

In the Certificate Order, the Commission issued a certificate of public convenience and necessity authorizing DTI to construct its Allegheny Storage Project, subject to conditions, pursuant to section 7(c) of the NGA.³ MCRC, the Town, and Mr. Cady each seek rehearing of the Commission's authorization of the Myersville Compressor Station, an important element of the project. MCRC and the Town argue that the Commission effectively was preempted from authorizing the Myersville Compressor Station because the Town Council of the Town of Myersville, Maryland (Myersville Council) denied DTI's application to amend the approved Site Master Plan (Site Plan Amendment Application) for the Myersville Compressor Station, thus allegedly rendering it impossible for DTI to obtain a required air quality permit from the Maryland Department of the Environment (MDE). Their position should be rejected, because it stands the doctrine of preemption on its head, and would subject the Commission's plenary authority over the siting of interstate natural gas pipeline facilities to local rules and authorities, at least in the state of Maryland and potentially to any state or local government that wants to circumvent FERC's jurisdiction over the siting of interstate natural gas pipeline facilities. In addition, the Commission should reject the attempts by MCRC and Mr. Cady to introduce new evidence in their respective requests for rehearing.

³ 15 U.S.C. § 717f(c) (2006).

I. MOTION FOR LEAVE TO ANSWER

The Commission's rules generally do not permit answers to requests for rehearing;⁴ however, the Commission may waive this prohibition for good cause.⁵ DTI requests that the Commission accept this answer on the grounds that it will clarify the issues, develop a more complete record, and assist the Commission in its decision-making process in this proceeding.⁶

II. BACKGROUND

On February 17, 2012, DTI filed an application (FERC Application) with the Commission for a certificate of public convenience and necessity for authorization of its Allegheny Storage Project. The Allegheny Storage Project involves the construction and operation of certain facilities located in Maryland, Ohio, Pennsylvania, and West Virginia that will enable DTI to provide 125,000 dekatherms per day (Dt/d) of new natural gas storage deliverability (with 7.5 million Dt of storage capacity), along with 125,000 Dt/d of transportation service to three customers.⁷ Among the facilities included in the Allegheny Storage Project is

⁴ See 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1) (2012).

⁵ 18 C.F.R. § 385.213(a)(2) & 385.101(e) (2012).

⁶ See, e.g., *Northern Natural Gas Co.*, 137 FERC ¶ 61,202 at P 10 (2011); *Dominion Cove Point LNG, LP*, 120 FERC ¶ 61,213 at P 2 (2007); *Florida Gas Transmission Co.*, 107 FERC ¶ 61,074 at P 2 & n.2 (2004); *Michigan Elec. Transmission Co., LLC*, 106 FERC ¶ 61,064 at P 3 (2004).

⁷ The 125,000 Dt/d transportation service will be delivered to Washington Gas and Light, Baltimore Gas and Electric, and TW Phillips Gas and Oil Co. (TW Philips). TW Phillips has contracted for 10,000 Dt/d of the 125,000 Dt/d of firm

the Myersville Compressor Station, a new 16,000 horsepower compressor station, consisting of one natural gas fired turbine, to be located in Frederick County, Maryland, in the Town of Myersville.

Consistent with the Commission's oft-stated view that pipelines should cooperate with local authorities where possible, DTI submitted a Site Plan Amendment Application to the Town of Myersville on April 15, 2012, requesting an amendment to an approved Site Master Plan for the construction of the Myersville Compressor Station. The Myersville Council denied DTI's Site Plan Amendment Application on August 1, 2012, on the grounds that the Site Plan Amendment Application was inconsistent with the Myersville Comprehensive Plan and applicable town codes.⁸ Relying upon this determination by the Myersville Council, a number of individuals requested that the Commission deny the project. In addition, MCRC filed a motion to dismiss DTI's FERC Application, in which it asserted that the Myersville Council's rejection of DTI's Site Plan Amendment Application meant that DTI could not obtain permits required by the federal Clean Air Act to operate the project.⁹ DTI filed an answer to MCRC's motion to dismiss, in

transportation service which does not require the additional facilities proposed by the Allegheny Storage Project.

⁸ See Certificate Order at P 67 & n.47.

⁹ Myersville Citizens for a Rural Community (MCRC) Motion to Dismiss Dominion Transmission Incorporated's (DTI) Application for Allegheny Storage Project (filed Oct. 1, 2012).

which it argued, among other things, that the Myersville Council's zoning decision would be preempted by issuance of a certificate by the Commission.¹⁰

In the Certificate Order, the Commission determined that the Allegheny Storage Project, including the Myersville Compressor Station, is required by the public convenience and necessity, subject to the conditions outlined in the Certificate Order.¹¹ The Commission rejected arguments that it should deny DTI's FERC Application based on the action of the Myersville Council, noting that state and local agencies may not, acting under state and local laws, "prohibit or unreasonably delay the construction or operation of facilities approved by the Commission."¹² The Commission further stated that "state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by the Commission."¹³ However, the Commission declined to address the arguments raised concerning MCRC's motion to dismiss on the ground that the motion requested the Commission "to interpret, and adjudicate in MCRC's favor, local, state and federal laws that are

¹⁰ Answer of Dominion Transmission, Inc. to Motion to Dismiss Application at 6-7 (filed Oct. 12, 2012) (DTI Answer).

¹¹ Certificate Order at P 21.

¹² *Id.* at P 68.

¹³ *Id.* (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply Corp. v. Public Service Comm'n*, 894 F.2d 571 (2d Cir. 1990) (*National Fuel*); *Iroquois Gas Transmission Sys., L.P.*, 52 FERC ¶ 61,091 (1990) (*Iroquois I*) and 59 FERC ¶ 61,094 (1992) (*Iroquois II*)).

outside of the Commission's jurisdiction."¹⁴ The Commission added that "if the state of Maryland rejects DTI's Air Quality Permit Application, or refuses to process it, then it is up to DTI to determine how it wishes to proceed."¹⁵

Subsequent to the Commission's issuance of the Certificate Order, on December 21, 2012, DTI resubmitted to MDE its Air Quality Permit Application for the Myersville Compressor Station. On January 18, 2013, DTI was provided with a copy of a letter (dated the previous day) from the Secretary of MDE to the president of MCRC, informing MCRC of MDE's determination that it would be unable to process DTI's Air Quality Permit Application.¹⁶ The letter notes that although DTI has asserted that the NGA preempts local zoning and land use requirements, "[t]he FERC certificate, however, does not definitively state that all of Myersville's applicable zoning requirements are preempted in this particular case, only that where local zoning conflicts with a federal regulatory scheme, local zoning would be preempted."¹⁷

On January 22, 2013, requests for rehearing of the Certificate Order were filed by, among others, MCRC, the Town, and Mr. Cady. MCRC and the Town request that the Commission deny the certificate for the Allegheny Storage Project in its entirety, or at a minimum amend the certificate to remove the Myersville

¹⁴ *Id.* at P 71.

¹⁵ *Id.* (footnote omitted).

¹⁶ *See* MCRC Rehearing, Exhibit 2.

¹⁷ *Id.* at 2.

Compressor Station as a component of the project.¹⁸ Mr. Cady requests that the Commission deny the certificate for the Myersville Compressor Station.¹⁹ Both MCRC and Mr. Cady argue that the Commission should consider evidence on rehearing that was not submitted before the Commission issued the Certificate Order.²⁰

III. ANSWER

A. **The Commission Should Uphold Its Preemptive Authority Over Siting of Interstate Natural Gas Pipeline Facilities.**

The Certificate Order properly recognizes that local agencies, such as the Myersville Council, may not prohibit the construction of interstate natural gas pipeline facilities determined by the Commission to be in the public convenience and necessity. In their requests for rehearing, however, MCRC and the Town argue that the Commission was precluded from granting a certificate to DTI to construct the Myersville Compressor Station because the Myersville Council's denial of DTI's Site Plan Amendment Application for local zoning approvals has resulted in MDE declining to process DTI's Air Quality Permit Application for the Myersville Compressor Station.²¹ In essence, they contend that the Commission's authority

¹⁸ MCRC Rehearing at 53; Town Rehearing at 7.

¹⁹ Cady Rehearing at 1.

²⁰ See MCRC Rehearing at 31; see also Cady Rehearing, Issue No. 3, Items 19, 34.

²¹ See MCRC Rehearing at 19-22; Town Rehearing at 6-7.

over the siting of interstate natural gas pipeline facilities must yield to the Myersville Council and the local zoning and land use rules that it administers. It is vital that the Commission make it clear that, to the contrary, the Commission's authority under the NGA preempts contrary actions by local authorities.

In *National Fuel*, the United States Court of Appeals for the Second Circuit established the principle that the NGA preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities, or the siting thereof.²² Thus, for example, the Commission repeatedly has emphasized that the NGA vests sole authority over the routing of interstate pipelines in the Commission,²³ and that a local authority may not deny a permit to conduct regulated activities with a town because the local agency believes another route to be superior to a Commission-approved route.²⁴ While the Commission encourages cooperation between interstate pipeline companies and local authorities,²⁵ the Commission recently has stated that "if a conflict arises . . . between the requirements of a state or local agency and the Commission's certificate conditions,

²² *National Fuel*, 894 F.2d at 575-76.

²³ *Iroquois I* at 61,403.

²⁴ *Maritimes & Northeast Pipeline, L.L.C.*, 81 FERC ¶ 61,166 at 61,728-31 (1997); *Iroquois II* at 61,360.

²⁵ Certificate Order at P 68.

the principles of preemption will apply and the federal authorization will preempt the state or local requirements.”²⁶

In the Certificate Order, the Commission made several specific findings regarding the DTI’s proposed Myersville Compressor Station:

- (1) Out of nine alternatives considered for construction of the Myersville Compressor Station, “the Myersville site is the most appropriate site[.]”²⁷
- (2) The Myersville Compressor Station is “required by the public convenience and necessity.”²⁸
- (3) The Myersville Compressor Station “will not result in significant impacts on visual resources.”²⁹
- (4) The operation of the Myersville Compressor Station will benefit the Town of Myersville and Frederick County.³⁰
- (5) The level of noise created by the Myersville Compressor Station will be imperceptible in the nearby noise-sensitive areas.³¹

Thus, the Commission clearly determined that the Myersville Compressor Station, and the location proposed by DTI, is in the public convenience and necessity under the NGA. The Commission also emphasized that it has preemptive authority over

²⁶ *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091 at P 109 (2012).

²⁷ Certificate Order at P 59, 64.

²⁸ *Id.* at P 104.

²⁹ *Id.* at P 100.

³⁰ *Id.* at P 106.

³¹ *Id.* at P 118.

state and local agencies, to the extent that they seek to prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.³²

MCRC and the Town, however, seek to turn the doctrine of preemption on its head, so that the Myersville Council would preempt the Commission in the matter of the Myersville Compressor Station. In particular, MCRC argues that because of the Myersville Council's actions, DTI cannot obtain an air quality permit from MDE due to Section 2-404(b)(1) of the Maryland Environmental Code, which requires an applicant to demonstrate that its project either "has been approved by the local jurisdiction for all zoning and land use requirements" or "meets all applicable zoning and land use requirements."³³ MCRC references NGA section 7(e), which requires the Commission to find that an applicant for a certificate be "able and willing to perform properly to do the acts and to perform the service proposed and to conform to the provisions of the Act."³⁴ MCRC claims that DTI is not "able" to carry out the acts required under the certificate, because the Myersville Council's action renders it impossible for DTI to obtain the MDE permit.³⁵

³² *Id.* at P 68.

³³ Md. Code Ann. Envir. § 2-404(b)(1).

³⁴ 15 U.S.C. § 717f(e) (2006).

³⁵ MCRC Rehearing at 19. MCRC also cites Environmental Condition No. 8 of the Certificate Order, which states that "[p]rior to receiving written authorization from the Director of OEP to commence construction of any project facilities, DTI shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)." (emphasis deleted)). MCRC Rehearing at 20.

Although the Certificate Order clearly enunciates the preemption doctrine,³⁶ it appears that MDE believes that some ambiguity exists as to whether the Myersville Council's denial of DTI's Site Amendment Application to build the Myersville Compressor Station is preempted by the NGA. MDE asserts that it "is without authority to make binding determinations on the scope of federal preemption as it relates to zoning and land use requirements."³⁷ As a result, as described above, MDE has refused to process DTI's Air Quality Permit Application for the Myersville Compressor Station, on the grounds that DTI has failed to satisfy Section 2-404(b)(1) of the Maryland Environmental Code. MCRC cites MDE's refusal to process DTI's Air Quality Permit Application in support of its contention that the Commission improperly granted the certificate to DTI.³⁸

It is amply clear under the preemption doctrine, as enunciated in the cases discussed previously, that the Myersville Council may not use its authority under local zoning and land use regulations to prevent construction of the Commission-

³⁶ Certificate Order at P 68, 78.

³⁷ MCRC Rehearing, Exhibit 2 at 2.

³⁸ MCRC Rehearing at 18. As the lead agency in preparing the EA for the Allegheny Storage Project, the Commission's regulations require that other agencies must make a final decision on federal authorizations no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established under federal law. 18 C.F.R. § 157.22 (2012). In this case, the EA was issued on July 15, 2012, and thus MDE should have processed DTI's Air Quality Permit Application by mid-October. DTI filed on February 1, 2013 a petition for review pursuant to 15 U.S.C. § 717r(d)(2) in the United States Court of Appeals for the District of Columbia Circuit, seeking an order directing MDE to process the Air Quality Permit Application.

certificated Myersville Compressor Station, yet MCRC and the Town argue for precisely that result. The only reason any question arises is that, as argued by MCRC and the Town, the requirement that, as a prerequisite to MDE review of an air quality permit application, the applicant demonstrate that it either (1) has obtained local zoning and land use approval, or (2) meets all applicable zoning and land use requirements, is part of Maryland's state implementation plan, and thus, part of the Clean Air Act. This requirement, which clearly is intended to ensure that MDE is not required to expend resources on projects that do not comply with applicable local rules, may not stand as a bar against a project certificated by the Commission.³⁹ Under the theory advanced by MCRC and the Town, however, any local authority in the state of Maryland could forestall the Commission from issuing a certificate for the construction of an interstate pipeline facility by denying a local land use permit, at least where an air quality permit is required for the facility.

In response to the requests for rehearing, the Commission should re-emphasize that the Myersville Council is preempted from relying on local zoning and land use regulations to deny DTI's application to construct the Myersville Compressor Station. The Myersville Council cannot be permitted to effectively use

³⁹ As DTI has pointed out previously, the Clean Air Act provides no basis for a land use requirement in a SIP, and 42 U.S.C. § 7431 expressly provides that “[n]othing in [the Clean Air Act] constitutes an infringement on the existing authority of counties and cities to plan or control land use, *and nothing in [the Clean Air Act] provides or transfers authority over such land use.*” (Emphasis supplied.) Thus, the inclusion of references to zoning and land use requirements in § 2-404(b)(1) of the Maryland Environmental Code does not affect the Commission's preemptive authority over the siting of the Myersville Compressor Station. See DTI Answer at 6.

its zoning and land use regulations, which address matters unrelated to the air quality considerations addressed by the Clean Air Act, to exercise a veto over the Commission by making it impossible for DTI to comply with a condition in the Certificate Order. The Commission should reject the attempts by MCRC and the Town to overturn the doctrine of preemption in this manner. In addition, the Commission should take the opportunity on rehearing to clearly state that now that the certificate has been issued authorizing the Myersville Compression Station, local zoning requirements that are contrary to the Commission's determination are preempted and thus are not applicable.

B. The Commission Should Reject the New Evidence Proffered by MCRC and Mr. Cady.

Both the MCRC Rehearing and the Cady Rehearing reference purported evidence that had not previously been submitted for the record in this proceeding.⁴⁰ However, neither MCRC nor Mr. Cady have demonstrated good cause for submitting these new materials at this time, and accepting them at this time would raise serious concerns regarding fairness and due process, as well as “disrupt[ing] the administrative process by inhibiting the Commission's ability to resolve issues with finality.”⁴¹ Consistent with its long-standing policy, the Commission should

⁴⁰ See MCRC Rehearing at 31 (citing the Cady Rehearing for the proposition that now, after the Certificate Order has been issued, MCRC “can present credible evidence regarding noise, explosions, and air quality issues.”). See also Cady Rehearing, Issue No. 3, Items 19, 34.

⁴¹ *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 at P 28 (2013).

reject these attempts to introduce supplemental evidence at the rehearing stage of this proceeding.⁴²

IV. CONCLUSION

WHEREFORE, DTI respectfully requests that the Commission accept this answer and deny the requests for rehearing, as set forth above.

Respectfully submitted,

/s/ J. Patrick Nevins

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⁴² *Id. See also Nevada Power Co.*, 111 FERC ¶ 61,111 at P 10 (2005).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding pursuant to 18 C.F.R. § 385.2010(f)(2) (2012).

Dated at Washington, D.C., this 4th day of February, 2013.

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