

ORAL ARGUMENT NOT YET SCHEDULED

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

Nos. 12-1481 and 13-1018

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MINISINK RESIDENTS FOR ENVIRONMENTAL PRESERVATION AND SAFETY, *ET AL.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**FINAL CORRECTED BRIEF:** November 12, 2013

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## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioners' brief.

### B. Rulings Under Review:

1. Order Issuing Certificate, *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045 (July 17, 2012) ("Certificate Order"), R. 870, JA 2;
2. Order Denying and Dismissing Requests for Rehearing, Denying Request to Reopen and Supplement the Record, and Denying Requests for Stay, *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,198 (Dec. 7, 2012) ("Rehearing Order"), R. 961, JA 52; and
3. Order Denying Rehearing, *Millennium Pipeline Co., L.L.C.*, 142 FERC ¶ 61,077 (Jan. 31, 2013) ("Second Rehearing Order"), R. 977, JA 99.

### C. Related Cases:

In addition to the cases listed in Petitioners' brief, the following is a related case:

1. *In re Minisink Residents for Preservation of the Environment and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (order denying All Writs Act petition seeking stay).

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## GLOSSARY

Certificate Order	<i>Millennium Pipeline Co., L.L.C.</i> , 140 FERC ¶ 61,045 (July 17, 2012)
Certificate Policy Statement	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999), <i>clarified</i> , 90 FERC ¶ 61,128, <i>further clarified</i> , 92 FERC ¶ 61,094 (2000)
Commission or FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment for the Minisink Compressor Project, issued Feb. 29, 2012
FOIA	Freedom of Information Act
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Pipeline	Millennium Pipeline Company, L.L.C., sponsor of the Minisink Compressor Project
Project	Minisink Compressor Project, a compressor station consisting of: (1) two 6,130-horsepower natural gas-fired compressor units and (2) approximately 545 feet of both suction and discharge pipeline
Rehearing Order	<i>Millennium Pipeline Co., L.L.C.</i> , 141 FERC ¶ 61,198 (Dec. 7, 2012)
Residents	Petitioners, Minisink Residents for Environmental Preservation and Safety, <i>et al.</i>
Second Rehearing Order	<i>Millennium Pipeline Co., L.L.C.</i> , 142 FERC ¶ 61,077 (Jan. 31, 2013)
Wagoner Alternative	Alternative comprising: (1) siting a 5,100-horsepower compressor unit at Millennium's existing Wagoner Meter Station, and (2) replacing the existing 7.2-mile Neversink pipeline with a larger, 30-inch diameter pipeline

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

---

**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

**STATEMENT OF THE ISSUE**

The Federal Energy Regulatory Commission (“Commission” or “FERC”) approved the construction and operation of a natural gas compressor station after considering alternatives and environmental impacts and, ultimately, balancing the public need for the compressor against its public costs. The question presented on appeal is:

Whether the Commission satisfied its responsibilities under the Natural Gas Act (“NGA”) and National Environmental Policy Act (“NEPA”), when it issued a certificate of public convenience and necessity after conducting a comprehensive

environmental assessment that considered all potential environmental harms in their appropriate context, considering relevant project alternatives, and attaching numerous conditions and mitigation measures designed to protect against adverse impacts.

## **STATUTORY AND REGULATORY PROVISIONS**

Pertinent statutes and regulations are contained in the Addendum.

## **STATEMENT OF JURISDICTION**

This case concerns the Commission’s environmental review of, and issuance of a certificate of public convenience and necessity for, the construction and operation of a new natural gas compressor station. Since this appeal was initiated, the project at issue was completed and is operating. Because the Petitioners claim injuries from the operation (not just the construction) of the compressor, there continues to be a judicable live controversy. *See Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990) (“A case is moot if events have so transpired that the [Commission’s] decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.”) (citing Wright, Miller, Cooper, *Federal Practice and Procedure* § 3533.3 at 273-74 (1984) (case moot if prospect of future effects “too remote to justify decision”)).

## INTRODUCTION

In the orders on review, the Commission issued a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Millennium Pipeline Company, L.L.C. (“Pipeline”), authorizing it to build and operate the Minisink Compressor Project (“Project”). *See Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045 (July 17, 2012) (“Certificate Order”), R. 870, JA 2, *on reh’g*, 141 FERC ¶ 61,198 (Dec. 7, 2012) (“Rehearing Order”), R. 961, JA 52, *denying reh’g*, 142 FERC ¶ 61,077 (Jan. 31, 2013) (“Second Rehearing Order”), R. 977, JA 99.<sup>1</sup> The Project, a compressor station, is sited on 4.5 acres within a 73.4-acre lot owned outright by Pipeline through which its existing interstate pipeline passes. The Project will enable Pipeline to transport an additional 225,000 dekatherms of natural gas per day on its pipeline to meet the contractual demands under three shippers’ gas transportation contracts. Certificate Order PP 4, 6 (Project capacity fully subscribed), JA 3-4.

In an agency proceeding extending over a year and resulting in a detailed, 61-page Environmental Assessment, the Commission thoroughly evaluated the Project’s potential impacts and multiple alternatives to the Project. *See*

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<sup>1</sup> “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515-000 (Feb. 29, 2012) (“EA”), R. 654, JA 428-506.

Petitioners Minisink Residents for Environmental Preservation and Safety, Michael Mojica, Pramilla Malick, and Karen Gartenberg (collectively, “Residents”)<sup>2</sup> participated throughout the Commission proceeding, raising numerous challenges regarding the Commission’s environmental analysis and advocating for an alternative site for the Project, the “Wagoner Alternative.” Certificate Order PP 22, 29, JA 9, 12. The Commission addressed all of Residents’ objections to the Environmental Analysis and fully evaluated and considered the Wagoner Alternative. Ultimately, the Commission determined that the Project is environmentally preferable to the Wagoner Alternative and, upon Pipeline’s satisfaction of numerous environmental conditions and mitigation measures, is consistent with the public convenience and necessity under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). Rehearing Order PP 7-8, JA 54-55. The final orders reflect the Commission’s balancing of all factors bearing upon the public interest, as required by NGA section 7(e), 15 U.S.C. § 717f(e), including environmental issues.

This appeal followed.

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<sup>2</sup> The Commission referred to Residents as “MREPS” in both the Certificate and Rehearing Orders.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. Natural Gas Act

The principal purpose of the Natural Gas Act is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, NGA sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). NGA section 7(c) requires any person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce to obtain a certificate of public convenience and necessity from the Commission. *Id.* § 717f(c)(1)(A). Under NGA section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility “is or will be required by the present or future public convenience and necessity.” *Id.* § 717f(e). Applicants seeking a certificate from FERC must comply with extensive application requirements, including public notice and comment and environmental review proceedings. *See generally* 18 C.F.R. §§ 157.1-157.22.

#### B. National Environmental Policy Act

The Commission’s consideration of an application for a certificate of public

convenience and necessity triggers NEPA. *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are “adequately identified and evaluated.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). “NEPA itself does not mandate particular results in order to accomplish these ends. Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Public Citizen*, 541 U.S. at 756-57 (quoting *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a “fully informed and well-considered decision, not necessarily the best decision”). Under NEPA, an agency must “take a ‘hard look’ at the environmental consequences before taking a major action.” *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an environmental analysis, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental

analysis); *see, e.g., Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008) (summarizing regulations governing agency's determination whether an environmental impact statement is needed). Once the agency issues a finding of no significant impact, it has fulfilled NEPA's documentation requirements. *See Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006) (citing 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13).

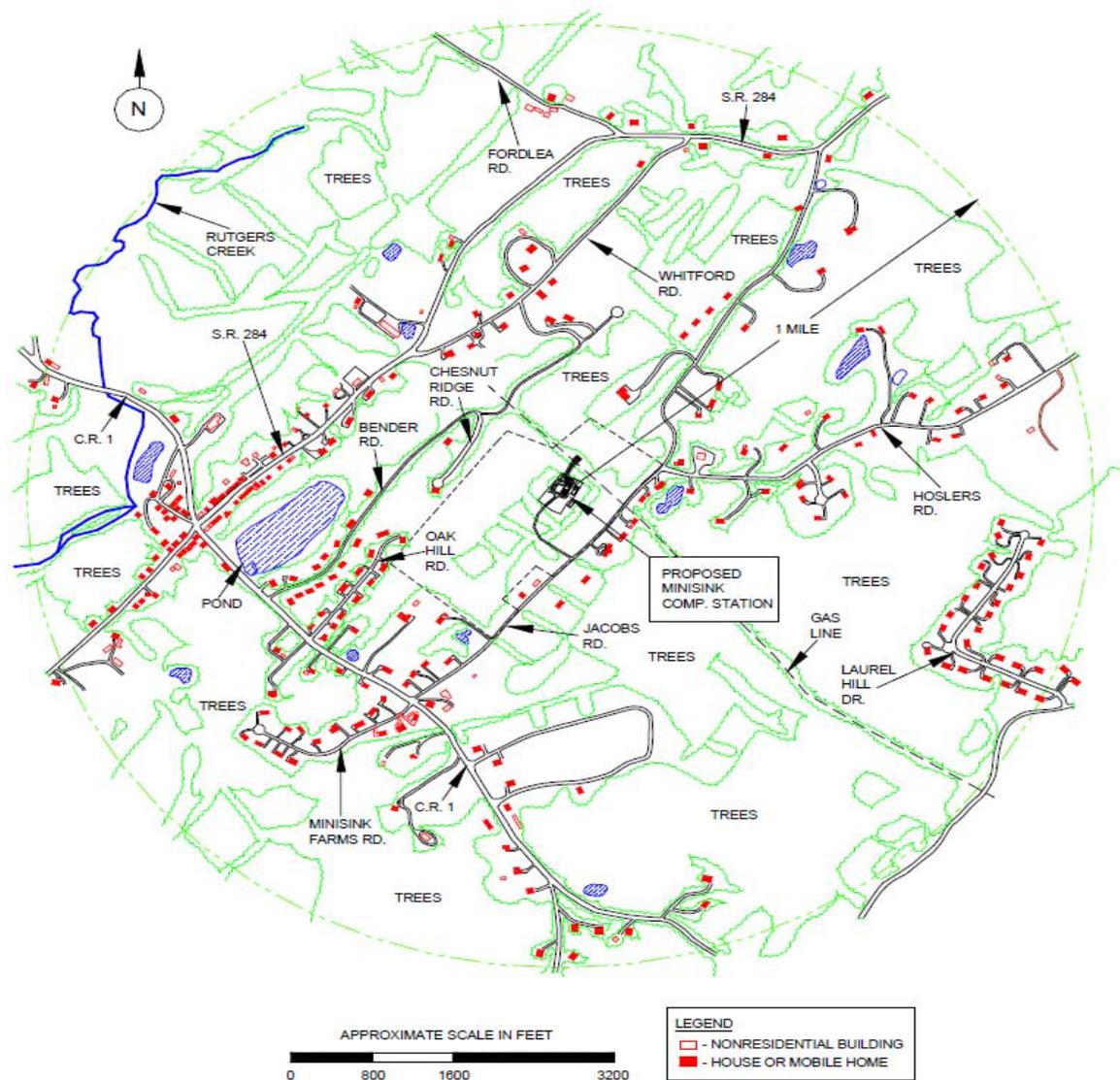
## **II. THE COMMISSION'S REVIEW OF THE PROJECT**

### **A. The Project**

On July 14, 2011, Pipeline filed with the Commission an NGA section 7(c) application for authorization to construct and operate the Project: two 6,130-horsepower natural gas-fired compressor units to be housed in a new building. Certificate Order P 3, JA 2-3. The Project includes approximately 1,090 feet of pipe connecting the compressor station to Pipeline's existing interstate pipeline, a driveway, a station control/auxiliary building, and intake, exhaust, and blow down silencers. *Id.*

The Project is located in a rural, low-density populated area, more than 25 miles from any major metropolitan areas (population over 50,000). Certificate Application, at p. 7 n.9, Docket No. CP11-515-000 (July 14, 2011), R. 1, JA 310. The Project's 4.5-acre footprint is situated in the midst of a 73.4-acre parcel owned by Pipeline. EA at 6, JA 441. The new compressor building is located at the end

of an 830-foot-long private, paved driveway on Pipeline's land. *Id.* at 18, JA 453. Existing forest land and topography obstruct views of the station from most of the surrounding residents. *Id.* at 19, 21 (station is visible by five residents), JA 454, 456. *See also* the diagram below showing the Project location vis-à-vis surrounding residences.



EA at 20, Figure 3, JA 455. The Project serves two purposes: (1) to transport an additional 225,000 dekatherms per day of natural gas to an interconnection with another pipeline at Ramapo, New York; and (2) to enable gas to flow bi-directionally on a segment of the existing pipeline. Certificate Order PP 4, 15, JA 3, 6-7.

### **B. The Commission's Environmental Review**

In August 2011, the Commission issued a notice of intent to prepare an Environmental Analysis for the Project and requested comments on potential environmental issues. Certificate Order P 21, JA 8. In response to its outreach, the Commission received numerous comments, including comments from Residents. *Id.* P 23, JA 9. In December 2011, the Commission issued a supplemental notice seeking comments on an alternative to the Project – the “Wagoner Alternative.” *Id.* P 22, JA 9. After considering all substantive comments on the Project and alternatives, the Commission issued an extensive Environmental Assessment. *Id.* P 24, JA 10.

The Environmental Assessment evaluated multiple alternatives to the Project, including a detailed comparison of the Wagoner Alternative to the Project. EA at 39-54, JA 474-489. The Wagoner Alternative has two components: (1) construction of a 5,100 horsepower compressor station at an existing meter facility operated by Pipeline and (2) construction of a 7.2-mile, 30-inch diameter pipeline

to replace the existing 24-inch Neversink segment. *Id.* at 49-51, JA 484-486.

Specifically, in order for a compressor located at the Wagoner meter station to be operationally feasible, i.e., to be able to deliver the contracted for volumes of gas, the existing constrained Neversink segment of pipeline must be replaced with a larger pipeline. *Id.* at 49, JA 484; *see also id.* at 42 (explaining why Wagoner alternative requires replacement of Neversink segment), JA 477. Conversely, the Project (the Minisink compressor) does not require any pipeline construction. The Environmental Assessment determined that the most significant advantage the Wagoner Alternative has over the Project is more limited visual impacts associated with the compressor part of the Wagoner Alternative. *Id.* at 52 (visual impacts negligible because of surrounding dense forest and absence of residences within 0.5 mile), JA 487. However, the Environmental Assessment found that because the Wagoner Alternative includes construction of the Neversink replacement pipeline, it has a significantly greater impact on multiple resources including: threatened and endangered species, wetlands, waterbodies, residential land, and forested land. *Id.* at 51, Table 13 (comparing Wagoner Alternative to the Project), JA 486. Thus, the Environmental Assessment concluded that because of the greater environmental concerns and landowner impacts associated with replacing the Neversink segment, the Wagoner Alternative does not provide a significant environmental advantage over the Project. *Id.* at 54, JA 489.

The Environmental Assessment also analyzed the Project's impacts on the following resources: geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, reliability, socioeconomics, and cumulative impacts. *Id.* Where adverse impacts were identified, the Environmental Assessment recommended mitigation measures that, if imposed, would reduce or resolve the respective impact. *See id.* at 55-59, JA 490-494. Ultimately, the Environmental Assessment recommended a finding of no significant impact based on implementation of mitigation measures listed in the Environmental Assessment. *Id.* at 55, JA 490.

### **C. The Certificate Order**

On July 17, 2012, the Commission issued a certificate of public convenience and necessity to the Pipeline authorizing the construction of the Project. Certificate Order P 1, JA 2. The Commission applied the criteria set forth in its Certificate Policy Statement to determine whether the public benefits of the Project outweigh the Project's adverse effects on specific economic interests. *Id.* P 10 (citing *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")), JA 4. The Commission found significant demand for the Project's capacity, as evidenced by the Pipeline's contracts with

three shippers for 100 percent of the Project's capacity for primary terms of 10 years. *Id.* P 6, JA 3. The Commission further determined that the only potential adverse economic impacts were on surrounding landowners and the community, but concluded that Pipeline had minimized these impacts by purchasing, from a willing seller, a 73-acre parcel of land for the 4.5-acre project. *Id.* PP 14-15, JA 6.

Next, the Commission conducted a thorough environmental review of the Project, taking into account the Environmental Assessment and all substantive comments on it. *See id.* PP 21-83, JA 8-30. The Commission addressed all of Residents' environmental comments including the issues which were ultimately raised in this appeal: the Wagoner Alternative (*id.* PP 26-27, JA 10-11); visual impacts (*id.* PP 30-34, 71, JA 12-14, 25); noise (*id.* PP 39-41, 77-78, JA 15-16, 27-28); emissions/pollution (*id.* PP 42-50, JA 16-18); safety (*id.* PP 60-61, 68-69, JA 21-22, 24-25); property values (*id.* P 70, JA 25); and Pipeline's potential future projects; e.g., a service line to the CPV Valley Power Plant and the Hancock compressor project (*id.* PP 65-67, JA 23-24). After consideration of the information and analysis contained in the record regarding the potential environmental effects of the Project, the Commission concluded that the Project, as mitigated, would have no significant environmental impact. *Id.* P 83, JA 29-30.

Ultimately, upon balancing the evidence of public benefits against the identified potential adverse effects of the Project, coupled with its finding of no significant environmental impact, the Commission determined that the Project, with appropriate environmental conditions and mitigation measures, is required by the public convenience and necessity. *Id.* P 15, JA 6.

Two Commissioners dissented. Chairman Wellinghoff and Commissioner LaFleur both disagreed with the conclusion in the Environmental Assessment that the “Wagoner Alternative does not provide a significant environmental advantage over the [Project],” and thus both preferred the Wagoner Alternative to the Project. Certificate Order, 140 FERC ¶ 61,045 at 61,219 (Wellinghoff, Comm’r, dissenting), JA 42; *id.* at 61,220 (LaFleur, Comm’r, dissenting), JA 46.

#### **D. The Rehearing Order**

On December 7, 2012, the Commission issued an order denying Residents’ rehearing requests and affirming the Certificate Order on all issues. Rehearing Order P 1, JA 52. As relevant to this appeal, the Commission addressed its application of the Certificate Policy Statement, including the determination of the need for the Project (*id.* PP 14-25, JA 58-65), the assessment of the Wagoner Alternative (*id.* PP 27-28, 39-43, 46, 66-67, JA 65-66, 72-74, 75, 84-85), Project impacts including visual, noise and air emissions (*id.* PP 29-31, JA 66-67), the Hancock compressor project (*id.* PP 32-35, JA 67-69), compliance with siting

regulations (*id.* PP 36-37, 49-50, JA 70-71, 77), and the Administrative Procedure Act and due process claims (*id.* PP 66-74, JA 84-90).

The Commission also denied Residents' belated request to reopen and supplement the record with a report by their expert Mr. Richard Kuprewicz. *Id.* PP 1, 13, JA 52, 57. The Commission applied its long-standing policy of not reopening the record except where the requesting party shows "extraordinary circumstances;" i.e., a change in circumstances that goes to the very heart of the case. *See id.* P 13, JA 57 (finding no change in circumstances that justify reopening the record). The Commission also addressed the merits of the Kuprewicz Report, finding that the Report, which questioned the safety and integrity of the Neversink segment once the Project is operating, was flawed. *Id.* PP 75-80, JA 90-92. Specifically, the Commission rejected as unsupported Mr. Kuprewicz's conclusion that the Project (the Minisink compressor), like the Wagoner Alternative, requires Pipeline to replace the Neversink segment to safely transport the contracted for volumes of gas. *Id.* PP 77-78, JA 91-92.

Chairman Wellinghoff and Commissioner LaFleur issued a joint dissent stating that they continue to believe that the Wagoner Alternative is environmentally preferable and, thus, the Commission "should have exercised its discretion to deny [Pipeline's] application." Rehearing Order, 141 FERC ¶ 61,198, at 61,992 (Wellinghoff and LaFleur, Comm'rs, dissenting), JA 95-96.

### **E. The Second Rehearing Order**

The last challenged order, the Second Rehearing Order, denied Petitioner Mojica's request for rehearing of the Commission's rejection of the Kuprewicz Report and decision to not reopen the record. Second Rehearing Order P 1, JA 99. The Commission affirmed that the Kuprewicz Report, specifically, the Report's conclusion that the Project necessitates replacement of the Neversink pipe segment, lacked authority or support for its assertions. *Id.* PP 9-12, JA 102-104. Thus, the Commission was not persuaded to reach a different decision than its earlier order. *Id.* P 9, JA 102. Chairman Wellinghoff and Commissioner LaFleur concurred, stating that Mr. Mojica failed to meet the "extraordinary circumstances" standard for reopening and supplementing the record. Second Rehearing Order, 142 FERC ¶ 61,077, at 61,334 (Wellinghoff and LaFleur, Comm'rs, concurring), JA 106.

### **F. Motions For Stay**

On October 4, 2012, Residents petitioned this Court for a stay of construction activities. Upon consideration of the pleadings, this Court denied Residents' All Writs Act Petition. *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (finding that Residents failed to demonstrate a likelihood of success on the merits). Again, on January 16, 2013, Residents filed with this Court a motion for a stay seeking to

stop the Project from being placed into service pending judicial review. This Court also denied this second stay request. *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (finding that Residents failed to meet the stringent standards required for a stay).

Since issuance of the Court's orders denying stay, Pipeline completed Project construction consistent with the Commission's authorizations, and placed the compressor station into service in June 2013. *See* Pipeline's Affirmative Statement of Compliance with Certificate Order, Docket No. CP11-515-000 (June 19, 2013).

### **SUMMARY OF ARGUMENT**

Residents' predominant claim – that the Commission should have preferred one siting alternative over another – is unsupported by record evidence. Here, the Commission selected the Project site, in Minisink, New York, preferred by the staff's Environmental Assessment. There are environmental consequences – mitigated to the extent possible by numerous environmental conditions – of this selection, just as there are environmental consequences to the alternative (the Wagoner Alternative) favored by Residents. Here, the Commission justified and explained in its Environmental Assessment, the Certificate Order and, again, in its Rehearing Order, its choice of alternative. A court will not substitute its judgment for the Commission's even when FERC Commissioners disagree on the merits as

to where to strike a balance between project benefits and effects. As long as the agency has justified and explained its selection, based upon record considerations, as the Commission did here, there is no legitimate reason for a reviewing court to second-guess that choice.

The Commission satisfied all of its statutory responsibilities in approving the Project. Residents cannot demonstrate that the Commission's interpretation of the public convenience and necessity standard in section 7(e) of the Natural Gas Act, as implemented through the Commission's Certificate Policy Statement, was unreasonable. Congress entrusted the Commission with broad power to determine whether a natural gas certificate application is in the present or future public interest. The Commission, in approving the Project, balanced the many competing interests under the guidelines set forth in its Certificate Policy Statement in the same manner as it has done in hundreds of certificate proceedings. While Residents do not believe the Commission made precisely the right decision in approving the Project, they failed to show that the Commission's choice was unreasonable or departed in any way from the Certificate Policy Statement or past Commission precedent.

The Commission's decision, after developing the 61-page Project Environmental Assessment, that an even more detailed environmental impact statement coupled with a quantitative cost-benefit analysis is unnecessary, was an

informed and reasoned decision. The Environmental Assessment fully identifies, describes, and analyzes the Project's potential environmental impacts, including the nuisance impacts that could impact property values in the Project area, and the cumulative impacts of other known projects. Ultimately the Environmental Assessment recommends appropriate mitigation measures to address identified adverse impacts. The Environmental Assessment disproves any argument that the Commission's finding of no significant impact was uninformed or arbitrary. With potential adverse impacts effectively mitigated, the Commission was justified in concluding, after balancing Project benefits and impacts, that the Project advances the public interest.

The Commission applied its siting regulations to determine that the 4.5-acre Project, located in the middle of a 73-acre parcel of land, is appropriately unobtrusive, has a minimal footprint, and will emit noise at levels that are barely, if at all, noticeable. That some residential homes are within a half-mile of the Project does not make the Project's location inherently unreasonable, particularly where, as here, the project sponsor has taken multiple steps to silence noise, screen the project from view, protect the surrounding 70 acres from development, and modify the building design.

Residents' attempt to support their speculation regarding the likelihood that Pipeline might or needs to replace the Neversink pipeline segment with their late-

filed expert's report, which the Commission rejected as untimely as well as unsubstantiated, fails. Residents base many of their arguments on their claim that construction of the Project requires replacement of the Neversink segment for safety reasons. Yet, the Commission's engineering analysis of the Project disproves the Report's allegations of safety concerns stemming from the claimed high velocity of the gas exiting the Project. The Commission's determinations regarding these disputed technical facts are based upon its expertise and are entitled to deference. Further, the Commission was not required to reopen the record for a flawed report that failed to legitimately call into question any of the Commission's determinations underlying its ultimate finding that the Project is in the public interest.

Residents fail to justify either of their two due process claims. In this case an evidentiary hearing was unnecessary. The Commission was able to resolve all issues based on the written record. Residents had ample opportunity to submit comments, protests and evidence into the record on all issues – an opportunity they took full advantage of. Last, Residents' claim under the Freedom of Information Act is presently pending before another court, making this Court's review of the issue unnecessary.

## ARGUMENT

### I. STANDARD OF REVIEW

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning disputed orders only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, the Court’s scope of review is narrow and it will not substitute its judgment for that of the agency; rather, the Court determines “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 120-21 (D.C. Cir. 1989) (citing *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974))). As part of this task, the Court determines whether “the agency . . . articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Administrative Procedure Act’s arbitrary and capricious standard also applies to challenges under the National Environmental Policy Act. *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). When the Court reviews

Commission action taken “under NEPA, the court’s role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a “rule of reason” standard. *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citing *Nevada*, 457 F.3d at 93). This Court has consistently declined to “‘flyspeck’ an agency’s environmental analysis, looking for any deficiency no matter how minor.” *Id.* Thus, “[a]s long as the agency’s decision is ‘fully informed’ and ‘well-considered,’ it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment.” *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting *North Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)). *See also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action).

## **II. THE COMMISSION SATISFIED ALL THE NATURAL GAS ACT RESPONSIBILITIES IN ACTING ON PIPELINE’S APPLICATION**

The theme expressed throughout Residents’ brief is that the Commission, in

violation of its responsibilities under the NGA, improperly applied the public interest standard in reviewing Pipeline’s certificate application and ignored an alternative project proffered by Residents. *See, e.g.*, Br. 6-7 (FERC “turned a blind eye to . . . a project alternative” and “alternative . . . was expressly disregarded”); *id.* at 6 (“Spurring decades of precedent on its public interest obligation”); *id.* at 20 (“nary a mention of the Wagoner Alternative”); *id.* at 24 (FERC “disavowed any duty to rigorously consider the Wagoner Alternative”); *id.* at 25-26 (FERC “violated NGA section 7 public interest standard” and “fail[ed] to look at alternatives”). The Commission orders show otherwise.

Section 7(e) of the NGA grants the Commission exclusive authority to determine whether an application to construct natural gas facilities “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). This statutory provision confers broad authority upon the Commission. *See FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (as “the guardian of the public interest,” the Commission “has been entrusted with a wide range of discretionary authority”).

Here, the Commission applied its standard three-step review process to determine that the Project “is in the public convenience and necessity.” Rehearing Order P 14, JA 58. The three steps are as follows. First, the Commission identifies and balances evidence of public benefits against adverse effects on

specific economic interests using the criteria set forth in its Certificate Policy Statement. Rehearing Order PP 14 & 18, JA 58 & 59 (citing *Certificate Policy Statement*, 88 FERC ¶ 61,227 (1999)). Next, pursuant to NEPA, the Commission takes a hard look at environmental impacts of the project. *Id.* P 15, JA 58. Last, if on balance the benefits outweigh adverse economic impacts and if the project is environmentally acceptable, the Commission will issue a certificate conditioned with specific mitigation measures or environmental conditions “as the public convenience and necessity may require.” *Id.* P 16, JA 59.

As detailed below, the Commission properly exercised its discretion in evaluating and balancing relevant factors under its established public convenience and necessity framework.

**A. The Commission Reasonably Balanced The Project’s Benefits Against Its Adverse Impacts**

The Commission’s balance of project benefits against residual economic and environmental impacts satisfied its statutory responsibilities. “[A]s an expert agency, the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest, and the exercise of that discretion will not be overturned unless the Commission’s action lacks a rational basis.” *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984). *See also Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960,

964 (D.C. Cir. 2000) (describing the “flexible balancing process” FERC employs to evaluate gas pipeline projects).

Consistent with its responsibilities under the NGA and NEPA, the Commission considered all views in its orders and in the comprehensive Environmental Assessment that informed those orders. Residents’ comments throughout the agency proceeding – like every commenter’s concerns – were considered as part of the Commission’s public interest balance under NGA section 7(c), 15 U.S.C. § 717f(c). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature.

Applying the Certificate Policy Statement, the Commission found a strong showing of need for this Project. *See* Certificate Order P 15 (100 percent of Project capacity subscribed under long-term contracts with three shippers), JA 6. The Project will provide substantial benefits to both gas producers and end-users by providing additional capacity to move natural gas produced in the area near Pipeline’s interstate pipeline to high-demand Northeast markets. *See Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, P 19 (2012) (order denying Residents’ motion for stay of Project construction), R. 899, JA 753. The Commission balanced the Project’s benefits against the limited residual adverse effects to landowners and communities identified in the environmental section of the

Commission’s orders and its earlier Environmental Assessment. *See* Rehearing Order PP 19-20, JA 60-61. The Commission found that Pipeline “has taken steps to minimize any adverse impacts on landowners and surrounding communities.” Certificate Order P 14, JA 6; *see also id.* P 28 (adopting the EA’s conclusion that the Project would result in limited impacts on air and noise quality, safety, visual resources, and property values), JA 12. Accordingly, the Commission reasonably concluded:

Based on the benefits the project will provide and the minimal adverse effect . . . we find, consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of Millennium’s proposal, as conditioned in this order.

*Id.* P 15, JA 6; *see, e.g., Midcoast Interstate*, 198 F.3d at 967 (as long as any adverse environmental effects are identified and evaluated, FERC may decide that other values outweigh the environmental costs); *Cal. Gas Producers Ass’n v. FPC*, 383 F.2d 645, 648 (9th Cir. 1967) (noting that the Commission enjoys “considerable” deference when making public interest determinations under Section 7 of the Natural Gas Act, which are “matter[s] peculiarly within the discretion of the Commission”).

**B. The Commission Gave The Wagoner Alternative The Required Hard Look**

The Commission is required – as it did in this case – to consider reasonable alternatives raised by parties (or dissenting Commissioners). *See American Gas*

*Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2009) (“FERC not required to agree with arguments raised by a dissenting Commissioner” provided it considers them). Residents are completely wrong in alleging that the Commission issued its Certificate Order “with nary a mention” (Br. 20) of their favored Wagoner Alternative. To the contrary, the Certificate Order identified and fully discussed the environmental impacts and benefits of the Wagoner Alternative as identified in the Environmental Assessment and compared and contrasted that Alternative to the Project. *See* Certificate Order PP 26-27 (concurring with the EA’s detailed assessment of the Wagoner Alternative), JA 10-11; *see also id.* PP 22-23 (noting supplemental notice of inquiry to solicit comments on the Wagoner Alternative, identified by landowners during scoping period), JA 9; Rehearing Order PP 39-43, 66-67 (addressing Residents’ rehearing arguments regarding Wagoner Alternative), JA 72-74, 84-85.

Notwithstanding Residents’ suggestions to the contrary (Br. 33-36), this is not a case where the alternative is demonstrably superior to the proposed project. Rather, the Commission concluded that the primary advantage of the Wagoner Alternative is that the compressor would be located farther from noise sensitive areas and residences than the Project. Certificate Order P 27 n.28, JA 11. But, because the Wagoner Alternative requires the replacement of the Neversink pipeline segment, it has substantial disadvantages as compared to the Project,

specifically: (1) significantly more tree clearing; (2) significantly more land clearing; (3) direct encroachment on 58 residential properties; (4) crossing of wetlands and waterbodies; and (5) greater impact on protected species. *Id.* P 27, JA 10-11; *see also* Rehearing Order P 67 (detailing the Wagoner Alternative’s impacts as compared to the Project’s), JA 85; EA at 40-54 (same), JA 475-489. In these circumstances, the Commission was amply justified in agreeing with its Environmental Assessment that the Wagoner Alternative favored by Residents does not, on balance, provide an environmental advantage over the Project. Certificate Order P 27, JA 11.

Further, the Commission’s certification of the Project here is consistent with the case cited (Br. 33) by Residents, *City of Pittsburgh v. FPC*, 237 F.2d 741, 751 n.28 (D.C. Cir. 1956). In *City of Pittsburgh*, the Court noted that “the existence of *a more desirable alternative* is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity.” *Id.* (emphasis added). Here, the Commission, based on record evidence, did not find the Wagoner Alternative to be more desirable than the Project. *See* Certificate Order P 27, JA 11; *see also* Rehearing Order PP 24-25 (noting that unlike *City of Pittsburgh*, here Pipeline is not proposing to abandon capacity needed to accommodate a future expansion), JA 63-65.

Thus, the Commission reasonably ended its consideration of this alternative.

*See, e.g., American Gas Ass’n*, 593 F.3d at 19 (reasoned decision-making requires FERC to consider alternatives raised by parties or give some reason, “within its broad discretion,” for declining to do so).

Residents’ reliance (Br. 34) on *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), is also misplaced. In *Scenic Hudson*, a hydroelectric licensing proceeding under the Federal Power Act, the Second Circuit found that the statutory provision requiring a proposed hydroelectric project to be the “best adapted to a comprehensive plan for . . . a waterway” established a “statutory duty” for FERC to give full consideration to alternative plans. *Id.* at 612, 617. Here, the Commission is applying a different statutory standard from a different statute than in *Scenic Hudson* – the NGA’s public convenience and necessity standard.

Moreover, the Commission explained, “even if it were the case that the Wagoner Alternative would result in fewer environmental impacts, which we do not find that it is, the Commission is not required to reject the environmentally acceptable Minisink Compressor proposal.” Rehearing Order P 46, JA 75-76; *see also Midcoast Interstate Transmission*, 198 F.3d at 967-68 (FERC must carefully consider alternatives, but even in the face of a preferable alternative, FERC may reasonably find that the proposed project is in the public convenience and necessity).

Indeed, this Court has recognized that where the reviewing agency is not the project sponsor, its “consideration of alternatives may accord substantial weight to the preferences of the project applicant . . . in the siting and design of the project.” *City of Grapevine, Tex. v. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). That Residents, two dissenting Commissioners, or even this Court may prefer an alternative to the Project does not render the Commission’s analysis of the Project under the public convenience and necessity standard incorrect, unreasonable, or arbitrary and capricious. *See ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (court is “not empowered to substitute its judgment for that of the agency”). *See also Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011, 1016 (D.C. Cir. 2003) (FERC’s choice must be reasonable, not “precisely right”).

Residents claim that the Commission violated section 7(e) by failing to consider Pipeline’s future expansion plans for its pipeline system and the role the Wagoner Alternative (in particular the Neversink replacement) might play in those plans. Br. 30-33. Residents err. Once the Commission finds a demonstrated need for the Project, it was not required to look further. *See, e.g., B&J Oil and Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004) (court cannot “compel FERC to consider factors that [it] believe[s] are in the public interest”). Moreover, the plain language of section 7 of the NGA requires only that the Commission determine that the

proposed project “is *or* will be required by the present *or* future public convenience and necessity.” 15 U.S.C. § 717f(e) (emphasis added) (no requirement to affirmatively establish both present and future need). With regard to the Project, the Commission satisfied the statutory requirement, finding that the three contracts for 100 percent of the Project’s capacity offer evidence that the Project is in the public convenience and necessity. *See* Certificate Order P 15, JA 6.

Residents further contend that the Commission should have rejected the Project in light of their unsupported allegation that the Project’s operation would require the Neversink segment of the Wagoner Alternative to be replaced. Br. 31-32. The Commission discredited this allegation. *See* Certificate Order P 65 (Project does not require replacement of the Neversink Segment), JA 23; Rehearing Order P 25 (“whether or not the Neversink Segment will someday need to be replaced will depend on the as-of-now-unknowable needs of future unknown customers”), JA 64. Moreover, contrary to Residents’ claim (Br. 31), there is no evidence that Pipeline plans on replacing the Neversink segment. *Id.* P 33, n.41 (Neversink’s replacement is “purely speculative”), JA 68.

**C. The Commission Correctly Applied Its Certificate Policy Statement Criteria**

Contrary to Residents’ claim (Br. 36-38), the Commission followed its established analytical framework set forth in its Certificate Policy Statement to evaluate the need for the Project. This is a purely economic test. Rehearing Order

P 18, JA 59-60. The Commission conducted a straightforward analysis of the Project using the Certificate Policy Statement criteria to determine whether, on balance, the Project's benefits outweighed the potential residual adverse effects. Certificate Order PP 10-15, JA 4-6; *see also* Rehearing Order PP 18, 21 (Commission has applied Certificate Policy Statement in the same manner since its issuance in 1999), JA 59-60, 61-62.

Residents make the unsupported claim that, to determine need, the Commission was required to look beyond the contracts with the Project's anchor shippers. *See* Br. 37. This argument is contradicted by the Certificate Policy Statement. *See Certificate Policy Statement*, 88 FERC ¶ 61,227, at 61,744, 61,748-49 (broadening the types of evidence applicants may present to show public benefits). *See also* Rehearing Order P 21 (noting that the Certificate Policy Statement allows, but does not require, some showing of public benefit beyond market need), JA 61-62. Precedent agreements with multiple new customers "constitute significant evidence of demand." *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,748.

Accordingly, an applicant, such as Pipeline, need only show that the project capacity is subscribed under contracts where the Commission found minimal adverse economic impacts, particularly where, as here, Pipeline did not exercise eminent domain. *See id.* at 61,749 ("the strength of the benefit showing [is]

proportional to the applicant's proposed exercise of eminent domain"); *see also*, e.g., Rehearing Order P 19 (citing *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,745) (the more adverse the impacts on a particular economic interest, the greater the showing of public benefits required), JA 60.

In this case, record evidence supported the Commission's conclusion that the Project's benefits outweighed residual impacts. Rehearing Order P 20, JA 60-61. The record shows: (1) 100 percent of Project capacity subscribed under multiple long-term contracts (Certificate Order PP 6, 15, JA 4, 6); (2) no adverse economic impacts on Pipeline's existing customers or existing pipelines in the market and their captive customers (*id.* P 13, JA 5); (3) no need to exercise eminent domain (*id.* P 14, JA 6); (4) some potential for negative impacts on surrounding property values (Rehearing Order P 20, JA 60); (5) adverse impacts on property values mitigated by environmental conditions imposed in the Certificate (*id.* P 20, JA 61); and (6) no evidence of negative impacts on non-project agricultural property or on the Town of Minisink's tax base. *Id.*

Residents fail to cite a single case in which the Certificate Policy Statement was applied differently than applied to evaluate the Project. *See* Br. 36-38. In fact, in the sole case cited by Residents, *Turtle Bayou Gas Storage Co., LLC* (Br. 38), the Commission applied the Certificate Policy Statement in the same manner as here. 135 FERC ¶ 61,233 (2011) (rejecting application where there was no

evidence of public benefits; e.g., no contracts for project capacity, and where applicant required eminent domain to obtain majority of property rights); *see also* Rehearing Order P 14 n.18 (describing *Turtle Bayou*), JA 58.

Residents also appear to suggest that when balancing the Project’s public benefits against its economic impacts, the Commission should have weighed the benefits that alternative projects may offer. *See* Br. 39-40. This claim misinterprets the Certificate Policy Statement. *See, e.g., Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,749 (consideration of alternative routes part of environmental analysis that follows the preliminary determination regarding a project’s public benefits). Moreover, as detailed *supra* at pp. 25-30, the Commission fully considered the Wagoner Alternative as part of its over-arching evaluation of the Project.

**D. The Commission’s Public Interest Determination Is Not Biased Towards Applicants**

Contrary to Residents’ baseless assertion (Br. 7-8, 24-26, 29, 35, and 41), the Commission does not presume a proposed project is in the public interest or otherwise “presumptively favor” proposed projects. Given that development of natural gas infrastructure requires huge expenditures, most of the developers that come before the Commission, like Pipeline, already own gas transportation infrastructure. As the Commission explained, such developers are already well aware of the certification process with its many steps, requirements, and pitfalls.

*See* Rehearing Order P 45 (criteria for evaluating projects are explicit and well understood), JA 74. *See also Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,743 (policy designed to give applicant an incentive to file a complete application and to develop a record that supports the need for and public benefits of the proposed project).

Thus, the Commission’s high approval rate of natural gas projects – typically subject to compliance with numerous construction and operational conditions – does not reflect bias, but the fact that developers tend to submit applications for financially and environmentally viable projects. *See* Rehearing Order P 45 (citing *Texas Eastern Transmission, LP, et al.*, 141 FERC ¶ 61,043, at P 24 (2012) (explaining FERC’s approval rate for natural gas infrastructure projects)), JA 74-75. *See also La. Ass’n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (noting, with respect to FERC’s certification of a proposed pipeline, that the Court presumes administrative regularity).

### **III. FERC’S FINDING OF NO SIGNIFICANT IMPACTS COMPLIES WITH NEPA AND IS FULLY SUPPORTED BY THE RECORD**

Residents’ claim that there are “gaping holes” in the Environmental Assessment (Br. 41) is belied by its content. Specifically, Residents argue that the Environmental Assessment lacks: (1) a cost-benefit analysis, (2) a direct impacts analysis of property values, and (3) a cumulative impacts analysis of two potential,

future projects. Br. 42-45. Consistent with NEPA procedures, the Commission prepared a detailed Environmental Assessment of the Project in order to determine whether the Project would have a significant impact on the environment. The Environmental Assessment addressed multiple alternatives, including the Wagoner Alternative, as well as geology, soils, water resources, wetlands, vegetation, wildlife, federally-listed species, cultural resources, land use, recreation, visual resources, socioeconomics, air quality, noise, safety, cumulative impacts, and public comments. Rehearing Order P 6, JA 54. Based on the Environmental Assessment, the Commission properly concluded that the Project, with appropriate mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment. *Id.*; *see also Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678, 682-83 (D.C. Cir. 1982) (a mitigated finding of no significant impact has long been appropriate under this Court's precedent); *Pub. Citizen v. Nat'l Hwy. Traffic Safety Admin.*, 848 F.2d 256, 266 (D.C. Cir. 1988) (agency's finding of no significant impact is entitled to deference).

**A. No Cost-Benefit Analysis Is Required**

Residents assert that the Commission violated NEPA by failing to include in the Environmental Assessment a cost-benefit analysis that compares the cost of the Project versus the Wagoner Alternative. Br. 8, 42-44. Neither the NEPA regulation nor the case cited by Residents support their argument. First, the NEPA

regulation cited by Residents, 40 C.F.R. § 1502.23, applies only to projects for which an environmental impact statement is required. *See* 40 C.F.R. Part 1502 (setting forth the purpose and requirements for environmental impact statements). Moreover, section 1502.23 does not mandate the development of a cost-benefit analysis even for an environmental impact statement. *See id.* § 1502.23 (stating that “if a cost-benefit analysis is being considered” then it should be incorporated into the environmental impact statement); *see also* Rehearing Order P 39 n.56 (noting that section 1502.23 is triggered only *if* a cost-benefit analysis is developed), JA 72. Second, the sole case Residents cite, *Chelsea Neighborhood Ass’n v. U.S. Postal Service*, 516 F.2d 378, 386 (2d Cir. 1975), is distinguishable. In *Chelsea Neighborhood*, the adequacy of the Postal Service’s environmental impact statement was at issue. *Id.* Conversely, this appeal involves an environmental assessment.

In this case, in evaluating the Wagoner Alternative, the Commission did not engage in an economic cost-benefit analysis of the Project and the Wagoner Alternative, nor was it required to do so. Although the Environmental Assessment notes that Pipeline represented that the Wagoner Alternative would cost 50 percent more than the Project (EA at 50, JA 485), project costs were not a factor in the Commission’s comparison of the environmental impacts of the Project versus the Wagoner Alternative. *See* EA 51-54, JA 486-489 (comparing the environmental

impacts of the two projects); *see also* Rehearing Order P 40, JA 73. Upon finding that the Wagoner Alternative was not environmentally preferable to the Project, the Commission appropriately eliminated the Wagoner Alternative from further consideration. *See* Certificate Order PP 26-27, JA 10-11; *see also* Rehearing Order P 41, JA 73.

Thus, any additional economic analysis of the Wagoner Alternative and the Project, such as a comparison of fuel costs sought by Residents (Br. 42-43), would be superfluous. A “rule of reason governs ‘both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.’” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (emphasis in original) (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)). *See also Public Citizen*, 541 U.S. at 767 (“rule of reason” guides an agency’s implementation of NEPA). Here, the analysis in the Environmental Assessment is consistent with the NEPA regulation governing evaluation of alternatives, which requires “substantial treatment of each alternative considered in detail . . . so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b).

**B. The Commission Adequately Identified And Mitigated All Project Impacts That Could Affect Property Values**

The record rebuts Residents’ claim (Br. 43-44) that the Commission failed to mitigate the Project’s potential adverse impacts from nuisance, pollution, noise, and safety. The Commission identified and extensively studied the potential

nuisance effects that could impact property values. *See* EA at 22-23 (finding that noise, pollution, safety and visual impacts could affect property values), JA 457-458. As discussed below, the Commission found each of the nuisance impacts to be limited or minimal and, where necessary, the Commission developed measures to prevent or mitigate potential impacts.

With respect to noise, the Commission's Environmental Assessment found that noise from the Project would be "barely noticeable, if noticeable at all" at nearby residences. *Id.* at 35, JA 470; *see also* Rehearing Order P 30 (noting that the projected Project noise level is 1.7 decibels, whereas a human's noticeable noise threshold is 3 decibels), JA 67. The Project was designed with several noise-abatement measures which would limit noise levels to a low level. EA at 35 (including exhaust and blow down silencers), JA 470. Further, the Commission conditioned the Project certificate on (1) Pipeline keeping Project noise significantly below the Commission's standard requirement and (2) ongoing monitoring and reporting of noise levels and vibration studies. Rehearing Order P 30, JA 67; Certificate Order at Environmental Condition 15, JA 39.

Regarding health impacts arising from pollution from air emissions, the Commission determined that the Project would not be a major source of air emissions. *See* Certificate Order P 43, JA 16; Rehearing Order P 30, JA 67; and EA at 28, JA 463. Further, the Project complies with air quality standards that

protect against damage to crops, vegetation, and animals, and minimizes air quality-related impacts on organic and non-organic farms in the Project area.

Certificate Order P 44, JA 17; EA at 31, JA 466.

Similarly, the Commission found no safety concerns related to the Project's operation. Safety was one of the multiple issues studied and evaluated in the Environmental Assessment. *See* EA at 36-38, JA 471-473; Certificate Order PP 24, 28, JA 10, 12; Rehearing Order P 6, JA 54. The Department of Transportation is the federal agency with principal responsibility to administer and ensure pipeline safety under 49 U.S.C. Chapter 401 – not FERC. Certificate Order P 60, JA 21; *see also* EA at 37 (compressor station must be designed, constructed, operated, and maintained in accordance with the Department of Transportation's *Minimum Federal Safety Standards*), JA 472. Thus, the Commission determined that, given the application of the DOT requirements, the Project's operation represents a minimal increase in risk to the public. Certificate Order P 61, JA 22.

Residents hypothesize that the Project's operation may increase the gas velocity on the pipeline system to a level that might increase the potential of a pipeline explosion. Br. 44. But the Commission found no such risk. *See* Certificate Order P 68 (responding to Residents' concerns that the Project would threaten the integrity of the pipeline system), JA 24; *see also* Rehearing Order PP 75-80 & n.116 (finding that Residents' expert report provides no support for

contention that Pipeline system will not operate in a safe, effective manner), JA 90-92 & 91. The Commission independently evaluated the hydraulic feasibility of the Project, completed an engineering analysis of Pipeline's system, and found nothing that suggests that Project operation would compromise system safety. Certificate Order PP 68-69, JA 24-25. The Commission's determination regarding disputed technical facts is based upon its expertise and is entitled to deference. *See Balt. Gas & Elec.*, 462 U.S. at 103.

Last, as Residents concede (Br. 43), the Commission imposed numerous mitigation measures that minimize the visual and aesthetic impacts of the Project. Although the existing forest land and topography obstruct views of the compressor station from most of the surrounding residents (EA at 19, JA 454), visual impacts will be further minimized by the Project's exterior building design and coloration which will resemble rural farm structures. Rehearing Order P 30, JA 67; *see also* Certificate Order at Environmental Conditions 13 and 14, JA 39. Further, Pipeline may not develop the surrounding 70 acres of property. Rehearing Order P 20 n.25, JA 61. Accordingly, the Commission reasonably concluded that the above-described mitigation measures will mitigate potential decreases in property values. *Id.* P 20, JA 60-61.

**C. FERC Correctly Considered The Cumulative Effects Of Known And Reasonably Foreseeable Activities In The Project Area**

Residents next claim (Br. 44-45) that the Commission failed to consider the

cumulative impacts of the Pipeline’s Hancock Compressor project and of a possible future pipeline to serve the CPV Valley Power Plant. A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. The Court will not disturb the Commission’s cumulative impacts analysis “absent a showing of arbitrary action.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976). As demonstrated below, there is nothing arbitrary about the Commission’s cumulative impacts analysis of the Project.

**1. The Environmental Assessment Adequately Analyzed Cumulative Impacts Of A Potential Lateral Pipeline To The CPV Power Plant**

Here, as required, the Environmental Assessment includes an analysis of the cumulative impacts of related past, present and reasonably foreseeable activities in the Project area. *See* EA at 38-39, JA 473-474. Contrary to Residents’ assertion (Br. 44), the Commission identified potential cumulative impacts of a lateral pipeline that would serve the CPV Valley Power Plant using the limited information it had. *See* EA at 38-39 (noting that there is no available information on a lateral line and the construction timeframe is unclear), JA 473-474; *see also* Certificate Order P 67 (noting that there are no pending proposals to construct

facilities to serve the CPV Valley power plant), JA 24. Without additional information, the Commission could not quantify impacts of construction of a lateral to the CPV Valley plant. *See* EA at 39, JA 474; Certificate Order P 67, JA 24. Nonetheless, the Environmental Assessment notes that construction of a lateral pipeline would disturb soils and vegetation, and impact air, noise and visual resources. The Environmental Assessment concludes that because the Project's impacts on those particular resources would be avoided or minimal, "cumulative impacts attributable to the compressor station would not be significant." EA at 39, JA 474.

The Environmental Assessment's level of discussion is enough. *See Marsh*, 490 U.S. at 376-77 (holding that agencies retain substantial discretion as to the extent of the inquiry and level of explanation necessary for a cumulative impacts analysis); *Robertson*, 490 U.S. at 346 (courts apply a rule of reason in evaluating the adequacy of an EA); *Kleppe*, 427 U.S. at 412 (determination of the scope of a cumulative impacts analysis "is properly left to the informed discretion of the responsible agenc[y]" and is not to be disturbed "[a]bsent a showing of arbitrary action"). Here, the Commission faced too many uncertainties about specific future development and its environmental consequences to provide meaningful consideration in a cumulative impacts analysis. NEPA does not require an agency to "engage in speculative analysis" or "to do the impractical, if not enough

information is available to permit meaningful consideration.” *N. Plains Res. Council, Inc. v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011) (citation omitted).

## **2. The Environmental Assessment Correctly Excluded The Hancock Project As Unknown**

The Commission appropriately excluded the Hancock project from its cumulative impacts analysis, an at-the-time unknown future compressor project which was not reasonably foreseeable at the time the Environmental Assessment issued. As required, the Environmental Assessment’s cumulative impacts section identifies projects that would potentially cause a cumulative impact when considered with the Project, including “an additional compressor station on [Pipeline’s] system.” EA at 38 (list of projects evaluated for potential cumulative impacts), JA 473. In this case, the Commission noted that given the typical 70-mile distance between compressor stations, the only potential resource that may be impacted by both the Project and a future compressor is air quality, as both compressors, while geographically distant, may share the same air shed; i.e., the geographic area subject to similar conditions of air pollution. *Id.* However, because no specific compressor project was identified at the time of the Environmental Assessment, the Commission could not conduct a project-specific analysis.

NEPA regulations only require consideration of reasonably foreseeable future actions. *See* 40 C.F.R. § 1508.7 (defining “cumulative effect”). A potential project for which an application has yet to be filed is not reasonably foreseeable. *See Theodore Roosevelt Conservation*, 616 F.3d at 512-14 (projects for which notices of intent to prepare an environmental study were issued are not “reasonably foreseeable” as the projects were too preliminary to meaningfully estimate their cumulative impacts). Pipeline first initiated the pre-filing process for an additional compressor station – the Hancock compressor project – two months after the Project Environmental Assessment issued. *See* Certificate Order P 25 n.25, JA 10. Another five months later, the Hancock project application was filed. *See* Rehearing Order P 32 n.40, JA 68. Thus, the Commission could not in this case develop a full cumulative impacts analysis for the Hancock project because the specific project was unknown at the time the Environmental Assessment issued.<sup>3</sup> EA at 38, JA 473; *see also id.* at 6 (planned location of the future compressor station had not yet been determined), JA 441.

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<sup>3</sup> Ultimately, the cumulative impacts of the Project and the Hancock compressor project were evaluated in the environmental analysis prepared for the Hancock project. *See* Environmental Assessment of Hancock Compressor Project at 61-62, Docket No. CP13-14-000 (Feb. 28, 2013) (finding no significant cumulative impacts on air quality in the air shed); *see also* Certificate Order P 65, JA 23.

Notably, on appeal, Residents do not pursue their rehearing argument that the Hancock compressor project was improperly segmented from the environmental review of the Project. Although Residents in their opening brief reference that argument in their factual description (Br. 13 (“[Project] was actually the first step of a three-phase expansion plan.”)), they have waived these contentions on appeal. *See City of Nephi v. FERC*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998) (petitioner failed to properly raise argument by “merely informing” the Court of it “in its statement of facts in its opening brief”).

The Commission’s comprehensive environmental review served its purpose – to provide sufficient information and analysis for determining whether to prepare an environmental impact study or issue a finding of no significant impact. *See* 40 C.F.R. § 1508.9(a)(1). The Environmental Assessment thoroughly evaluates Project impacts and cumulative impacts, along with measures intended to mitigate identified environmental impacts. Indeed, the Environmental Assessment contains a level of detail on par with an environmental impact statement such that the preparation of an environmental impact study would serve no purpose in light of NEPA’s regulatory scheme as a whole. *See Public Citizen*, 541 U.S. at 767 (a “rule of reason” governs agency determination whether to prepare an EIS based on usefulness of additional information).

#### **IV. THE PROJECT'S SITING IS FULLY CONSISTENT WITH THE COMMISSION'S REGULATIONS**

Residents' allegation (Br. 45-52) that the Commission departed from its siting requirements, 18 C.F.R. §§ 380.15(b), (d) and (f), is without merit. Two of the siting requirements cited by Residents (Br. 46), sections 380.15(b) and 380.15(d), are inapplicable to an above-ground compressor station project sited entirely on land owned by the project sponsor. Section 380.15(b) details requirements where a proposed project is sited on a person's property. *See* 18 C.F.R. § 380.15(b) (requiring landowner desires to be taken into account regarding "facilities on their property"). Here, the Project is sited entirely on land owned by Pipeline. Certificate Order P 14, JA 6. Section 380.15(d) applies only to "pipeline and electronic transmission facilities construction." 18 C.F.R. § 380.15(d).

With respect to the applicable siting requirement for above-ground natural gas facilities such as the Project, 18 C.F.R. § 380.15(f), the Project's siting is fully consistent with the regulation's five requirements: (1) an unobtrusive site; (2) utilizing the minimum area practicable; (3) consideration of noise potential; (4) exterior facilities that harmonize with the surrounding area; and (5) appropriate landscaping. *See* Rehearing Order P 50, JA 77. Residents only challenge the first three guidelines. Br. 46-47.

The Project site is unobtrusive as it is a half-acre site surrounded by and buffered by over 70 acres that Pipeline committed to not develop. Further, the Commission imposed several mitigation measures to make the Project's location as unobtrusive as possible. *See* Rehearing Order P 50 (e.g., landscaping requirements, building design requirements, and noise mitigation requirements), JA 77. *See also* Certificate Order P 33 and Environmental Condition 13 (mandating that Pipeline collaborate with the town to blend the Project into the surrounding rural residential agricultural landscape), JA 13, 39. Further, Pipeline has agreed to allow farming to continue on the site and to return much of the land to its natural state. *See* Rehearing Order PP 57-60 (detailing Pipeline's agreements with the Town of Minisink regarding use of Project property and the final landscaping and site screening plan), JA 81-82; Second Rehearing Order P 13 (per the town's request, Pipeline will not create a conservation easement, but instead will limit development and allow farming on its 73-acre lot), JA 104-105. The Commission reasonably determined under its siting regulation that, with these mitigating conditions, the Project location is as unobtrusive as possible. Rehearing Order P 50, JA 77; *see also, e.g., City of Oconto Falls, Wis. v. FERC*, 204 F.3d 1154, 1162 (D.C. Cir. 2000) ("The Commission's interpretation of its regulations is entitled to substantial deference").

With respect to the next guideline, use of the minimum area practicable, Residents fail to explain how the Project's 4.5-acre footprint is larger than necessary, particularly where a "similar amount of land" would be required for Residents' preferred alternative – the Wagoner compressor. *See* EA at 52, JA 487.

Last, the Commission fully considered the Project's noise potential, ultimately determining that the noise emitted from the Project's compressor would be "barely noticeable." *Id.*; *see also* Rehearing Order P 30 (Project's operation will potentially increase ambient noise to 1.7 decibels (dB), but the noticeable noise increase threshold for humans is about 3 dB), JA 67; Certificate Order at Environmental Condition 15 (requiring Project noise to be held significantly below the Commission's standard requirement), JA 39; EA at 33-35 (summarizing noise impact analysis), JA 468-470.

Residents' last argument (Br. 48-49), that under the siting guidelines the Wagoner Alternative is the clear winner, is equally unpersuasive. The Commission examined the Project and alternative sites taking into account landowner concerns, avoidance of siting impacts, and the requirement to select an unobtrusive site as required by section 380.15 of the Commission's regulations. *See* Rehearing Order P 50, JA 77. The Commission's finding that the Project's proposed site (Minisink) was preferable to the Wagoner site was based on a comparison of the environmental impacts of the two projects. *See* EA at 42-54

(considering alternative compressor station sites, including the Wagoner alternative, along with alternative station locations on Pipeline's 73.4-acre property in Minisink), JA 477-489. As Residents acknowledge (Br. 47), the Commission favors projects that limit the need for acquisition of additional property, which in this case favors the Project (sited entirely on land owned by Pipeline) over the Wagoner Alternative (requiring easements from 58 landowners). *See* EA at 53, JA 488. Accordingly, the Commission balanced the fact that the Project would not have a direct impact on any landowner, whereas the Wagoner alternative would have direct impacts on residential land use and would require Pipeline to obtain additional easements for a right-of-way across 58 landowners' property (including ten landowners who do not currently have a utility right-of-way across their property). *Id.*

Furthermore, Residents' argument is based on several misleading statements. Contrary to their claim (Br. 48), replacement of the Neversink segment would require an expansion of the existing right-of-way including the clearing of 47.61 acres of trees (compared to the half-acre of trees cleared for the Project). EA at 53, JA 488. Moreover, the Project will result in the loss of only ten acres of farmland, not the 73.4 acres claimed by Residents (Br. 49). Rehearing Order PP 36, 67, JA 70, 85. Last, Residents' claim that the Wagoner Alternative would only temporarily interfere with "just a single season of farming" is contradicted by

the record. *See* EA at 51 (operation of Wagoner alternative would permanently occupy seven acres of agricultural land), JA 486. Here, the Commission’s reasonable interpretation and application of section 380.15 of its regulations should be upheld. *See Oconto Falls, Wis. v. FERC*, 41 F.3d 671, 677 (D.C. Cir. 1994) (upholding FERC’s interpretation of its hydroelectric licensing regulations).

**V. RESIDENTS’ ADMINISTRATIVE PROCEDURE ACT CLAIMS ARE MERITLESS**

**A. Residents Have Not Established The Need For A Trial-Type Evidentiary Hearing**

Residents argue that an evidentiary hearing was required to resolve Pipeline’s future plans for the Neversink pipe segment and to engage in pre-trial discovery to obtain Pipeline’s flow diagrams and hydraulic studies. Br. 53-56. Residents fail to justify either argument.

Those seeking an evidentiary hearing from the Commission must allege disputed issues of material facts, proffer evidence to support their claim, and explain why the agency cannot adequately resolve the dispute on the written record. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (FERC can resolve disputed facts based on the written record ““unless motive, intent or credibility are at issue or there is a dispute over a past event””) (quoting *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997)).

Residents argue for an evidentiary hearing to resolve the question of whether Pipeline intends to upgrade the Neversink segment. Br. 53-54. The Neversink issue comes into play only to support Residents' argument that if Pipeline has immediate plans to replace Neversink then, when comparing the Project to the Wagoner Alternative, the Commission should have assumed that the Project (like the Wagoner Alternative) required replacement of Neversink. *See* Rehearing Order P 12 n.14 (summarizing argument in Resident's Motion to Reopen and Supplement the Record at 16 (Nov. 30, 2012), R. 940, JA 773), JA 56. Residents argue that this assumption – that the Project also requires Neversink's replacement – “neutralizes any of [the Project's] perceived advantages.” Br. 54.

Contrary to Residents' assertion (Br. 54), the Commission resolved the Neversink issue based on the written record. The record reflects that Pipeline had twice before proposed replacing the Neversink segment and both times the proposal was rejected for environmental reasons related to the pipe's crossing at the Neversink River. *See* Pipeline's Answer to Rehearing Requests at 22-25, Docket No. CP11-515-000 (Aug. 29, 2012), R. 886, JA 684-687. Pipeline states it is unable to cross the Neversink River under the conditions imposed by FERC and other federal and state agencies in prior proceedings. *Id.* at 23, JA 685.

Moreover, the Commission found that the Project does not require or contemplate replacement of the Neversink segment. *See* Certificate Order PP 65 &

68, JA 23 & 24; *see also* Rehearing Order P 73 & n.108 (citing record evidence supporting FERC's finding that Neversink need not be replaced for Project operation), JA 89. The Commission determined that replacement of Neversink is not required to serve the CPV Valley Power Plant. *See* Certificate Order P 67, JA 24. Last, the Commission notes that Pipeline has no current plans to replace Neversink. *Id.* P 65, JA 23; *see also* Rehearing Order P 25, ("Whether or not the Neversink Segment will someday need to be replaced will depend on the as-of-now-unknowable needs of future unknown customers") JA 64; *id.* P 47 (Pipeline stated it has no intention of filing an application to replace Neversink before 2014), JA 76.

On the other hand, Residents' sole evidence to support their claim that Pipeline intends to upgrade Neversink is a 2011 Power Point presentation. *See* Rehearing Order P 32 n.41, JA 68. The Commission found Pipeline's 2011 Power Point to be marketing materials and concluded that nothing in the record indicates that Pipeline has actual plans to upgrade Neversink. *Id.*; *see also id.* P 34, JA 69.

Because the Commission was able to resolve contradictory claims on the written record, it appropriately found no need for another hearing on the Neversink issue. *See* Certificate Order P 86, JA 30; *see also, e.g., Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (court reviews decision not to hold a hearing under deferential standard).

On appeal, Residents neither identify nor proffer any evidence of material factual disputes that were not resolved in the Rehearing Order. *See* Br. 53-56; *see also Pa. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989) (FERC did not error in not holding an evidentiary hearing where petitioner's only claim to an issue of material fact is based on broad allegations) (quoting *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982) ("mere allegations of disputed facts are insufficient")); *see also Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) (petitioner has "failed to indicate what evidence that it might present in an evidentiary hearing would contribute to the data and analysis in the record already before the Commission"). Residents' reliance on the Kuprewicz Report (Br. 55) as evidence is unhelpful. The Commission rejected the Kuprewicz Report as flawed and unsupported. *See* Rehearing Order PP 76-79, JA 90-92; *see also infra* at pp. 58-59 (detailing Kuprewicz Report's flaws). Further, the Commission concluded, based on record evidence including Commission staff's hydraulic studies, that the Project can safely operate and met its contractual obligations without upgrading Neversink. Rehearing Order P 77, JA 91; *see also* Certificate Order P 87 n.56 (finding no basis for Residents' suggestion that the hydraulic studies may show that the Neversink upgrade is required), JA 31.

Last, contrary to Residents’ claim (Br. 55), they were able to obtain certain flow diagrams and other hydraulic data and to meaningfully challenge the Project without discovery and an evidentiary hearing. Residents received many of the requested flow diagrams, as well as other materials submitted by Pipeline, several months before the Certificate Order issued. *See* Certificate Order P 87, JA 31. In addition, Commission staff independently verified the engineering requirement of each alternative studied and independently confirmed that the Project could provide the contemplated service. *Id.* P 87 n.56, JA 31. Thus, the Commission concluded that Residents were not negatively impacted by not having access to Pipeline’s hydraulic models. *Id.* The hydraulic studies involve highly technical matters of scientific measurement; thus, their evaluation by the Commission is entitled to “an extreme degree of deference.” *B&J Oil & Gas*, 353 F.3d at 76. *See also Illinois Commerce Comm’n*, 721 F.3d at 776 (“[c]onsidering the highly technical character of the data, . . . the technical knowledge and experience of FERC’s members and staff, and the petitioners’ access to [applicable] studies, we would be creating gratuitous delay to insist at this late date on the Commission’s resorting” to an evidentiary hearing). Finally, Residents unsubstantiated general claim regarding Pipeline’s “credibility” (Br. 55) is not sufficient to require a trial-type hearing. *Blumenthal*, 613 F.3d at 1145 (general claim that “credibility is at issue” does not require agency to conduct an evidentiary hearing).

**B. No Violation Of Due Process Where Commission Declined To Disclose Privileged Information**

Residents' due process argument (Br. 57-59) regarding the Commission's decision to not make public privileged materials is misplaced. Residents' claim is essentially a Freedom of Information Act ("FOIA") dispute that they masquerade as a due process claim. *See* 5 U.S.C. § 552. Requests for disclosure of privileged and confidential materials filed in a FERC proceeding are subject to FOIA and the Commission's FOIA regulations. *See* 18 C.F.R. § 388.108. Consistent with FOIA, the principal federal statute governing access to government information, the Commission's regulations exempt from public disclosure a party's privileged trade secrets and commercial information. *See* 18 C.F.R. § 388.107(d).

In response to Residents' request under FOIA for the hydraulic analysis and models submitted by Pipeline (which Pipeline submitted as privileged), the Commission determined that "the system models, flow diagrams, and flow models . . . were exempt from mandatory disclosure under FOIA." Certificate Order P 87 (referencing Residents' FOIA requests in FERC Docket Nos. FY12-33 and FY12-66), JA 31. As required under 5 U.S.C. § 552(a)(4)(B), Residents have sought judicial review of the Commission's FOIA determination in the U.S. District Court for the District of Columbia, case number 13-cv-141.<sup>4</sup> Thus, the Commission's

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<sup>4</sup> Residents members John Odland and Michael Mojica brought action under 5 U.S.C. § 552 challenging, in part, the Commission's decision to not make public

decision to not release to Residents certain privileged materials will be resolved by the District Court and is outside the scope of this appeal. *See Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1162 (3d Cir. 1995) (U.S. District Courts have subject matter jurisdiction over claim that agency improperly failed to disclose documents under FOIA) (citing 5 U.S.C. § 552(a)(4)(B)).

Even if this Court were to consider the merits of this issue, Residents fail to support their claim (Br. 58-59) that their lack of access to the privileged hydraulic studies deprived them of their due process rights to meaningfully comment on the Project. Nothing impeded Residents' ability to challenge the Project. *See* Certificate Order P 87 n.56 (FERC found that there was no basis for Residents' suggestion that the hydraulic studies may show that the Project will require an upgrade to Neversink), JA 31. Further, as the Commission explained, Residents were not required to provide engineering support for their proposed alternative – the Wagoner Alternative – rather, the Commission independently verified the engineering requirements of the Project and each alternative studied. *Id.*; *see also* Rehearing Order P 72 (explaining that given the availability of certain hydraulic information the privileged documents were not necessary for Residents'

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“hydraulic models and related staff work papers, methodologies and analysis referenced in the Commission’s certificate order.” *See* Complaint for Injunctive Relief filed in *Odland, et al. v. FERC*, No. 13-cv-141, attached hereto in the Appendix.

meaningful participation), JA 88. Moreover, “[Residents] never indicate what specific arguments they would have made if they had the requested material, beyond vaguely stating that the material might show that [Pipeline] will need to upgrade the Neversink Segment in order to provide project service.” Rehearing Order P 73, JA 88; *see also, e.g., B&J Oil & Gas*, 353 F.3d at 78 (intervenor’s argument that a pipeline applicant’s confidential documents “might” support its position “too speculative to provide a basis” for setting aside FERC order). In addition, the cases cited by Residents (Br. 57) are distinguishable, as neither case involved privileged and confidential documents. *See Conn. Light and Power Co. v. Nuclear Reg. Com’n*, 673 F.2d 525 (D.C. Cir. 1982) (agency failed to reveal technical basis for a proposed rulemaking); and *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (agency did not give intervenor a key, public component of a permit application).

### **C. FERC Correctly Declined To Reopen The Record For The Kuprewicz Report**

Residents argue that the Commission erred in rejecting the late-filed Kuprewicz Report. Br. 59-64. The Commission’s decision was based on longstanding Commission and court precedent recognizing that an agency is required to reopen its record only in “extraordinary circumstances.” Rehearing Order P 13 & n.15 (citing *Cal. Indep. System Operator Corp.*, 121 FERC ¶ 61,193, at P 14 (2007), *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991) (citing

references omitted)), JA 57; Second Rehearing Order P 8 (citing *Bowman Transp.*, 419 U.S. at 296; and *Am. Fin. Services Ass'n v. FTC*, 767 F.2d 957, 964, n.5 (D.C. Cir. 1985)), JA 101; *see also* Residents' Motion to Reopen Record at 3, (recognizing that "reopening the record after a decision has issued represents extraordinary relief"), JA 760.

The Kuprewicz Report is the work product of an engineer, Mr. Richard Kuprewicz, retained by Residents. The Report purportedly is based on Mr. Kuprewicz's review and analysis of some of Pipeline's hydraulic information submitted as "Exhibits G and G-II" to Pipeline's Certificate Application, which Residents refer to as the "CEII information."<sup>5</sup> *See* Rehearing Order P 70, JA 86. "Exhibit G" includes the flow diagrams showing daily design capacity and reflecting operation with and without the proposed facilities added, along with the suction and discharge pressures and compression ratio. *See* 18 C.F.R. § 157.14(a)(7) (describing Exhibit G requirements). "Exhibit G-II" includes the supporting engineering design data. *Id.* § 157.14(a)(9).

The Commission did not reopen the record because the Kuprewicz Report failed to demonstrate the existence of extraordinary circumstances that would

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<sup>5</sup> "CEII" stands for critical energy infrastructure information. CEII is "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure" that, among other things, "is exempt from mandatory disclosure under FOIA." 18 C.F.R. § 388.113(c)(1) (defining CEII).

warrant doing so. *See* Second Rehearing Order P 9 n.13 (FERC’s decision not based on lateness of the Report), JA 102. Specifically, Residents fail to demonstrate that the additional evidence they seek to present would affect the outcome of the case. *See* Rehearing Order P 13 (Residents use Report to “buttress arguments they have already made”), JA 57. Here, the Commission found that the Kuprewicz Report provides no support for its assertion that the Project will result in gas velocities that are inconsistent with prudent design standards and safety margins. *See id.* PP 13, 75-80 (discussing Report’s flaws, including multiple erroneous or unsupported assumptions and lack of citation to industry standards, regulations or published papers to support his conclusions), JA 57, 90-92; Second Rehearing Order P 9, JA 102; *see also Friends of the River v. FERC*, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983) (FERC correctly refused to reopen record where the new evidence was “unreliable or not material”).

Moreover, Kuprewicz’s conclusion is contradicted by the Commission’s findings regarding the hydraulic feasibility of the Project, which are based on FERC staff’s independent analysis that the Project can safely meet all of Pipeline’s contractual obligations and design assumptions. *See* Rehearing Order P 77, JA 91; *see also, e.g.,* Second Rehearing Order P 10 (rebutting Kuprewicz’s arguments that the Project contracts require a pressure equal to 1,200 pounds per square inch, well above the Project’s discharge pressure), JA 103. Here, the Commission’s

determination regarding disputed technical facts is based upon its expertise and is entitled to deference. *See NRG Power Marketing, LLC v. FERC*, 718 F.3d 947, 962 (D.C. Cir. 2013) (court defers to FERC's informed discretion on issues that require technical expertise).

Last, contrary to Residents' argument (Br. 62-63), *Tennessee Gas Pipeline, Co.*, 139 FERC ¶ 61,161 (2012), is inapposite. *See* Second Rehearing Order PP 11-12 (distinguishing *Tennessee Gas*), JA 103-104. As the Commission explained, in *Tennessee Gas*, the Commission rejected as infeasible a proposal for a new 30-inch pipeline to connect to an existing 24-inch pipeline segment for a portion of the route. 139 FERC ¶ 61,161 at P 86 (finding that velocity of gas entering 24-inch pipe from the 30-inch pipe would be significantly higher than the maximum design velocity of the 24-inch pipe). In contrast, in this case, the Commission determined that the Project would not result in gas velocities in excess of prudent design standards for any portion of Pipeline's system, including Neversink. *See* Second Rehearing Order P 12, JA 104; *see also* Rehearing Order P 73 (citing the record evidence supporting FERC's conclusion that Project operation would not require replacement of Neversink), JA 88-89.

## CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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FINAL CORRECTED BRIEF: November 12, 2013

***Minisink Residents for Environmental Preservation  
and Safety, et al. v. FERC***  
**D.C. Cir. Nos. 12-1481 and 13-1018 (consolidated)**

**Docket No. CP11-515**

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Corrected Brief of Respondent Federal Energy Regulatory Commission contains 12,939 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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