UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Millennium Pipeline Company, L.L.C.	**)**	**Docket No. CP16-17-001**

ANSWER OF MILLENNIUM PIPELINE COMPANY, L.L.C. TO THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S MOTION FOR REOPENING AND STAY OR, IN THE ALTERNATIVE, REQUEST FOR REHEARING AND STAY AND ANSWER TO THREE PARTY INTERVENORS' MOTION TO PARTICIPATE IN REOPENED HEARING AND RENEWED MOTION FOR REHEARING

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[1] Millennium Pipeline Company, L.L.C. ("Millennium") files this answer ("Answer") in opposition to the New York State Department of Environmental Conservation's ("NYSDEC") Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay.[2] Millennium's Answer also opposes the Motion to Participate in Reopened Hearing and Renewed Motion for Rehearing filed by other intervenors in the proceeding.[3]

I. EXECUTIVE SUMMARY

NYSDEC's Motion is an attempt to further delay the construction of the Millennium's Valley Lateral Project ("Project"), a small 7.8-mile lateral pipeline designed to transport natural gas to be burned at the CPV Valley, LLC's ("CPV Valley") Valley Energy Center, a natural gas-fired electric generating facility that is nearing

[1] 18 C.F.R. §385.213 (2017).
[2] Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay, Docket No. CP16-17-000 (Aug. 31, 2017) ("NYSDEC's Motion").
[3] Motion to Participate in Reopened Hearing and Renewed Motion for Rehearing of Sarah E. Burns, Amanda King, Pramilla Malick, Melody Brunn and the Brunn Estate, Docket No. CP16-17-000 (Sept. 13, 2017) ("Motion to Participate").

completion and is scheduled to begin operations by mid-February 2018. The Commission has found that the construction and operation of the Project is required by the public convenience and necessity and granted a certificate authorizing the project.[4] As Millennium demonstrated in its NTP Request, NYSDEC has already improperly delayed the Project by exceeding the Clean Water Act's statutory deadline for issuing a Water Quality Certification for the Project.[5] As a result of this improper delay, NYSDEC waived its ability to deny Millennium's requested Water Quality Certification.[6] Nevertheless, on August 30, 2017, nine months after the statutory deadline for acting on Millennium's application for a Water Quality Certification, NYSDEC issued what appears to be a conditional denial of Millennium's Water Quality Certification request.[7] NYSDEC's Notice states that Millennium's application is deemed denied unless the Commission grants NYSDEC's Motion in this docket. NYSDEC's Motion is both procedurally and substantively invalid, and should be denied by the Commission. On September 15, 2017, the Commission issued a declaratory order holding that NYSDEC waived its authority under CWA Section 401 to issue or deny a water quality certification for the Project.[8]

In its Motion, NYSDEC argues that the Commission should either reopen the evidentiary record in this proceeding or grant rehearing to allow the Commission to conduct additional analysis of downstream greenhouse gas ("GHG") emissions from the natural gas that will be burned at the CPV Valley Energy Center. As the basis for this

[4] *Millennium Pipeline Co.*, 157 FERC ¶ 61,096 (2016) ("Certificate Order").
[5] *See* Request of Millennium Pipeline Co., L.L.C. for a Notice to Proceed with Construction, Docket No. CP16-17-000 (July 21, 2017) ("NTP Request").
[6] *Id*. at 3-4.
[7] Notice of Decision, NYSDEC, Permit ID 3-3399-00071/00001, Docket No. CP16-17-000 (Aug. 31, 2017) ("NYSDEC's Notice").
[8] *Millennium Pipeline Co. L.L.C.*, 160 FERC ¶ 61,065, at P 2 (2017) ("Declaratory Order").

request, NYSDEC cites the United States Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") recent opinion in *Sierra Club*, in which the court held that the Commission had not conducted a proper analysis of downstream GHG emissions for another pipeline project.[9]

NYSDEC's Motion fails as matter of law. NYSDEC failed to seek rehearing of the Commission's GHG analysis within 30 days of the Certificate Order, and NYSDEC's rehearing request is therefore barred by statute.[10]

NYSDEC's request to reopen the evidentiary record is likewise flawed. NYSDEC has not demonstrated the "extraordinary circumstances" required to grant such a motion. Irrespective of *Sierra Club*, NYSDEC had the opportunity to seek rehearing of the Commission's analysis of downstream GHG emissions, but failed to do so. Unlike the facts in *Sierra Club*, the Commission's environmental review properly reviewed downstream GHG emissions, and in the Certificate Order, the Commission specifically incorporated a calculation of the GHG emissions from the CPV Valley Energy Center in the sole power plant to be served the Project.[11] There is no basis to either grant rehearing or re-open the record in this proceeding.

Likewise, there is no basis to grant NYSDEC's request to stay the Certificate Order. NYSDEC has not even attempted to meet the Commission's standard for granting a stay request. NYSDEC has not demonstrated and cannot demonstrate that a stay is necessary to prevent irreparable harm. To the contrary, Millennium, CPV Valley, and wholesale and retail customers in the Lower Hudson Valley Zone of the New York

[9] *Sierra Club v. FERC*, No. 16-1329, 2017 WL 3597-14 (D.C. Cir. Aug. 22, 2017) ("*Sierra Club*").
[10] 15 U.S.C. § 717r(a) (requiring that rehearing requests be submitted within 30 days after issuance of an order).
[11] Certificate Order at n.196.

Independent System Operator, Inc. market would be substantially harmed by a stay. Moreover, a stay would be contrary to the public interest because it would further delay the Project, which the Commission has found is required by the public convenience and necessity. Accordingly, the Commission should deny NYSDEC's Motion.[12]

II.
BACKGROUND

Millennium filed its Application in this docket requesting a Certificate of Public Convenience and Necessity for its Valley Lateral Project, a small project consisting of just 7.8-miles of 16-inch-diameter lateral pipeline and related facilities in Orange County, New York, on November 13, 2015.[13] The Project is designed to be the sole source of natural gas transportation service to the CPV Valley Energy Center, a 680-megawatt combined cycle, natural gas-fired electric generating station under construction in the Town of Wawayanda, New York. After months of review, including a comprehensive environmental review that resulted in the preparation of a 141-page (excluding appendices) Environmental Assessment ("EA"),[14] on November 9, 2016, the Commission found that the Project was required by the public convenience and necessity and issued a certificate authorizing Millennium to construct and operate the Project.[15]

On November 23, 2015, NYSDEC received Millennium's Joint Application for the Valley Lateral Project ("Joint Application") requesting (i) a Water Quality Certificate pursuant to Section 401 of the Clean Water Act ("CWA") and (ii) state freshwater

[12] The Commission should also deny the Intervenors' Motion to Participate, which "joins" NYSDEC's request to reopen the proceeding and stay the Certificate Order.
[13] Abbreviated Application for a Certificate of Public Convenience and Necessity and for Related Authorizations of Millennium Pipeline Company, L.L.C., Docket No. CP16-17-000 (Nov. 13, 2015).
[14] Millennium Pipeline Co., L.L.C., Environmental Assessment, Docket No. CP16-17-000 (May 9, 2016) ("EA").
[15] Certificate Order at P 1.

wetlands and stream permits pursuant to New York state law.[16] The CWA provides that if NYSDEC does not act on an application for a Water Quality Certification within one year "after receipt of such request," the Section 401 certification requirement "shall be waived."[17] After the CWA's one-year deadline passed, in December 2016, Millennium requested, pursuant to Section 19(d)(2) of the Natural Gas Act ("NGA"),[18] that the D.C. Circuit find that NYSDEC had waived the Section 401 certification requirement.[19] The D.C. Circuit expressly held that "if the [NYSDEC] has unlawfully delayed . . . it can no longer prevent the construction of Millennium's pipeline."[20] Instead, the delay triggers the [CWA's] waiver provision, and *Millennium then can present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction.*[21] Following the court's directive, Millennium filed its NTP Request demonstrating that NYSDEC waived the CWA Section 401 certification requirement by failing to act within one year of receiving Millennium's Joint Application.

On August 30, 2017, after withholding action on Millennium's Joint Application for over 21 months, NYSDEC issued a Notice of Decision conditionally denying Millennium's Joint Application. Notably, NYSDEC's Notice did not raise any issues with respect to water quality and, in fact, water quality is not even mentioned. Instead, NYSDEC conditionally denied the Joint Application based on the incorrect contention that the Commission's EA for the Project did not consider or quantify the indirect effects

[16] Millennium filed its Joint Application on November 22, 2015. NYSDEC received the Joint Application on November 23, 2015.
[17] 33 U.S.C. § 1341(a)(1) (2012).
[18] 15 U.S.C. §§ 717-717w.
[19] *Millennium*, 860 F.3d 696.[20] *Id*. at 700.
[20] *Id*. at 700.
[21] *Id*. (emphasis added). [22] NYSDEC's Notice at 2.

of downstream GHG emissions that will result from burning natural gas transported on the Project.[22] NYSDEC's Notice also denied two state permits.[23]

As the basis for the conditional denial, NYSDEC relied solely upon the D.C. Circuit's recent decision in *Sierra Club v. FERC*,[24] asserting (i) a lack of a complete environmental review for the Project and (ii) a material change in applicable law.[25] Specifically, NYSDEC asserted that the Commission did not properly analyze the environmental impacts of downstream GHG emissions that will result from burning the gas transported on the Project at the CPV Valley Energy Center. NYSDEC's Motion requests that the Commission reopen the evidentiary record in this proceeding to take additional evidence on the "quantification of GHG emissions associated with the combustion of the natural gas being transported by the Project that will be used solely at the CPV Valley Energy Center."[26] Alternatively, NYSDEC's Motion requests that the Commission grant rehearing of the Certificate Order to prepare a supplemental environmental review and, in either instance, stay the Certificate Order pending review of NYSDEC's Motion.

On September 15, 2017, the Commission issued a Declaratory Order finding that NYSDEC, "by failing to act within the one-year timeframe required by the CWA, waived its authority to issue or deny a water quality certification."[27] The Declaratory Order

[22] NYSDEC's Notice at 2.
[23] The two state permits deemed "denied" are, in fact, preempted by the NGA. *See generally* Certificate Order at P 134 (explaining that state agencies may not "through application of state or local laws . . . prohibit or unreasonably delay the construction or operation of facilities approved by this Commission") (citing 15 U.S.C. §717r(d) (2012); *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 310 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013)).
[24] *Sierra Club*, 2017 WL 3597-14.
[25] NYSDEC's Notice at 2.
[26] NYSDEC's Motion at 2.
[27] Declaratory Order at P 2.

renders NYSDEC's Notice void, but NYDSEC's Motion is still pending before the Commission. The Commission should deny NYSDEC's Motion.[28]

III.
ANSWER

A. NYSDEC's Request for Rehearing Is Statutorily Barred.

NYSDEC's request for rehearing is untimely and barred under the express words of the NGA. The NGA imposes a strict 30-day filing requirement for requests for rehearing. Section 19(a) of the NGA states that "a party may apply for a rehearing *within 30 days* after the issuance of such order."[29] Because the 30-day deadline is statutory and jurisdictional, the Commission must adhere to it and is "without authority to extend the time period."[30] Even if a request for rehearing is only seconds late, the request is untimely and the Commission must reject it.[31] The Commission has expressly held that "[b]ecause the 30-day rehearing deadline is a statutory requirement, it cannot be waived or extended."[32] Therefore, a late request for rehearing filed after the 30-day deadline "must be rejected as untimely."[33]

---

[28] To the extent necessary to respond to NYSDEC's and Intervenors' improper rehearing requests, pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, Millennium respectfully moves to answer NYSDEC's request for rehearing, and requests the Commission accept this Answer. The Commission has explained it will accept answers to requests for rehearing in order to "assist[] our decision-making process." *See, e.g.*, *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied*, *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015) Because NYSDEC and Intervernors have introduced new arguments, the Commission should accept Millennium's answer to ensure a complete and accurate record.

[29] 15 U.S.C. § 717r(a) (emphasis added).

[30] *Amendments to Regulations Governing Case-by-Case Exemption from All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects with an Installed Capacity of Five Megawatts or Less*, Order No. 255-A, 21 FERC ¶ 61,369, at p. 61,936 n.4 (1982) (*citing Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978); *S. Union Gathering Co. v. FERC*, No. 81-4464, 5th Cir., Slip Op. (Sept. 27, 1982)).

[31] *See Cameron LNG, LLC*, 148 FERC ¶ 61,237 (2014) (denying a request for rehearing for being 25 seconds late).

[32] *Dominion Carolina Gas Transmission, LLC*, 159 FERC ¶ 61,001 (2017) (denying a request for rehearing filed twelve minutes late).

[33] *Id.*

NYSDEC's Motion was filed 295 days past the deadline for rehearing requests of the Certificate Order. The Commission issued its Certificate Order on November 9, 2016, and NYSDEC did not file its request for rehearing until August 31, 2017. NYSDEC's rehearing request is likewise barred by Rule 713(b) of the Commission's Rules of Practice and Procedure, which requires that "[a] request for rehearing by a party must be filed *not later than 30 days* after issuance of any final decision or other final order in a proceeding."[34] Thus, the rehearing request is out of time and the Commission cannot consider it.

The Commission may not consider issues related to downstream GHG emissions on rehearing because the issue was not raised earlier. Although other parties timely sought rehearing of the Certificate Order, no party challenged the Commission's analysis of downstream GHG emissions in their rehearing requests.[35] The Commission "reject[s] requests for rehearing that raise a novel issue, unless [it] find[s] that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances."[36] As the Commission explained in *Texas Gas*:

> Rule 713(c)(3) of our Rules of Practice and Procedure states that any request for rehearing must "[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought, based on matters not available

[34] 18 C.F.R. § 385.713(b) (emphasis added).

[35] *See* Request for Rehearing, to Stay & Exceptions to Decision by Intervenors Burns and King, Docket No. CP16-17-001 (filed Dec. 12, 2016); Request for Rehearing, Consideration of Additional Evidence and Stay by Intervener Melody Brunn, Docket No. CP16-17-001 (filed Dec. 9, 2016); Request for Rehearing, to Stay & Exceptions to Decision by Intervenors Burns and King, Docket No. CP16-17-001 (filed Dec. 9, 2016); Request for Rehearing, Consideration of Additional Evidence and Stay by Intervener Pramilla Malick, Docket No. CP16-17-001 (filed Dec. 9, 2016).

[36] *Texas Gas Transmission, LLC*, 155 FERC ¶ 61,099, at P 23 (2016) (citing *Texas Eastern Transmission*, 141 FERC ¶ 61,043, at P 19 (2012), *appeal dismissed*, *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014)).

> for consideration by the Commission at the time of the final decision or final order."[37]

In that case, the Commission denied rehearing where the party seeking rehearing failed to "explain why it could not have raised this new argument earlier."[38]

Despite being a party and active participant in this proceeding, NYSDEC does not explain why it could not have raised the issue of the Commission's analysis of downstream GHG emissions within 30 days of the Certificate Order. Notably, the *Sierra Club* case relied upon by NYSDEC involved a participant that timely challenged the Commission's downstream GHG analysis on rehearing. The Sierra Club's rehearing request in that proceeding was filed on March 3, 2016,[39] eight months prior to the Commission's Certificate Order for Millennium's Project. NYSDEC could likewise have sought rehearing on this issue, but failed to do so. The Commission has rejected requests for rehearing where a party "does not explain why it could not have raised this new argument earlier"[40] and should do so again here.

B. NYSDEC Provided No Basis to Reopen the Commission's Evidentiary Record.

NYSDEC's request that the Commission "reopen the evidentiary record in this proceeding" fails to meet, or even address, the Commission's high bar for granting this extraordinary request. Rule 716 of the Commission's Rules of Practice and Procedure provides that "the Commission may, for good cause . . . reopen the evidentiary record in a proceeding for the purpose of taking additional evidence."[41] The rule further provides that "[a]ny motion to reopen must set forth clearly the facts sought to be proven and the

[37] *Id*.
[38] *Id.*
[39] *See Fla. S. Connection, LLC*, 156 FERC ¶ 61,160, at n.7 (2016).
[40] *Texas Gas*, 155 FERC ¶ 61,099 at P 23.
[41] 18 C.F.R. § 385.716(a).

reasons claimed to constitute grounds for reopening."[42] In denying a motion to reopen the record in *San Diego Gas & Elec. Co.*, the Commission explained that it "views good cause [to reopen] as consisting of *extraordinary circumstances*, that is, a change in circumstances that is more than just material, but goes to the very heart of the case."[43] The Commission's "policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process."[44] While "the Commission looks to whether or not the movant has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process. . . . 'the general rule is that the record once closed will not be reopened.'"[45]

NYSDEC has failed to demonstrate extraordinary circumstances that warrant reopening the record. NYSDEC argues that reopening the record is warranted based on *Sierra Club*, in which, based on the facts and circumstances unique to that case, the D.C. Circuit recently held that the Commission's analysis of downstream GHG emissions for the pipeline projects at issue there was inadequate. NYSDEC asserts incorrectly that the Commission's analysis of the downstream GHG emissions of the CPV Valley Center is similarly deficient. Based on this incorrect argument, NYSDEC contends that the Commission should supplement its environmental review of the Project to include additional analysis of downstream GHG emissions.

The Commission addressed GHG emissions in the Project's EA issued May 9, 2016. NYSDEC actively participated in the EA process and submitted comments on the

[42] *Id*. § 385.716(b)(2).
[43] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services*, 133 FERC ¶ 61,014, at P 24 (2010) (emphasis added) (citing *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at p. 61,624, *reh'g denied*, 56 FERC ¶ 61,361 (1991)) ("*San Diego*").
[44] *CMS Midland*, 56 FERC ¶ 61,177 at p. 61,624.
[45] *E. Texas Elec. Coop. Inc. v. Central & South West Servs., Inc.*, 94 FERC ¶ 61,218, at p. 61,801 (2001) (quoting *Transwestern Pipeline Co.*, 32 FERC ¶ 61,009, at p. 61,037 (1985), *reh'g denied*, 36 FERC ¶ 61,175 (1986)).

EA,[46] yet failed to challenge the Commission's GHG analysis until now. The Commission's Certificate Order contains additional analysis of the GHG emissions of the CPV Valley Energy Center, but again, NYSDEC never sought timely rehearing of that order. In contrast to NYSDEC's inaction, the parties in the *Sierra Club* proceeding sought timely rehearing based on concerns about the GHG analysis in that case.[47] NYSDEC does not and cannot explain why its prior failure to challenge the Commission's GHG analysis for the Project amounts to extraordinary circumstances that warrant reopening in this case.

NYSDEC's failure to challenge the Commission's GHG analysis constitutes a lack of due diligence which precludes a finding of extraordinary circumstances. The Commission has explained that it "has an obligation to preserve the integrity of [its] processes, and so due diligence must be used to obtain and present evidence in a timely manner."[48] Therefore, "[a]llowing parties to behave with less than due diligence would cripple the orderly resolution of disputes."[49] The Commission has rejected requests to reopen proceedings where the movant has offered no explanation regarding why it waited so long to seek information.[50] The Commission held that for the movant to "seek to reopen the record after all these years, on the basis of material which could have been available at the start of this proceeding, is the antithesis of due diligence."[51] The EA has been available since May 9, 2016, and the Commission addressed downstream GHG emissions in the Certificate Order. NYSDEC could have raised its concerns regarding

[46] New York State Department of Environmental Conservation, Comments on Environmental Assessment, Docket No. CP16-17-000 (June 9, 2016).
[47] *Sierra Club*, 2017 WL 3597-14 at *2.
[48] *Central Maine Power Co.*, 55 FERC ¶ 61,060, at p. 61,170 (1991) (citing *Commonwealth Elec. Co. v. Boston Edison Co.*, 46 FERC ¶ 61,253, at p. 61,758, *reh'g denied in part*, 47 FERC ¶ 61,118 (1989)).
[49] *San Diego*, 133 FERC ¶ 61014, P 26 (citing *Central Maine Power Co.*, 55 FERC ¶ 61,060, at p. 61,170).
[50] *Id*. at P 26.
[51] *Id.*

downstream GHG emissions in response to the EA or in a timely request for rehearing of the Certificate Order, or both, but failed to do so. Accordingly, the Commission should make the same finding here with respect to NYSDEC that it did in *San Diego* and deny NYSDEC's motion to reopen the record.

NYSDEC's contention that *Sierra Club* constitutes a material change in law that warrants reopening the evidentiary record is baseless. In *Sierra Club*, the court held that the Commission, based on the particular set of facts of that case, did not fulfill its obligations under NEPA. *Sierra Club* does not represent a *material* change in law here because the Commission correctly applied existing law in this proceeding. Therefore, *Sierra Club* would not change the outcome the Commission's determination here.

NYSDEC ignores that the Commission's analysis of the downstream GHG emissions for the Project is distinct from the analysis that was reviewed in the *Sierra Club* proceeding. In the certificate order under review in *Sierra Club*, the Commission did not consider the GHG emissions that would result from the downstream combustion of gas.[52] On review, the court found that the Commission "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so."[53] By contrast, the record in the instant proceeding shows that the calculations and analyses demanded by the D.C. Circuit in *Sierra Club* already were part of the Commission's review of the Project. The facts with respect to the Commission's downstream GHG analysis for the Project in the instant proceeding are in sharp contrast from those in the *Sierra Club* proceeding. A finding that the Commission

[52] *See Fla. Southeast Connection*, 154 FERC ¶ 61,080 (2016).
[53] *Sierra Club*, 2017 WL 3597-14 at *10.

misapplied existing law to a specific set of facts does not constitute a material change, much less one that requires the Commission to apply *Sierra Club* to the facts in this proceeding.

Irrespective of the court's opinion in *Sierra Club*, the Commission properly analyzed the downstream GHG emissions from the CPV Valley Energy Center in both the Certificate Order and EA. The Commission's Certificate Order specifically addressed the GHG emissions from the CPV Valley Energy Center.[54] The Commission expressly incorporated the findings with respect to the GHG emissions from the Draft Environmental Impact Statement ("DEIS") and the Final Environmental Impact Statement ("FEIS") prepared by the Town of Wawayanda for the CPV Valley Energy Center in accordance with the New York State Environmental Quality Review Act.[55] The Commission included the DEIS's calculation of downstream GHG emissions in the Certificate Order explaining that "CO_2 annual emissions from the Valley Energy Center were estimated to be about 1.98 million metric tons of CO_2 per year (539,938 metric tons carbon per year)."[56] Expressly relying upon the DEIS and FEIS, the Commission explained:

> [T]he Town of Wawayanda's environmental analysis contains a comprehensive GHG analysis of the Valley Energy Center, including discussion of the Kyoto Protocol and Regional Greenhouse Gas Initiative; the Valley Energy Center's emissions of GHG on an hourly, yearly, and 30-year basis; comparison to state, national, and global emissions; and the importance of emissions from the project in relation to the common good. As explained in the FEIS, the Valley Energy Center's emissions are subject to Prevention of Significant Deterioration regulations under the

[54] Certificate Order at P 30.
[55] *Id*. at P 122 (citing Town of Wawayanda Planning Board, Draft Environmental Impact Statement, CPV Valley Energy Center (February 2009) and Town of Wawayanda Planning Board, Final Environmental Impact Statement, CPV Valley Energy Center (February 2012)). The Town of Wawayanda, as lead agency, conducted an in-depth, multi-year environmental review process for the power plant.
[56] *Id*. at n.196 (citing Valley Energy Center DEIS, at section 9.6.8.2).

> [Clean Air Act ("CAA")], which require determination of the Best Available Control Technology (BACT) for GHG emissions. Appendix 3B to the FEIS demonstrates that the Valley Energy Center will comply with all requirements of the CAA, including the BACT analysis for GHG emissions. Additionally, the Valley Energy Center DEIS noted that trace amounts of methane would be emitted, but would be negligible compared to the total CO_2 emissions resulting from combustion.[57]

The Commission's EA for the Project also included reference to the DEIS, which included a GHG analysis of the power plant,[58] as well as additional analysis of downstream GHG emissions. The Commission's EA also discussed the emissions of the CPV Valley Energy Center in conjunction with the Project emissions and noted that the CPV Valley Energy Center received all air quality permits required for its operation, including a NYSDEC Air State Facility Permit and a Title IV (Phase II Acid Rain) Permit.[59] In addition, the EA explained that the identified "Existing or Proposed Projects with Potential Cumulative Impacts in the Region of Influence," including the CPV Valley Energy Center, would be required to meet all applicable federal and state air quality standards and concluded "the Project would not result in significant cumulative impacts on regional air quality."[60] The EA also included a discussion of global climate change and concluded "there is no standard methodology to determine how a project's relatively small incremental contribution to GHGs would translate into physical effects on the global environment."[61]

---

[57] Certificate Order at P 130 (citing both the CPV Valley Energy Center FEIS, at 3.3.2. and the CPV Valley Energy Center DEIS at section 9.6.8.2).
[58] EA at 107.
[59] *Id.* at 108
[60] *Id.* at 102-03, 109.
[61] *Id.* at 110. The EA also summarized the expected direct GHG emissions (in carbon dioxide equivalents ("CO_2e")) during construction of the Project and estimated that the potential operational emissions for the proposed Project would be 7.8 tons per year of CO_2e. *Id*. at 86. In addition, the EA estimated the combined cumulative emissions of the power plant and the Project during construction of the Project and found that "[a]ny potential cumulative impacts from construction would be limited to the duration of the construction period, and would be temporary and minor." *Id.* at 108.

The Commission's reliance on the Town of Wawayanda's DEIS and FEIS should come as no surprise to NYSDEC. NYSDEC relied on the Town of Wawayanda's environmental review when NYSDEC issued air permits for the CPV Valley Energy Center.[62] The Commission should reject NYSDEC's attempt to force the Commission to undertake a redundant analysis of downstream GHG emissions. Because the Commission explicitly took into account and analyzed the downstream GHG emissions from the CPV Valley Energy Center in its review of the Project, *Sierra Club* is not a material change in law that would require reopening the evidentiary record in this case.[63]

C. The Commission Should Deny NYSDEC's Request to Stay the Certificate Order.

The Commission should deny NYSDEC's request for a stay of the Certificate Order pending the outcome of NYSDEC's Motion. NYSDEC has not even attempted to demonstrate that it has met the high legal standard for granting a stay. Pursuant to Section 705 of the Administrative Procedure Act, the Commission can only grant a stay when "justice so requires."[64] In deciding whether justice requires a stay, the Commission considers the following factors: "(1) whether the party requesting the stay will suffer

[62] NYSDEC participated in the Town of Wawayanda's review of CPV Valley Energy Center as an "involved agency" and ultimately relied upon this environmental review in issuing the air permits for the power plant, effective August 1, 2013. NYSDEC, Air State Facility, Permit ID: 3-33356-00136/00001 (effective Aug. 1, 2013); NYSDEC, Facility Subject to Title IV Acid Rain Regulations and Permitting, Permit ID: 3-3356-00136/00001 (effective Aug. 1, 2013). Notably, NYSDEC limited the power plant's CO_2 emissions to 2,164,438 tons per year consistent with the findings of the FEIS. NYSDEC, Air Facility Permit, at Item 18.1.

[63] To the extent the Commission wishes to incorporate additional findings from the Town of Wawayanda and NYSDEC's review of the CPV Valley Energy Center, the Commission may take administrative notice of the DEIS, FEIS, and NYSDEC's air permits for the power plant without reopening the record. *See Pac. Gas & Elec. Co.*, 109 FERC ¶ 61,205, at P 7 (2004) ("This Commission and the Courts can take official notice of any judicial decision at any time, so there is no need to reopen the record for this purpose."). Alternatively, the Commission itself can easily quantify the potential GHG emissions from the volume of gas transported on the Project facilities. Should the Commission wish to perform this analysis, it could do so in response to the rehearing requests currently pending in this proceeding without "reopening" the evidentiary record.

[64] *Nat'l Fuel Gas Supply Corp.*, 160 FERC ¶ 61,043, at P 5 (2017) (internal citation omitted); *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 56 (citing 5 U.S.C. § 705).

irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest."[65] "If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, [the Commission] need not examine the other factors."[66] The Commission's "general policy is to refrain from granting stay [of its orders] to ensure definiteness and finality in [its] proceedings."[67] NYSDEC's Motion does not discuss these factors at all, let alone demonstrate that they are present to a degree that the Commission should, contrary to its general policy, stay the Certificate Order.

As a preliminary matter, NYSDEC's failure to address these factors is sufficient grounds in and of itself to deny its request for a stay. When movants for a stay fail to address the factors the Commission uses in evaluating requests for a stay, the Commission denies the stay on this basis alone.[68] In any event, NYSDEC's request for a stay fails on the merits to meet the Commission's test.

First, NYSDEC's Motion does not show why NYSDEC would suffer "irreparable injury" in the absence of a stay. The injury "must be both *certain* and *great*, actual and not theoretical."[69] The mere possibility of irreparable harm is insufficient; rather, the movant must "substantiate the claim that irreparable injury is 'likely' to occur."[70] This

[65] *Nat'l Fuel*, 160 FERC ¶ 61,043 at P 5 (internal citation omitted); *Tenn. Gas Pipeline Co.*, 154 FERC ¶ 61,263, at P 4 (2016) (internal citation omitted); *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103, at P 17 (2011) (internal citation omitted); *Dominion Cove Point, LNG, LP*, 126 FERC ¶ 61,238, at P 16 (2009) (internal citation omitted).

[66] *Tenn. Gas Pipeline Co., L.L.C.*, 160 FERC ¶ 61,062, at P 4 (2017) (quoting *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016)).

[67] *Constitution Pipeline Co.*, 154 FERC ¶ 61,092, at P 9 (2016) (citing *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000)).

[68] *See, e.g.*, *Nat'l Fuel*, 160 FERC ¶ 61,043 at P 7.

[69] *Ruby Pipeline*, 134 FERC ¶ 61,103 at P 18 (emphasis added) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[70] *Id*. *See also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008).

requires that NYSDEC "provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future."[71]

Here NYSDEC does not specify irreparable harm that would result from the Commission not granting a stay of the Certificate Order, nor has it substantiated a claim that such harm is likely to occur. Instead, NYSDEC merely asserts that the Commission's EA for Millennium's Project was insufficient based on the D.C. Circuit's rejection in *Sierra Club* of the Commission's environmental review of a different pipeline project involving an entirely different set facts and circumstances that are not applicable here. The Commission has denied stay requests where the movant "only asserts generalized environmental harm to its members without identifying specifics."[72] The Commission should do the same here.

Moreover, the Commission consistently rejects assertions that flaws in its environmental review of a project constitute irreparable harm sufficient to warrant a stay when it has reviewed a project's environmental impacts and found the project environmentally acceptable.[73] The present case is no different. The Commission has conducted a comprehensive EA for the Project and concluded that the Project will not constitute a major federal action significantly affecting the quality of the human environment. NYSDEC has not substantiated its claims that the Commission's EA for the Project was inadequate. Given that the Commission has already considered the Project's environmental impacts and found them not to be significant, NYSDEC will not suffer "irreparable harm."

---

[71] *Ruby Pipeline*, 134 FERC ¶ 61,103 at P 18 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *Winter v. Nat. Res. Def. Council*, 555 U.S. at 22.
[72] *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 19 (2015).
[73] *See Tenn. Gas Pipeline*, 160 FERC ¶ 61,062; *Nat'l Fuel*, 160 FERC ¶ 61,043.

Second, NYSDEC has not demonstrated that a stay would not substantially harm other parties. Millennium and CPV Valley would both be substantially harmed by a delay if a stay is granted. The construction of natural gas pipeline facilities and gas-fired electric generators is a complex, interdependent, time-sensitive process designed to accomplish numerous prerequisite tasks during time periods that avoid or minimize environmental impacts. The construction schedule for the Project has been crafted to comply with requirements of several environmental permits and clearances, which in certain cases allow only limited time windows to perform certain critical construction activities. As a result, any regulatory delay, no matter how brief, has the potential to delay completion of the Project to the detriment of Millennium, CPV Valley (the Project's sole customer), and the public.

Further delay would place Millennium and CPV Valley at risk of losing substantial investments. Such economic harm is a factor to be considered in the balance of equitable interests.[74] The CPV Valley Energy Center is nearing completion and is scheduled to commence commercial operation by mid-February 2018. If the Project facilities cannot deliver natural gas, the CPV Valley Energy Center will be essentially unable to operate and will lose substantial revenue.[75]

Third, granting a stay would be contrary to the public interest. Given that the Commission has already found the Project to be in the public interest,[76] further delays in its construction would harm the public interest. In cases where a company has had limited periods of time to comply with the U.S. Fish and Wildlife Service's ("FWS")

[74] *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).
[75] Millennium Pipeline Co., LLC v. Seggos, Brief of Intervenor CPV Valley, LLC in Support of Petitioner at 16, Case No 16-1415 (Jan. 31, 2017).
[76] Certificate Order at P 24.

tree-clearing window and setbacks in construction would cause delays in service on fully-subscribed projects, the Commission has found that the public interest weighs against granting stays.[77] The same applies here. As explained above, Millennium needs to be able to construct the Project promptly upon reopening of the FWS tree-clearing window in November 2017 in order to allow the CPV Valley Energy Center, which has subscribed to all of the Project's capacity, to enter service by mid-February 2018.

In addition, further delay in the construction schedule resulting from a stay would delay completion of a project that is needed and consumers. Granting a stay would also prevent the power plant from delivering electricity to the grid, thereby harming the public through decreased capacity availability and increased energy prices.[78] A stay could also adversely affect regional electric reliability by precluding the CPV Valley Energy Center from alleviating transmission congestion in the Lower Hudson Valley Zone.

Because NYSDEC has not even attempted to show why its request for a stay satisfies the legal standard required to support such a stay, and this standard in fact supports denial of a stay, the Commission should deny NYSDEC's motion to stay the Certificate Order.

D. The Commission Should Reject the Intervenors' Motion to Participate.

The Commission should also reject the Motion to Participate jointly filed by the intervenors Sarah E. Burns, Amanda King, Pramilla Malick, and Melody Brunn, individually, and as Trustee of the Stanley Brunn Living Trust (collectively,

[77] *See Tenn.*, 154 FERC ¶ 61,263 at P 9 (public interest favored denying stay because pipeline had small window of opportunity to comply with FWS tree-clearing recommendations and delays in construction would delay commencement of service); *Transco*, 150 FERC ¶ 61,183 at P 17 (same).

[78] Certificate Order at PP 28-29. The New York Independent System Operator ("NYISO") has already taken into account the CPV Valley Energy Center into its forecasting. For example, NYISO assumes that the remaining coal units in New York will retire and that the CPV Valley Energy Center will come online to replace capacity lost from the retiring coal units. NYISO, *Pricing Carbon into NYISO's Wholesale Energy Market to Support New York's Decarbonization Goals Report* at 40-1 (Aug. 10, 2017).

"Intervenors"), which "joins the request to reopen filed by [NYSDEC]" and "to participate in any such reopened proceedings and further joins the [NYSDEC's] motion to stay the Certificate pending any reopening or rehearing.[79] Intervenors offer no additional arguments in support of NYSDEC's requests to reopen the proceeding or stay Millennium's Certificate. Like NYSDEC, Intervenors have failed to demonstrate the "extraordinary circumstances" that would warrant reopening the record in this proceeding. Intervenors also have not even attempted to meet the Commission's heightened standard for granting a stay request and have not and cannot demonstrate that a stay is necessary to prevent irreparable harm. Thus, the Commission should reject Intervenors' requests to reopen this proceeding and stay the Certificate for the reasons discussed above with respect to NYSDEC's Motion.[80]

The Commission should also reject Intervenors' attempt to supplement their rehearing requests to add a challenge to the Commission's analysis of GHG emissions.[81] The 30-day statutory limit for filing rehearing requests "precludes the Commission from considering late-filed supplements to a timely petition for rehearing."[82] None of the intervenors challenged the Commission's analysis of downstream GHG emissions in their requests for rehearing. Intervenors are barred from raising this issue now. In addition, Intervenors have not demonstrated why they could not have challenged the Commission's downstream GHG analysis in their rehearing requests, as required by Rule

[79] Motion to Participate at 2.
[80] *See supra* Sections B and C and accompanying text.
[81] Motion to Participate at 2-3.
[82] *Boston Edison Co.*, 106 FERC ¶ 61,150, at P 12 (2004) (citing *Commonwealth Electric Co. v. Boston Edison Co.*, 46 FERC ¶ 61,253, at pp. 61,757-58, *reh'g denied*, 47 FERC ¶ 61,118, at pp. 61,349-50 (1989)). *See also City of Tacoma, Washington*, 110 FERC ¶ 61,140, at P 8 (2005) ("To the extent that, in the course of renewing their earlier rehearing requests, parties now make new or different arguments in support of those requests, we reject their arguments as an untimely attempt to supplement their prior requests for rehearing, which is not permitted.") (internal citation omitted).

713(c)(3) of the Commission's Rules of Practice and Procedure.[83] Intervenors admit that they raised the issue earlier in the proceeding,[84] but fail to explain why they did not seek rehearing on this issue.

IV.
CONCLUSION

For the foregoing reasons, Millennium respectfully requests that the Commission deny NYSDEC's Motion and Intervenors' Motion to Participate in their entirety, including (1) the requests for rehearing and renewal of rehearing, (2) the requests to reopen the evidentiary record, and (3) the requests for stay.

Respectfully submitted,

/s/ Georgia Carter

Georgia Carter
Vice President and General Counsel
Millennium Pipeline Company, L.L.C.
109 North Post Oak Lane, Suite 210
Houston, TX 77024
carter@millenniumpipeline.com

A. Gregory Junge
Michael R. Pincus
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
202-298-1800
agj@vnf.com
mrp@vnf.com

Attorneys for Millennium Pipeline Company, L.L.C.

September 15, 2017.

[83] *Texas Gas*, 155 FERC ¶ 61,099 at P 23 (denying rehearing where the party seeking rehearing failed to "explain why it could not have raised this new argument earlier").
[84] Motion to Participate at 2-3.

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2017), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 15th day of September, 2017.

/s/ Marco Bracamonte

Marco A. Bracamonte
Paralegal
Van Ness Feldman, LLP
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007-3877
(202) 298-1800