

126 FERC ¶ 61,097  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Transcontinental Gas Pipe Line Corporation

Docket No. CP08-31-001

ORDER DENYING REHEARING AND STAY

(Issued February 6, 2009)

1. On August 14, 2008, in Docket No. CP08-31-000, the Commission issued a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Corporation (Transco) authorizing construction of the Sentinel Expansion Project (Sentinel Project) in Pennsylvania and New Jersey.<sup>1</sup> Timely requests for rehearing and stay were submitted by several landowners along the Downingtown Replacement section of the Sentinel Project. As discussed below, the requests for rehearing and stay are denied.

**I. Background**

2. Transco's Sentinel Project is an incremental expansion of Transco's existing pipeline system in Pennsylvania and New Jersey to serve the northeastern market area. The August 14 Order granted Transco the authority to construct 142,000 dekatherms per day (Dth/d) of expansion capacity in two phases. Phase 1 is construction of the Wind Gap Loop, and Phase 2 is construction of the Conyngham, Mountain View and Turnpike Loops and the Downingtown Replacement.

3. The Downingtown Replacement will replace a 7.15-mile section of 30-inch Mainline A pipe in Chester County, Pennsylvania, with 42-inch pipe. Mainline A lies in a utility corridor that also includes Transco's Mainlines B and C and a fiber optic cable owned by Level 3 Communications (Level 3).<sup>2</sup> Mainline A is located on the north side

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<sup>1</sup> *Transcontinental Gas Pipe Line Corp.*, 124 FERC ¶ 61,160 (2008) (August 14 Order).

<sup>2</sup> Level 3 purchased an easement from Transco to lay the fiber optic cable.

of the right-of-way, Mainline B is in the middle, and Mainline C is on the south side. The Level 3 fiber optic cable is located between Mainlines A and B. Along the Downingtown Replacement, the distance between Mainlines A and B varies from less than 25 feet to almost 50 feet.

4. The original Mainline A was placed in service in 1951. Transco's easement extends as little as five feet to the north of Mainline A in some locations. Significant suburban growth has occurred adjacent to Mainline A, and now hundreds of residential lots abut the portion of the easement within which the Downingtown Replacement construction activities will occur. Nineteen of the residences are within 25 feet of Mainline A. The August 14 Order authorizes Transco to increase the width of its easements to a total of 50 feet, centered on the replacement pipeline. Thus, the increased easement will extend to a total of 25 feet to the north of the new Mainline A.

5. All of the properties at issue in this order on rehearing abut the northern edge of the pipeline corridor. As applicable to these properties, the August 14 Order authorized Transco to obtain an additional zero to 20 feet of easement space to the north of the pipeline corridor, depending on the width of the currently existing easements at specific points, to ensure that the easements extend 25 feet to the north of Mainline A.

## **II. Procedural Issues**

6. In total, seven requests for rehearing of the August 14 Order were submitted by Downingtown Replacement landowners. Five of the rehearing requests were timely filed by September 15, 2008, by existing parties: Mark T. and Cheryl A. Bradley; Michael A. and Lisa L. B. Matson; Henry J. and Margaret M. McHugh, and Michael and Erin Heilig, filing jointly; Andrew J. and Kathleen P. Moody; and Stephen K. and Gwendolynne C. Pfau. One timely rehearing request, accompanied by a motion seeking late intervention, was filed by Lynda Kymer Farrell and Steven R. Farrell. On September 22, 2008, Dyanne and Joseph Delaney filed a late rehearing request, accompanied by a motion seeking late intervention.

7. Six additional motions to intervene were submitted after the issuance of the August 14 Order by Thomas J. and Sheri W. Burke; Jun Kong and Guochang Zhao; Alfred T. and Carmen C. Myles; Louis Ottaviano; Brent C. and Charlene Robinson; and Walter M. and Reva M. Rohlf. These landowners do not state in their pleadings that they are seeking rehearing. However, like the Farrells and the Delaneys, they reference their previous comments expressing concerns about potential impacts of Transco's Downingtown Replacement on their properties, notwithstanding the August 14 Order's condition ensuring that Commission staff will not grant Transco clearance to commence construction on these landowners' properties until Transco has developed site-specific plans for its construction activities and the landowners have had ample opportunity to comment on the plans.

8. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d), and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed.<sup>3</sup> Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interest of any party. We are therefore more liberal in granting late intervention at the early stages of a proceeding, but are more restrictive as the proceeding nears its end. A petitioner for late intervention bears a higher burden to show good cause for late intervention after issuance of a final order in a proceeding, and generally it is Commission policy to deny late intervention at the rehearing stage.<sup>4</sup>

9. The Delaneys, Farrells, Myleses, Robinsons, and Mr. Ottaviano state that good cause exists to grant them late intervention because they are not lawyers and were unaware of the need to file for intervenor status in order to appeal a Commission decision. These landowners state that they believed that filing comments and protests with the Commission established their rights of representation and appeal. The Burkes, Rohlfs, and Zhoas state that since the certificate has been issued, a new compliance phase of the Sentinel Project has begun. They argue that this phase is separate and distinct from the certificate phase, and as such their intervention in this second phase is timely.

10. All landowners with property abutting the Downingtown Replacement received a packet of information from Transco soon after the filing of the Sentinel Project application. Included in this packet was a copy of the Commission's December 17, 2007, notice of Transco's application.<sup>5</sup> The December 17, 2007, notice states that "any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. . . . Protests *will not* serve to make protestants parties to the proceeding. . . . Any person wishing to become a party must file a notice of intervention or motion to intervene as appropriate."<sup>6</sup> The notice continues by explaining that a person does not have to intervene in order to have comments considered by the Commission, "but the filing of a comment alone *will not* serve to make the filer a party to the proceeding."<sup>7</sup> The standard notice further

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<sup>3</sup> 18 C.F.R. § 385.214(d) (2008).

<sup>4</sup> *See, e.g., Cameron LNG, L.L.C.*, 112 FERC ¶ 61,146, at P6 (2005).

<sup>5</sup> Under 18 C.F.R. § 157.6(d)(viii), Transco is required to mail or hand deliver a copy of the Commission's notice to all landowners whose property abuts the pipeline right-of-way within three days of the Commission's issuance of the notice.

<sup>6</sup> 72 Fed. Reg. 73,342 (2007) (italics added).

<sup>7</sup> *Id.* (italics added).

emphasized that non-party commenters “will not have the right to seek court review of the Commission’s final order.”<sup>8</sup>

11. The motions for late intervention argue as cause for being late that the landowners either were unaware of the implications of not timely intervening or that a compliance phase of the proceeding has begun. However, all of the landowners who have filed for late intervention received the packet of information from Transco that included a copy of the Commission’s notice cited above, and have commented previously in this proceeding. Therefore, we are satisfied that these landowners had ample notice and opportunity to intervene. Further, as to those landowners who argue that they should be permitted to intervene now because the issuance of Transco’s certificate signified the beginning of a new, compliance phase of the proceeding, the fact is that the Commission has not authorized Transco to begin construction on their properties, and the issues they raise have nothing to do with whether Transco is complying with its certificate conditions. These landowners are too late to intervene in the certificate proceeding, and there is no other proceeding pending at this time.<sup>9</sup> In view of these considerations, we will deny all of the motions for late intervention.

12. Under section 19(a) of the Natural Gas Act (NGA),<sup>10</sup> only a party may seek rehearing of a Commission order and a request for rehearing must be filed within 30 days of the date of issuance of the Commission order.<sup>11</sup> These are statutory limitations that cannot be waived by the Commission. Although the Farrells’ rehearing request was filed by September 15, 2008, i.e., within 30 days after issuance of the August 14 Order, we are denying their motion for late intervention, as discussed above. Therefore, the Farrells are not a party to the proceeding and we accordingly reject their request for rehearing. Because the Delaneys’ rehearing request was filed after September 15, 2008, we must reject it as well. However, we note that the concerns and issues raised by these landowners in their filings are almost identical to those raised by the landowners that are parties and filed timely requests for rehearing. Therefore, to that extent the Farrells’ and the Delaneys’ issues are addressed below.

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<sup>8</sup> *Id.*

<sup>9</sup> Should the landowners be aggrieved by any post-certificate activity in a manner that was not contemplated by the certificate order, they may be able to seek rehearing of any applicable orders. However, entities may not use post-certificate activities to collaterally attack the certificate order. In other words, they may not later raise issues that could have been raised on rehearing of the certificate order.

<sup>10</sup> 15 U.S.C. § 717r(a) (2006).

<sup>11</sup> *Id.*; *see also* 18 C.F.R. § 385.713(b) (2008).

13. On January 15, 2009, Victory Brewing Company (Victory) filed a motion for late intervention. Victory states it received no formal notification of the Sentinel Project and that Transco's crossing of Brandywine Creek may impact the downstream public water supply that Victory uses for its brewing operations. Victory's brewing facilities are located more than a mile away from the Sentinel Project, and Victory is not an affected landowner as defined in section 157.6(d)(2) of the Commission's regulations.<sup>12</sup> Therefore, Transco was not required to individually notify Victory of the Sentinel Project. However, notice of the Sentinel Project was published in local newspapers, and local media have published several additional stories about the Sentinel Project. In any event, the Commission considered comments from the Chester County Water Authority, the Downingtown Municipal Water Authority, and AQUA Pennsylvania in considering impacts on all public water systems, including water intakes from Brandywine Creek downstream of the Sentinel Project. We note, in particular, Environmental Condition No. 29, adopted in response to these comments, requires Transco to file and obtain the Commission's approval of a public water supply protection plan developed in consultation with the Downingtown Municipal Water Authority. Therefore, Victory's motion to intervene is denied.

### **III. Requests for Rehearing**

14. The requests for rehearing assert almost identical assignments of error, with only slight variations that are identified and addressed below. The assignments of error can be summarized as follows: (1) the environmental assessment's (EA) mitigation measures are inadequate and an environmental impact statement (EIS) should have been prepared; (2) the site-specific plans should have been approved before issuance of the final order, and specific impacts to the landowner properties were not considered by the Commission; (3) alternatives to the replacement of Mainline A were not considered, including the relocation of the Level 3 fiber optic cable; (4) the grant of additional permanent right-of-way is unnecessary and unsupported by Department of Transportation (DOT) or Commission regulations; (5) an evidentiary hearing should have been held because disputed issues of fact exist regarding the possibility of the Level 3 relocation; and (6) the eminent domain authority granted to Transco should not be contingent upon approval of site-specific residential construction plans.

#### **A. The EA and Mitigation Measures**

15. The landowners state that the Sentinel Project is a major federal action that requires the preparation of an EIS rather than an EA, and that the "determinations of potential negative environmental impacts in the EA and the Order . . . are summarily dismissed on the grounds that Transco will mitigate these impacts." The landowners also

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<sup>12</sup> 18 C.F.R. § 157.6(d)(2) (2008).

state that the Commission “erred in taking insufficient measures to minimize impacts upon the environment and citizens, by merely ‘urg[ing] Transco to make all possible efforts to minimize adverse impacts on landowners and communities.”

16. The Commission’s regulations implementing the National Environmental Policy Act (NEPA) require that an EIS be prepared for major pipeline construction projects using rights-of-way in which there is no existing natural gas pipeline.<sup>13</sup> The entire Sentinel Project involves replacing, looping, or abandoning approximately 17 miles of existing pipeline within an existing natural gas right-of-way.<sup>14</sup>

17. Under these circumstances, Commission staff chose to first prepare an EA to determine whether the project constituted a major federal action significantly affecting the quality of the human environment, which would require the preparation of an EIS. The CEQ regulations state that an “EA shall include brief discussions of the need for the proposal, alternatives, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”<sup>15</sup>

18. In preparing the EA, we received and considered comments from the Malvern Hunt HOA, the Glen Ridge Homeowners Association, Chester County, East Caln Township, West Whiteland Township, East Whiteland Township, Montgomery Township, AQUA Pennsylvania, the Appalachian Trail Conservancy, the Appalachian Mountain Club, the U.S. National Park Service, the U.S. Fish and Wildlife Service, Pennsylvania State Representative Curt Schroder, Pennsylvania State Senator Andrew Dinniman, U.S. Congressman Jim Gerlach, U.S. Senator Arlen Specter, and a number of landowners. Staff also consulted with the Appalachian National Scenic Trail, the New Jersey Department of Environmental Protection, the Pennsylvania Department of Environmental Protection, the U.S. Army Corps of Engineers, and the U.S. National Marine Fisheries Service.

19. The EA analyzed construction methods; land and right-of-way requirements; geology and soils; water resources and wetlands; vegetation, wildlife, and fisheries; endangered and threatened species; land use and visual resources; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and, project alternatives. Based on Commission staff’s analysis, the EA concluded that if Transco constructed the proposed project in accordance with its application, supplements, and our mitigation

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<sup>13</sup> 18 C.F.R. § 380.6(a)(3) (2008).

<sup>14</sup> The Downingtown Replacement involves the replacement of approximately seven miles of existing pipeline.

<sup>15</sup> 40 C.F.R. § 1508.9 (2008).

measures, approval of the project would not constitute a major federal action significantly affecting the quality of the human environment. In the August 14 Order, the Commission agreed with the EA's conclusion, issued a certificate to Transco to construct the project, and conditioned the certificate on Transco's compliance with the EA's environmental conditions, as amended by the order.<sup>16</sup> Environmental Condition No. 1 required Transco to "follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Commission's order."<sup>17</sup>

20. Courts have found that a federal agency may use mitigation measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS when the adequacy of proposed mitigation measures is supported by substantial evidence.<sup>18</sup> Mitigation measures have been found to be sufficiently supported when they are likely to be "adequately policed," such as when they are included as mandatory conditions imposed on licenses.<sup>19</sup>

21. Not only have we conditioned Transco's certificate on its compliance with the mitigation measures in the EA, but we have required certain actions by Transco to ensure its compliance with the mitigation measures and to demonstrate that compliance to the Commission. For example, Environmental Condition No. 8 requires Transco to file with the Commission weekly status reports prepared by the required head environmental inspector describing the current construction status, the work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas; a listing of all problems encountered and each instance of noncompliance; the effectiveness of all corrective actions implemented; a description of any landowner/resident complaints relating to compliance with the August 14 Order and the measures taken to satisfy their concerns; and, copies of any correspondence

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<sup>16</sup> August 14 Order, Ordering Paragraph (I).

<sup>17</sup> August 14 Order, Appendix B.

<sup>18</sup> See, e.g., *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (citing *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2d Cir. 1992)); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 245 (D. Vt. 1992), *aff'd* 990 F.2d 729 (2d Cir. 1993) (*Abenaki*).

<sup>19</sup> *Abenaki*, 805 F. Supp. at 239 n.9.

received by Transco from other federal, state, or local permitting agencies concerning any noncompliance and Transco's response.<sup>20</sup>

22. As demonstrated by the analysis in the EA, the August 14 Order, and this order, we have taken the requisite "hard look" at the possible effects of Transco's proposal,<sup>21</sup> identified the relevant areas of environmental concern, and where the impact could be more than insignificant, imposed mitigation measures to reduce the environmental impact caused by the proposal.<sup>22</sup> Therefore, we find that the Downtown Replacement is not likely to have a significant impact on the environment. Accordingly, we find that an EIS is not required for Transco's proposal, the mitigation measures to minimize adverse environmental impacts are adequate, and rehearing is denied on this issue.

### **B. Site-Specific Plans and Property-Specific Impacts**

23. The landowners state that the Commission "was insufficiently specific . . . and improperly deferred certain aspects of [the Sentinel Project's] approval" when the Commission "failed to define the process of future site-specific approvals." Similarly, the landowners state that the Commission "erred in deferring to post-EA studies and contingencies to satisfy its statutory obligation." The landowners also allege that the Commission "failed to include and analyze certain criteria necessary in evaluating potential environmental impacts, including but not limited to the impacts referenced in the January 1, 2008 and May 15, 2008 filings" made by landowners with respect to their individual properties.

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<sup>20</sup> See also Environmental Condition No. 6 requiring, among other things, Transco to file a plan describing how it will implement the mitigation measures and incorporate them into construction contracts, the number of environmental inspectors assigned to the project, the training and instructions it will give to all personnel involved with construction, and procedures if noncompliance occurs. For each discrete facility Transco must provide a chart and dates for the completion of all required surveys and reports, the mitigation training of onsite personnel, the start of construction, and the start and completion of restoration of the site.

<sup>21</sup> See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (adopting the "hard look" standard of review to determine whether an agency's decision not to issue an EIS is appropriate).

<sup>22</sup> See, e.g., *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (citing *Maryland-National Capital Park and Planning Comm'n v. United States Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973) (describing the four criteria used by the D.C. Circuit Court of Appeals for reviewing an agency's decision to forego preparation of an EIS)).

24. The EA and the August 14 Order considered all substantive issues identified throughout this proceeding, including the environmental issues raised by landowners and resource agencies. We addressed the possible removal of trees within the right-of-way; the removal of trees on steep slopes and the mitigation of possible erosion; the proximity of residences to construction areas, including access to residences, landowner safety concerns, construction work hours, noise levels, and possible damage to residences; the possibility of utility disruption; and stream and wetland crossings. In their requests for rehearing, the landowners raise no new issues and do not elaborate on any specific environmental issues with respect to their individual properties except to note that the Commission did not consider issues raised in the January 1, 2008 and May 15, 2008 comments. All of the landowner comments received in response to the Notice of Application, which includes comments received in January, were considered in the EA. Likewise, all of the landowner comments received in response to the EA, which includes comments received in May, were considered in the August 14 Order.

25. The EA contained sufficient information for the Commission to determine in the August 14 Order that, with the imposition of mitigation measures, some of which would be developed and approved after the certificate was issued, the project is an environmentally acceptable action. The Commission issued the certificate to Transco expressly conditioned upon Transco's subsequent completion of the necessary surveys and environmental studies, its development of mitigation measures and the filing of implementation plans, including site-specific construction plans, and further Commission review and approval of the proposed environmental protections, prior to the commencement of construction.

26. Contrary to the landowners' contentions, the Commission did not fail to define future procedures or otherwise err by issuing the certificate prior to the completion of all necessary environmental work and analysis, including the site-specific plans. The Commission's procedure of allowing the necessary environmental work and analysis to be completed after the certificate is issued but before construction begins reflects longstanding Commission practice that is supported by judicial precedent.<sup>23</sup> As we explained in prior cases, the practical reality of pipeline projects is that they take considerable time and effort to develop. While we consider the major impacts of a project in a certificate proceeding, and develop environmental measures to ameliorate these impacts, we cannot predict in advance the details of project construction. Thus, the

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<sup>23</sup> See *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 (2003); *Islander East Pipeline Co., L.L.C.*, 102 FERC ¶ 61,054 (2003); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091, at 61,402, n.195 (1990) (explaining that "the Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or on the adherence by the applicants to environmental conditions.").

Commission conditioned construction under Transco's certificate on its completion of the necessary survey and environmental studies, including site-specific plans to ensure that the pipeline will be constructed in an environmentally acceptable manner, consistent with the certificate order.<sup>24</sup>

27. Courts have upheld the Commission's authority to so condition its certificates, ruling that the Commission may issue a certificate under NGA section 7(c) before the environmental analysis has been fully completed without violating NEPA.<sup>25</sup> In *Public Utility Commission of California v. FERC* the court stated:

While it is generally true that 'NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*,' we [have] held . . . that this did not prevent an agency from making even a final decision so long as it assessed the environmental data before the decision's effective date. Here, the Commission's non-environmental approval was expressly not to be effective until the environmental hearing was completed. Similarly, the Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA.<sup>26</sup>

28. The Commission has interpreted the term "effective date" to mean the effective date that the pipeline is authorized to begin "destructive planning activities," such as construction.<sup>27</sup> Hence, all of the environmental work required by the conditions imposed

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<sup>24</sup> Section 7(e) of the NGA provides that "the Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2006).

<sup>25</sup> *Public Utility Commission of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990).

<sup>26</sup> *Id.* at 282-83 (citations omitted).

<sup>27</sup> See, e.g., *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 94 (2006); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091, at 61,402-03, *order on reh'g*, 53 FERC ¶ 61,194, at 61,763 (1990). See also *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983), in which the court determined that NEPA "requires federal agencies to evaluate the environmental consequences of their actions prior to commitment to any actions which might affect the quality of the human environment," which is when "the critical agency decision' is made which results in (continued...)

in the August 14 Order, as well as the Commission's review and approval of Transco's required submissions such as site-specific plans, must be completed before Transco is authorized to commence construction of the Downingtown Replacement. These conditions are designed to ensure that the additional environmental work and analyses are completed, the environmental protections are in place, and the site-specific plans are approved before construction begins on the pipeline. Since Transco has accepted the certificate with the imposed conditions, it must work diligently to complete the required surveys and prepare the final reports, including the site-specific plans.

29. As part of this requirement, Environmental Condition No. 17 ensures that Transco allows Downingtown Replacement landowners an opportunity to review and comment on their site-specific plans before Transco submits the plans, the landowner comments, and Transco's responses to the Commission. Further, Environmental Conditions No. 6 and No. 2 are designed to continue to protect environmental resources and landowners even after the environmental review is completed and construction commences. Environmental Condition No. 6 requires Transco to develop and implement an environmental complaint resolution procedure to identify and resolve mitigation problems during construction and restoration of the right-of-way. Environmental Condition No. 2 gives the Director of the Office of Energy Projects (OEP) broad authority to take any steps necessary to ensure the protection of environmental resources during the construction and operation of the project. This includes the authority to modify the existing project conditions and to impose additional mitigation measures, including stop work authority.

30. In addition to the common landowner concerns, the McHughs and Heiligs state that as to their specific properties, the August 14 Order is "inconsistent with the prior representations of both FERC and Transco representatives, to the effect that no such disturbance would be made on the McHugh property, and that only limited disturbance would be made on the Heilig property." The McHughs and Heiligs do not reference any specific statement made by either Commission staff or Transco, and do not explain what is anticipated or not anticipated to be disturbed on their properties. As discussed above, under Environmental Condition No. 17, the McHughs and Heiligs have the opportunity to review their individual site-specific plans and comment to Transco and the Commission on the sufficiency of those plans.

31. We find that the environmental conditioning in the August 14 Order, including the future approval of the site-specific residential construction plans complies with NEPA, and that through this conditioning, the EA, and the August 14 Order, property-specific

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'irreversible and irretrievable commitments of resources' to an action which will affect the environment."

impacts have been considered and mitigated to the extent feasible. As such, we deny rehearing on this issue.

**C. Alternatives to the Replacement of Mainline A**

32. The landowners state that the Commission did not consider the Level 3 alternative, arguing that if the fiber optic cable were not located between Mainlines A and B or if the fiber optic cable could be relocated, additional easement space to the north of Mainline A would be unnecessary. Specifically, the landowners state that the Downingtown Replacement could be effectuated through “less destructive measures, such as performing a crossover that would relocate Mainline A to the south of Mainline B or C, where more than enough open space already exists to provide sufficient separation distance and workspace.”

33. As part of the environmental assessment, the Commission analyzed a range of alternatives to the proposed action, including, among others, design and construction alternatives. The EA considered several different route variations and conducted an analysis that considered potential impacts on sensitive environmental resources such as wetlands, waterbodies, and forest communities, as well as potential impacts on existing residential communities. In particular, Commission staff evaluated: (1) looping a fourth pipeline to the south of Mainline C (Downingtown Loop); (2) the replacement of Mainline B instead of the replacement of Mainline A; and (3) moving Mainline A closer to Mainline B to reduce the amount of additional permanent right-of-way to the north of Mainline A. Ultimately, the Commission determined that the replacement of Mainline A would involve the least environmental disturbance, and result in the most long-term reliability to Transco’s natural gas transmission system since Mainline A is the oldest of the three lines.

34. Commission staff compared the Downingtown Loop on the southern edge of the utility corridor with the Downingtown Replacement on the northern edge of the utility corridor. Commission staff’s comparative analysis found that the Downingtown Replacement would be three miles shorter than the Downingtown Loop; require less land for construction and operation; involve less major road, utility, wetland and waterbody crossings; and impact fewer existing structures within 50 feet of the pipeline. Based on this comparison, Commission staff determined that the Downingtown Replacement is the environmentally preferred action.<sup>28</sup>

35. Commission staff also evaluated the replacement of Mainline B rather than Mainline A. Commission staff found that the replacement of Mainline B would require a longer replacement because Mainline B operates at a higher pressure than Mainline A,

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<sup>28</sup> EA at 92.

which in turn would also involve a larger area of disturbance and proportionately higher costs. In addition, the replacement of Mainline B would require that Mainline A, which operates at a lower pressure, remain in service, thereby adversely affecting the hydraulic design flows of the modified system. This would restrict the ability of Transco to adequately service customers both during the construction of the Sentinel Project and during the long-term operation of the three mainlines. In addition, Mainline A would not be able to adequately feed Compressor Station 200 in many operational flow circumstances, thereby reducing the reliability and flexibility of Transco's operation of Compressor Station 200 and the connecting pipeline system. Based on this evaluation, Commission staff determined that the replacement of Mainline A would be the technically and environmentally preferable alternative.<sup>29</sup>

36. Commission staff also considered the possibility of moving Mainline A to within 25 feet of Mainline B, and concluded that Transco would need to coordinate with Level 3 to relocate specific sections of their fiber optic cable.<sup>30</sup> Commission staff concluded that the separation between Mainlines B and C was too small – less than 25 feet – to safely place the fiber optic cable between the two mainlines.<sup>31</sup> In the EA, Commission staff expressed concern that relocation of the fiber optic cable may delay construction of the Downingtown Replacement.<sup>32</sup> Nevertheless, in the August 14 Order, Environmental Condition No. 24 required Transco to consult with Level 3 and file with the Commission a reevaluation of the feasibility of relocating the fiber optic cable along the Downingtown Replacement. On December 4, 2008, Transco filed the required assessment (December 4 Assessment) in which it concluded that in certain locations along the Downingtown Replacement, the fiber optic cable could be lowered so that Mainline A could move closer to Mainline B, while still maintaining a minimum spread of 25 feet between the two pipelines.

37. Transco explained the pipeline safety criteria that it used to determine in which locations the fiber optic cable could safely be relocated. Industry safety standards recommend that natural gas pipelines are spaced at least 25 feet apart, a distance which would also be necessary to safely install the new Mainline A and maintain both pipelines. Level 3 has indicated to Transco that the fiber optic cable could be lowered to a depth of as much as 15 feet to facilitate moving Mainline A to within 25 feet of Mainline B. Therefore, in locations where the cable is at least 25 feet to the north of Mainline B, it

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<sup>29</sup> *Id.*

<sup>30</sup> EA at 91.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

may be possible to lower the fiber optic cable and move Mainline A to within 25 feet of Mainline B.

38. Transco analyzed the entire length of the Downingtown Replacement using the above criteria and found three residential locations where the cable can be lowered, Mainline A can be moved closer to Mainline B, and the additional permanent right-of-way authorized in the August 14 Order would no longer be necessary. The three locations are from mileposts (MP) 1716.91 to 1717.5, MP 1720.08 to 1720.46, and MP 1721.80 to 1722.08, and encompass the Bell Tavern Boulevard/McIlvain Drive area, the Swedesford Chase neighborhood, and the Malvern Hunt neighborhood. This relocation will affect three of the landowners requesting rehearing – the Bradleys, Matsons, and Pfaus – all located in the Malvern Hunt community. As to these three landowners, Transco states that it will file revised site-specific plans for the three properties, indicating the new area of permanent right-of-way. The relocation of the fiber optic cable will not affect the temporary construction right-of-way authorized in the August 14 Order. Due to the closer spacing of Mainlines A and B in the vicinity of the McHugh, Heilig, and Moody residences, relocation of the fiber optic cable would not facilitate the movement of Mainline A closer to Mainline B.

39. In view of the above discussion, we find that the potential for relocating Level 3's fiber optic cable has been given appropriate consideration and rehearing is denied on this issue.

**D. Additional Right-of-Way Unsupported by Regulations**

40. The landowners argue that the grant of additional permanent right-of-way to Transco in the August 14 Order is unnecessary and unsupported by existing regulations. The Downingtown Replacement has had significant residential development since the original pipeline was placed in service in 1951. To date, 19 residences have been constructed less than 25 feet from the existing Mainline A. Township and county governments have not required setbacks from natural gas pipelines for new construction.

41. The Department of Transportation (DOT) has the exclusive authority to promulgate the federal safety standards used in the transportation of natural gas.<sup>33</sup> All of the sections of Mainline A adjacent to landowners' properties at issue in this rehearing are classified as high consequence areas. For high consequence areas, a pipeline company is required to take additional measures beyond those already required by Part 192 of DOT's regulations to prevent a pipeline failure and to mitigate the consequences

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<sup>33</sup> Memorandum of Understanding on Natural Gas Transportation Facilities, January 15, 1993. *See also* 18 C.F.R. § 157.14(a)(9)(vi) (2008) (Commission requirement that natural gas company comply with DOT regulations on pipeline safety).

of a pipeline failure in a high consequence area.<sup>34</sup> While Transco's Mainline A currently complies with all DOT requirements, the additional right-of-way proposed by Transco is consistent with DOT's directive that pipeline operators enhance their damage prevention programs to prevent and minimize the consequences of a release due to third party damage in high consequence areas.<sup>35</sup>

42. In the EA, Commission staff found that additional permanent right-of-way would place a greater distance between the existing pipelines and activities that may occur without notice to Transco, such as new building construction, landscaping, utility construction and maintenance, outbuilding construction, and other unplanned digging.<sup>36</sup> The EA concluded that additional permanent right-of-way would reduce the risk of third-party damage to the existing and proposed pipelines, thereby decreasing the potential for threats to the pipeline integrity and the subsequent need for remediation of the pipeline.<sup>37</sup> In addition, natural gas industry best practices advise a 25-foot buffer from a pressurized pipeline and encroaching development. We find that Transco's proposed right-of-way is consistent with pipeline industry standards and DOT pipeline safety standards. Therefore, we deny rehearing on this issue.

#### **E. Evidentiary Hearing**

43. The landowners state that the Commission "erred in failing to provide an evidentiary hearing, despite the existence of disputed facts and virtually no factual record substantiating the Level 3 alternative or its feasibility." The landowners do not explain which facts are in dispute and proffer no evidence to support their view of the allegedly disputed facts.

44. Courts have held that the decision whether to conduct an evidentiary hearing is in the Commission's discretion, and it is not an abuse of that discretion to deny a motion for a hearing when there are no material facts in dispute.<sup>38</sup> Further, mere allegations of

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<sup>34</sup> 49 C.F.R. § 192.935(a) (2008).

<sup>35</sup> *Id.* § 192.935(b).

<sup>36</sup> EA at 80.

<sup>37</sup> *Id.*

<sup>38</sup> *Woolen Mill Associates v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (citing *Cerro Wire & Cable v. FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1981)).

disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them.<sup>39</sup>

45. The existence of and possible relocation of the Level 3 fiber optic cable has been considered throughout the Sentinel Project certificate proceeding. In response to a January 29, 2008, environmental data request, Transco responded to Commission staff's inquiry into whether the fiber optic cable could be relocated. Transco explained that Level 3 could not move the fiber optic cable laterally.<sup>40</sup> Similarly, Commission staff noted in the EA that because of the proximity of Mainlines B and C to one another, it would not be feasible to dig a trench between the two to relocate the fiber optic cable.<sup>41</sup> Finally, in the August 14 Order, Environmental Condition No. 24 required Transco to consult again with Level 3 and submit a feasibility analysis to the Commission. Transco has done so, and as discussed above, in residential locations where Mainline A can be moved closer to Mainline B, the fiber optic cable will be lowered. We are satisfied that we have considered all aspects of this issue through our certificate proceeding, there are no material facts in dispute, and we deny rehearing on this issue.

#### **F. Eminent Domain**

46. The landowners state that the Commission "erred in making Transco's eminent domain authority under section 7(h) of the NGA contingent upon an unreasonably limited condition, specifically the Director of OEP's approval of site-specific residential construction plans." Environmental Condition No. 17 of the August 14 Order states that Transco shall not exercise the eminent domain authority granted in the order until the required site-specific residential construction plans along the Downtown Replacement have been reviewed and approved by the Commission.

47. Under section 7(h) of the NGA, a certificate of public convenience and necessity granted to a natural gas company gives that company the right to initiate eminent domain proceedings for the authorized natural gas facilities. Therefore, without further Commission restrictions, a natural gas company has no limitations placed on its ability to secure the necessary properties through eminent domain. In the August 14 Order, the Commission required as part of Transco's certificate that it refrain from initiating eminent domain proceedings on individual properties along the Downtown Replacement until the Commission had approved the site-specific plans for that property. As discussed above, as part of the site-specific plan process Transco is required to give

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<sup>39</sup> *Id.*

<sup>40</sup> Transco response to data request at 6 (February 12, 2008).

<sup>41</sup> EA at 91.

landowners an opportunity to review and comment on their property's plan, and Transco is then required to report these comments, and Transco's response to the landowner comments to the Commission. Commission staff will then review each property's plan before approving the construction with respect to that property. Thus, by restricting Transco's ability to seek eminent domain until after the approval of site-specific plans, the Commission has given landowners more rights than they otherwise would have had under the NGA certificate.

48. In the absence of the eminent domain limitation set forth in Environmental Condition No. 17, Transco would have been able to seek eminent domain as of the date of the August 14 Order. Environmental Condition No. 17 places a restriction on Transco by requiring Transco to wait until site-specific plans have been drawn, landowners have commented on the plans, Transco has responded to these comments, and the Director of OEP has approved the plans before Transco may initiate eminent domain proceedings for a property along the Downingtown Replacement. Therefore, we deny rehearing on this issue.

#### **IV. Stay Requests**

49. The landowners request a stay of construction of the Downingtown Replacement pending rehearing of the August 14 Order. Since the Commission is addressing the landowners' concerns in this order, the requests for stay are moot and are therefore denied.

#### **The Commission orders:**

(A) The motions to intervene filed after the issuance of the August 14 Order by Lynda Kymer Farrell and Steven R. Farrell; Joseph and Dyanne Delaney, Thomas J. and Sheri W. Burke; Jun Kong and Guochang Zhao; Alfred T. and Carmen C. Myles; Louis Ottaviano; Brent C. and Charlene Robinson; Walter M. and Reva M. Rohlf; and Victory Brewing Company are denied.

(B) The requests for rehearing of the August 14 Order filed by Mark T. and Cheryl A. Bradley; Michael A. and Lisa L. B. Matson; Henry J. and Margaret M. McHugh, Michael and Erin Heilig; Andrew J. and Kathleen P. Moody; and Stephen K. and Gwendolynne C. Pfau are denied.

(C) The requests for rehearing of the August 14 Order filed by Lynda Kymer Farrell and Steven R. Farrell; and Joseph and Dyanne Delaney are rejected.

(D) The requests for stay filed by Mark T. and Cheryl A. Bradley; Michael A. and Lisa L. B. Matson; Henry J. and Margaret M. McHugh; Michael and Erin Heilig; Andrew J. and Kathleen P. Moody; Stephen K, and Gwendolynne C. Pfau; Lynda Kymer Farrell and Steven R. Farrell; and Dyanne and Joseph Delaney are denied.

By the Commission. Commissioner Kelliher is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.