BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Dominion Transmission Inc.	**)**	
	)	**Docket No. CP12-72**
Allegheny Storage Project	**)**	

REQUEST FOR REHEARING BY MYERSVILLE CITIZENS FOR A RURAL COMMUNITY OF ORDER ISSUING CERTIFICATE TO DOMINION TRANSMISSION INC.

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, the Myersville Citizens for a Rural Community, Inc. (MCRC) hereby seek rehearing of the Federal Energy Regulatory Commission's (the Commission) December 20, 2012 decision issuing a certificate to Dominion Transmission Incorporated (DTI) for the Allegheny Storage Project. Spanning four states (West Virginia, Ohio, Pennsylvania and Maryland), the Allegheny Storage Project consists of various pipelines, storage facilities and compression stations, including a 16,600 horsepower compressor station that will be located in Myersville, Frederick County, Maryland.[1] MCRC is an incorporated group of Myersville residents formed to oppose DTI's plans to build and operate a natural gas compressor station at the gateway to their community. MCRC asks the Commission to vacate the certificate because it is not supported by substantial evidence

[1] *Dominion Transmission, Inc.*, Order Issuing Certificate, 141 FERC ¶ 61,240 (December 20, 2012)(hereinafter "December 2012 Order").

and is arbitrary and capricious and violates the Natural Gas Act, the National Environmental Policy Act and MCRC's due process rights.

I. STATEMENT OF ISSUES

Issue No. 1: The Commission erred in (a) failing to dismiss the application because of DTI's inability to comply with the requirements of the Clean Air Act, (b) issuing a permit conditioned on DTI's future receipt of an air quality permit and (c) concluding that the project will not have adverse impacts on air quality because of inaccurate assumptions about how DTI will operate the project.

The Commission erred in rejecting MCRC's motion seeking dismissal of DTI's application for failure to comply with the Clean Air Act. Because the Town of Myersville denied DTI's zoning application, MDE cannot, under MD. ENV. § 2-404, accept DTI's application for required permits under the Clean Air Act. *See* Exhibit. 2, MDE Letter to Dr. Gerner (January 17, 2013). Without the necessary air quality permits, DTI is not able to construct and operate the project as authorized by the certificate, and therefore, the Commission's issuance of a certificate to DTI violates Section 7(e) of the NGA (requiring the Commission to find that an applicant is "able and willing" to carry out the acts required under the certificate).

Next, the Commission erred by issuing a conditioned permit that allows DTI to apply for a Clean Air Act permit, until waiting for DTI to receive a permit before granting a Section 7 certificate. Finally, the Commission also erred in adopting the EA's findings that the project—an enormous, pollution-emitting structure that will be located in a non-attainment area—does not have adverse air impacts. The EA mistakenly

assumed that DTI's intended 6000 hours/year operating cap alters the project's potential to emit (PTE) and did not examine the level of the project's emissions without the cap, which are much higher and in fact, would trigger the need for a Part 70 operating permit.

Issue No. 2: The proposed project is not in the public necessity and convenience under the Natural Gas Act and the Commission's certificate policy because the open season on which the proposal is based is more than five years out of date and because a 16,000 horsepower compressor station is far larger than what is needed for DTI to meet its contractual obligations for delivery of an additional 115,000 decatherms/day.

Under the Natural Gas Act and its Certificate Policy, the Commission must find a need for a proposed facility. Here, the Commission's finding of need is not supported by substantial evidence. DTI's alleged need is based on precedent agreements executed back in 2007 and associated with the predecessor (and withdrawn) Storage Factory Project. Further, even assuming that DTI has a need to supply these customers, there is no evidence that so large a compressor station—16,000 horsepower—is required unless DTI intends to use the Compressor Station to transport gas for export at Cove Point.

Issue No. 3: The Commission violated the National Environmental Policy Act by (a) failing to prepare a full environmental impact statement (EIS); (b) failing to take a hard look at project alternatives including a no-build option; (c) failing to consider or mitigate the extent of the project's adverse impacts including visual impacts, property values, historic properties, impacts on wetlands and noise; basing the EA on inaccurate information and (d) unlawfully segmenting review of this project and closely related projects.

The Commission violated the National Environmental Policy Act (NEPA) in several ways. First, the Commission erred by preparing only an EA rather than an EIS,

given the controversial nature of the project, its unique geographic characteristics, the questionable need for the compressor station and the incompatibility of the project with federal, state and local laws. *See* 40 C.F.R. § 1508.27 (describing factors for determining whether agency must prepare an EIS). Second, the Commission erroneously adopted the conclusions in the EA, especially since the EA failed to take a hard look at project alternatives including a no-build option and did not fully consider the extent of the project's adverse impacts on property values, historic properties, noise and air quality and viewshed. Third, the Commission based the EA on inaccurate information, including failure to disclose that DTI will use the Myersville Compressor Station to facilitate gas deliveries for export to Cove Point.[2] Finally, the Commission unlawfully segmented review of the Sabinsville Storage Project, Docket No. CP12-59, and the Allegheny Storage Project, Docket No. CP12-72, even though the Sabinsville Project is integral to DTI's ability to supply the storage services contemplated by the Allegheny Storage Project.

Issue No. 4: The Commission was arbitrary and capricious in taking account of local zoning considerations for some aspects of the project while ignoring the Town of Myersville's denial of a zoning variance.

The Commission partly justified its choice of Myersville over alternative locations for the compressor station by explaining that the Myersville site is zoned for commercial use while other alternatives are zoned for agricultural or residential use

[2] *See, e.g., N.C. Wildlife Federation v. N.C. DOT,* 677 F.3d 596 (4th Cir. 2012)(vacating agency EIS that relied on inaccurate data).

only. December 2012 Order, at ¶ 55. Yet, the Commission ignored the Town of Myersville's decision to deny a zoning variance to DTI for the compressor station because of its incompatibility with the Town's master plan. The Commission's deference to local zoning law in some respects, but disregard of it in others is arbitrary and capricious.

Issue No. 5: The Commission's pattern of delay in processing and releasing CEII and FOIA information in this case violated MCRC's due process rights.

The Commission's delays in processing MCRC's requests for Critical Energy Infrastructure Information (CEII) and Freedom of Information Act (FOIA) materials violated MCRC's due process rights and compromised their ability to provide meaningful comment. The Commission's regulations (18 C.F.R. § 388.113) governing CEII releases have never been challenged; however, the regulations create a new category of confidential information exempt from release under FOIA and in doing so, unlawfully restrict disclosure. Moreover, MCRC was required to repeatedly seek access to information which should have been available as a matter of right as intervenors in the process. *See* 18 C.F.R. § 385.2010 (requiring service of all documents filed at Commission on intervenors).

I. FACTUAL BACKGROUND

A. DTI'S Application and MCRC's Response

On February 17, 2012, Dominion Transmission Inc. (DTI) filed an abbreviated application for a certificate of public convenience and necessity for its Allegheny Storage Project, Docket Number CP12-72, which would provide an additional 115,000 decatherms/day of transportation services to three customers along with additional storage capacity and withdrawal services. The Allegheny Storage Project would include proposed new compressor station that would be located in Myersville, Maryland (the Myersville Compressor Station), along with installation of 0.6 miles of 30-inch pipelines that would extend from the compressor station to DTI's line. Along with its application, DTI filed a "Draft Environmental Assessment" which DTI prepared, listing Commission staff as authors and to which DTI affixed FERC's official seal. DTI's document led many residents to believe that the Commission completed an independent environmental assessment.

DTI's proposal alarmed Myersville residents, who grew concerned about the substantial adverse impact of locating a large, industrial-sized, emissions-spewing compressor station within 5000 feet of at least six hundred homes. Hundreds of Myersville residents filed motions to intervene and comments with the Commission opposing the compressor station. On March 26, 2012, MCRC filed a timely motion to intervene, opposing the compressor station and asking that the Commission to dismiss

the application. In addition to raising concerns about impacts to safety, property values, clean air and historic properties and farmland surrounding Myersville, MCRC and residents also described the confusion caused by DTI's use of FERC's official seal on the EA and mislabeling of certain components of the application and EA as Middletown rather than Myersville.[3]

Following the submission of comments, on June 14, 2012, the Commission issued its environmental assessment (EA) for the project. The EA concluded that the Allegheny Storage Project would not have significant adverse environmental impacts, so an environmental impact statement would not be required. The EA's conclusions rested on the assumption that DTI would obtain "all applicable authorizations required under federal law."[4]

B. MCRC's Frustrated CEII and FOIA Requests

In an effort to gain a better understanding of DTI's proposal and to file well-informed comments, early in the process, MCRC invoked the Commission's Freedom of Information Act (FOIA) and Critical Energy Information (CEII) procedures. On May 10, 2012, MCRC filed a FOIA request, FY10-45, seeking Exhibit H Gas Supply Information

[3] For example, it is still not clear whether the cost information in Exhibits K and P are actually for the Myersville Compressor Station, or had been recycled from DTI's earlier proposal from several years before which would have located the compressor in Middletown.

[4] Environmental Assessment of Dominion Transmission, Inc's Allegheny Storage Project (June 14, 2012), at 101 (hereinafter "Environmental Assessment").

to DTI's Application. Ordinarily, most pipelines make Exhibit H materials publicly available at both the Commission's online docket; however, because DTI asserted them as privileged, MCRC was forced to obtain this information through the FOIA process. On June 22, 2012, over DTI's opposition, the Commission granted MCRC's request for the Exhibit H materials.

By letter dated May 11, 2012, MCRC president, Franz Gerner on behalf of MCRC, requested CEII flow data and hydraulic studies relevant to feasibility of alternative routes. Dr. Gerner explained that the information was necessary to enable MCRC to challenge the adequacy of the EA and the need for the project and to comment on the adverse impacts the project would have on the Myersville community. The CEII flow data was not released to Dr. Gerner until July 11, 2012 *after* MCRC's attorney, Carolyn Elefant, wrote a letter to the Commission, dated July 5, 2012, requesting the disclosure of the information. Dr. Gerner was not permitted to share the CEII materials with other CEII members, so on August 3, 2012, he filed a request to add Tammy Mangan and Ted Cady to the access list. The Commission did not approve those requests until November 4, 2012, three months later and well after the deadline for commenting on the EA expired.

Finally, on June 14, 2012, MCRC made its final FOIA request, FY10-57, seeking access to DTI's cultural resources report and the list of potentially impacted landowners that DTI notified about the proposed compressor station. MCRC sought the

information for two reasons. First, MCRC requested the cultural resources report to meaningfully comment on the projects adverse impacts on local historic resources which are a source of pride in the community. Second, MCRC suspected that DTI did not contact all the potentially affected landowners, and a landowner list would allow MCRC to independently determine whether the Commission followed proper notice and comment procedure so as to ensure there is transparency in the Commission's decision making process.

On July 20, 2012, a week after the deadline for response, the Commission denied Dr. Gerner's request for cultural resources information and landowner list. On September 4, 2012, Dr. Gerner filed a timely appeal of the denial. As a result of this appeal, on October 17, 2012, the Commission staff released the part of the cultural resources report that pertains to items known to the public, but continues to deny of the release of the landowner lists and the parts of the cultural resources report that discusses the archeological effects on the historic site.[5] Again, the materials were released after the deadline for commenting on the EA closed.

C. Town of Myersville Zoning Process

Simultaneous to pursing a Section 7 certificate at the Commission, DTI filed an application with the Myersville Planning Board seeking a modification to the Myersville

[5] MCRC contemplated a FOIA lawsuit to obtain this information but must focus its limited resources on challenging the compressor station rather than ancillary litigation.

Master Plan to allow construction of the Myersville Compressor Station. On August 1, 2012, just days after the July 31, 2012 EA comment deadline, the Myersville Town Council denied DTI's application, finding the proposed compressor station inconsistent with the town site plan and highway overlay and hazardous to the community. On August 27, 2012, Myersville Mayor, Wayne S. Creadick, and the Council submitted a copy of the Council's decision to the Commission (Accession No. 20120828-0012), requesting an update to the EA to note the denial of the DTI's application to the planning board. The Commission did not make the requested update in the environmental assessment.

D. MCRC's Motion to Dismiss

MCRC filed a motion to dismiss on October 1, 2012. MCRC argued that the proposed Myersville Compressor Station cannot obtain the necessary permits required under the federal Clean Air Act. This is because the Environmental Protection Agency (EPA) approved Maryland state implementation plan requires projects to obtain a zoning variance as a pre-requisite to obtaining the necessary air quality permits. *See* MD. ENV. § 2-404(b)(i). Because the Myersville Council denied DTI's request for a variance on August 27, 2012, DTI would never be able to obtain the Clean Air Act permits that were a pre-requisite to obtaining a Commission certificate of public necessity

E. Commission Order Issuing Certificate

On December 20, 2012, the Commission issued an order granting DTI a certificate for the Allegheny Storage Project. Applying the first step of the *Certificate Policy*, the Commission majority accepted DTI's claimed need for the Myersville Compressor Station based on its existing precedent agreements and determined that existing customers would not subsidize the cost of the Compressor Station.[6] Having found need and no subsidies, the Commission agreed with the EA's finding of no significant impact. In reference to the Maryland air quality permits, the Commission said that "Maryland state and local agencies retain full authority to grant or deny air quality permits; 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."[7] Even though the Commission recognized that Maryland and Myersville had authority to deny DTI's permits, even though Myersville had already denied the permits, the Commission still approved the Myersville Compressor Station.

[6] December 2012 Order, at ¶¶ 23, 18.

[7] December 2012 Order, at ¶ 71.

II. ARGUMENT

A. The Commission erred in (a) failing to dismiss the application because of DTI's inability to comply with the requirements of the Clean Air Act and (b) concluding that the project will not have adverse impacts on air quality because of inaccurate assumptions about how DTI will operate the project.

1. Overview of Clean Air Act arguments

As discussed below, in order to construct a new emissions source like the Myersville Compressor Station, DTI must apply for a general permit under Maryland regulation COMAR 26.11.02 to operate the station at 6000/hours per year. Inclusion of the 6000/hour per year cap in the permit is critical in order to keep nitrogen dioxide (NOx) emissions below the 25 tons/year trigger for a Part 70 operating permit and other Clean Air Act requirements. The Clean Air Act permits are not preempted by the Natural Gas Act. The Part 70 requirement is federally mandated, while Maryland's general permit program (administered under COMAR 26.11.02) is part of a federally-approved state implementation plan (SIP).

To apply for a general permit, DTI must show that its compressor station complies with applicable zoning laws. MD. ENV. § 2-404. DTI cannot satisfy MD ENV. § 2-404 because on August 1, 2012, the Town of Myersville rejected DTI's requested zoning variance. On January 17, 2013, the Maryland Department of the Environment (MDE) confirmed that it would not process DTI's permit application in light of DTI's inability to show compliance with local zoning law. *See* Exhibit 2, MDE Letter to Franz

Gerner, January 17, 2013. Because DTI cannot obtain the federally-required permits for the Myersville Project, the Commission should have dismissed DTI's application or required DTI to remove the Myersville Compressor Station from the proposal. The following sections provide additional background on the Clean Air Act as administered by the state of Maryland and explain why the Commission erred in issuing the permits, notwithstanding DTI's inability to obtain the required permits.[8]

2. Background on the Requirements of Clean Air Act for the Myersville Compressor Station

a. Emissions limits on NOX for non-attainment area

The Myersville Compressor Station will be constructed in Frederick County, Maryland, a non-attainment area. Under Maryland's federally-backed state implementation plan (SIP) and applicable regulations, a new source that emits, or has a potential to emit more than 25 tons per year of Nitrox Oxide (NOx) or Volatile Organic Compounds (VOCs) in a non-attainment area (tpy) of or VOC in a non-attainment area must apply for a Part 70 operating permit and also comply with the Clean Air Act's KKK or YYY regulations.[9]

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[8] For additional background, *see* MCRC Motion to Dismiss (October 1, 2012); DTI Answer to Motion to Dismiss (October, 12, 2012) and MCRC Response to DTI (November 15, 2012).

[9] MD. CODE REGS. 26.11.02.09 (2012*); see also* 2008 Guide to Environmental Permits and Approvals, http://energy.maryland.gov/documents/2008_MDE_Permitguide.pdf (Last visited October 1, 2012).

DTI claims that the compressor will emit 23.76 tons per year of NOx, just slightly less than the major threshold limits. However, an identical compressor station proposed by El Paso has emissions of 31.25 NOx.[10] DTI argues that it will achieve emissions below the major source threshold level by capping its operation of the facility to 6000 hours. But DTI's operational limits do not change the PTE of its facility (which is likely closer to that of the 31.25 tons per year of El Paso's identical compressor station than the 23.76 that DTI claims)[11] unless they are included as a condition in a federally enforceable.

Under Maryland's COMAR regulations which track federal law, PTE means:

> (a) the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.
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> (b) Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable.

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[10] *See* July 2009 Resource Report 9 from El Paso Company Which includes NOx estimates for the exact same Gas Compressor is 31.25 tons per year. *See* MCRC Comments (December 26, 2011)(discussing El Paso Compressor).

[11] Because the EA assumes that the 6000/hour cap will apply, it did not independently analyze the Myersville Compressor Station's NOX emissions without a cap in place, which is the appropriate measurement if the cap is not federally enforceable. The Commission's failure to seek information based on the station's potential to emit without any cap in place is, in and of itself, a deficiency of its environmental review.

MD. CODE REGS. 26.11.17.01 (2012).[12] Under Maryland's regulations, operational limits are not treated as part of the project's design and therefore do not change a project's PTE unless those limits are federally enforceable. The Maryland regulations define "federally enforceable" as "all limitations and conditions which are enforceable by the U.S. Environmental Protection Agency (EPA)." *Id*. Because DTI's 6000 hours per year operational limits are not enforceable by EPA, they do not count towards reduction of the project's overall PTE. The EA mentions the operational caps, apparently assuming that they bring the project's PTE within minor threshold limits. But as noted, unless the operational caps are federally enforceable by EPA, the application emissions number is the project's maximum capacity to emit under its design.

In DTI's Answer to MCRC's Motion to Dismiss, filed on October 12, 2012, DTI conceded that the 6000/hour cap must be included as a condition in a federally enforceable permit in order to avoid exceeding the 25 tpy NOx emissions which would trigger a Part 70 permit as well as KKK and YYY compliance.[13] DTI stated that it had applied for a permit pursuant to Maryland's General Permit to Construct, COMAR 26.11.02, to construct the Myersville Compressor Station, and that the application requested authority to operate for and a limit on operations of the compressor to 6,000

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[12] See MD. CODE REGS. 26.11.17.01; *see also National Miners' Sass's. v. US EPA*, 59 F.3d 1351, 1362 (D.C. Cir. 1995)(explaining that operational restrictions will not cap project's "potential to emit," unless restrictions are enforced by federal law.)

[13] *See* DTI Response to Motion to Dismiss (October 12, 2012) at 7.

hours per year. *See* DTI Answer at 8-9. Of course, what DTI *did not* disclose in its Answer was that on June 5, 2012, MDE had returned DTI's application because DTI did not show compliance with applicable zoning laws and therefore, MDE could not process the application. *See* Exhibit 1 (DTI Letter to MDE describing history of application process, December 21, 2012).

b. Maryland's procedures for applying for clean air permits

As a state agency, MDE is a creature of statute vested only with that authority conferred by the legislature. In Maryland, the legislature has empowered MDE to issue various clean air act permits, including COMAR 26.11.02 General Permit to Construct, however, MDE is prohibited from accepting an application under COMAR unless the applicant submits documentation that:

- demonstrates that the proposal has been approved by the local jurisdiction on for all zoning and land use requirements; or
- The source meets all applicable zoning and land use requirements.

MD. CODE ANN. ENVIR. §§ 2-404(b)(i)-(ii). Because the Town denied DTI's zoning variance, DTI cannot demonstrate that its proposal has been approved by the local jurisdiction or meets all applicable zoning and land use requirements and therefore, MDE cannot accept its permit application.

As MCRC argued, MD. ENV. § 2-404 is not subject to preemption by the Natural Gas Act. The law is incorporated in Maryland's federally-backed SIP program and cannot be preempted. Moreover, even if MD. ENV. § 2-404 were subject to preemption

(which MCRC does not concede),[14] DTI still could not obtain the permit. If MD. ENV. § 2-404 did not apply, the MDE would be stripped of its statutory authority to process the DTE's permit application at all. Section 2-404 is the source of MDE's power to issue a permit, and overriding this provision still would not enable DTI to procure a permit that is required by federal law.

c. Recent developments regarding the Clean Air Act

On December 21, 2012, the day after the Commission issued the certificate for the project, DTI submitted a general permit application to MDE. Exhibit 1 (DTI application and cover letter). In the letter, DTI explained that it received a certificate for the project from the Commission which preempted all state and local zoning laws. Accordingly, DTI asserted that it was in compliance with applicable zoning and land use requirements for purposes of MD. ENV. § 2-404(b)(ii) and therefore, MDE could accept and process the application.

Subsequently, MCRC President Franz Gerner and other members wrote to Maryland Governor O'Malley and various congressional representatives to dispute DTI's position. MCRC acknowledged that the Natural Gas Act preempts state and local zoning laws but only for the purpose of siting the compressor station, and not for the

[14] DTI argues that MD ENV. § 2-404 is not part of Maryland's federally-backed SIP thus suggesting that it lacks the force of federal law and need not be followed. MCRC already disputed DTI's claims in its November 15, 2012 reply, submitting materials from EPA's website that show that MD ENV. § 2-404 is in fact considered part and parcel of Maryland's SIP.

purpose of restricting the role of state and local government in the permit process under the Clean Air Act, where Congress intended for state and local governments to play a paramount role.[15]

On January 17, 2013, Dr. Robert M. Summers, Secretary of MDE responded to Dr. Gerner. Exhibit 2. Dr. Summers explained that MDE determined that the FERC certificate "does not definitively state that all of Myersville's applicable zoning requirements are preempted…only that where local zoning conflicts with a federal regulatory scheme, local zoning would be preempted." Accordingly, continued Dr. Summers, MDE advised DTI that its permit application cannot be processed.

3. The Commission's errors regarding the Clean Air Act analysis

The Commission erred in three respects in granting DTI a certificate. First, the Commission should have dismissed DTI's certificate application or forced DTI to exclude the Myersville Compressor Station from the proposal since DTI can never obtain the required air quality permits necessary to operate the project. Second, the Commission should not have issued a conditioned permit because by changing the timing, the Commission potentially could have changed the outcome of the Maryland

[15] *See Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D. RI 2000)(stating that "State and local laws that have only an indirect effect on interstate gas facilities are not preempted.")

permit proceeding.[16] Third, the Commission should not have adopted the EA's conclusions that "air impacts would be within environmentally acceptable limits" when the EA erroneously assumed a 6000-hour cap on operations even though the cap was not adopted as a condition in a federally enforceable permit.

a. The Commission cannot grant even a conditioned certificate where compliance with the condition is known to be impossible at the time of issuance.

Under Section 7(e) of the Natural Gas Act, 15 U.S.C. §717f(e), the Commission may issue an application only upon finding that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act." Here, one of the requirements implicit in the grant of the certificate is that DTI obtain all necessary federal authorizations needed to construct and operate the project—since if DTI does not obtain these permits, it cannot carry out the underlying purpose of the certificate, *i.e.*, to construct and operate a project that serves the public necessity and convenience.

In this case, DTI cannot meet this statutory requirement. Although DTI may be *willing* to carry out the acts required under the certificate, DTI is not *able* to do so with respect to obtaining the Clean Air Act permits without which DTI can neither construct nor operate the Myersville Compressor Station. As discussed *supra*, the Town of

[16] Fortunately, Maryland reached the correct decision and found that the Commission's issuance of a certificate does not mean that the project complies with applicable land use laws for purposes of satisfying MD ENV. § 2-404. Nevertheless, MCRC challenges the conditioned nature of the permit to preserve the argument.

Myersville denied DTI's application for a zoning variance. As a result, MDE is unable to process DTI's permit application because it does not satisfy MD. ENV. § 2-404(b)(1) 's requirement that an applicant demonstrate compliance with applicable state and local law.

Rather than dismiss DTI's application, as MCRC asked, the Commission responded by issuing the certificate, but conditioning commencement of construction of the compressor on DTI filing documentation of receipt of all applicable federal authorizations. December 2012 Order, at ¶ 53 and Environmental Condition 8. The Commission explained that DTI could determine how it wishes to proceed if Maryland rejected the permit.

The Commission's approach to DTI's inability to obtain Clean Air Act permits violates the Natural Gas Act and is inconsistent with the public interest. First, the Natural Gas Act requires the Commission to find that an applicant is "able and willing" to carry out the obligations of the certificate—something that DTI cannot do in light of MDE's inability to process DTI's clean air act permit for the Myersville Compressor Station. In the past, the Commission has issued conditioned certificates, where there is uncertainty about whether an applicant will be able to successfully procure a required federal authorization.[17] The conditioned application affords the applicant an

[17] *See Tennessee Gas Pipeline Company, L.L.C.*, 139 FERC ¶ 61,161, Appendix B (May 29, 2012)(environmental condition 18 required pipeline company to comply with Endangered Species Act); *see D'Lo Gas Storage, LLC*, 140 FERC ¶ 61,182, Appendix B

opportunity to continue to pursue required permits while simultaneously moving forward with other aspects of project development.

By contrast, no such uncertainty about DTI's ability to procure the Clean Air Act permits exists here. It cannot. Twice, DTI tried to submit an application to MDE for a general permit, and twice (in June 2012 and January 2013), MDE refused to accept DTI's applications because it did not comply with MD ENV. § 2-404. Because the record shows that DTI cannot obtain the Clean Air Act permits required to operate the compressor, DTI is not "able and willing" to carry out the obligations of the certificate as required by Section 7(e) of the NGA. Accordingly, the Commission has no choice but to deny DTI's application.

The Commission's issuance of a certificate to an entity that is not "able and willing" to comply with the certificate's terms also violates the public interest. A certificate confers on a private company unique advantages that it would not ordinarily have, including the ability to override conflicting state and local siting laws (thus allowing the company to locate a facility where it may not have otherwise been able to) and to invoke the power of eminent domain. A private company should not be entrusted with these special powers unless it has the ability to construct and operate the facilities authorized by the certificate. Otherwise, upon receipt of a certificate, a private

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(September 6, 2012)(environmental condition 8 required pipeline company to show documentation that it received all applicable authorizations required under federal law.)

entity could, for example, take advantage of the powers conferred by the certificate for its own benefit—for example, by initiating condemnation proceedings to buy up property at a discount even though the company has no intention or ability to develop the project. If DTI cannot receive its certificate, it is not "up to DTI to determine how it wishes to proceed," as the Commission erroneously stated. December 2012 Order, at ¶ 71. Rather, it is the responsibility of the Commission, in the name of the public interest, to prohibit DTI from proceeding with a project that it knows it can never build.

b. **The Commission erred in issuing a conditioned certificate because by issuing a certificate in advance of DTI's receipt of a Clean Air Act permit the Commission could have changed the outcome of the Maryland proceeding.**

The Commission erred in issuing a certificate contingent on DTI's future receipt of required Clean Air Act permits because doing so could have changed the outcome of the state permit process. As already discussed, MD ENV. § 2-404 requires a permit applicant to show compliance with applicable zoning and land use laws. Thus, when DTI initially applied for an air quality permit in January 2012, MDE rejected the application in June 2012—because at that time, the Town of Myersville had not yet acted on DTI's zoning request and therefore, DTI could not satisfy MD. ENV. § 2-404. On August 27, 2012, the Town rejected DTI's zoning request—and if DTI had reapplied for an air quality permit after that time, MDE would have presumably rejected DTI's application again.

However, when the Commission issued the certificate on December 20, 2012 – conditioned on DTI's future procurement of a state clean air permit, the Commission's decision could have changed the outcome of the process under state law. On December 21, 2012, DTI re-submitted its air quality application under MD. ENV. § 2-404. *See* Exhibit 1. DTI explained that the Commission granted a certificate for the Myersville Compressor Station which preempted local zoning laws, and therefore, DTI should be deemed in compliance with applicable local zoning law for purposes of MD. ENV. § 2-404.

Fortunately, MDE rejected this argument. *See* Exhibit 2. MDE determined that even though the Natural Gas Act may preempt local zoning for purposes of siting a project, the preemptive effects do not extend to other regulatory processes such as the Clean Air Act where Congress signified an intent for local government to play an important role. Nevertheless, it is possible that DTI may appeal MDE's ruling, and for that reason, MCRC challenges the Commission's issuance of a conditioned permit as unlawful, because based on a mere trick of timing, a conditioned permit could affect the substantive outcome of a state process.

In this case, the Town of Myersville denied DTI's zoning request, so DTI as precluded from obtaining an air quality permit under MD. ENV. § 2-404. If the Commission withheld approval of the certificate until DTI obtained an air quality certificate, DTI would never have been able to successfully get the permit because of the

Town's denial. However, granting the certificate conditional on DTI obtaining required permits before starting construction, the Commission created a situation that could have potentially opened the door to DTI using the FERC certificate as a proxy for compliance with local law under MD. ENV. § 2-404. Thus, the conditioned certificate would have changed the outcome of the Maryland proceeding by allowing DTI to apply for a permit which it could not qualify for but for the FERC certificate.

Fortunately, MDE saw through this potential ruse and determined that a FERC certificate issued under the NGA is not a substitute for compliance with local law. Exhibit 1. Nevertheless, because it is possible that DTI may challenge MDE's determination, the Commission should vacate the conditioned certificate so that DTI cannot use it to apply for a clean air permit under Maryland law.

c. The Commission erred in adopting the EA's finding that air impacts would be within environmentally acceptable limits.

If the Commission declines to dismiss (or deny) DTI's application because it cannot obtain the required Clean Air Act permits, the Commission must reject the EA's erroneous analysis of air quality impacts. The Commission found that:

> As DTI correctly notes, air emission issues associated with the Myersville Compressor Station were addressed in the EA, which concluded that air impacts should be within environmentally acceptable risks.[18]

The EA's conclusions are incorrect and reflect a misunderstanding of the requirements of the Clean Air Act.

[18] December 2012 Order, at ¶ 71.

For example, the EA accepted without question, DTI's representation that the Myersville Compressor Station will emit 23.75 tons per year (tpy) of NOx. *See* Environmental Assessment, at 62. However, as MCRC pointed out, an identical compressor station proposed by the El Paso Company estimated emissions of 31.25 tpy of NO_x. *See supra* n. 10. Rather than attempt to determine the Myersville Compressor Station's potential to emit, which is the operative metric for assessing air quality impacts under the Clean Air Act, the EA assumes that DTI will operate the facility at 6000 hours per year. But commitments to limit operation do not change a project's PTE unless those limits are incorporated in a federally enforceable permit. *See* MCRC Motion to Dismiss (October 1, 2012) at 13. Because DTI's 6000 hour cap was not incorporated into a federally enforceable permit, the EA should have explored the air quality impacts of the facility's PTE *without* a cap, which likely are closer to those for the El Paso facility.

In short, there is nothing in the EA to indicate that Myersville facility will not adversely impact air quality. The Myersville Compressor is an enormous new source of emissions in an area still in non-attainment. The Commission erred in finding that air quality impacts are not significant.

B. The proposed project is not in the public convenience and necessity under the Natural Gas Act and the Commission's certificate policy because a 16,000 horsepower compressor station is based on an outdated precedent agreement and is far larger than what is needed for DTI to meet its contractual obligations for delivery of an additional 115,000 decatherms/day.

The proposed project is not in the public necessity and convenience under the Natural Gas Act, 15 U.S.C. §717f(c) or the Commission's *Certificate Policy*[19] because there is no need for the proposed compressor station, particularly one that is 16,000 horsepower. Under the Commission's *Certificate Policy*, applicants may demonstrate need for a proposed facility by showing that a project is fully subscribed. Here, as evidence of need, DTI proffered precedent agreements executed by two customers back in 2007 the now defunct Storage Factory Project proposal as evidence of need for the current project.

The agreements submitted by DTI[20] are not sufficient evidence of need. To begin, the agreements resulted from an open season conducted in 2007, more than five years ago and, therefore, are out of date. Second, the agreements relate to a completely different project so at best, they demonstrate only a need for the Storage Factory Project, not for the current proposal.

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

[20] It should be noted that there does not appear to be even sample or generic precedent agreements available in the public record.

Moreover, need is not a static concept. By analogy, a company may "need" to supply power to 1000 customers, but it does not need to construct a nuclear reactor to meet demand. Forcing these customers to bear the entire cost of an excessive facility would result in unjust and unreasonable rates, since customers would pay for costs that they did not cause. Here, DTI may very well have a need to serve its Washington Gas and Baltimore Gas & Electric (BG&E) customers but that does not mean that it can choose an overly large facility, with devastating environmental consequences to meet that need when other options exist.

In its comments on the EA, MCRC argued that the delivery requirements for Washington Gas and BG&E can be accommodated either on extra capacity already existing on Dominion's transmission lines, or through available capacity on Columbia's or Transco's transmission.[21] Moreover, as the recent EIA data, the demand for gas is declining precipitously, meaning that this excess capacity will likely remain available for the longer term. The Commission did not fully consider the possibility that this minimal demand could be met by a smaller facility.

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[21] *See* MCRC EA Comments (July 30, 2012).

1. The proposed compressor station reflects overbuild.

DTI's purported need for a $62 million,[22] 16,000 hp compressor station is even less plausible given that DTI plans to operate the facility just four months of the year. Given the multiple pipeline systems in the area, DTI should have the ability to free up capacity for four months a year either through increasing efficiency of system operations or entering into contracts with other pipelines. Moreover, constructing a $62 million, 16,000 hp compressor is virtually unprecedented for a peak four month delivery of 125,000 dh/d. A cursory review of past FERC orders involving compressor stations shows that compressor stations of this size typically support larger deliveries of gas, or conversely, smaller, lower cost stations typically suffice for the delivery obligation that DTI says it must meet.[23] The Commission failed to address these arguments.

DTI has informed the Commission on several occasions that it does not intend to export gas through Cove Point. Yet review of the CEII data suggests otherwise. MCRC

[22] This number comes from Exhibit K – though it is labeled as the cost for the Middletown Compressor, not Myersville. Since the Commission still has not corrected this mistake, MCRC will use this number as a rough estimation but urges the Commission to clarify whether the Exhibit K numbers reflect the Myersville costs, or are actually reproductions of the costs of the Middletown project that was proposed in an early iteration of this project, Storage Factory Project.

[23] *See, e.g.*, *TransColorado*, 106 FERC ¶ 61,265 (2004)(delivery of 125,000 dth/d through 3 smaller compressors of 12,000 hp at cost of $28 million); *National Fuel*, 137 FERC ¶ 61,054 (2011)(320,000 dt/day supported by 14,000 hp expansion at two stations); 99 FERC ¶ 61,367 (2002)(300,000 dt/day using smaller compressor station)).

members Ted Cady and Franz Gerner have filed comments based on CEII data received late in the process that deliveries will be directed to Cove Point for export. This is the only explanation for why such a very large compressor station is needed for such a small and infrequent load.

In short, the Commission's finding of need for the Myersville Compressor station is unsupported by substantial evidence. The Commission's finding is based on outdated contracts associated with another project and does not justify why such a large compressor station is needed, unless deliveries will be going for export.[24] Without a need, DTI's application must be dismissed, or the Commission must adopt the no action alternative or approve the project without the compressor.

C. **The Commission violated the National Environmental Policy Act by (a) failing to prepare a full environmental impact statement (EIS); (b) failing to take a hard look at project alternatives including a no-build option or to consider the extent of the project's adverse impacts including visual impacts, property values, historic properties, impacts on the wastewater facility and noise; basing the EA on inaccurate information and (d) unlawfully segmenting review of this project and closely related projects.**

1. The Commission erred by failing to prepare an EIS.

NEPA requires federal agencies to prepare environmental impact statement (EIS) for actions that significantly affect the "quality of the human environment."[25] The

[24] Section 7 of the Natural Gas Act and the Certificate Policy are based on the assumption that gas will be delivered to national markets, not exported overseas.

[25] The National Environmental Policy Act, 42 U.S.C. § 4332 (2006).

Council on Environmental Quality's (CEQ) NEPA regulations list ten factors for determining whether an agency must prepare an EIS for a proposed action.[26] As relevant here, the list includes:

- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The grant of the certificate to DTI would be significant because the project is both controversial and violates Maryland law

a. The Myersville Compressor Station is highly controversial because there is a substantial dispute as to the necessity of the compressor station and the environmental effects of the compressor station.

As the Commission notes in DTI's certificate order, for an action to be highly controversial, there must be a "dispute over the size, nature or effect of the action, rather than the existence of opposition to it."[27] The Commission incorrectly determined

[26] 40 C.F.R. § 1508.27.

[27] December 2012 Order, at ¶ 76; *Fund for Animals v. Williams*, 246 F.Supp.2d 27, 45 (D.D.C. 2003). *See also Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir 1992)(holding that aesthetic changes would not result in a need for rehearing); *and LaFlamme v. FERC*, 852 F.2d 389, 401 (9th Cir 1988) (Court vacated FERC's grant of a hydropower license because the scant record did not support FERC's conclusion.)

that the issue of noise, explosions, and air quality issues were not highly controversial since MCRC did not present persuasive evidence regarding these issues.[28]

First, MCRC was hampered in its ability to present persuasive evidence regarding noise, explosions, and air quality issues due to lack of access to CEII and FOIA information. Despite having requested CEII and FOIA materials in May and June 2012, shortly after the EA was released, much of this information was not produced until at least July 2012 (and then only to Dr. Gerner), with cultural resource reports withheld until October 2012, and Mr. Cady and Ms. Mangan were denied access to CEII materials until November 2012. Because a good deal of information that would have informed MCRC members' comments on the EA was still outstanding when comments were due August 1, 2012, it is not surprising that some of their arguments did not convince the Commission.

Now, MCRC can present credible evidence regarding noise, explosions, and air quality issues. Ted Cady offers several studies in his petition for rehearing that highlight the increase in air pollution, the potential risk of a catastrophic explosion, and the harmful effects of low level noise that would result from the Myersville Compressor Station.[29] As for air quality issues, the Commission erroneously based its analysis on the assumption that DTI will only operate the station 6000 hours/year even though

[28] December 2012 Order, at ¶ 76.

[29] *See* Ted Cady's Petition for Rehearing, at 22-27.

there is no federally enforceable permit imposing this condition. *See* Part III.A (discussing Clean Air Act issues). As such, none of the Commission's assumptions about potential emissions are accurate.

In addition to disputes over noise, air quality and safety, there is another reason why the proposed project fits within the CEQ definition of "controversial" and therefore requires an EIS. As MCRC contended in its EA comments, past Commission orders show that smaller, lower cost stations typically suffice for the delivery obligation that DTI says it must meet.[30] Not only would the compressor station be overbuilt, MCRC also contends that the Myersville Compressor Station is not even necessary. *See supra* Part III.B (discussing lack of need for project). MCRC's arguments regarding lack of need for the project are more than just mere opposition, but rather, rebut the very nature and purpose of the certificate. One of the factors that the Commission must consider in both the EA (as well as under its *Certificate Policy*) is whether a need exists for the proposed project. Need is the starting point for an EA because without a need for the project, there is no reason to undertake the action at all, and the resulting

[30] *See, e.g., TransColorado*, 106 FERC ¶ 61,265 (2004)(delivery of 125,000 dth/d through 3 smaller compressors of 12,000 hp at cost of $28 million); *National Fuel*, 137 FERC ¶ 61,054 (2011)(320,000 dt/day supported by 14,000 hp expansion at two stations); *Dominion Transmission Inc.*, 99 FERC ¶ 61,367 (2002)(300,000 dt/day using smaller compressor station).

adverse impacts can be avoided entirely.[31] Because MCRC challenged the underlying need for the project, there is sufficient controversy within the meaning of the CEQ regulations to warrant an EIS rather than just an EA.

b. **The Commission's grant of the certificate to DTI violated state and local air quality and land use laws, and therefore required the Commission to prepare an EIS.**

The CEQ's NEPA regulations state that an action is significant for the purposes of NEPA if "the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."[32]

The Myersville Compressor Station does not comply with local zoning laws. On August 1, 2012, the Town denied a variance to DTI for the compressor station, finding that the proposal was not consistent with the Town's Master Plan. The Commission points out that the Natural Gas Act preempts contrary state and local laws; however, that is all the more reason for the Commission to prepare an EIS rather than an EA. This would require the Commission to take a closer, more in depth look at the potential impacts of a project that does not comply with local law. To the extent that the Commission seeks to broadly assert its preemptive authority, at a minimum, the Commission should incorporate additional safeguards such as use of an EIS rather than

[31] *See N.C. Wildlife Fed'n v. N.C. DOT*, 677 F.3d 596 (4th Cir 2012)(holding that a "no build alternative" based on mischaracterized data was inadequate for the purposes of NEPA.)

[32] 40 C.F.R. § 1508.27(10).

an EA to ensure that local communities are not stripped of all protection from adverse environmental impacts.

In addition to violating local law, DTI also cannot comply with the Clean Air Act, as discussed in detail in Part III.A, *supra*. The lack of compliance with the Clean Air Act is another factor militating in favor of a full-blown EIS rather than an EA.

2. **The Commission violated NEPA by failing to take a hard look at viable project alternatives including the looping alternative proposed by MCRC president Franz Gerner, the viability of other sites, a smaller compressor station, an electric compressor station, or the "no build" alternative proposed by MCRC.**

Analysis of alternatives lies at the heart of the EIS.[33] In order to conduct an adequate alternatives analysis, the Commission must "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated" and includes a "no build" alternative.[34] As part of this analysis, agencies *must* measure the direct effects, indirect effects, and possible conflicts between the proposed action and the objectives of Federal, regional, State, and local law.[35]

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[33] 40 C.F.R. § 1502.14.

[34] 40 C.F.R. §1502.14; *see also N.C. Wildlife Fed'n v. N.C. DOT*, 677 F.3d 596, 602 (4th Cir. 2012)(holding that a "no build alternative" based on mischaracterized data was inadequate for the purposes of NEPA.)

[35] 40 C.F.R. § 1502.16.

As described above, the EA's treatment of the "no build" alternative makes no mention of DTI's ability to meet requirements on its existing infrastructure. In addition to the "no build" alternative, there were also other preferable alternatives to the project that the Commission dismissed out of hand. In his comments, MCRC president Franz Gerner presented a viable alternative where DTI could construct a pipeline loop that would vitiate the need to build a compressor station (the "looping alternative.")

In its comments to the EA, MCRC also presented several viable alternatives that the Commission could have considered, such smaller compressor stations or an electric compressor (neither of which are particularly acceptable to MCRC if they are located at the same site, but in any event, they were not even considered). The Jefferson and Middletown sites are both closer to the proposed pipeline and would not require as much horsepower, which would reduce emissions and have a smaller impact on the environment.

Of course, it bears noting these are not necessarily the only alternatives either. DTI unreasonably limited the scope of its proposal to focus on a twelve mile corridor within the vicinity of its PL-1 line in Frederick County. There may be other viable options outside of the corridor, but because the hydraulic data is protected by CEII, MCRC has not yet been able to comment on the studies or the Commission's "independent verification."

The EA fails to adequately measure the direct and indirect effects of the Myersville Compressor Station compared to the other viable alternatives. Not only that, but the EA also fails to highlight how the proposed alternatives do not face the same conflicts of law that the Myersville Compressor Station faces.

3. The EA did not take a hard look or adequately mitigate all adverse impacts.

The Commission adopted the EA notwithstanding that it failed to take a hard look at or adequately mitigate all of the adverse impacts of the project, including increased noise, deterioration of air quality, impacts to the wastewater treatment plant, and effects on historic properties and property values. The impacts on air quality are discussed in Section III.A *supra*. Remaining impacts not adequately examined or mitigated are discussed briefly below.

a. Property values and lost development opportunity

The Commission order 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. December 2012 Order, at ¶ 104. 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.*

The Commission did not go far enough in quantifying the impacts of the project on property values and lost development opportunities. First, and most significantly,

the Commission does not discuss the impact of preemption on property values. Courts recognize that state and local zoning and land-use laws protect property values and promote orderly development directed by the community rather than a private developer.[36] As a result of preemption, the Town of Myersville and its residents suffered a loss because a site that would have once sustained uses that would benefit the community has now been taken off the market by DTI. Moreover, as the Town noted in its comments, due to a downturn in the economy, interest in development of the site temporarily abated, which enabled DTI to acquire the site at a far lower value, thus reducing property values for all other commercial sites in the area.

Residential property values suffer, as well, when zoning laws are preempted. Many MCRC members chose to live in Myersville because of the rural character of the area and commitment to open space and orderly development. These features, which enhance the value of residents' property, have now been obliterated by the Commission's approval of the compressor station. Yet, the Commission's Certificate Order does not acknowledge the impacts of preemption of local zoning decisions on property values.

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[36] *See, e.g., Rectory Park, L.C. v. City of Delray Beach*, 208 F. Supp. 2d 1320, 1327 (S.D. Fl. 2002)(finding as a matter of law that zoning ordinances were designed in part to protect the property values of all property within the regulated area); *Board of County Commissioners v. Gaston*, 401 A.2d 666 (Md. 1979)(recognizing importance of master plan to avoid having "developer, not the constituted authority of the county…in control of planning for the future of the county").

The Commission also fails to recognize that 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 the harm that might be caused by risk of explosion or toxics emitting from a compressor station or transmission line[37] or nuisance caused from living next to a noisy compressor station that fails to comply with applicable permitting requirements.[38] 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. December 2012 Order, at ¶ 104. Thus, as mitigation for the effects of the compressor station on property values, the EA proposes that DTI use part of the site as a buffer and further, design and screen the site to minimize residential

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[37] *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 (Kan. 1981)(summarizing state rulings on impact of fear on property values where transmission lines are located).

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

impacts. But none of this mitigation addresses the nuisance and security issues that also depress property values.

b. Impacts on noise

The Commission underestimates the impact of expected noise from the Compressor Station, as detailed in Mr. Cady's comments. Moreover, the mitigation provided by Condition 12 is inadequate. Condition 12 provides DTI up to one year to add additional noise controls to address levels in excess of 55 decibels. At the very least, DTI should be held to a strict liability standard and forced to shut down operation if it cannot comply with the decibel level limits adopted by the EA, and prohibited from resuming operation until the noise levels are cured. Having acknowledged that decibel levels in excess of 55 decibels would be an adverse impact, the Commission must provide adequate mitigation to conclude that the project will have no significant impact. Thus, a strict standard that places the onus of compliance on DTI by forcing it to shut down when noise exceeds 55 decibels is the only way to fully mitigate the project's adverse impacts.

c. Impacts on historic properties

MCRC was not able to access DTI's reports on cultural resources until October 24, 2012 well after the comment period for the EA had concluded. Up until that point, MCRC never even had access to any information on historic properties. Upon receiving the cultural resources report through FOIA, Franz Gerner filed extensive comments

about potential impacts on viewshed and stability of these sites, which are not adequately addressed in the EA.

d. Impacts on wetlands

The EA acknowledges that the Myersville Compressor will impact wetlands. EA at 32-33. Notwithstanding these impacts, the EA allows DTI to use a 90-foot wide right of way rather than the ordinary 75-foot right of way. Environmental Assessment, at 32. The EA concluded, and the Commission agreed, that there would be no adverse impacts to wetlands provided that DTI complies with the requirements of the Clean Water Act, yet the Commission approved the project before DTI demonstrated compliance.

According to the EA list of permits, DTI applied for a Section 404 Clean Water Act permit in February 2012. There is no indication that DTI has received a Clean Water Act permit, or that it will be able to do so. Until DTI obtains a Clean Water Act permit, the EA cannot assume that it will, and therefore, the proposed mitigation for adverse impacts to wetlands is not adequate.

4. Unlawful segmentation

In its EA comments, MCRC argued that DTI unlawfully segmented the proposed Allegheny Storage Project CP (Allegheny) and the Sabinesville Storage Pool Boundary Project (Sabinesville), Docket No. CP12-59, to evade more extensive environmental review and mask the overall cost of the total project to increase the likelihood of

approval under the Commission's *Certificate Policy*. As MCRC explained, the two projects are inextricably related. The Allegheny Project will change the ratio of cushion gas/working gas in the Sabinesville Storage Pool and provide associated transportation and storage services to customers[39] while, the Sabinesville project will secure the pool boundaries to protect those same customers who have subscribed to service from the pool. *Sabinesville Storage Pool Project*, Docket CP12-59, Motion for Leave to Response at 5 (April 16, 2012) (discussing both Allegheny and Sabinesville projects).

Presumably, DTI seeks to bifurcate review of the two projects because it fears that the cost and potentially controversial eminent domain proceedings required for the Sabinesville Project[40] will increase the costs of the Allegheny Storage Project resulting in

[39] Specifically, the application states that: DTI proposes to convert 0.5 Bcf of cushion gas capacity to working gas capacity at its Sabinsville Storage Pool. As a result, the certificated cushion gas capacity (without native) will decrease from 16.422 Bcf to 15.922 Bcf, and the certificated working gas will increase from 17.697 Bcf to 18.197 Bcf. The total capacity of the Sabinsville Storage Pool including native reserves of 1.499 Bcf will remain unchanged at 35.618 Bcf. The incremental Project facilities proposed at Sabinsville Storage Station and Pool are designed to provide the capabilities needed to effectively turn this additional capacity. DTI Allegheny Storage Project Application at 9.

[40] To secure pool boundaries, DTI acknowledges that it expects to incur additional costs in acquiring property rights from landowners – many of whom such as CNX Gas Company (already an intervenor in the proceeding) hold valuable Marcellus Shale-related lease and drilling rights. *See* Sabinesville Storage Pool Project, Docket No. 10-59 (February 10, 2012) at 11.

subsidization by captive customers in violation of the Commission's *Certificate Policy*.[41] Separating the projects enables DTI to divert attention from the Sabinesville impacts in the Allegheny Storage proceeding, thereby increasing the likelihood of project approval while minimizing the need for more extensive environmental review.

Under NEPA, actions are connected if they:

> (i) Automatically trigger other actions, which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. §1508.25(a)1(i)-(iii). CEQ's "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. *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" its analysis so as to conceal the environmental significance of the project or projects").

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[41] FERC Certificate Policy, Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), *order on clarification* 90 FERC ¶61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000).

Here, the Sabinesville Storage Pool Project and Allegheny Storage project in this docket are related under the CEQ regulations since they will only move forward simultaneously. The applications for each project were filed contemporaneously on February 10 and 17, 2012, respectively. Moreover, as DTI itself admits, the boundaries around the Sabine Storage Pool are necessary to ensure that DTI can protect the boundaries of the storage pool to meet its contractual storage obligations to customers; presumably, the same customers that have subscribed to service under the Allegheny Storage project in this docket. Without securing the project boundaries as it did in the Sabinesville docket, DTI could not provide the storage services contemplated by the Allegheny Storage Project. Finally, DTI lists the Sabinsville Pool as one of the project facilities that will be used to provide storage services, and plans to add piping and ancillary equipment to the Sabinsville Pool. *See* DTI Allegheny Storage Project Application at 9.

The Commission dismissed MCRC's segmentation arguments, finding that the only connection between the Sabinesville and Allegheny projects is that DTI filed the applications within a week of each other. But the record does not support the Commission's findings. The Commission found that the impetus for the Sabinesville Project was increased development around the storage pool. However, the Commission ignores that the reason that increased development necessitated the boundary resulted from DTI's plans to use Sabinesville Storage to serve Allegheny

Storage Project customers. Moreover, the Commission notes that it found no impacts associated with the Sabinesville Project, in part because "it does not involve construction of any facilities or ground disturbance." Of course, the reason that Sabinesville Project did not include construction of facilities is because DTI has proposed to add facilities in the docket for the Allegheny Storage Project. *See* DTI Application at 9 (describing facilities to be added at Sabinesville Project).

The Commission's endorsement of DTI's divide and deploy strategy creates confusion for intervenors and obscures the environmental impacts of proposed actions. Because of the interdependent nature of the Sabinesville Storage Project, Docket No. CP12-59, and the Allegheny Storage Project Docket, Docket No. CP12-72, NEPA required the Commission to conduct a single environmental review rather than segmenting the projects.

D. The Commission was arbitrary and capricious in taking account of local zoning considerations for some aspects of the project while ignoring the Town of Myersville's denial of a zoning variance.

The Commission partly justified its choice of Myersville over alternative locations for the compressor station by explaining that the Myersville site is zoned for commercial use while other alternatives are zoned for agricultural or residential use only. December 2012 Order, at ¶ 55. Yet, the Commission ignored the Town of Myersville's decision to deny a zoning variance to DTI for the compressor station because of its incompatibility with the Town's master plan. The Commission's

deference to local zoning law in some respects, but disregard of it in others is arbitrary and capricious.

E. The Commission's pattern of delay in processing and releasing CEII and FOIA information in this case violated MCRC's due process rights.

The Commission's delays in processing MCRC's requests for Critical Energy Infrastructure Information (CEII) and Freedom of Information Act (FOIA) materials violated MCRC's due process rights and compromised their ability to provide meaningful comment. Although the Commission's CEII and FOIA provisions offer adequate access to non-parties interested in information about a proceeding, as applied to contested, adjudicative proceedings, they limit the rights of intervenors to access critical information, and in so doing, violate the Administrative Procedure Act's requirement for on-the record rulemaking as well as participants' due process rights, as has been the case here.

1. Certificate proceedings versus hearings

In a certificate proceeding under Section 7 of the Natural Gas Act, the Commission typically does not permit full-blown on the record evidentiary hearings, but instead, conducts what are known as "paper hearings," which are quasi-adjudicative proceedings consisting of publication of an application and opportunity to intervene and comment in the proceeding. Intervenors in a certificate proceeding

typically do not have discovery rights as would a participant in a hearing,[42] but even so, they are entitled to service of all documents filed with the Commission. *See* 18 C.F.R. § 385.2010.

Significantly, the Commission regulations governing service on intervenors *do not* contain any exceptions for privileged or CEII information. By contrast, members of the public do not have a similar entitlement. Thus, in any certificate proceeding, the Commission's analysis of the impact of CEII and FOIA regulations on intervenors' due process rights must begin the presumption that intervenors are entitled to immediate service of *all* documents and any delays that result from CEII or FOIA unlawfully limit intervenors' due process rights.

2. Deficiencies in CEII process

In the wake of 9-11, the Commission took prompt action to secure thousands of documents that had previously been publicly available, but if left fully disclosed on the Commission's public website, could fall into the hands of terrorists and compromise the security of the nation's power supply. At the same time, the Commission recognized that members of the public, from potential developers seeking interconnection to transmission lines to landowners or state public service commissions, might have a legitimate interest in reviewing material classified as CEII. Because CEII information is

[42] In a case set for hearing, intervenors are entitled to request documents through the discovery process, where turn-around times for document are typically five to ten business days and production is overseen by an administrative law judge. *See* 18 C.F.R. § 385.

by definition "confidential," it is exempt from mandatory disclosure under the Freedom of Information Act (FOIA). So the Commission adopted Order No. 769, implementing a process for members of the public to obtain CEII information. *See* 18 C.F.R. § 388.113.

The Commission's CEII regulations were never intended to restrict intervenors' rights. In fact, Order No. 769 expressly provides that:

> Any party relying on CEII information in a filing needs to be prepared to provide that information to intervenors that need the information to understand the filing.[43]

Yet as applied in practice, the CEII restrictions substantially limit intervenors' rights.

In this proceeding, DTI filed its application in February 2012, with a deadline for intervention established in March 2012. MCRC and its members timely intervened and on May 11, 2012, MCRC president Franz Gerner filed a request for CEII information supporting DTI's application. The Commission released the EA on June 14, 2012 and still, Dr. Gerner had not received the CEII information. Finally, on July 11, 2012 following two phone conversations with CEII staff and a letter by undersigned counsel, Dr. Gerner received the CEII information, just a week before the deadline for comment on the EA. Although the Commission extended the deadline by two weeks or until July 31, 2012, this meant that Dr. Gerner had just 20 days (rather than the typical 30 days) to review the CEII information and prepare comments for the EA. Moreover, undersigned

[43] *See* Order No. 769, at ¶ 41.

counsel's time was spent dislodging the CEII information from the Commission instead of assisting MCRC and its members on filing comments.

Moreover, Dr. Gerner had hoped to share his comments based on CEII information with MCRC members to ensure consistency. Even though MCRC members Ted Cady and Tammy Mangan were willing to execute Non-disclosure Agreements (NDAs), they still had to make separate CEII requests, which they did on August 3, 2012, too late for timely comments on the EA. These requests were not granted until November 3, 2012, a full three months after they were made. Notwithstanding this egregious lack of access, the Commission declared untimely Ted Cady's extensive comments on the EA filed on November 21, 2012 and would not consider them. December 2012 Order. at n.110.

As applied in these proceedings, the Commission's CEII regulations deprive intervenors of their full due process rights. The entire certificate process from beginning to end (February to December 2012) was ten months, while the period for timely comment lasted six months (February to August 2012). Intervenors are entitled to access to all filed information for the entire period yet here, Dr. Gerner spent two months, a full fifth of the process, trying to obtain information while Mr. Cady and Ms. Mangan lost three months, a third of the process.

The Commission suggests that no prejudice resulted from lack of access by MCRC members to the CEII information because the parties had thirty days from the

date it was granted to file comments. December 2012 Order, at ¶¶ 160-161. But intervenors should have been granted access from the beginning of the process. Moreover, intervenors were forced to submit comments in a piecemeal manner rather than provide comprehensive comments which might have been more persuasive.

The Commission's application of its CEII regulations in disputed certificate proceedings is troubling for another reason. Rather than make determinations regarding the release of CEII on its own, the Commission permits the applicant to an opportunity to offer feedback. This is akin to allowing the fox to guard the henhouse, since applicants have a vested interest in publicly releasing as little information about a proposal as possible to avoid objections. In a contested proceeding, where an applicant has a duty under Commission regulations to serve all intervenors with materials filed at the Commission, the applicant should not be given an opportunity to disapprove release of materials to intervenors who execute the Commission's NDA. An applicant cannot decide whether or not to release of relevant data in a formal hearing proceeding, and should not be entitled to similar powers in a quasi-adjudicative certificate proceeding.

The final problem with the Commission's CEII regulations is the lack of any firm deadlines. For information releases under FOIA, the Commission must respond within twenty working days. *See* 18 C.F.R. § 388.108(c)(1). Although, as discussed below, twenty working days is not enough time to allow for meaningful comment, at least the

FOIA deadlines make the Commission accountable to respond within a specific period or face a challenge in court. By contrast, the CEII regulations do not establish firm dates for processing requests, which means that they can linger two or three months as was the experience of MCRC members. At a minimum, the CEII regulations must establish tight time frames for responses to intervenors' requests in order to minimize impacts to their due process rights.

Because the Commission's CEII regulations, as applied to certificate proceedings and specific to this particular case violated the due process rights of MCRC and its members, the Commission should reopen the proceeding and allow additional time for further comment.

3. Deficiencies in the FOIA process

FOIA is a tool to allow members of the public to gain access to information and records relied on by an administrative agency in making a decision. FOIA was not intended to serve as a substitute for discovery and in fact, in many litigated judicial proceedings, parties may subpoena production or seek discovery of privileged materials otherwise unavailable under FOIA.

As with CEII materials, intervenors in a certificate proceeding are entitled to service of all materials filed with the Commission pursuant to Rule 2010, irrespective of whether those materials can be obtained under FOIA or not. In this case, MCRC members sought to comment on project impacts to historic sites but were unable to do

so because DTI filed the cultural resource reports as privileged and would not provide MCRC with copies, even upon voluntary execution of an NDA. As a result, Dr. Gerner was forced to file a FOIA request for these materials in May 2012 and then an appeal of an adverse decision. Ultimately, on October 24, 2012, nearly six months after his original request, and after the EA deadline had long since closed, Dr. Gerner finally received limited access to these materials which enabled him to file comments. Again, the time and expenses associated with obtaining these FOIA materials served as unnecessary distractions and by the time Dr. Gerner filed comments, the deadline for considering them had long since closed. Indeed, there is no indication in the Commission's decision that Dr. Gerner's comments were ever considered.

The Commission's practices are also discriminatory because they adversely impact communities and property owners but do not similarly affect larger companies involved in disputed proceedings at the Commission. According to the Commission website, there are approximately 100 pending administrative hearings, virtually all of which involve disputes between large companies over rates, transmission access or contracts. Although much of the information filed in these cases is CEII or otherwise privileged material, the companies involved do not suffer because they can avail themselves of the discovery process to promptly procure information. By contrast, because the Commission does not hold hearings in certificate proceedings, the intervenors in these cases, which are typically, resource-strapped municipalities,

landowners and non-governmental organizations, must waste precious resources just to obtain information that as intervenors, they are technically entitled to as a matter of course under Commission Rule 2010. The Commission's current process not only deprived MCRC and its members of due process in this case, but it systematically violates due process across the board and must be changed.

IV. CONCLUSION

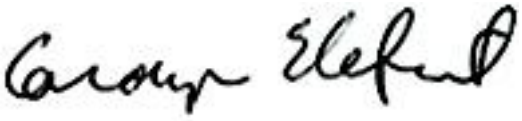
The Commission's December 20, 2012 order granting a certificate to DTI for a certificate for the Allegheny Storage Project is arbitrary, capricious, and unsupported by substantial evidence and resulted from a process rife with due process violations that deprived intervenors of timely access to information that they were due as a matter of court under the Commission's own regulations. The Commission issued a certificate for a project that can never be built since DTI cannot obtain the necessary air quality permits required by federal law to build the compressor station. In addition, there is no evidence to show that DTI has a need for a compressor station of this size, or even at all, to meet the needs of two customers. The Commission erred in adopting the environmental assessment's finding of no significant impact as the compressor station will substantially impact air quality, historic properties and property values within the Town of Myersville (and in fact, an EIS should have been prepared instead).

The Commission has two options on rehearing. It can either vacate the certificate order for the entire Allegheny Storage Project or issue the certificate, subject to the

removal of the Myersville Compressor Station from the project. Either approach is acceptable to MCRC so long as the Myersville Compressor Station is not authorized.

WHEREFORE, for the foregoing reason, the Myersville Citizens for a Rural Community, Inc., asks the Commission to GRANT this rehearing request and DENY the certificate for the Allegheny Storage Project Docket No. 12-72, or issue a modified certificate conditioned on DTI's removal of the Myersville Compressor Station from the project.

Respectfully submitted,



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