

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Empire State Pipeline and Empire Pipeline, Inc.	Docket Nos. CP06-5-004 CP06-6-003 CP06-7-003
--	--

Millennium Pipeline Company, L.L.C.	CP98-150-009
Algonquin Gas Transmission, LLC	CP06-76-001
Iroquois Gas Transmission System, L.P.	CP02-31-003

ORDER GRANTING AND DENYING REQUESTS
FOR REHEARING AND CLARIFICATION

(Issued May 21, 2007)

1. Empire State Pipeline (Empire) and Empire Pipeline, Inc. (EPI) filed a joint request for clarification or, in the alternative, a request for rehearing, of the order issued in *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319 (December 21, 2006) (the 2006 *Millennium* order). Algonquin Gas Transmission, LLC (Algonquin) also filed a request for clarification or, in the alternative, a request for rehearing, of the 2006 *Millennium* order. In addition, Millennium Pipeline Company, L.L.C. (Millennium) and the KeySpan Delivery Companies (KeySpan) filed requests for clarification of the order.

2. The 2006 *Millennium* order authorized EPI, Millennium, Algonquin, and Iroquois Gas Transmission System, L.P. (Iroquois) to, among other things, construct and operate facilities in order to transport gas from the United States-Canada border to the New York City metropolitan area. We will grant and deny the requests for clarification or rehearing, as discussed below.

I. The Millennium Orders

3. In 1997, Millennium, a newly formed company with no facilities, filed an application, as amended in 2000, proposing to construct and operate approximately 424 miles of 24- and 36-inch diameter pipeline extending from a connection with facilities to be constructed by TransCanada PipeLines Ltd. (TransCanada) at the United States-Canada border in Lake Erie through southern New York across the Hudson River and

Westchester County to a connection with Consolidated Edison Company of New York Inc.'s (Consolidated Edison) high-pressure pipeline in the City of Mount Vernon, New York. Millennium proposed to use existing utility corridors and easements acquired from Columbia Gas Transmission Corporation (Columbia) for approximately 223.9 miles of its proposed pipeline route.¹ In *Millennium Pipeline Company, L.P.*, 97 FERC ¶ 61,292 (2001) (Interim Order), we authorized Millennium's and Columbia's proposals.

4. Because of opposition from residents of Mount Vernon, the Interim Order did not authorize Millennium to construct facilities through the city. Rather, the Interim Order required Millennium to negotiate with elected officials and interested parties and citizens in Mount Vernon to work toward reaching an agreement on a route to a connection with Consolidated Edison's high-pressure line. After Millennium and Mount Vernon reached a settlement on the route of the pipeline through the city, we issued a final certificate to Millennium to construct and operate its pipeline, including a specific route through Mount Vernon. *Millennium Pipeline Company, L.P.*, 100 FERC ¶ 61,277 (2002) (the 2002 *Millennium* order).²

5. At the time the Interim Order was issued, the New York State Department of State (NYS DOS) had not completed its consistency review of Millennium's application under the Coastal Zone Management Act.³ Thus, the Interim Order held that Millennium could not construct facilities until it received an affirmative coastal zone determination from the NYSDOS.

6. On May 9, 2002, the NYSDOS found that Millennium's proposals were inconsistent with New York's Coastal Management Program. The NYSDOS decision prevented Millennium from constructing its pipeline across the Hudson River and through portions of Westchester County. Millennium appealed the NYSDOS' decision to the Secretary of Commerce. The Secretary of Commerce denied Millennium's appeal and Millennium appealed the denial to the United States District Court for the District of

¹ In a contemporaneous application, Columbia, among other things, requested permission and approval to abandon facilities.

² In 2006, Millennium Pipeline Company, L.P. changed its name to Millennium Pipeline Company, L.L.C.

³ 16 U.S.C. § 1451 *et seq.* (2004).

Columbia. The court denied Millennium's appeal.⁴ Consequently, the Millennium pipeline was never constructed.

7. As a result of the decision in *Gutierrez*, and to meet the current needs of the natural gas market, Millennium redesigned the project approved for construction in the 2002 *Millennium* order. Specifically, Millennium proposed to acquire, construct, and operate pipeline facilities from the North Greenwood compressor station in south central New York, east to the Buena Vista measurement and regulation station in Rockland County, New York. Millennium also requested that the Commission vacate that portion of the 2002 *Millennium* order that authorized it to construct facilities from the United States-Canada border to North Greenwood and from the Ramapo measurement and regulation station in Rockland County to Mount Vernon.⁵ In addition, EPI, a newly-formed pipeline company, and Empire, an existing Hinshaw pipeline, proposed to construct facilities to connect Empire's system to Millennium at the Corning compressor station near Corning, New York.⁶ EPI also requested authorization to operate the facilities to be constructed, as well as Empire's existing system, as a jurisdictional company under the Natural Gas Act.⁷ Algonquin proposed to construct and operate pipeline and compressor facilities to transport gas from a connection with Millennium at the Ramapo station to a connection with Iroquois in the Town of Brookfield, Connecticut. Iroquois proposed to construct and operate compressor facilities to transport gas to the New York City metropolitan area.

8. The 2006 *Millennium* order, among other things, amended the certificates issued to Millennium and Columbia in the 2002 *Millennium* order, vacated the portions of the

⁴ *Millennium Pipeline Co. v. Gutierrez*, 424 F.Supp.2d 168 (D.D.C. 2006). Millennium did not appeal the *Gutierrez* decision.

⁵ Columbia requested authority to, among other things, change some of the facilities it proposed to abandon.

⁶ Empire's existing system extends from a connection with TransCanada at the United States-Canada border to a point near Syracuse, New York.

⁷ Subject to an evaluation of environmental issues, we issued a preliminary determination authorizing EPI's proposals. *Empire State Pipeline*, 116 FERC ¶ 61,074 (2006).

2002 *Millennium* order that were no longer needed,⁸ issued certificates to EPI to construct and operate facilities and to operate the existing Empire system,⁹ issued a certificate to Algonquin to construct and operate pipeline and compression facilities, and amended a certificate issued to Iroquois to construct and operate compressor facilities.

9. The issues raised in the requests for clarification or rehearing of the 2006 *Millennium* order are discussed below.

II. Discussion

A. Empire's and EPI's Requests for Clarification or Rehearing

1. Certificate Authorization for Empire

a. Background

10. Empire is an existing Hinshaw pipeline exempt from the Commission's jurisdiction under section 1(c) of the Natural Gas Act. Empire is a joint venture between Empire State Pipeline Company, LLC (Empire LLC) and St. Clair Pipeline Company, LLC (St. Clair LLC). Empire LLC and St. Clair LLC own the Empire facilities as tenants in common.

11. EPI is a newly formed company with no pipeline facilities. On the in-service date of the proposed facilities, Empire LLC and St. Clair LLC will merge into EPI. Effective with the merger, EPI will be vested with all of the property, assets, debts, obligations, and liabilities previously belonging to Empire LLC and St. Clair LLC, including ownership of the Empire facilities. The 2006 *Millennium* order authorized EPI, but not Empire, to construct facilities to connect Empire's existing system to Millennium, to construct a compressor station on Empire's system, and to replace and relocate a pressure reduction station and the pipeline between the current and new location of the pressure reduction station.

⁸ On February 19, 2002, in Docket No. CP98-150-005, Millennium made a compliance filing in response to the Interim Order. That filing is moot because of the 2006 *Millennium* order.

⁹ On September 18, 2006, in Docket No. CP06-5-003, Empire and EPI made their compliance filing in response to the preliminary determination.

b. Request for Clarification or Rehearing

12. Empire contends that EPI was not intended to own facilities until the post-construction merger of Empire LLC and St. Clair LLC into EPI. Prior to the merger and during construction of the project, Empire contends that it will be the entity carrying out the construction activities authorized in the 2006 *Millennium* order. Empire asserts that it will be merged into EPI prior to the commencement of the services authorized in the order, but not before construction of the project. Moreover, Empire contends that having EPI construct a compressor station and replace and relocate a pressure reduction station on Empire's existing facilities "would cause unnecessary complications." Thus, Empire requests that the authorization in the 2006 *Millennium* order should be granted to both Empire and EPI.

c. Commission Holding

13. We cannot issue a section 7(c) certificate to Empire because Empire is a Hinshaw pipeline that never intends to be a natural gas company under the Natural Gas Act. As proposed, Empire would accept the certificate, construct facilities, then go out of business without ever performing a jurisdictional sales or transportation service.¹⁰ We do not believe it is appropriate to issue, in essence, a construction-only certificate. Thus, we will not grant Empire's and EPI's requests for clarification or rehearing and issue a certificate to Empire. We note that as the holder of the certificate issued herein, EPI need not perform the actual construction of the facilities. It remains, however, responsible for ensuring compliance with all applicable environmental conditions.

2. The Empire-National Fuel Gas Distribution Corporation Agreement

a. Background

14. The 2006 *Millennium* order found that the contract between Empire and National Fuel Gas Distribution Corporation (National Fuel Distribution) qualified as a non-affiliated transaction because National Fuel Gas Company (NFG), an affiliate of National Fuel Distribution, did not own any interest in Empire at the time the contract was entered into in 1994.¹¹ The order also stated that if the contract is renegotiated, EPI will have to justify a discount given to an affiliate.

¹⁰ We also note that if Empire were a certificate holder, it would need to apply for abandonment authority prior to Empire LLC and St. Clair LLC merging into EPI.

¹¹ NFG acquired an interest in Empire in 2003.

b. Request for Clarification or Rehearing

15. EPI and Empire state that the preliminary determination required EPI to renegotiate Empire's existing contracts using EPI's standard pro forma service agreement as the starting point for drafting any negotiated rate or contract.¹² EPI and Empire request clarification, or in the alternative rehearing, that the mere restatement of the 1994 contract with National Fuel Distribution on the pro forma agreement form appearing in EPI's tariff will not constitute a renegotiation for purposes of its having to justify the rate as a discount to an affiliate. EPI and Empire contend that the preservation of the pre-existing discounted rates under the restated contract cannot be reasonably viewed as a new affiliate discount.

16. EPI and Empire also request that the Commission clarify that they can modify the rate provision in the restatement of the Empire and National Fuel Distribution contract to preserve National Fuel Distribution's pre-existing effective per unit cost without changing the contract's status as a non-affiliated contract. EPI and Empire contend that in an effort to comply with the requirement that they restate the 1994 contract with National Fuel Distribution, EPI conditionally agreed to offer National Fuel Distribution a straight fixed variable (SFV) reservation rate that, while lower than the reservation rate under the 1994 agreement, would result in the same annual transportation revenues generated by the 1994 agreement based on recent load factors. EPI and Empire state that the adjusted rate would fit within EPI's recourse rate and would not require approval as a negotiated rate. EPI and Empire allege that the change would preserve National Fuel Distribution's cost of transporting gas under the 1994 contract and should not be viewed as a renegotiation that would convert the contract into an affiliated transaction.

c. Commission Holding

17. Since EPI will operate Empire's existing Hinshaw pipeline as an interstate pipeline, the preliminary determination required EPI to renegotiate Empire's existing contracts using EPI's Commission-approved pro forma service agreement as the starting point, rather than simply incorporating contracts under Empire's New York pro forma service agreement into EPI's jurisdictional tariff. We clarify that while a new contract executed between EPI and National Fuel Distribution is an affiliate contract for the reason provided in the 2006 *Millennium* order,¹³ the contract will be accorded non-affiliate status for calculating a discount adjustment. It was not our intent that the mere

¹² Preliminary Determination at P 136.

¹³ 117 FERC ¶ 61,319 at P 191.

restatement of the 1994 contract with National Fuel Distribution on to EPI's standard pro forma service agreement would constitute a renegotiation that would require that the restated contract be treated as a new affiliate discount, because the restatement would not change the underlying economic bargain between the parties. Similarly, we find that a restated agreement that adopts a SFV rate design, to preserve National Fuel Distribution's pre-existing effective per unit costs, can be treated as a non-affiliate transaction for the purposes of calculating a discount adjustment.¹⁴

B. Millennium's Request for Clarification

1. Rate Schedules PALS and IPP Nominations

18. The 2006 *Millennium* order required that Millennium revise section 7.4(e) of its General Terms and Conditions (GT&C) to detail the procedures and timelines under which it will implement various alternative scheduling arrangements for rejected Parking and Lending Service (PALS) and Interruptible Paper Pool (IPP) nominations.¹⁵ Millennium contends that the procedures and timelines are adequately set forth in the tariff and requests that we find that the revisions are not necessary.

19. Upon further review, we find that Millennium's existing tariff adequately sets forth the procedures and timelines under which it will implement the alternative scheduling arrangements and that it is not necessary for Millennium to revise its tariff.

2. Multi-Year Seasonal Agreements

20. The 2006 *Millennium* order required Millennium to revise section 4 of its GT&C to acknowledge that shippers with multi-year seasonal agreements at the maximum recourse rate also have a regulatory right of first refusal.¹⁶

¹⁴ We distinguish between the burden of proof the pipeline must meet, depending upon whether a discount was given to a non-affiliate or an affiliate. In the case of discounts to non-affiliated shippers, it is a reasonable presumption that a pipeline will always seek the highest rate from such shippers, since it is in the pipeline's own economic interest to do so. However, if parties raise reasonable questions whether competition required a discount, the pipeline bears the ultimate burden of proof on this issue. See *Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309 at P 59 (2005).

¹⁵ 117 FERC ¶ 61,319 at P 141.

¹⁶ *Id.* at P 158.

21. Millennium contends that it does not offer multi-year seasonal service under a seasonal rate schedule. Millennium requests clarification that it may defer making the revision until it offers such service.

22. Since it does not currently offer multi-year service under a seasonal rate schedule, we will not require Millennium to revise its tariff. However, if it does in the future offer multi-year seasonal service under a seasonal rate schedule, we will require Millennium to revise its tariff to provide a regulatory right of first refusal at that time.

3. North American Energy Standards Board Standards

23. Millennium requests clarification that it will not be required to reflect any version of North American Energy Standards Board (NAESB) standards until that version has been adopted by the Commission and incorporated in the regulations.

24. When it files its actual tariff sheets at least 90 days prior to the in-service date of the proposed facilities, we will require Millennium to reflect the latest version of the NAESB standards that have been adopted by the Commission and incorporated in section 284.12 of the regulations.

C. Algonquin's and KeySpan's Requests for Rehearing and Clarification

1. Background

25. In its application, Algonquin proposed to reflect fuel use and lost and unaccounted-for fuel (LAUF) associated with its construction of additional compression in the fuel retention percentages calculated under section 32 of its GT&C.

26. In its motion to intervene, the New England Local Distribution Companies (New England LDCs) contended that the use of Algonquin's fuel retention percentages to recover the cost of fuel use and LAUF associated with the addition of compression could result in the existing firm shippers subsidizing the proposed expansion. Because they believed that the information to make such a determination was lacking in the pleadings, the New England LDCs requested that the Commission direct Algonquin to provide sufficient information to confirm that there would be no subsidy by existing firm customers with respect to the fuel use and LAUF associated with the proposed increase in compression.

27. The 2006 *Millennium* order held that the Certificate Policy Statement required that expansion facilities be financially viable without subsidies from existing customers.¹⁷ For this reason, we directed Algonquin to ensure that expansion fuel use costs are the responsibility of only the expansion shippers and Algonquin and that no costs attributable to the proposed expansion would be charged to existing shippers.¹⁸ We also required Algonquin to delineate the actual fuel use and LAUF associated with its proposal in the annual fuel tracker filing required by section 32, so that existing shippers could review the costs and verify that only expansion shippers are assessed fuel costs attributable to expansion service.

28. Algonquin and KeySpan request that the Commission clarify that the 2006 *Millennium* order did not mean to preclude Algonquin from assessing fuel charges associated with the new facilities to existing shippers to the extent Algonquin can demonstrate that the new facilities benefit existing shippers, as well as expansion shippers.

2. Commission Holding

29. In the 2006 *Millennium* order, we required Algonquin to ensure that only expansion shippers be charged for fuel associated with the expansion facilities. We did not mean to preclude Algonquin from proposing a charge to existing shippers to the extent that the existing shippers derive a benefit from the expansion facilities. The principle of cost incurrence following cost responsibility underlies the cost allocation and rate design processes, and while the Certificate Policy Statement regarding expansion facilities is meant to ensure that there is no subsidization of expansion facilities by existing shippers, it is not meant to preclude existing shippers from paying a share of expansion costs to the extent that existing shippers benefit from expansion facilities. Thus, Algonquin may propose to assess costs associated with the expansion facilities to existing shippers to the extent that Algonquin can demonstrate that the expansion facilities benefit existing shippers, as well as the expansion shippers.

¹⁷ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹⁸ 117 FERC ¶ 61,319 at P 107 and Ordering Paragraph (H).

III. Environment

30. In letters dated December 19, 2006, and January 18, March 26, April 3, and April 23, 2007, Peter and Alice Supa filed comments about the impact of Millennium's proposed construction on their property in Broome County, New York. On April 16 and April 18, 2007, Millennium responded to the Supas' comments. Since these comments were filed after the issuance of the 2006 *Millennium* order, we will address them here.

A. Millennium's Hydrologic Evaluation of the Supa Property

31. Environmental condition 58 of the Interim Order required Millennium to prepare a report about the spring which supplies water on the Supas' property. Specifically, the condition required Millennium to assess if pipeline construction would intersect the water bearing stratum that feeds the spring or the spring's water source; whether the pipeline trench would convey water away from the spring based on trench elevations; and, if so, to develop engineering and/or other mitigation measures (including a re-route up slope to avoid the water table) to maintain uninterrupted flow to the spring and cistern. To meet this requirement, Millennium installed piezometers in boreholes drilled along the pipeline route on the Supas' property, conducted analyses of water quality, and recorded water measurements in the boreholes for more than one year.

32. On February 26, 2007, Millennium filed a "Hydrologic Evaluation of the Supa Property" (Hydrologic Report) as required by environmental condition 58. The Hydrologic Report examined two additional instances where the Supas reported sediment in their water supply subsequent to Millennium's November 29, 2006 filing.¹⁹

33. Millennium's Hydrologic Report found that the water supply on the Supas' property is within fractured reservoir rock and that water moves within the fractures. Generally, the fractures are continuous through the rock, but decrease in size and density with depth. Basically, the Hydrologic Report found that groundwater flow is downhill and follows the topography. The Supas' spring formed where the soil down slope of the spring confines the groundwater within the fractured rock and discharges it to the surface.

¹⁹ Millennium's November 29 filing addressed claims by the Supas that wells drilled on their property had damaged their water supply. The November 29 filing examined two reports by the Supas that claimed their cistern was cloudy. Millennium's November 29 filing was addressed in the 2006 *Millennium* order. 117 FERC ¶ 61,319 at P 261-271.

34. The Hydrologic Report also found that measured water levels varied by a maximum of eight feet, but most measurements varied by approximately two feet during the year of observations. Measured water levels show that trench excavation would likely intersect the groundwater surface and may extend up to four feet into the reservoir rock. The Hydrologic Report concluded that the trench could serve as a preferential pathway for the downslope movement of a limited amount of groundwater and might cause a small change in the recharge of the Supas' spring by redirecting the water. However, the Hydrologic Report also found that the installation of clay trench breakers across the trench would minimize the flow of groundwater along the trench. The Hydrologic Report recommended that trench excavation use a tracked excavator, possibly supplemented with a ram hoe in hard areas. The Hydrologic Report found that any soil densification caused by equipment operations would not affect the Supas' spring because groundwater movement is in the rock fractures underlying the soil which will not be affected by any consolidation of the soil.

1. **March 26, 2007 Supa Letter**

35. As a result of the installation of the piezometers, Mr. Supa contends that there is a problem with diminished water flow in the collector and, when combined with the less than full capacity of the cistern, Mr. Supa is concerned about a water shortage.²⁰ Mr. Supa contends overflow was measured at 23.3 gallons per minute (gpm) in January 2006. He states he measured an overflow of 0.68 gpm on March 7, 2007, and measured an overflow of 8 gpm on March 21, 2007, which was a warm rainy day with snow melting. He states that the overflow was 40 gpm on April 1999. Mr. Supa concludes that installation of the piezometers damaged the water supply.

36. Mr. Supa points out that water quality testing performed by Millennium's consultant showed the presence of *Escherichia coli* (*E. coli*). Mr. Supa states that his earlier testing showed no *E. coli* in the water. He concludes that the installation and/or removal of the piezometers introduced *E. coli* into the water supply. According to Mr. Supa, the level of *E. coli* in the water now requires the use of a disinfection system.

37. Mr. Supa contends that the measurements of the "Depth to Static Water Level" in the Hydrologic Report were incorrectly measured from the top of the PVC pipe that extended above the ground surface by 1.74 to 2.40 feet, rather than from the ground surface. From this, Mr. Supa asserts that the depth to the groundwater table is approximately two feet shallower than the Hydrologic report indicates.

²⁰ Millennium installed the piezometers between September 27 and October 6, 2005, and removed them in October 2006.

38. Mr. Supa comments that the description of trench excavation does not include leveling the construction right-of-way which would make the ground surface lower. Mr. Supa contends that the use of heavy equipment over the reservoir rock and the use of a ram hoe would cause further fractures in the reservoir rock and will damage the water supply.

39. Mr. Supa concludes that the pipeline route should be moved farther upslope away from his spring to follow the Rockefeller pipelines to avoid further damage to their water supply system.²¹ However, he speculates that there may be spilled petroleum products that might be disturbed by pipeline construction at the location of the Rockefeller pipelines. He also requests that Millennium correct the existing damage to their water supply system.

2. April 16, 2007 Millennium Letter

40. With regard to diminished water flow, Millennium contends that the Hydrologic Report concluded that flow from the Supas' spring varies, with the flow being higher during the spring and rainy season or during unusual weather events.²² Millennium asserts that since the flow is subject to seasonal variation and precipitation, it is not appropriate to conclude that the four flow measurements demonstrate that water flow is diminished. Millennium contends that Mr. Supa's claim that "the dramatic decrease in water flow can only be attributed to the installation of the piezometers" is not supported. While the Supas have indicated that a measurement taken by Mr. Supa in April 1999 indicated a flow rate of 40 gpm, Millennium asserts that it is not aware of any recorded measurements of discharge rates at the spring prior to the installation of the piezometers in October 2005.

41. Millennium contends that Mr. Supa's conclusions about the presence of *E. coli* in the water are speculative. Specifically, Millennium asserts that the Hydrologic Report shows that *E. coli* were present in water from the spring that was collected on October 27, 2006, and was present in water tested from boreholes 11B and 12A, which are near the spring. These samples were collected on October 5, 2005, when the study began. Also, Millennium points out that total coliform are present in the sample collected from the Supas' spring on October 27, 2006, and in the samples collected October 5, 2005 from boreholes 3, 8B, 11B, and 12A. Millennium asserts that this sampling indicates that bacteria, including coliform, were present in the Supas' spring since the beginning of the

²¹ The Rockefeller pipelines are abandoned petroleum products lines.

²² The report included four water discharge measurements at the cistern overflow.

hydrogeologic investigation and that they were present in the saturated subsurface up to depths of 47 feet below the ground surface. Millennium contends that fluctuations in the presence of *E. coli* and total coliform are a function of weather and ground conditions and are also dependant on the nature and condition of the source of the bacteria, especially in rural farm lands.

42. Millennium contends that no hydrocarbon was observed when the piezometer was installed in borehole 1 on September 27, 2005, during the instantaneous displacement test of piezometer 1 on October 3, 2005, or during measurements taken at piezometer 1 on October 7, 2005. Millennium asserts that evidence of suspected hydrocarbons was first observed on January 12, 2006. Millennium also asserts that no evidence of hydrocarbons was observed at any of the fifteen other piezometers, including piezometers 11A, 11B, 12A, and 12B which were upslope from the Supas' spring.

43. Millennium contends that it recently completed the civil survey of the Supas' property and that the survey will enable it to determine the precise location of the abandoned Rockefeller pipelines in relation to Millennium's right-of-way. If the pipelines are within the construction right-of-way, Millennium contends it will manage construction in a manner that is consistent with its environmental construction standards (ECS) and that all efforts will be made to prevent spills of any amounts of petroleum product or polluting materials. Millennium maintains that its Spill Prevention, Containment and Control plan in the ECS includes prevention, containment, and clean up procedures to minimize the potential for spills and to address instances, if and when construction activities cause a spill.

44. In response to Mr. Supa's statement that the Hydrologic Report contains misleading information, Millennium contends that the report is consistent with generally accepted professional practice for subsurface investigations, including hydrogeologic investigations. Millennium asserts that field measurements were taken from the top of the piezometer casing because that elevation is surveyed relative to mean sea level (or some other reference elevation) and that the report included static water level elevations in feet above mean sea level measured relative to the surveyed top of the casing elevations. Millennium believes that the report's conclusion that pipeline construction will not cause significant or noticeable impact to the Supas' spring or water supply system is correct. Thus, based on the Hydrologic Report, Millennium contends that it does not need to change the approved pipeline alignment.

3. Commission Response

45. We note that *E. coli* was present in the initial water samples collected at the beginning of the study. It does not appear that installation of the piezometers and the testing procedures introduced *E. coli* to the water.

46. Water flow from the water supply system appears to vary seasonally with rain events and with snow melt, since the data collected for the report shows that flow rates ranged from a high of 23.3 gpm on January 12, 2006, to a low of 4.4 gpm on July 6, 2006. Since only one year of data was collected for the Hydrologic Report, the conclusion that there is a seasonal variation is speculative based only on the report. It is also speculative to conclude that the installation of the piezometers affected the flow rate.

47. However, there is a seasonal component to the recharge of the reservoir supplying the Supas' spring, since it is recharged from surface sources. The reservoir serving the Supas' spring is within the Clinton Street Ballpark Valley Aquifer System (Clinton Street Aquifer). The aquifer is composed of highly permeable glacial sediments which facilitate rapid and direct infiltration into the ground water zone. Groundwater for the Clinton Street Aquifer originates in several ways. Precipitation within the streamflow source zone can directly or indirectly, via captured runoff, recharge the streams and rivers that ultimately enter the Susquehanna River Valley. Precipitation also enters the aquifer system by direct infiltration through permeable soils within the recharge zone or by runoff from surrounding hillsides which are underlain by impermeable till or bedrock.²³

48. Contaminants entering the Susquehanna River through direct discharge, or indirectly by feeder streams, can also impact the aquifer because of significant recharging from the river. There are several areas in Broome County, within the Towns of Johnson City, Endicott, and Vestal, where the presence of coliform bacteria has been detected in well water. These levels of bacterial growth correspond to increased excavation and dredging activities in the Susquehanna River and to upstream discharge from sewage treatment plants.²⁴ We conclude that rain events, snow melt, and seasonal precipitation variations affect recharge and discharge rates at wells and springs within the Clinton Street Aquifer. Contaminants may be derived from the Susquehanna River by recharge and pollutants present on the ground surface may be introduced into the aquifer by indirect infiltration. These factors have contributed and will continue to contribute to the ground water in the Clinton Street Aquifer and in the Supas' spring.

49. The Hydrologic Report shows that pipeline construction will intersect the water table of the reservoir that supplies the Supas' spring. The Hydrologic Report points out the potential for the excavated trench to capture some of the groundwater flow and to serve as a conduit to move groundwater away from the Supas' spring. To mitigate this possibility, Millennium proposes to install clay trench breakers to block the flow of

²³ See www.epa.gov/Region2/water/aquifer/clinton/clinton.htm#I9.

²⁴ *Id.*

groundwater away from the spring. While we believe that Millennium's proposal is appropriate, we will require Millennium to provide more details about this mitigation in the site-specific plan for crossing the Supas' property.²⁵

50. We note that the pipeline route along the New York State Electric and Gas Company (NYSEG) powerline right-of-way approved in the 2006 *Millennium* order was developed to address the issues raised by NYSEG about the safe operation of both facilities when they are located along the same corridor. We also took into account the Supas' spring in moving the pipeline. These considerations resulted in the pipeline centerline being moved farther upslope and away from the Supas' spring so that the separation between the pipeline and the spring is approximately 350 feet.²⁶ In light of the environmental conditions attached to the Interim Order, the 2006 *Millennium* order, and the additional conditions adopted here, and considering the Hydrologic Report, we conclude that Millennium does not need to realign the approved pipeline route across the Supas' property.

B. Millennium's Supa Construction Plan

51. On March 2, 2007, Millennium filed its implementation plan as required by environmental condition 6 of the 2006 *Millennium* order. The implementation plan included the Supa Construction Plan in compliance with environmental condition 23 of that order. Specifically, condition 23 required Millennium to develop a site-specific plan for construction and restoration across the Supas' property that considers alternative construction methods and limited access across the Supas' property along the construction right-of-way after construction. Millennium shall file the site-specific plan with the Secretary for review and written approval of the Director of OEP prior to construction in this area.

52. Millennium's proposed pipeline will cross approximately 1,450 feet of the Supas' property between mileposts (MP) 241.9 and 242.2. The pipeline will be aligned parallel to and along the south side of the NYSEG electric transmission right-of-way, which is occupied by three sets of electric transmission lines. The route will cross upland and wetland areas.

53. Millennium proposes to use a 75-foot wide construction right-of-way and will require two 25 by 100 foot areas of extra workspace, one at a wetland crossing and one

²⁵ Millennium's site-specific Supa Construction Plan is discussed below.

²⁶ The three sets of NYSEG powerlines lie between the pipeline and the spring.

where the pipeline forms an angle and changes direction to continue following the powerline. Access to the property will be limited to the construction workspaces. Once the construction workspaces have been graded, stabilized, and reseeded, Millennium will limit construction-related access to follow-up restoration work, removal of temporary erosion and sediment control devices, and follow-up monitoring of wetland restoration.

54. Two wetlands are within the construction right-of-way on the Supas' property near MP 241.9 (70 feet across where pipeline will be constructed) and MP 242.0 (63 feet across where pipeline will be constructed). No waterbodies will be crossed on this property. The Supas' spring is approximately 350 feet north of the pipeline centerline near MP 242.1. Assuming a trench depth of seven feet, pipeline construction will intersect a portion of the reservoir rock supplying the Supas' spring.

55. Under the Supa Construction Plan, Millennium plans to control the potential transmission of groundwater along the trench and away from the Supas' spring by installing trench breakers. Millennium plans to monitor the spring before and after construction for flow rate and will test water quality for analyte, total alkalinity, bicarbonate, chloride, corrosivity, nitrite, nitrate, pH, total dissolved solids, sulfate, arsenic, barium, calcium, cadmium, chromium, copper, iron, potassium, magnesium, manganese, sodium, lead, selenium, zinc, total coliform, *E. coli*, and standard plate count. Millennium contends that it will provide a temporary water supply if the spring is compromised during construction.

56. Millennium believes that standard pipeline construction methods will be appropriate rather than the stove-pipe method because the stove-pipe method would take one to two weeks longer to complete construction, since a smaller crew and less equipment would be used requiring additional time for ingress and egress to the property. In addition, Millennium asserts that use of the stove-pipe method will not eliminate the concerns raised by the Supas as to the potential impact to groundwater supplies, since the trench would be installed at the same depth and the same mitigation techniques would be implemented. Millennium states that it will address potential issues regarding the Supas' spring through the groundwater monitoring program, which will be conducted regardless of the type of construction method used on the property.

1. April 3, 2007 Supa Letter

57. Mr. Supa contends that the Supa Construction Plan is unacceptable because it does not protect their water supply and "does not address the extensive and potential serious damage to our water reservoir and water system." In addition, Mr. Supa asserts that the plan does not address the need for hardened crossings for their logging operation and NYSEG's maintenance of the electric lines. Mr. Supa wants pipeline construction procedures that are specific to his property and not an explanation of "typical"

construction procedures. He states that the “Typical Wetland Crossing” shown in figure 24 of the Supa Construction Plan does not show wetland and upland areas as stated earlier in the text of the plan.

58. Mr. Supa maintains that pipeline construction will intersect with water flow, but that the plan contains no mention of how much water will be diverted and what preventive measures will be used to prevent pollution to their water reservoirs. Specifically, Mr. Supa raises concerns about grease and oil from construction machinery entering the reservoir, the pipe trenching encountering “weathered diesel” fuel, the introduction of more *E. coli* into the water reservoir, refueling stations, portable workplace toilets, the alteration of the construction right-of-way surface in relation to the original grade, destruction of woods and two deer stands on their property, testing for bacteria, volume of water, presence of petroleum, the steep side-slope on the property, additional erosion controls, and temporary repair of ruts on steep side slopes during construction.

2. April 18, 2007 Millennium Letter

59. Millennium contends that the Supa Construction Plan includes the specific steps it will implement while constructing the project across the Supas’ property. Millennium asserts that the plan describes the environmental characteristics of the Supas’ property, considers alternative construction methods, and describes the construction and restoration methods that will be used.

60. In regard to the water reservoir and water supply system, Millennium contends that it conducted a study of the water supply on the Supas’ property and prepared the Hydrologic Report, which was incorporated into the Supa Construction Plan. The report provides information on how Millennium will control groundwater and ensure that the integrity of the Supas’ water supply is not compromised during construction.

61. Millennium asserts that it was not aware of the need for hardened crossings. Millennium points out that anyone who needs to cross over a pipeline with heavy equipment must notify the pipeline directly or contact the state utility One Call system so that inspectors can mark the pipeline. After that, temporary mats or earthen berms must be installed on the right-of-way for the movement of equipment.

62. Millennium contends that no refueling will be conducted on the Supas’ property since the property is within 100 feet of wetlands and is in an area that recharges a potable water supply. Millennium indicates that it will require contractors to use portable toilets and that it will post signs. Millennium also contends that once the pipeline is installed, the grade of the construction right-of-way and workspaces will be returned as closely as practicable to pre-construction contours. Further, Millennium states that the existing

grade of the pipeline right-of-way is not considered severe and that the pipeline can be constructed using standard construction techniques without the need to implement special side-slope construction techniques.

3. Commission Response

63. Millennium indicates that it will not need to use special construction techniques like side-slope construction to install the pipeline across the Supas' property. Millennium will also use the erosion and sediment controls described in its ECS to control erosion. These will be maintained throughout construction until construction workspaces are restored. Thus, we find that Millennium's description of the construction procedures it will use to cross the Supas' property is appropriate.

64. The Supa Construction Plan describes the mitigation Millennium will use to minimize the potential for groundwater to flow away from the Supas' spring via the pipeline trench by using trench breakers. However, we find that additional detail about the placement, spacing, and design of the trench breakers should be included in the site-specific Supa Construction Plan. Thus, we will require that:

Millennium shall modify its Supa Construction Plan to include specific details about the spacing, placement, and design of the trench breakers it will install in the trench to control groundwater flow on the Supas' property. The modified Supa Construction Plan shall be filed with the Secretary for review and written approval of the Director of the Office of Energy Projects (OEP) prior to construction on the Supas' property.

65. Millennium's ECS includes procedures for vehicle maintenance and refueling that will be implemented throughout the project, including at workspaces on the Supas' property. Millennium indicates that it will not conduct any refueling on the Supas' property. Millennium shall follow these procedures.

66. As to the need for hardened crossings on the Supas' property, we note that the Supas and others commented about this issue earlier in the proceeding. At that time, Millennium responded that landowners should directly inform Millennium about this need during easement negotiations so that the locations for permanent hardened crossings could be constructed when the pipeline is installed. Thus, the Supa Construction Plan should include the location(s) of hardened crossings.

67. Millennium's ECS includes a provision stating that all man-made structures that are disturbed or damaged during construction will be repaired or replaced and left in equivalent or better condition than prior to construction, unless otherwise specified in the

easement agreement. Since Mr. Supas' deer stands are man-made structures, they should be repaired or replaced as required by the ECS.

68. As discussed above, Millennium plans to monitor the Supas' spring before and after construction for flow rate and will test water quality for substances including total coliform and E. coli.

C. Diesel Fuel

69. In their December 19, January 18, March 26, and April 3 letters, the Supas raise concerns about diesel fuel contamination found at piezometer 1 on January 12, 2006.

70. The 2006 *Millennium* order noted that Millennium's November 29 filing did not indicate whether diesel fuel was observed prior to or after January 12, nor did it indicate possible sources for the diesel fuel. For these reasons, the 2006 *Millennium* order required Millennium to report on the potential sources of diesel fuel observed on November 29; whether there is any further evidence of diesel fuel; whether there is a need for clean up; and, if so, a plan for clean up.²⁷

71. Millennium states that it is currently preparing a report about the diesel fuel observed at piezometer 1 in compliance with environmental condition 55. Millennium asserts that the report on diesel fuel will include the collection and laboratory analysis of soil and groundwater in the vicinity of the former site of piezometer 1 and that the report will include an evaluation of the laboratory analysis and a recommendation about further actions if appropriate. In light of the fact that Millennium's report on diesel fuel is pending, we believe that it would be premature to address this issue at this time.

D. April 23, 2007 Supa Letter

72. Mr. Supa contends that the pipeline route is directly over south boreholes 1 through 6 and is directly over the four abandoned Rockefeller oil pipelines. Mr. Supa states that the "weathered oil/diesel" found in borehole 1 came from the abandoned Rockefeller pipeline. Mr. Supa asserts that the Millennium pipeline route will require Millennium to dig up more than 775 feet of the old pipelines on the Supas' property and about 1,500 feet of the old pipelines on adjoining properties, which will pollute the underlying aquifer and will further damage their water supply.

²⁷ 117 FERC ¶ 61,319, environmental condition 55.

73. Mr. Supa mentioned the Rockefeller pipelines in previous filings. Millennium asserts that the completion of the civil survey will allow it to better locate the Rockefeller pipelines and that it will implement the procedures in its ECS for dealing with the removal of old pipelines. While we agree that Millennium should implement the procedures in its ECS, we will require that, prior to construction, Millennium sample the construction right-of-way where it will disturb the abandoned Rockefeller pipelines on the Supa and adjacent properties to assess the level of hydrocarbon contamination, and develop a plan for removal of the abandoned pipelines and potentially contaminated excavated materials. Thus, we will require that:

Millennium shall conduct a study to evaluate the level of hydrocarbon contamination along the abandoned Rockefeller pipeline right-of-way where project construction will disturb these abandoned facilities on the Supa and adjacent properties. A report about this study should be filed with the Secretary for review and written approval of the Director of OEP prior to construction on the Supas' property. The report should include a plan for removal of the abandoned pipeline and for treatment of any contaminated excavated material that may be found.

74. The results of this study may require modification of the Supa Construction Plan. Environmental condition 23 requires review and written approval by the Director of OEP of this plan. The approval is currently pending.

E. Miscellaneous Issues from the January 18, 2007 Supa Letter

75. Mr. Supa claims that the 2006 *Millennium* order refers to "existing powerline towers," rather than "H frame wooden powerline poles." He questions if this is the result of Millennium misidentifying the powerlines in 1999 as being Niagara Mohawk steel towers rather than NYSEG powerlines. Mr. Supa also states that widening an existing corridor for pipeline construction means that the project is a "greenfield" project.

76. The use of the words "powerline towers" in the 2006 *Millennium* order is generic and doesn't reflect wooden or steel construction. The use of the words does not have a relationship to a data response from Millennium in 1999. Millennium's proposal will widen the existing utility corridor, but it will not create a new corridor. Since no new construction corridor will be created, the proposed construction on the Supas' property is not a greenfield project.

The Commission orders:

(A) The requests for clarification or, in the alternative, for rehearing are granted and denied as discussed in the body of this order.

(B) Millennium shall comply with the environmental conditions adopted in this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.