

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Dominion Transmission, Inc.) Docket No. CP12-72-000

**ANSWER OF
DOMINION TRANSMISSION, INC.
TO MOTION TO DISMISS APPLICATION**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 1/ Dominion Transmission, Inc. (DTI) hereby responds to the Myersville Citizens for a Rural Community's (MCRC) Motion to Dismiss DTI's application for a certificate of public convenience and necessity for its Allegheny Storage Project (the "Motion"). As explained below, the Commission should reject, or disregard, MCRC Motion, proceed with its processing of DTI's application for the Allegheny Storage Project, and issue that certificate as soon as possible.

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. On June 14, 2012, the Commission Staff issued its environmental assessment (EA) to assess the potential environmental effects of the construction and operation of the Allegheny Storage

1/ 18 C.F.R. § 385.213 (2012).

Project in accordance with the requirements of the National Environmental Policy Act. The Commission staff concluded that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Motion is the latest of a series of filings by MCRC focused on one portion of the Allegheny Storage Project, the proposed new Myersville Compressor Station and, more particularly, on its related air emissions. The Myersville Compressor Station will combust clean-burning natural gas in a highly efficient Solar Mars 100 combustion turbine with a rating of 16,000 horsepower of compression.

Air emission issues associated with the Myersville Compressor Station were considered by the Commission Staff as part of the EA. EA at 65-71. The EA does not support any suggestion that air emission requirements present any barrier to the construction and operation of the Myersville Compressor Station. Yet, MCRC claims that “[a]s a matter of law, the proposed Myersville Compressor Station cannot comply with the requirements of the federal Clean Air Act.” 2/

The basis for this claim is the recent denial by the Myersville Council of DTI’s request of a zoning variance for the compressor station. MCRC attempts to bootstrap the denial of this local zoning permit into a bar to compliance with the Clean Air Act and, going still farther, presents it as a reason for the Commission to dismiss DTI’s Application or, “at a minimum” eliminate the Myersville Compressor Station from the larger project proposal. 3/

2/ MCRC Motion to Dismiss at 1.

3/ *Id.* at 2.

MCRC argues that:

Though ordinarily the Natural Gas Act preempts most state and local decisions, here, DTI's obligation to obtain approval arises out of Maryland's emission permitting program which is part of a federal-approved SIP [State Implementation Plan]. Consequently, the zoning approval requirement is backed by federal law and does not give way to the Natural Gas Act. 4/

MCRC's theory is that the need for a local permit from the Myersville Council is, in essence, part of the Clean Air Act and, therefore, the local permitting decision cannot be preempted by a finding by this Commission that the Allegheny Storage Project is in the public convenience and necessity.

The linchpin of MCRC's claim is Section 2-404 of the Maryland Environmental Code, which concerns ambient air quality control permits and provides in relevant part:

§ 2-404. Ambient air quality control permits; notice; hearings

...

(b) Acceptance of application.

(1) Before accepting an application for a permit subject to subsection (c) of this section, the Department shall require the applicant to submit documentation:

(i) That demonstrates that the proposal has been approved by the local jurisdiction for all zoning and land use requirements; or

(ii) That the source meets all applicable zoning and land use requirements.

(2) Paragraph (1) of this subsection does not apply to any application for a permit to construct at an existing source unless the existing source is a nonconforming use.

(c) Construction of certain sources. -- The Department shall comply with the provisions in subsection (d) of this

4/ *Id.* at 11-12 (internal footnotes omitted).

section before issuing a permit for the activities listed in subsection (a) of this section at:

...

(d) Hearing and notice of intended issuance of permit; impact analyses.

(1) Before issuing a permit subject to subsection (c) of this section, the Department shall:

(i) Comply with the provisions of Title 1, Subtitle 6 of this article; and

(ii) Conduct any public hearing required by Title 1, Subtitle 6 of this article in the county in which the proposed source is located.

(2) In addition to the requirements under paragraph (1) of this subsection, before issuing a permit to construct a source described in subsection (c)(3) of this section, the Department shall require at the expense of the applicant the preparation of an ambient air quality impact analysis regarding the proposed construction. 5/

MCRC argues that the requirement in Section 2-404(b) that the emissions source either be approved by the local jurisdiction or meet “all applicable zoning and land use requirements” is effectively part of the Clean Air Act. MCRC suggests that this requirement is part of Maryland’s SIP – the plan that demonstrates how a state will comply with certain provisions of the Clean Air Act.

Maryland’s SIP, as published in the Code of Federal Regulations, lists the specific provisions of state law that Maryland has submitted and the Environmental Protection Agency has approved. 6/ Section 2-404 is *not included* on that list. Therefore, MCRC’s suggestion that the statutory section is part of the SIP is simply incorrect.

5/ Md. Code Ann. Envir. § 2-404.

6/ 40 C.F.R. § 52.1070, *et seq.*

MCRC states (without offering any explanation or supporting citation) that “the Maryland SIP incorporates the Code of Maryland Regulations (COMAR) Part 26, Title 11(Air Quality), which in turn is *subject to* Maryland Environ. Code § 2-404.” ^{7/} MCRC’s theory seems to be that because the Maryland regulations included in the SIP are “subject to” a statutory provision requiring the satisfaction of “applicable” zoning and land use requirements, those local permitting requirements are actually part of the SIP. Portions of COMAR Part 26 Title 11 are listed as part of the SIP and one of those sections, COMAR 26.11.02, lists Section 2-404 as its authority. Section 2-404 (*b*), however, is self implementing -- no related regulations are required and none are provided in the COMAR, and no provisions of the SIP are tied to that specific provision.

Neither COMAR 26.11.02 nor any other regulation listed in the Maryland SIP requires or addresses local zoning and land use requirements. Moreover, Section 2-404 authorizes other regulations which are part of the SIP, like the requirements for a hearing and ambient air quality analysis. Thus, the reference to Section 2-404 as authority for the COMAR regulations incorporated in the SIP appears to relate to those other provisions that specifically implement the requirements of Section 2-404. Notably, the provisions in Section 2-404(d) for public notice and comment, and air quality modeling, are analogous to provisions in Section 165 of the Clean Air Act and its implementing regulations at 40 C.F.R. § 52.51.

^{7/} MCRC Motion at 5 (emphasis added).

In contrast, no requirement similar to Section 2-404(b) for local zoning or land use approval or conformity is included in the Clean Air Act or its implementing regulations. Nor does the Clean Air Act provide any basis for such a land use requirement. In fact, the Clean Air Act expressly disclaims any effect on the existing authority of localities to plan or control land use, indicating Congressional intent to steer clear of these issues. 42 U.S.C. § 7431 provides:

§7431. Land use authority

Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use.

Section 2-404(b) relates to the inter-relationship between State and local governments; it is an issue of State law only and has no relationship to federal law or concerns.

This Commission is responsible for siting decisions for interstate natural gas pipeline infrastructure. For that reason, “[a]ny state or local permits issued with respect to the jurisdictional facilities authorized . . . must be consistent with the conditions of [the Commission-issued] certificate.” ^{8/} Even MCRC recognizes that “ordinarily the Natural Gas Act preempts most state and local decisions.” ^{9/} The creative legal arguments of MCRC notwithstanding, this is just such an “ordinary” case. The zoning decision of the Myersville Council will be pre-empted by a decision

^{8/} *E.g., Islander East Pipeline Co.*, 100 FERC ¶ 61,276, P 138 (2002); *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, P 143-45 (2006).

^{9/} MCRC Motion at 11.

by this Commission that the Allegheny Storage Project is in the public convenience and necessity.

This result is fully consistent with Section 2-404(b), because it requires satisfaction of only “*applicable* zoning and land use requirements.” Once the Commission issues a certificate, the local zoning requirement will be pre-empted and, thus, no longer “applicable.” Accordingly, the air emissions permit then may proceed.

One final argument raised by MCRC warrants a brief response here. MCRC alleges that there is an “inconsistency” between DTI’s statement that it expects to operate the Myersville Compressor Station four months per year and its proposal to limit operations to 6,000 hours (or the equivalent of 250 days) per year. 10/ The simple explanation is that the four months reflect DTI’s intended operations, but the 6,000 hours reflect an operational limit. DTI’s air permit application proposes to operate the station with an enforceable operating limit (in the permit) of a maximum of 6,000 hours per year – which is well in excess of the planned operations, but set at a level that stays below the emissions threshold for a major source. Without support or explanation, MCRC asserts that the 6,000 hours limit is not a federally enforceable limit. 11/ For the reasons set forth below, that limit is federally enforceable and limits the Myersville Compression Station’s potential to emit so as to ensure that it is not a major source.

The federal Clean Air Act regulations define “potential to emit” as:

10/ MCRC Motion at note 1.

11/ *Id.* at 13.

the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. 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 fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. 12/

For purposes of new source review, "Federally Enforceable" is defined as

all limitations and conditions which are enforceable by the Administrator, including those . . . requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 C.F.R. § 52.21 or under regulations approved pursuant to 40 C.F.R. part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program. 13/

To be federally enforceable, *i.e.*, enforceable by EPA, a state permit must be issued pursuant to a program that is incorporated into its SIP, submitted to and approved by EPA. Thus, the federal regulations provide that "federally enforceable" includes limitations and operations imposed in a state operating permit under a state operating permit program that has been approved by EPA and incorporated in the SIP to which the permit conforms. 14/ DTI applied under Maryland's General

12/ 40 C.F.R. §§ 52.21(b)(4), 51.165(a)(1)(iii), 51.166(b)(4).

13/ 40 C.F.R. § 52.21(b)(17).

14/ 54 Fed. Reg. 27,282-84 (June 28, 1989); *see also, e.g., United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1159 (D. Colo. 1988) (state permit was issued under the terms of Colorado's air quality regulation, which were part of

Permit to Construct, COMAR 26.11.02, for a permit to construct the Myersville Compressor Station. 15/ The application requested authority to operate for and a limit on operations of the compressor to 6,000 hours per year. Unlike Maryland Environmental Code § 2-404, COMAR 26.11.02, the regulation under which that permit program is authorized, is incorporated in Maryland's SIP. 40 C.F.R. § 1070(c) (providing a chart specifically listing COMAR 26.11.02 as part of the SIP). Because this section of Maryland's regulation is incorporated into Maryland's SIP, COMAR 26.11.02 and the permit program it authorizes are federally enforceable. Consistent with the federal regulations cited above, the same Maryland permit program regulations specifically authorize the Maryland Department of Environment ("MDE") to "include a condition in a permit to construct, an approval, or a State permit to operate that limits emissions from a source and that is federally enforceable so that the source is not subject to a Part 70 permit or an applicable requirement of the Clean Air Act." 16/ This EPA-approved provision authorizes MDE to impose limitations on hours of operation which are federally enforceable so that sources like DTI's proposed compressor station can apply for and obtain restrictions on operations, such as hours of operation, so that its potential to emit

Colorado's approved SIP for the enforcement of the National Ambient Standards and therefore was federally enforceable.).

15/ DTI applied for the permit specifically under COMAR §§ 11 and 26.11.02.13 which are listed in the chart of EPA-approved SIP elements at 40 C.F.R. § 1070 (c). See Attachment 3 to DTI's Air Permit Application Package for the Myersville Compressor Station at p. 5 (January 25, 2012).

16/ COMAR 26.11.02.03.a.

remains below major source thresholds. Contrary to MCRC's assertion, that is precisely what DTI lawfully has requested.

Conclusion

WHEREFORE, for all the foregoing reasons, DTI respectfully urges the Commission to reject, or disregard MCRC's Motion, to proceed with its processing of the application for the Allegheny Storage Project, and to issue that certificate as soon as possible.

Respectfully submitted,

/s/ J. Patrick Nevins

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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.

Dated at Richmond, Virginia this 12th day of October, 2012.

/s/ Lois M. Henry

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Document Content(s)

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