-captioned docket. In so doing, the Commission erred by accepting a short-term fix to Millennium's asserted need to increase its delivery capabilities which neither satisfies the "present and future public convenience and necessity" of the NGA nor the criteria for approval under the Commission's Certificate Policy[1] particularly in light of the environmentally and economically preferable Wagoner/Neversink option favored by the dissent. Accordingly, the Minisink Residents for Environmental Preservation and Safety (MREPS) timely seek rehearing of the Commission's order within 30 days of its issuance pursuant to Rule 713 of the Commission's Rules of Practice and Procedures, 18 C.F.R. §385.713 and ask

[1] 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶61,128, *order on clarification*, 92 FERC ¶61,094 (2000).

the Commission to vacate its order granting a certificate for the Minisink Compressor Station.

II. ISSUES ON REHEARING

Issue 1: The Commission order approving the Minisink Compressor violates the Natural Gas Act, 15 U.S.C. §717f because the project serves only Millennium's narrowly defined private objectives and does not serve the "present and future public necessity."

Under Section 7 of the Natural Gas Act,15 U.S.C. §717f(e), the Commission must find that a proposed interstate natural gas facility will serve the "present or future public convenience and necessity" prior to granting a certificate authorizing "the whole or any part" of the proposed project. If the Commission concludes that a proposal does not serve the present or future public convenience and necessity, the Commission must either deny the application outright, or "attach conditions to the issuance of the certificate…as the public convenience and necessity may require." Courts hold that the public convenience requires the Commission to consider future needs and alternatives, even if not contemplated by an applicant's proposal. *See Pittsburgh v. Federal Power Comm.*, 237 F.2d 741 (DC Cir 1956)(holding that Commission not precluded from considering more costly expansion not proposed by applicant to meet future needs and serve public convenience).

Issue 2: Both the Commission's approval of the Minisink Compressor Station, as well as Commissioner Clark's separate concurrence is inconsistent with the *Certificate Policy Statement* because the project's marginal public benefits do not outweigh the considerable adverse impacts as both Chairman Wellinghoff and Commissioner LaFleur concluded in their respective dissents.

Under the Commission's *Certificate Policy Statement,*[2] a specific project is in the public convenience and necessity when its public benefits are proportional to its adverse impacts. Public convenience is not a static standard but must be evaluated in light of a project's specific characteristics including available alternatives. Here, the dissent properly applied the *Certificate Policy Statement*,

> Rather than evaluate the Minisink Compressor with reference to the entire record as the Certificate Policy requires, the majority approved the Minisink Compressor in a vacuum. Ignoring the Neversink constraints on Millennium's long-term delivery capabilities and the availability of the environmentally and operationally preferable Wagoner Alternative, the majority concludes that the Minisink Compressor is in the public convenience and necessity because the project supports Millennium's precedent agreements (a proxy for need), is not subsidized and does not have significant environmental impacts according to the EA (a finding that MREPS challenges at Issue 4 infra). Meanwhile, Commissioner Clark goes a step farther, cautioning that alternatives are not merely irrelevant to the Commission's public convenience analysis but that their consideration may result in an "unfortunate public policy outcome," whereby proceedings are delayed and local communities pitted against each other as alternatives serially considered in an effort to determine *the* minimum impact site. *See* Clark, *concurring*.

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[2] 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶61,128, *order on clarification*, 92 FERC ¶61,094 (2000).

By contrast, the dissenters, Chair Wellinghoff and Commissioner La Fleur properly evaluated the project benefits and adverse impacts in the context of the entire record as required by the *Certificate Policy*. As such, they correctly determined that Millennium's application for the Minisink Compressor is not in the public convenience and necessity and should not be granted.

Issue 3: **The Commission was arbitrary and capricious in approving the Minisink Compressor, which is inconsistent with the Commission's siting and maintenance requirements in Section 380.15 and Commission precedent which favors projects with temporary impacts over those with long-term duration.**

Section 380.15 of the Commission's regulations establish requirements for site selection for natural gas facilities which recommend use of existing rights of way and unobtrusive sites for natural gas facilities, and consideration of noise potential when locating compressor stations. In addition, as a matter of precedent, the Commission typically accords greater weight to permanent, adverse impacts than short-term affects when choosing between project alternatives. *See, e.g., Central New York Oil & Gas Company, LLC*, 137 FERC ¶61,211, 61,643 (2011)(noting that reduced carbon sequestration due to tree removal is short-term impact that will revert to pre-existing conditions). The Commission's approval of the Minisink Compressor ignored these existing siting protocols and therefore, was arbitrary and capricious.

Issue 4: **The Commission violated NEPA by adopting the EA's conclusions**

The Commission's decision to rely on the EA's conclusions violated NEPA. First, the EA unlawfully segmenting the uniform, three-phase Millennium Pipeline upgrade (consisting of the Hancock and Minisink Compressor and Neversink replacement) into three "bite-sized" pieces, each capable of avoiding full environmental review. Moreover, the segmentation prevented the type of apples-to-apples comparison (Minisink Compressor versus Waggoner Alternative/Neversink upgrade) that would have starkly demonstrated that the Waggoner Alternative is both environmentally and operationally superior to the stand-alone Minisink Compressor.

In addition to improperly segmenting Millennium's multi-phased project, the Commission violated NEPA in other ways as well. The Commission did not undertake a full cost benefit analysis of the proposed project as required by the CEQ regulations (40 C.F.R. §1502.23). Nor did the Commission take the requisite hard look at adverse impacts such as diminished property values, loss of farmland, increased noise and air pollution, study impacts of the CPV/Wawayanda plant or other development.

Issue 5: The Commission violated the Natural Gas Act by failing to consider Millennium's past compliance record notwithstanding that most of the recommended mitigation depends upon Millennium's ability to comply with the conditions of its certificate.

Under Section 7(e) of the Natural Gas Act, the Commission may not issue a certificate unless it finds that "the applicant is able and willing properly to do the acts and perform the services proposed and to conform the provisions of the NGA and Commission regulations." The Commission

failed to take into account Millennium's extensive and continuing record of compliance violations[3], which casts doubt on Millennium's ability to comply with the conditions of the certificate. Moreover, Millennium's history also calls into question its ability to adequately oversee the activities of the intended compressor station operator, Columbia Gas, which like Millennium, is a repeat offender.

Issue 6: The Commission majority violated the Administrative Procedure Act (APA) by failing to respond to the concerns of the dissenting Commissioners.

While the Commission is not required to agree with arguments raised by dissenting Commissioners, it must, at a minimum acknowledge and address them under the Administrative Procedure Act. *American Gas Association v. FERC*, 593 F.3d 14 (D.C. Cir. 2010). The majority did not respond to any of the issues raised in Chairman Wellinghoff's or Commissioner LaFleur's dissenting opinions, while concurring Commissioner Clark not only reached different legal conclusions but also diametrically opposed factual findings. These differerent positions, without explanation render the decision arbitrary and capricious under Administrative Procedure Act.

Issue 7: MREP's inability to gain timely access to CEII and FOIA information from the Commission, and the Commission's failure to disclose the basis of its "independent verification" deprived members of due process right to meaningful comment under the

[3] *See* MREPS Appendix (April 16, 2012) at 436-438 (Gartenberg Protest and EA Comments (April 15, 2012) describing violations of both Millennium and Columbia Gas, which will operate the compressor station for Millennium).

United States Constitution, violates the Administrative Procedure Act and NEPA and discriminates against landowners.

Both the Administrative Procedure Act and NEPA require the Commission to engage in on-the-record decision making, with full disclosure of the studies and data relied on in making those decisions. *Itzaak Walton League of America v. FERC*, 655 F.2d 346 (1981). Denial of access to data violates parties' due process rights to meaningful comment. *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002). MREPS' inability to timely access the information sought under CEII and FOIA not only denied MREPS and its members of due process, but also diverted scarce resources to chasing down information to which intervenors should be entitled as a matter of course. The Commission could have cured the due process problems by holding the proceeding in abeyance pending release of the requested information, but instead, the Commission exacerbated the problem by plowing ahead and issuing a decision based on a mysterious "independent verification" that will not withstand judicial review.

Issue 8: The Commission's denial of MREPS request for an on the record hearing violated its members' due process rights and further, reflects an arbitrary, capricious and unduly discriminatory practice of granting hearings requested by large companies, but never individuals or landowners.

The Natural Gas Act prohibits the Commission from issuing a Section 7 certificate without first providing notice and an opportunity for hearing. Although the Commission is not obligated to hold a hearing in all instances, an on- the-record hearing is required when a genuine issue of material fact exists that cannot be resolved from the written submissions. See *Cajun Elec.*

Coop. v. FERC, 28 F.3d 173, 177 (D.C. Cir. 1994). Given the numerous factual disputes in this proceeding, ranging from Millennium's future expansion plans to its unsupported assertions regarding project costs, a hearing was required. Moreover, a hearing would have cured the "information access" problems since MREPS and other intervenors could have obtained CEII and FOIA materials promptly through discovery. Finally, the Commission's denial of MREPS' request for a hearing is arbitrary, capricious and unduly discriminatory; of the hundred or so active administrative hearings pending before the Commission, not a single case involves landowners.

Issue 9: The Commission erred in finding that MREPS as a group, and its individual members intervened in an untimely manner.

Under both Section 157.10(a)(2) and Section 380.10 of the Commission's regulations, interventions are considered timely in a Section 7 certificate proceeding when filed prior to the deadline for commenting on the Environmental Assessment. MREPS and its members intervened before the April 16, 2012 deadline for comment on the EA. Accordingly, the Commission erred in determining that their MREPS interventions were untimely and must correct this finding.

III. FACTUAL BACKGROUND

A. Description of MREPS

The Minisink Residents for Environmental Preservation and Safety (MREPS) is an unincorporated community group of comprised of the following Minisink residents: Laurie Arias, Leanne Baum, Asha Canalos, Karen Gartenberg, Deborah Lain, Pramilla Malick, Michael Mojica, John

Odland, Carolyn Petschler and Tom Salamone. The majority of MREPS members are located within 650 to 2500 feet from the proposed compressor station site. Both MREPS as a group and each of its members individually have timely intervened in this proceeding and collectively, filed hundreds of pages of comments.

In contrast to many of the intervenor groups cropping up nationally in response to proposed pipelines, MREPS does not, in this proceeding, seek to stop Millennium from upgrading its system to meet increased capacity needs at Ramapo. Instead, from the outset, MREPS has argued that Millennium's objectives are better served, economically, operationally and environmentally by the Wagoner Alternative, which was also endorsed by the dissent rather than the Minisink Compressor Station option approved by the Commission.

B. History of Proceedings

1. Millennium's Application

On July 14, 2011, Millennium filed an application in the above-captioned docket seeking a certificate of public necessity and convenience to construct and operate a natural gas compressor station in Minisink, New York (hereinafter, the Minisink Compressor Station or Millennium proposal). The proposed compressor would consist of two 6130-horsepower gas-fired compressor unit to be housed within a new building, and would be located on land that Millennium will acquire. According to Millennium s application, the purpose of the Minisink Compressor Station is to increase deliveries to its interconnection with Algonquin Gas Transmission LLC at Ramapo, New York, to approximately 675,000 dekatherms per day to meet the demands of new customers producing gas in the area near Millennium s existing

pipeline. Millennium claimed that the pipeline must go into service by November 2012 to satisfy its contractual delivery obligations with its new customers.

2. The Scoping Process and The Slow Trickle of Information

On August 17, 2011, the Commission issued notice of intent to prepare an EA, request for comments and notice of a public scoping session set for September 6, 2011. But the ensuing review process moved forward in fits and starts, largely because extracting information from Millennium was the equivalent of pulling teeth.

Notwithstanding Commission regulations requiring certificate applicants to submit resource reports describing "reasonably foreseeable plans for future expansion of facilities," (Appendix A to Part 380, Commission Regulations), Millennium was not forthcoming. Instead, it was not until after the initial close of comments in mid-October 2011, that MREPS members learned from various powerpoint presentations located via an Internet search[4] that the Minisink Compressor station was actually the first step of a three-phase expansion plan. Phase 2 contemplated the addition of another compressor station, while Phase 3 involved an enlargement of the 7.2 mile Neversink pipe segment, a 24-inch pipe built in 1987 and acquired by Millennium from its affiliate Columbia Gas (Phase 3).[5]

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[4] See Currie Report, Appendix to EA (submitted April 16, 2012) at 215 from Powerpoint presentations regarding Millennium s three phase expansion plan.

[5] *See Millennium Pipeline LLC*, 117 FERC ¶61,319 (2006), describing Millennium s acquisition of the Neversink segment from Columbia as part of its system expansion. With the exception of the Neversink segment, which

The Wagoner alternative to the Minisink Compressor station did not materialize either until the scoping process, at the suggestion of residents, including several MREPS members. Although Appendix A to Part 380 of the Commission regulations specifically requires applicants to identify and describe viable project alternatives, Millennium did not disclose the Wagoner site as an alternative to the Minisink Compressor in its application.[6] The Wagoner Alternative involves the construction of a smaller 5100 horsepower compressor station at a site adjacent to Millennium s existing Wagoner Meter Station in Sparrowbush, New York. The alternative site was previously used by Columbia Gas (a Millennium affiliate) for a temporary compressor station for three years between November 2008 and June 2011. The Wagoner Alternative would also necessitate upgrading the Neversink segment from 24 to 30 inches (most likely by parallel construction to avoid taking the line out of service) to accommodate additional gas. However, the Neversink upgrade may be accomplished through use of existing rights of way.

Because Millennium had not initially identified the Wagoner Alternative, and because landowners adjacent to the Neversink right-of-way would be potentially impacted, in December 2011, the Commission reopened the comment period again. The majority of commenters -- including

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is 25 years old, the mainline pipe on Millennium's system within the vicinity of the compression station was built in the 2008.

[6] In fact, as MREPS member Michael Mojica argued in earlier comments (*See* Appendix 5-8, listing Mojica filings), Millennium also mislead the Commission by providing inaccurate and incomplete data on the feasibility of the Wagoner Alternative in response to a Commission data request.

landowners along the Neversink right-of-way -- favored the Wagoner Alternative since a larger, newer pipeline would improve safety and increase capacity, thus allowing for a smaller – and quieter – compression station.

But Millennium balked at the Wagoner Alternative. Millennium contends that it would need to construct a parallel pipeline to avoid taking the Neversink Segment out of service. In addition, Millennium states that the Wagoner Alternative would cost at least 50 percent more than the Minisink Compressor and would jeopardize timely delivery to new customers. Finally, Millennium denied any intention to upgrade the Neversink segment in 2014 as shown in its own Powerpoint materials.

3. EA Comments and Request for a Hearing

On March 2, 2012, the Commission staff released for comment the EA for the Millennium proposed project. The EA recommended the Minisink Compressor as the preferred alternative and found that no significant impacts would ensue so an environmental impact statement (EIS) was not required. The original comment date of April 2, 2012 was extended to April 16, 2012 in light of continuing changes by Millennium as well as the size of the EA and degree of public controversy surrounding the project.

On April 16, 2012, MREPS as a group and its individual members timely submitted hundreds of pages of comments on the proposed EA along with a lengthy Appendix highlighting key comments and evidence. Unfortunately, MREPS and several of its members (Gartenberg, Mojica, Odland and Arias) were forced to file comments on the EA without the benefit of information sought under CEII and FOIA. Much of the CEII information related to gas flow charts or hydraulic studies performed by

Millennium in support of its application and filed pursuant to CEII rules. Through FOIA, MREPS and members sought correspondence between Millennium and FERC staff as background, earlier drafts of the EA, resource reports and other information filed a "privileged" but not classified as CEII. *See* Mojica Rehearing Request (August 15, 2012)(describing outstanding FOIA requests).

In addition, MREPS filed a separate motion seeking a hearing to resolve disputed factual issues related to Millennium's future expansion plans. MREPS also pointed out that a hearing would provide another outlet to obtain information through use of the discovery process.

4. Post-EA Efforts to Obtain Information

Once the deadline for EA Comments passed, MREPS and its members renewed their efforts to obtain CEII information and FOIA materials, a frustrating process made even more stressful by tight deadlines. In June 2012, after waiting seven and three months respectively, Laurie Arias and John Odland received access to CEII information from Exhibits G and G1 and counsel was granted access as well. However, even though undersigned counsel represents a *group* with ten members, Millennium would not permit these other members to share the information without going through the CEII clearance. Consequently, the remaining members filed CEII requests, only to learn that a "technical glitch" in the system would cause a two week delay. It was not until some time last week that FERC gave notice of intent to release the CEII materials – less than a week before rehearing requests are due.

Moreover, the Commission's most recent order necessitates a new round of FOIA or CEII requests. For example, Michael Mojica has filed a FOIA request to gain access to the engineering and hydraulic studies that the Commission "independently verified" (Commission Order ¶56), but did not disclose. Meanwhile, John Odland's FOIA requests for correspondence filed in March 2012 – nearly six months ago – are still outstanding, with data trickling in on a revolving basis. Meanwhile, on June 4, 2012, the Commission released some CEII information to Mr. Odland, but denied his FOIA request for certain engineering data and system models. Mr. Odland, through undersigned counsel, has appealed the Commission's FOIA denial to the General Counsel's office.[7] As discussed in Part IV.H *infra*, MREPS's inability to access information in this proceeding in a timely and efficient manner has hobbled the ability of the group as well as its individual members to meaningfully participate in this process.[8] Further, MREPS and its members have been forced them to divert already limited resources to deal with ancillary issues like FOIA and CEII instead of focusing on the merits of the case.

[7] The Commission claims that its denial of the Mr. Odland's FOIA request renders the motion to hold the case in abeyance moot. Commission Order ¶87. If anything, the abeyance request is even more important now that Mr. Odland's request was denied and he must await a decision on appeal.

[8] As discussed in Part IV.H, it is common practice for individual residents or landowners to create small formal or informal groups to pool their resources and efforts to participate in the Commission process. The Commission's CEII rules pose a special hurdle for groups such as MREPS, which makes decisions collectively, because each member must separately request and gain clearance for CEII information before being able to discuss the materials with each other.

5. Commission Order Issuing Certificate for Millennium Project

On July 16, 2012, a divided Commission, by a 3-2 majority issued an order granting Millennium a certificate for the Minisink Alternative. Applying the first step of the *Certificate Policy*, the Commission majority accepted Millennium's claimed need for the Compressor Station based on its existing precedent agreement and determined that existing customers would not subsidize the cost of the Compressor Station. Having found need and no subsidies, the Commission agreed with the EA's finding of no significant impact, with nary a mention of the Wagoner Alternative except to agree with the EA's conclusion that Wagoner would no offer a significant environmental advantage over the Minisink Project. Commission Order ¶27. Accordingly, the Commission approved the Millennium Compressor Station.

By contrast, dissenting Chairman Wellinghoff and Commissioner LaFleur did not confine their review to Millennium's proposal alone but took a more expansive view of the record, as protection of the public convenience and necessity demands. Based on this more comprehensive review, Chairman Wellinghoff concluded that:

> I believe that the Millennium Pipeline should have considered the long-term effects of improved reliability, greater impact on capacity, reduced emissions and reduced fuel costs offered by the Wagoner Alternative and proposed that comprehensive solution in lieu of the short-term fix presented by Minisink.

Commissioner LaFleur also questioned the majority's approach:

> I am dissenting in this case because I do not believe that the majority has correctly applied the standards set forth in the Certificate Policy Statement to the facts in the record before us. Based upon that record, I believe that the serious averse consequences of the Minisink compressor facility outweigh its

> public benefits, particularly given the existence of the environmentally preferable Wagoner Alternative.

On the other end of the spectrum, Commission Clark endorses an even narrower review of Millennium's application than his colleagues in the majority. In Commission Clark's view:

> It is necessary to review an application based on the appropriate standards and if the applications meets those standards to approve the certificate…To deviate from these principles could create a precedent wherein the Commission is asked to serially consider alternate sites for a project and applicants are expected to file applications under a constantly moving target of requirements.

While Commissioner Clark assures that pipelines must accommodate landowner requests for modifications, under Commissioner Clark's view, pipelines may propose and receive approval for essentially any project, without regard to broader public interest concerns such as patchwork systems or potential for "spaghetti pipelines," (*i.e.,* overbuilding)[9] so long as they show need and ability to support the project without subsidy.

MREPS and its members are aggrieved by the Commission order issuing the certificate to Millennium for the Minisink Compressor. The certificate will permit Millennium to construct industrial-sized compressor in a rural/residential community, reducing property values, saddling residents with noise, polluted emissions and a

[9] Currently, on the electric transmission side, the Commission is grappling with how to encourage merchant transmission development while avoiding spaghetti transmission. *See Proposed Policy Statement, Allocation of Capacity on New Merchant Transmission Projects and New Cost-based, Participant-Funded Transmission Projects,* FERC Docket Nos. AD12-9-000 and AD11-11-000, 140 FERC ¶ 61,061 (2012).

visual blight and destroying the agricultural and organic farming economy. And for what? The Minisink Compressor is a short-term fix; the quickest way for Millennium to meet the delivery dates in its two precedent contracts. But it is not a solution that serves the public convenience and necessity. Accordingly, MREPS seeks rehearing of the certificate granted for the Minisink Compressor.[10]

IV. ARGUMENT

A. The Commission order approving the Minisink Compressor violates the Natural Gas Act, 15 U.S.C. §717f because the project serves only Millennium's narrowly defined private objectives and does not serve the "present and future public necessity."

Under Section 7 of the Natural Gas Act,15 U.S.C. §717f(e), the Commission must find that a proposed interstate natural gas facility will serve the "present or future public convenience and necessity" prior to granting a certificate authorizing "the whole or any part" of the proposed project. If the Commission concludes that a proposal does not serve the present or future public convenience and necessity, the Commission must either deny the application outright, or "attach conditions to the issuance of the certificate…as the public convenience and necessity may require." The public convenience and necessity requires the Commission to consider *future* needs and alternatives, even if not contemplated by an applicant's proposal. In *City*

[10] This rehearing request is filed on behalf of MREPS as a group. Several other MREPS members are filing individual rehearing requests as well.

of Pittsburgh v. Federal Power Comm., 237 F.2d 741 (DC Cir 1956), the court found that the Commission erred in excluding evidence relating to the applicant's future expansion plans. The court held that the Commission's obligation to make findings on "present and future public convenience and necessity" obligated it to consider future expansion and various alternatives in light of such expansion as part of its evaluation of a proposal.

Just as in *City of Pittsburgh*, Commission did not consider the "future public convenience and necessity" as required by Section 7 of the NGA. Instead, the Commission focused solely on Millennium's short term need to make deliveries under two ten year precedent agreements when the more significant problem confronting Millennium is the Neversink segment of its pipeline which severely constrains Millennium's future ability to expand or increase capacity and maintain consistent maximum allowable operating pressures (MAOP) along the Millennium pipeline.

In short, even if Millennium can plausibly argue that the Minisink Compressor serves the *present* public convenience (which MREPS does not concede), the Minisink Compressor does not serve the future public convenience because it does not address the long term problem of the Neversink pipe, which is the source of Millennium's capacity constraints. Because the Minisink Compressor station does not serve the present and future public convenience, the Commission erred in granting a certificate to Millennium for the project.

B. The Commission's approval of the Minisink Compressor Station, is inconsistent with the *Certificate Policy Statement* because the project's marginal public benefits

do not outweigh the considerable adverse impacts as both Chairman Wellinghoff and Commissioner LaFleur concluded in their respective dissents.

1. Background on Policy Statement

In adopting its present *Certificate Policy Statement*, the Commission's original impetus was to "strike the proper balance between the enhancement of competitive alternatives and the possibility of over building. *Certificate Policy*, 88 FERC at 61,736.[11] Ultimately, the Commission decided to adopt a flexible test for issuing certificates that would balance the project's public benefits against adverse impacts.

In a change from earlier practice, where a pipeline's need was dispositive of public benefits, under the Certificate Policy, serving customer need is but one of many public benefits that a new natural gas facility might offer:

> The types of public benefits that might be shown [by a Section 7 applicant] are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability or advancing clean air objectives. Any relevant evidence could be presented to support any public benefit the applicant may identify. [Certificate Policy at 61,748]

The Commission went on to explain that the *Certificate Policy* represents a change by eliminating the requirement to present precedent agreements to establish need:

> A project that has precedent agreements with multiple new customers may present a greater indication of need than a

[11] Interestingly, Millennium filed comments, disagreeing with the presumption that overbuilding must be avoided because all markets have excess capacity. 88 FERC at 61,738.

> project with only a precedent agreement with an affiliate. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project.

Thus, the Commission's analysis of public benefits reflects a broad approach that goes well beyond whether an applicant holds a precedent agreement. Once the Commission identifies the project's public benefits, it will balance them against adverse impacts – and if the benefits outweigh the impacts, the Commission will find that the proposed project is in the public convenience and necessity under the Certificate Policy.

2. The Commission misapplied the Certificate Policy

The majority misapplied the Certificate Policy. Rather than evaluate the Minisink Compressor with reference to the entire record or examine a broad range of benefits as the Certificate Policy requires, the majority approved the Minisink Compressor in a vacuum. Ignoring the Neversink constraints on Millennium's long-term delivery capabilities and the availability of the environmentally and operationally preferable Wagoner Alternative, the majority concludes that the Minisink Compressor is in the public convenience and necessity because the project supports Millennium's precedent agreements (a proxy for need), is not subsidized and the residual environmental effects such as noise, emissions and visual impacts are not significant.

The majority incorrectly applied the standards of the Certificate Policy Statement in several ways. First, as Commissioner LaFleur points out, the majority did not balance the residual impacts against the need for the project

as required by the Certificate Policy Statement (LaFleur at n.9 and text):

> The residual impacts of the Millenium facility must, under the Certificate Policy Statement be balanced against the need for the project. *However, the record does not demonstrate that the "specific project" is needed in light of the availability of an environmentally and operationally preferable alternative, the Wagoner Alternative.* (emphasis added)

Second, the majority downplayed the seriousness of the adverse project impacts by

> incorrectly equating temporary environmental impacts due to construction of the Wagoner Alternative with permanent residual impacts of the Minisink proposal and therefore, makes an invalid comparison.

Third, the majority did not consider the long term costs and benefits of the Wagoner and Minisink proposal as did Chairman Wellinghoff in his dissent (see infra, Part IV.D.2 (discussing Commission failure to evaluate costs and benefits of proposal). Had it done so, the Commission would have found that the Minisink Compressor Station not only offers fewer benefits but that it is not necessarily 50 percent less expensive than the Wagoner Alternative either, given that Minisink's fuel costs are double that of the Wagoner Alternative.

Under the Certificate Policy, public benefits and adverse impacts are not absolute, but are evaluated on a sliding scale in the context of the facts in the record. For that reason, the Minisink Compressor cannot be considered in isolation but rather, its benefits must be considered with reference to other available options that address Millennium's needs.

This does not mean, as suggested by Commissioner Clark, that the Commission is obligated to develop and consider one alternative

after another to identify *the* minimal impact project. But at the same time, the Commission is not free to ignore viable alternatives to the Applicant's proposal.[12] Moreover, the Commission's regulations require the applicant to submit alternatives as part of the application process and therefore, must consider those alternatives in evaluating the application.

Not only does the majority ignore the Wagoner Alternative, but it also improperly conflates project need with public convenience and necessity. Merely because a pipeline has a need to increase its capabilities to serve customers does not mean that the applicant's chosen means to serve that need satisfy the public convenience and necessity. The Commission's Certificate Policy makes this clear, which is why it defines public benefits more broadly than just contractually-demonstrated need, but rather, to include a broad range of impacts from eliminating bottlenecks to reducing air emissions. *See* Commission Policy.

Both the majority and Commissioner Clark would have the Commission act as nothing more than a gatekeeper, checking an applicant's proposal along a list of criteria and approving the project if it satisfies the applicable factors. This, however is not the Commission's role either under the Certificate Policy or the Natural Gas Act:

[12] Moreover, the Applicant is also required to include alternatives in its application.

> [as representative of the public interest], the Commission may not act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission….**The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.**[13]

By failing to consider the Wagoner Alternative in balancing project benefits against adverse impacts, the Commission violated the Certificate Policy as well as its obligation to ensure that a project is in the public convenience and necessity under the Natural Gas Act.

C. The Commission was arbitrary and capricious in approving the Minisink Compressor, which is inconsistent with the Commission's siting and maintenance requirements in Section 380.15 and Commission precedent, which favors projects with temporary impacts over those with long-term duration.

1. Description of Commission site guidelines and practices

Section 380.15 of the Commission's regulations establish requirements for site selection for natural gas facilities which recommend use of existing rights of way and unobtrusive sites for natural gas facilities, and consideration of noise potential when locating compressor stations. Siting guidelines relevant to this case include:

- Section 380.15(b) *Landowner consideration.* The desires of landowners should be taken into account in the planning, locating, clearing, and maintenance of rights-of-way and the construction of facilities on their property, so long as the result is consistent with applicable requirements of law, including laws relating to land-use and any requirements imposed by the Commission.
- Section 380.15(d) *Pipeline and electric transmission facilities*

[13] *Scenic Hudson Preservation* Conference *v. Federal Power Commission*, 354 F.2d 608, 621 (2nd Cir. 1965).

construction. (1) The use, widening, or extension of existing rights-of-way must be considered in locating proposed facilities.

- Section 380.15(f) *Construction of aboveground facilities.*
    - (1) Unobtrusive sites should be selected for the location of aboveground facilities.
    - (2) Aboveground facilities should cover the minimum area practicable.
    - (3) Noise potential should be considered in locating compressor stations, or other aboveground facilities,

In previous cases, the Commission routinely follows these guidelines when reviewing and approving a proposed project. For example, the Commission looks favorably on those projects which are sited in existing rights-of-way, since they limit the need for acquisition of additional property,[14] and has rejected route variations that would take a project outside an existing right-of-way and cause more significant impacts than the incremental harm in an already developed location.[15] In addition to the siting guidelines, the Commission accords greater weight to permanent, adverse impacts of a project rather than short-term effects when choosing between

[14] *Florida Gas Transmission Co.,* LLC, 129 FERC ¶61,150 (2004)29 (2009)(finding that majority of project will occur within or adjacent to Florida Gas' existing right-of-way thereby limiting easements required).

[15] *Transcontinental Gas Pipeline*, 2008 FERC LEXIS 1577 ("Since the affected lands abut a long established natural gas pipeline corridor, we believe that the use of this land, whether on a temporary or permanent basis, should not significantly impact the overall land value."); *Dominion Transmission, Inc.*, 135 FERC ¶61,239, para. 73 (2012)(rejecting route variation which would establish a new right of way and thus, is contrary to Commission's preference for routing along established right-of-way to reduce impacts).

project alternatives.[16]

2. The Commission's Order Ignores Siting Guidelines and Precedent

Agencies are expected to follow their own regulations; departure from existing rules without explanation is arbitrary and capricious.[17] The Commission ignored its siting guidelines and precedent order in granting a certificate to Millennium and thus, its decision is arbitrary and capricious.

Contrary to Section 380.15(b) and Commission precedent requiring siting in existing rights-of-way, the Millennium Compressor will be built on 73 acres of residential/agricultural property that will be permanently lost for future agricultural use. By contrast, the Wagoner Alternative would be built in an existing right of way owned by Millennium, on an industrial-zoned site, which previously housed an operational compressor station consistent with siting guideline Section 380.15(d) and Commission precedent. As for the upgrade to the 7.2-mile Neversink segment which is a necessary component of the Wagoner Alternative, the pipe replacement would take place in an

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[16] *See, e.g., Central New York Oil & Gas Company, LLC*, 137 FERC ¶61,211, 61,643 (2011)(noting that reduced carbon sequestration due to tree removal is short-term impact that will revert to pre-existing conditions); *Florida Gas Transmission Co.*, 129 61,150 at para. 29 (noting that most impacts are short term, and further, will be reduced to less than significant levels with mitigation). *Transwestern Pipeline,* 121 FERC ¶61,175 at 61,181 (finding that alternative streamcrossing method will have short term impacts and is therefore acceptable)

[17] *Mine Reclamation Corporation v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994), citing *Way of Life Television Network Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Circ. 1979) ("On its way to decision, however, the agency must follow its own regulations; "it is a "well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.")

existing right-of-way that has been largely cleared of trees thus providing 75 to 100 feet of work space.[18]

Contrary to Section 380.15(f)(1), the Minisink Compressor is sited in close proximity to homes (the closest is a scant few hundred feet away) in an obvious location By contrast, the Wagoner Compressor will be located in an unobtrusive site a half mile from any residences, thus minimizing noise and safety impacts.

The Commission also deviated from past practice in adopting the Minisink Compressor, even though its long-term environmental impacts on noise, air and visual aesthetics (the Minisink Compressor requires a visual screening plan to address visual impacts, which may take several years to complete) could be avoided by the Wagoner Alternative, a smaller compressor station in a remote location with less noise and emissions. The Wagoner Alternative would also cause temporary, short-term loss of agricultural crops for one season, whereas the Minisink Compressor will occupy 73.4 acres of agricultural land permanently, fully foreclosing any future use for crops or agribusiness. Likewise, the majority did not take account of the Minisink Compressor Station's long-term economic toll on the community, including diminution of property values, and foreclosure of opportunities for residential or other compatible development that might generate added tax revenues.

Equating long and short-term impacts not only deviates from

[18] MREPS members question the accuracy of the need for additional workspace based on photos of the right of way submitted in comments to the EA. The photos show that large swaths have already been cleared, and it is unclear why Millennium will need more workspace. See Commission Order at n.27, also MREPS Appendix to EA Comments, Photos at 81. Incidentally, this is the type of disputed fact that lends itself to resolution at a hearing.

established Commission policy of favoring short-term harm over lasting damage, but not surprisingly, skews the results of the Commission's environmental analysis, as Commissioner LaFleur emphasized out in her dissent:

> I believe that the EA's finding that the Wagoner Alternative "does not provide a significant environmental advantage over the proposed project is incorrect. This conclusion incorrectly equates temporary environmental impacts due to construction of the Wagoner Alternative with permanent residual impacts of the Minisink proposal and therefore makes an invalid comparison.

Because the Commission did not follow its siting guidelines or precedent in evaluating the Millennium application, and further, unreasonably equated long-term and short-term impacts, the Commission's order is arbitrary and capricious and must be vacated on rehearing.

D. The Commission violated NEPA

Although the NGA and the *Certificate Policy Statement* requires the Commission to find that a project is in the public convenience and necessity by balancing project benefits and impacts, NEPA adds a secondary responsibility by mandating that the Commission consider the environment in carrying out its obligations under the NGA.[19] The Commission's order violates NEPA by improperly segmenting the project, omitting a cost/benefit analysis of the Millennium proposal, ignoring cumulative project impacts related to the Wawayanda Power Project (and more recently, the Hancock

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[19] *State of Louisiana v. FPC*, 503 F.2d 844, 847 (5th Cir. 1974)(describing that NEPA supplements but does not supplant the Commission's obligations under the NGA).

Compressor) and failing to take a hard look at adverse impacts such as reduced property values and tax base, noise, feasibility of electric compressors, effects and bald eagles and adopting inadequate mitigation measures to address adverse impacts.

1. Unlawful segmentation

NEPA requires agencies to discuss connected actions in the same environmental analysis. Applying the CEQ guidelines,[20] courts define connected actions as those, which lack substantial independent utility or has a "direct and substantial probability of influencing the decision on the larger project." Further, an agency may not unquestioningly adopt an applicant's "self-serving and unreliable statements" about the scope of its project and future development plans without conducting its own independent investigation.[21] The "anti-segmentation" rule prevents agencies from artificially dividing a major project into multiple components, each of which individually has an insignificant environmental impact, but which collectively have a substantial effect.[22]

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[20] The CEQ regulations define connected actions as those which trigger other actions that may require an EIS, cannot proceed without each other and are interdependent parts of a larger action.

[21] *Hammond*, 370 F. Supp. 2d at 253; *State of South Carolina ex. rel. Campbell v. O'Leary*, 64 F.3d 892 (4th Cir. 1995)(establishing "probability of influence on ultimate decision" factor for purposes of evaluating interdependence of projects).

[22] *Fla. Wildlife Fed'n v. United States Army Corps of Eng'rs*, 401 F. Supp.2d 1298 (S.D. Fl 2005*), citing PEACH v. U.S. Army Corps*, 87 F.3d 1242 (11th Cir. 1996); *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005) ("It is established that an agency preparing an EIS may not "segment"

The Commission rejected MREPS claims of unlawful segmentation raised in its comments on the EA. Without reference to any specific evidence, the Commission determined that Millennium demonstrated that the [Minisink Compressor Station has independent utility and constitutes a stand-alone project to provide 225,000 Kth of firm transportation to customers under long-term precedent agreements. Order at ¶65. Yet if the Millennium Project has stand-alone utility, why was it characterized as the first phase of a singular "expansion project" in Millennium's Powerpoint presentations?[23] Similarly, if the Minisink Project has stand-alone utility, why did Millennium rush forward, before the ink was scarcely dry on the EA, to initiate pre-filing for the Hancock Compressor station, which like the Minisink Project, also provides capacity at Ramapo. These projects are not independent of each other, but rather, sequential steps that comprise part of a larger expansion project.

Now that the Hancock facility has been proposed, comments by the Delaware Riverkeeper Network offer additional evidence that the two compressor stations and the Neversink upgrade are inextricably linked:[24]

> Resource Report 1 for the Minisink project indicates that the project will boost "the pressure of the natural gas up to the

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its analysis so as to conceal the environmental significance of the project or projects").

[23] The most powerful evidence that the three phases are part of a uniform project comes from Millennium's own powerpoint presentations, (Currie Presentation, Appendix to EA at 309) shows the Millennium project as Phase 1 of a larger project, that includes additional compression, replacement of Neversink and pipeline looping as Phase 2.

[24] Delaware River Keeper Comments (August 10, 2012), Accession Number 20120810-5128 FERC PDF

> current maximum allowable operating pressure (MAOP) of 1,200 pounds per square inch gauge (psig)."[49] In Resource Report 1 for the Hancock compressor station, Millennium makes a *word for word* identical statement. It is clear that Millennium is attempting to increase the capacity of its existing pipeline by boosting the pressure to the maximum allowable limit all across its entire pipeline. As such, it is improperly segmenting its projects. It is incumbent upon FERC to consider the applications in one environmental analysis even if the applicant submits separate applications to the agency. This is a burden for which FERC is responsible, regardless of the way in which the applicant represents the projects before the agency[…]Furthermore, the expected lifetime of these projects outreach the length of their associated shipping contracts (10 years), and therefore Millennium cannot appropriately claim that the projects are completely independent of each other; rather, each project will inevitably act in concert to increase the capacity of the entire Millennium pipeline

Without concomitant upgrades to the Neversink segment, the Millennium Compressor station, standing alone, is either a useless, short-term fix or a costly boondoggle to serve a limited set of customers. Further, the Commission erred in unquestioningly adopting Millennium's applicant's "self-serving and unreliable statements" about the scope of its project and future development plans without conducting its own independent investigation.[25]

The record proves that Millennium Compressor station lacks independent utility, the EA should have evaluated the Millennium Compressor station and related system upgrades as a unified development instead of piecemealing its review. Had the EA compared a Millennium

[25] *Hammond*, 370 F. Supp. 2d at 253; *State of South Carolina ex. rel. Campbell v. O'Leary*, 64 F.3d 892 (4th Cir. 1995)(establishing "probability of influence on ultimate decision" factor for purposes of evaluating interdependence of projects).

Compressor/Hancock/Neversink Expansion Project to the Wagoner Alternative (which includes the Neversink upgrade) in a level-playing field, apples-to-apples comparison, the Wagoner Alternative would have emerged as the environmentally preferable option.

Piecemealing environmental review may foreclose consideration of future alternative or influence the ultimate decision on the broader project, thus rendering the preferred outcome a fait accompli rather than the product of reasoned review. *See generally*, *Hammond*, 370 F. Supp. 2d at 253; *Campbell v. O'Leary*, 64 F.3d at 895. The Commission neglected to consider that by steamrolling the Minisink Compressor forward as a stand alone -- notwithstanding that doing so will strain the aging Neversink segment to bursting – Millennium can manufacture a situation of grave urgency so as to virtually guarantee its ability to upgrade the Neversink segment in expedited fashion in the future.

Historically, Millennium has encountered challenges to siting in the Neversink segment.[26] By segmenting the Minisink Compressor station, Millennium is calculating that the added pressure from the new compressor on its system will create so dire threat to the integrity of the Neversink segment that the environmental considerations that have stymied upgrades in the past will give way to safety, leaving the Commission no other alternative

[26] Millennium Pipeline Company, LLC, 117 FERC ¶61,319 (2006)(approving Millennium's proposal to acquire 7.2-mile Neversink segment from Columbia Gas to avoid impacts of new construction).

but to approve the Neversink expansion in expedited fashion, on Millennium s own terms.[27]

2. Inaccurate cost benefit analysis

NEPA, in effect requires a broadly defined cost benefit analysis of major activities. See *Chelsea Neighborhood Association v. United States Postal Service*, 516 F.2d 378, 386 (2d. Cir. 1975). The CEQ regulations (40 C.F.R. §1502.23) identify those factors that an agency should consider as part of a cost benefit analysis. The EA's cost benefit analysis is improper in two respects. First, the discussion the projects costs and benefits is skimpy at best or in legal parlance, unsupported by substantial evidence). Second, the EA is inadequate according to Chairman Wellinghoff dissent, because it does not compare the long-term costs and benefits of the Minisink Compressor and the Wagoner Alternative.

The EA's sole mention of cost comes in its Alternatives Analysis, at page 50, noting that:

> Millennium states that the Wagoner Alternative would cost at least 50 percent more than its proposed project.

The EA does not cite any submissions by Millennium to support the asserted cost differential and for that reason alone; the EA is inadequate under NEPA

[27] *See* Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), order clarifying statement of policy, 90 FERC ¶61,128, order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000) (describing that Commission balances project benefits against adverse impacts and that compelling benefits will counterbalance adverse impacts).

(which requires disclosure of the facts underlying agency decisions) and the NGA (requiring substantial evidence to support findings).

However, a full evaluation of the long-term costs of Minisink and Wagoner shows that the cost differential is not as stark as the EA suggests. In his dissent, Chairman Wellinghoff explains:

> Because the fuel requirements of the two options were not considered…Due to the difference in size of the compressors, the smaller compressor station at Wagoner would likely release approximately 44 p3ercent of the emissions related with the operation of the new Minisink Compressor…. Further, comparison of the options indicates that the smaller compressor station at Wagoner would require roughly 438,000 Mcf in comparison to the 1,000,000 Mcf in annual fuel consumption at the proposed Minisink compressor station based on the amount of fuel required to operate the Minisink station in accordance with the Clean Air Acct permit issued by the State of New York. **At a price of $2.89 per MMBtu, it would cost approximately $1,261,502 to provide fuel for the Wagoner Alternative compared to $2,890,289 in fuel year for the Minisink Station.**

Wellinghoff Dissent (emphasis added). Assuming a 20-year life for the Compressor Station, and the Minisink Station will actually cost $32 million more than the Wagoner Alternative over the life of the project.

Likewise, the Neversink component of the Wagoner Alternative produces long-term, far-reaching benefits as well. In contrast to the Minisink Compressor, which is a short term, fix designed to enable Millennium to meet its delivery obligations by November 2012, Chairman Wellinghoff points out that:

> Not only does upgrading the Neversink Segment result in the need for decreased compression and corresponding decreased emissions and fuel requirements, it will also provide for greater capacity on the Millennium system in the long term. The EA notes that in replacing the Neversink segment, the effect on agricultural land would consist of a temporary loss of crops for one growing season,

> and after construction is completed most agricultural land uses would revert to previous uses within the permanent rights of way [in contrast to the Minisink proposal which results in the permanent loss of agricultural land]

If the costs of the permanent loss of farmland are factored in, the Minisink Compressor becomes a far more expensive option than the Wagoner Alternative with far fewer benefits.

As Chairman Wellinghoff points out, "a full evaluation of the long term benefits and costs of the two options shows that the Wagoner Alternative is the most efficient proposal for expanding capacity on the Millennium system. The EA erred in concluding otherwise.

3. Failure to take a hard look at various project impacts and cumulative impacts

NEPA requires agencies to take a hard look at a project's adverse impacts and also to consider the project's cumulative impacts. The EA did neither.

The deficiencies in the EA's analysis of noise, emissions impacts and other project alternatives are discussed in detail in the rehearing requests of Michael Mojica and Karen Gartenberg. The MREPS rehearing request will focus on the lack of discussion of adverse impacts to property values and the tax base within Minisink and failure to review impacts associated with the CPV Power Plant.

a. Property values

The Commission "recognizes the general potential for property values to be negatively impacted by the construction of nearby energy infrastructure, noting that the EA reached a similar conclusion. Order ¶70. Nevertheless, the

Commission determined that "on balance, we do not find the potential for such an impact sufficient to alter our determination" that the Compressor Project is required by the public convenience and necessity. *Id.*

Again, the Commission failed to consider the cost of impacts to property value. As development of pipelines accelerates, there is a growing body of data that quantifies impacts. One report, *The Impact of Oil and Natural Gas Facilities on Rural Residential Property Values: A Spatial Hedonic Analysis.* (Rural Property Value Report) online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894562. concluded that:

> oil and sour gas (gas containing hydrogen sulphide) facilities located within 4 km of rural residential properties significantly affect their sale price.

Rural Property Value Report at 1. Reductions are significant; at least 4 to 8 percent, but potentially twice that amount. *Property Values Report* at 24. MREPS members who are all located within the 4-kilometer range, as well as all community residents will suffer these same impacts, yet they are not addressed in the EA.

In addition, a number of jurisdictions in the United States recognize that property values may be reduced that property values in close proximity to compressor stations frequently experience a drop in value due to fear of fear of harm that might be caused by risk of explosion or toxics emitting from a compressor station or transmission line.[28] or nuisance caused from living next

[28] *See Midwestern Gas Transmission v. 2.62 Acres*, Case No. 3:06-cv-0290 (M.D. Tennessee 2011)(allowing testimony on impact of proximity to fear on perception of property value in compressor station takings case); *Willsey v. Kansas City,* 631 P.2d 268 (Kansas 1981)(summarizing state rulings

to a noisy compressor station that fails to comply with applicable permitting requirements.[29] Given that academics and courts alike have found ways to quantify impacts of compressor stations and utility facilities on property values, the Commission should have the ability to do the same in the EA.

Finally, the Commission erroneously assumes that visual impacts are the most substantial detractor of a Compressor station rather than nuisance, pollution, noise and potential for explosions. Order at ¶70. Thus, as mitigation for the effects of the compressor station on property values, the EA proposes that Millennium use part of the site as a buffer and further, design and screen the site to minimize residential impacts. But none of this mitigation addresses the nuisance and security issues that also depress property values.

b. Cumulative and future impacts

Commission did not consider the impacts of construction related to the CPV Valley Power Plant, explaining that "a proposal to construct facilities to serve the CPV Valley power plant is not before us." Commission Order ¶67. However, as several commenters have pointed out, there is a relationship between the Minisink Compressor and the CPV Power Plant, and eventually a lateral line will be constructed to provide gas to the power plant.

The Commission's reluctance to evaluate future impacts violates

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on impact of fear on property values where transmission lines are located).

[29] *Natural Gas Pipeline v. Justiss*, Case No. 06-09-00047 (Court of Appeals, Sixth District 2010)(awarding $645,000 in reduced property values based on noise and pollution from compressor station).

NEPA. As explained by the Fifth Circuit:

> Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry.[30]

Millennium has an agreement in place with CPV, and presumably, it has in mind the route through which it will provide service. Moreover, the Commission could have requested this information from Millennium in order to evaluate the full impacts of the Minisink station, in particular, to determine whether an upgrade to the Neversink segment is imminent. By Commission's refusing to consider the future impacts of CPV Valley related construction, the Commission shirked its duties under NEPA.

E. The Commission violated the Natural Gas Act by failing to consider Millennium's past compliance record notwithstanding that most of the recommended mitigation depends upon Millennium's ability to comply with the conditions of its certificate.

Section 7(e) of the Natural Gas Act bars the Commission from issuing a certificate unless it finds that "the applicant is able and willing properly to do the acts and perform the services proposed and to conform the provisions of the NGA and Commission regulations." The Commission did not make any findings regarding Millennium's fitness, and therefore its order unsupported by substantial evidence as required by the Administrative Procedure Act and Section 717r(b) of the Natural Gas Act to survive judicial review. (The

[30] *State of Louisiana v. Federal Power Commission*, 503 F.2d 844, 877 (5th Cir. 1974).

finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive). The EA's brief mention of a January 2011 leak on Millennium's pipeline, is no substitute for the formal, statutorily mandated finding by the Commission on Millennium s fitness to hold a certificate. Moreover, had the Commission investigated Millennium's fitness, it would have discovered that Millennium has an extensive history of violations which shows that Millennium would not be able to carry out the acts required by the certificate for the Millennium Compressor.

MREPS member Karen Gartenberg documented Millennium's ongoing compliance problems and substantial penalties in comments on the EA.[31] Many of Millennium's violations related to environmental concerns such as failure to protect water quality or minimize wetland disturbance.

The Commission order notes stakeholder concerns about Millennium's ability to successfully implement "the mitigation which underlay the Commission's findings," (Order, ¶83), but does not discuss or address Millennium's extensive penalty history. Moreover the Commission assures that its required monitoring reports and staff inspections will keep Millennium in line. *Id.* Though ongoing monitoring may help, presumably, Millennium was subject to regulatory oversight when it botched its mitigation efforts.

To be sure, Millennium's compliance history raises red flags even when it comes to operation of the Wagoner facility. However, because the

[31] *See* MREPS Appendix (April 16, 2012) at 436-438 (Gartenberg Protest and EA Comments (April 15, 2012) describing violations of both Millennium and Columbia Gas, which will operate the compressor station for Millennium).

Wagoner Alternative effectively *is* the mitigation for the Minisink Proposal and inflicts less noise and emissions and fewer visual impacts, the Wagoner Alternative would not require as many, or as stringent conditions to mitigate adverse noise, air emissions and visual impacts, which in turn, could facilitate Millennium's compliance. In addition, because the Neversink upgrade will replace a 25-year old, 24-inch pipe with a new, 30-inch pipe, any compliance problems that Millennium may experience in maintaining an older line will also be avoided.

However, before the Commission can assess whether the Wagoner Alternative may offer the residual benefit of easing Millennium's compliance problems by imposing fewer conditions and requiring an upgrade of a vulnerable pipe segment, the Commission must first make the statutorily required findings on Millennium's fitness on rehearing.

F. The Commission majority violated the Administrative Procedure Act (APA) and principles of reasoned decision-making by failing to respond to the concerns of the dissenting Commissioners.

Reasoned decision-making requires consideration of reasonable alternatives to the Commission's position raised by parties. The same duty to address alternatives raised by parties also applies to those raised by dissenting Commissioners. "While the Commission is not required to agree with arguments raised by dissenting Commissioners, it must, at a minimum acknowledge and address them" under the Administrative Procedure Act (APA).[32]

[32] *American Gas Association v. FERC*, 593 F.3d 14 (D.C. Cir. 2010)(remanding case to consider dissenting views of Chair Wellinghoff);

Most seriously, the majority minimizes the advantages of the Wagoner Alternative, noting that they relate solely in its distance from noise sensitive areas and residences than the compressor station. Order at ¶27. But the majority does not acknowledge the other, expansive benefits of the Wagoner Alternative identified and discussed at length by Chairman Wellinghoff and Commissioner LaFleur in their dissents, such as increased reliability, avoidance of permanent loss of 73 acres of farmland, reduced air emissions (since the Wagoner Compressor would be half the size of Minisink) and reduced fuel costs, which over the life of the project make the costs of the Minisink Compressor and the Wagoner Alternative roughly equivalent. See Part IV.D.2.

The majority also focuses myopically on Millennium's need for the project, suggesting that need trumps all other considerations. By contrast, the dissenters likewise acknowledge that Millennium has a need to upgrade and expand capacity, but that this particular project does not appropriately address that need (Commissioner LaFleur) or that a comprehensive solution (in the form of the Wagoner/Neversink Alternative) is preferable to the short-term fix proposed by Millennium (Chairman Wellinghoff). At a minimum, the majority must explain why the dissent's preferred alternatives are inappropriate.

Chamber of Commerce v. SEC, 412 F.3d 133, 137-138 (D.C. Cir. 2005)(requiring SEC to address views of two dissenting commissioners which were neither frivolous or out of bounds).

G. MREPS' inability to gain timely access to CEII and FOIA information from the Commission, and the Commission's failure to disclose the basis of its "independent verification" deprived members of due process right to meaningful comment under the United States Constitution, violates the Administrative Procedure Act and NEPA and discriminates against landowners.

Both the Administrative Procedure Act and NEPA require the Commission to engage in on-the-record decision making, with full disclosure of the studies and data relied on in making those decisions. *Itzaak Walton League of America v. FERC*, 655 F.2d 346 (1981). Denial of access to data violates parties' due process rights to meaningful comment. *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002). MREPS' inability to timely access the information sought under CEII and FOIA not only denied MREPS and its members of due process, but also diverted scarce resources to chasing down information to which intervenors should be entitled as a matter of course.

1. Factual Background on CEII and FOIA Requests

In its comments on the EA and a letter dated May 9, 2012, MREPS and John Odland argued that their inability to access information submitted by Millennium through CEII or FOIA violated their due process rights to meaningful comment. CEII information sought includes Exhibit G to its application, which includes various hydraulic models and gas flow charts, while the information sought under FOIA includes communications between staff and Millennium and other materials that Millennium classified as privileged in its filing. As of the date of this rehearing, many of John Odland's FOIA request, originally filed in March 2012 are still outstanding, with information trickling in months after the 20-day deadline for production.

By July 2012, undersigned counsel, Mr. Odland and Laurie Arias, another MREPS member were able to obtain access to Exhibit G materials and some hydraulic studies, but MREPS engineers did not receive access until a week before this rehearing request was due. In addition, several other MREPS members have also sought this same CEII information; Mojica and Gartenberg received access just a few days before the deadline while others are still awaiting production.[33]

2. The Commission CEII/FOIA ruling

In its order, the Commission found that the request to hold the proceeding in abeyance was moot because the Commission had responded to Mr. Odland's FOIA requests. But the Commission has notified Mr. Odland that it is still – nearly six months after he filed his request – identifying responsive information. Moreover, the Commission's June 4, 2012 letter denied release of materials that Millennium submitted in response to a Commission data request – and Mr. Odland has appealed the determination. In light of the pending appeal and ongoing FOIA production, the request to hold the proceeding in abeyance is not moot.

More troubling, however, is the Commission's assertion that MREPS was not prejudiced by lack of access to engineering studies (which show the feasibility of Millennium's proposed alternatives), flow data (which show the inter-connected nature of the three phased project that Millennium has improperly segmented) and most recently, hydraulic studies (that the

[33] These requests were filed some time in June 2012, but due to a "technical glitch" within the CEII office, MREPS members were required to refile their requests.

Commission relied on in its evaluation of the need for the Neversink upgrade). The Commission states at n.56 that:

> Commission staff has independently confirmed that the project as proposed will enable Millennium to provide the contemplated service without negatively impacting existing customers. There is no basis for MREPS' suggestion that the "hydraulic studies may show that the Minisink Compressor will in fact require an upgrade to Neversing…Commission staff independently verified the engineering requirements of each alternatives studied. Thus, the fact that MREPS did not have access to Millennium s hydraulic models did not negatively impact MREPS.

That the Commission independently verified information submitted by Millennium is utterly irrelevant to MREPS's due process claims. As the court emphasized in *Gerber*, intervenors are entitled to access all information submitted in support of a proposal so that they can meaningfully participate in the process as due process demands. In *Gerber*, the D.C. Circuit remanded a Forest Service decision granting a construction permit for a project that would be located on endangered squirrel habitat. The Forest Service issued notice of the permit application, which explained that the squirrels would be relocated as mitigation for adverse construction impacts, but the notice did not include a map showing the relocation site. A conservation group challenged the permit, identifying three specific challenges that could have been raised if the Service had disclosed the map. The D.C. Circuit deemed the lack of disclosure harmful error.

If anything, rather than obviate the need for MREPS to review engineering studies and data, the Commission's "independent verification" triggered an additional disclosure requirement under NEPA and the APA:

> the administrative record must disclose the studies and data used

> in compiling environmental impact statements. Moreover, any methodologies relied upon should be carefully described. The impact statement must be "sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved…NEPA clearly contemplates that the public should have an opportunity to challenge the adequacy of environmental impact statements. But without full disclosure the public would not be able to make independent judgments about the agency's action. Moreover, disclosure is necessary if the courts are to review environmental impact statements for compliance with NEPA. Additional support for the disclosure requirement is provided by the Administrative Procedure Act, 5 U.S.C. § 704 (1976).[34]

Because of the unique procedural requirements of the Natural Gas Act (NGA), MREPS inability to access information submitted by Millennium and relied upon by the Commission in issuing the certificate caused substantial prejudice. The NGA imposes a firm 30-day deadline for filing rehearing requests. Any arguments not raised are deemed waived for purposes of judicial review. In short, because of its inability to access CEII and FOIA information, MREPS was not only deprived of its due process rights to meaningful participation in the proceeding before the Commission, but it is also potentially cheated out of the ability to challenge certain aspects of the Commission's order on judicial review. Like the challengers in *Gerber*, the Commission recklessly trampled on MREPS' due process rights "to an extent…rarely seen in [Administrative Procedure Act] cases." 294 F.3d at 182.

3. MREPS inability to timely access CEII information is particularly troubling

While participants do not necessarily have a right to all information sought under FOIA (since some is potentially exempt from disclosure as proprietary or privileged), CEII information is not subject to similar restraints.

[34] *Itzaak Walton League v. Marsh*, 655 F.2d 246 at 252 (5th Cir. 1981)(cites omitted).

Indeed, prior to September 11, virtually all of the data today classified as CEII was freely available in the public record.

Because parties, upon a showing of need and execution of an NDA are entitled to CEII materials (again, in contrast to FOIA which contains many exceptions), the inability of landowner intervenors to obtain access to CEII information promptly and without the need to make multiple requests is particularly troubling. In this case, Millennium was willing to provide undersigned counsel with access to CEII (upon signing a disclosure), but all ten members of MREPS had to file CEII requests just so that counsel could discuss the information with the group. Moreover, because data is often submitted piecemeal in response to Commission information requests, intervenors must continuously file CEII requests to obtain information.

The Commission's CEII staff is exceptionally helpful, but like most government agencies, it is overburdened. Most CEII requests require at least a month to process and even longer if, for example, a request falls through the cracks (as was the case with Laurie Arias) or the system goes down (a technical glitch wiped out MREPS CEII requests, which they were required to refile). And while ordinarily, a month's response is not an inherently unreasonable, given that parties in Section 7 proceedings often have only 30 days to comment on an EA or file a rehearing request, a month's time is simply not sufficient to request and evaluate CEII materials and make use of them in filings. For that reason, the Commission's current CEII practices, systematically deprive intervenors of due process rights.

H. The Commission's denial of MREPS request for an on the record hearing violated its members' due process rights

and further, reflects an arbitrary, capricious and unduly discriminatory practice of granting hearings requested by large companies, but never individuals or landowners.

The Natural Gas Act prohibits the Commission from issuing a Section 7 certificate without first providing notice and an opportunity for hearing. Although the Commission is not obligated to hold a hearing in all instances, an on- the-record hearing is required when a genuine issue of material fact exists that cannot be resolved from the written submissions. See *Cajun Elec. Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994). Given the numerous factual disputes in this proceeding, ranging from Millennium's future expansion plans to its unsupported assertions regarding project costs, a hearing was required. Moreover, a hearing would have cured the "information access" problems since MREPS and other intervenors could have obtained CEII and FOIA materials promptly through discovery.

The Commission denied MREPS' request for a hearing, finding that it has the ability to resolve the disputed issues on the record.[35] Trouble is, many of these facts were not resolved. For example, the Commission determined that Millennium intended the Minisink Proposal as a standalone project, and yet, Millennium's own sales materials show otherwise; that the Minisink Compressor is the first phase of a larger project. At a hearing, the

[35] The Commission also found that *Florida Gas & Transmission*, a case involving a Commission- mandated amendment to a compressor station proposal, does not support MREPS' request for a hearing. Nor did MREPS intend it to. MREPS cited *Florida Gas & Transmission* for illustrative purposes; as an example of a case where vital facts were overlooked and when discovered, necessitated a change in the proposal. MREPS suggested that a hearing would ensure full disclosure of information to avoid the need for an amendment process right on the heels of a Section 7 proceeding as was the case in *Florida Gas & Transmission*.

Commission could cross examine Millennium's representatives about their plans to upgrade rather than simply accept Millennium's explanations as it has in this proceeding.

Moreover, the Commission's denial of a request for a hearing is arbitrary, capricious and unduly discriminatory because the Commission does hold hearings – but for large corporate entities, not landowners. The Commission's website lists approximately 100 pending administrative hearings (see http://ferc.gov/legal/admin-lit/act-cases.asp). Yet not a single case involves adjudication of landowner claims in a certificate proceeding. Notwithstanding that the issues here are just as complex and hotly disputed as those in the multi-party rate or cost allocation cases that dominate the Commission's hearing docket. Because the Commission does indeed hold hearings frequently, but for corporate interests, not individuals, its refusal to grant MREPS request for a hearing is arbitrary and capricious.

I. The Commission erred in finding that MREPS as a group, and its individual members intervened in an untimely manner.

Under both Section 157.10(a)(2) and Section 380.10 of the Commission's regulations, interventions are considered timely in a Section 7 certificate proceeding when filed prior to the deadline for commenting on the Environmental Assessment. MREPS and its members intervened before the April 16, 2012 deadline for comment on the EA. Accordingly, the Commission erred in determining that their interventions were untimely.

V. CONCLUSION AND REQUEST FOR RELIEF

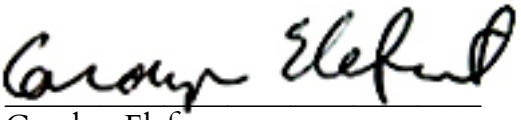
MREPS asks the Commission to vacate the certificate for the Minisink Compressor Station on rehearing. Understandably, the Commission may harbor reservations about granting the relief sought in light of potential consequences to Millennium. However, as discussed Millennium will not be prejudiced or delayed if the Commission denies its certificate.

First, Millennium, like most applicants, recognize that there is no guarantee that the Commission will grant them a certificate – and even if the Commission does, it may also impose conditions that obligate an applicant to undertake activities that were not encompassed by the original application. Second, even if Millennium is unable to construct the Minisink Compressor, based on the record in this case, it could obtain a certificate for the Wagoner Alternative in relatively short order. The EA has already extensively explored the Wagoner Alternative and found that it does not have any significant impacts. The Wagoner Alternative combined with the Neversink upgrade will also provide Millennium with the capacity to meet its obligations under the precedent agreements. And while Millennium has argued that it cannot put the Wagoner Alternative in service by the November 1, 2012 commitment date, Millennium will not suffer any liability for missing this deadline under the terms of Millennium's precedent agreements.[36]

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

WHEREFORE, for the foregoing reason, MREPS respectfully requests that the Commission grant this petition for rehearing and vacate the Section 7 certificate issued to Millennium.

Respectfully submitted,



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