

104 FERC ¶ 61,145  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Greenbrier Pipeline Company, LLC

Docket Nos. CP02-396-003  
CP02-397-003  
CP02-398-003

ORDER DENYING LATE INTERVENTION, DENYING, IN PART,  
AND DISMISSING, IN PART, REHEARING

(Issued July 28, 2003)

1. In this order, the Commission addresses the requests for rehearing of the order issued in this proceeding on April 9, 2003 (April 9 order),<sup>1</sup> as well as those comments on the final environmental impact statement (FEIS) for this proceeding which were filed after the April 9 order issued.
2. In the April 9 order, the Commission, after completing its environmental analysis, issued a certificate of public convenience and necessity to Greenbrier Pipeline Company, LLC (Greenbrier), authorizing it to construct and operate the Greenbrier Pipeline Project, comprised of approximately 279 miles of pipeline in West Virginia, Virginia and North Carolina. The April 9 order also denied requests for rehearing of the October 31, 2002 preliminary determination (October 31 order) which addressed the non-environmental issues raised in this proceeding, and found that Greenbrier's proposed Greenbrier Pipeline Project was required by the public convenience and necessity.<sup>2</sup>
3. On April 14, 2003, Phoebe A. Meadows filed a motion to intervene out-of-time and request for rehearing of the April 9 order. On May 8, 2003, Floyd County, Virginia filed a request for rehearing and reconsideration of the April 9 order. Also on May 8, 2003, Jerry A. Warren filed a motion to intervene out of time and a request for rehearing

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<sup>1</sup>Greenbrier Pipeline Company, LLC, 103 FERC ¶ 61,023 (2003).

<sup>2</sup>Greenbrier Pipeline Company, LLC, 101 FERC ¶ 61,122 (2002).

of the April 9 order.<sup>3</sup> On May 9, 2003, Floyd Unified Landowner's Association (FULA), George W. Keatley, Jim Williams, and Michelle Bankey<sup>4</sup> filed requests for rehearing of the April 9 order.

4. In addition, after the April 9 order was issued, a number of other parties, including Dr. Daniel Porter, the Virginia Department of Environmental Quality (VADEQ), North Carolina Department of Administration (NCDA), U. S. Environmental Protection Agency (EPA), Floyd County (Virginia) Board of Supervisors (Floyd County), Retha and Jerry A. Warren, Lora Leigh Giessler, Allen W. Dudley, and Diana Adkins, filed comments to the FEIS.<sup>5</sup>

5. For reasons discussed below, the Commission denies the requests for rehearing of FULA, George W. Keatley, Jim Williams, and Michelle Bankey. Additionally, the Commission denies Phoebe A. Meadows' and Jerry A. Warren's motions to intervene out-of-time, and dismisses their rehearing requests. However, we will treat their specific complaints as comments and discuss them below.

### **Background**

6. On July 3, 2002, Greenbrier filed an application for a certificate of public convenience and necessity under Section 7(c) of the NGA, to construct and operate the Greenbrier Pipeline Project. Greenbrier's project would extend from east of Clendenin, in Kanawha County, West Virginia, through West Virginia, southwestern Virginia and North Carolina, to its terminus near Stem, in Granville County, North Carolina, and

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<sup>3</sup>Mr. Warren filed an earlier motion to intervene out-of-time on April 12, 2003.

<sup>4</sup>Ms. Bankey's rehearing request includes a request that the Commission act on her March 28, 2003 request for rehearing of the FEIS. A FEIS is not a final order of the Commission under the rules providing for rehearing requests. In the April 9 order, the Commission addressed, as comments on the FEIS, issues raised in Ms. Bankey's March 28, 2003 filing. Those issues are further addressed in this order to the extent that they compare to the issues raised in Ms. Bankey's request for rehearing of the April 9 order.

<sup>5</sup>In one case, the comments were filed on the same day the Commission issued the April 9 order. Comments which are wholly repetitive of earlier-filed comments already addressed by the Commission will not be discussed in this order.

comprises approximately 279 miles of pipeline,<sup>6</sup> two compressor stations, and related facilities to provide up to 600,000 dekatherms per day (Dth/d) of firm transportation service. Greenbrier also filed applications requesting blanket certificates pursuant to Subpart G and Subpart F of Part 284 of the Commission's regulations.

7. The October 31 order found, based on non-environmental issues, that the Greenbrier Pipeline Project is in the public interest because it will create supply diversity and new competition, and meet a portion of the growing energy market needs in the South Atlantic region. Specifically, Commission found that the Greenbrier Pipeline Project will bring 600,000 Dth/d of gas to meet a variety anticipated loads, including local distribution companies' growth, new electric power plants, and other needs. The Commission also determined that through its interconnections with Dominion Transmission, Inc. (DTI), Greenbrier will provide its customers with access to a large market hub for the mid-Atlantic and northeast regions. Finally, the Commission found that the Greenbrier Pipeline Project will also provide seasonal services, access to storage, and high-pressure deliverability. The Commission concluded that the public benefits of the proposed project will outweigh any adverse impacts.

8. After completing its environmental analysis, the Commission granted Greenbrier final certificate authorization, subject to environmental compliance conditions in the April 9 order.<sup>7</sup>

### **Late Interventions**

9. On April 12, 2003, Jerry A. Warren filed a motion to intervene out-of-time. Mr. Warren states in his motion that his property will be greatly damaged if the project is completed and that he did not intervene earlier because he "originally thought the rules and regulations would be followed." Thereafter, on May 8, 2003, Mr. Warren filed a request for rehearing in which he claimed that Mercer County, West Virginia residents were discriminated against because they did not receive adequate notice of meetings and the DEIS was not in the public library. Mr. Warren also asserts that the Commission did not adequately investigate the claim that three of the four plants Greenbrier is to serve are

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<sup>6</sup>In addition to a 275.6-mile-long, 20-, 24- and 30-inch diameter mainline, the Greenbrier Pipeline Project would have three lateral lines, a 1.0-mile-long, 12-inch-diameter, a 2.1-mile-long, 10-inch-diameter, and a 0.7-mile-long, 30-inch-diameter line.

<sup>7</sup>Additionally, the April 9 order granted Greenbrier's and Public Service Company of North Carolina, Inc.'s request for clarification, and denied the various requests for rehearing of the October 31 order.

not being built. On April 14, 2003, Phoebe A. Meadows filed a motion to intervene out-of-time and request for rehearing also questioning the need for the project based on the allegation that three of the four plants Greenbrier is to serve are not being built.

10. When late intervention is sought after the issuance of an order disposing of an application, the prejudice to the other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.<sup>8</sup>

11. Mr. Warren and Ms. Meadows have failed to establish that good cause exists to grant their motions. Mr. Warren acknowledges that he was aware of the proceeding, but chose not to intervene earlier. Ms. Meadows gives no reason for the late request. Moreover, the record in this case demonstrates that there was sufficient opportunity for all the affected landowners to have received notice and comment on the proposed project. Further, we note that the concerns raised by Mr. Warren and Ms. Meadows have been addressed in either the October 31 order, the April 9 order, or in this order. Accordingly, we find that Mr. Warren's and Ms. Meadows' concerns have been adequately addressed. Under these circumstances, the movants have failed to demonstrate good cause for granting their intervention and we will deny their motions to intervene out-of-time. As a consequence, their requests for rehearing are dismissed. However, as noted above, we will treat their specific complaints as comments and discuss them below.

### **Rehearing Requests**

#### **Lack of Public Benefit/Costs to Affected Local Communities**

12. Ms. Bankey asserts that the Commission has discounted the adverse economic impacts and costs to the communities affected by the project. Ms. Bankey states that the Commission fails to acknowledge that in the rural areas impacted by the pipeline, economic and environmental issues are interrelated. Ms. Bankey also claims that no local infrastructure will receive any benefits from the project.

13. Specifically, Ms. Bankey states that issues have been raised regarding the impact of pipeline construction activities on the environment, tourism, business, farming and logging activities (including loss of prime farmland and timber resources), and historic

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<sup>8</sup>18 C.F.R. §§ 385.214(d)(1)(ii), 214(d)(iv) (2003); North Baja Pipeline, L.L.C., 99 FERC ¶ 61,028 (2002).

resources. Ms. Bankey asserts that these issues go beyond the issue of compensation to right-of-way landowners.

### **Commission Response**

14. The April 9 order rejected claims that impacts and costs to the communities affected by the project were in any way discounted. The April 9 order detailed the types of increased economic activity that local economies would enjoy, in particular during the period of pipeline construction activities. The April 9 order further explained that adverse economic impacts that the Greenbrier Pipeline Project might have on landowners are addressed by monetary compensation, either through negotiation between the individual landowners and the pipeline company or through the eminent domain process. This would include compensation for any loss of prime farmland or timber resources. The April 9 order further notes that a number of counties and communities along the proposed pipeline route have expressed a desire that taps be installed allowing them to receive natural gas service from Greenbrier.

15. While the April 9 order recognizes that there will be some permanent adverse environmental impacts resulting from construction and operation of the Greenbrier project, those impacts would be limited. In some areas of rugged or steep terrain, contours in some locations would be modified beyond the life of the project, and new or wider corridors would have some effect on the visual quality of forested ridges and mountain regions. However, as noted in the April 9 order, these adverse effects will be minimized by revegetation and other mitigation measures that are required of Greenbrier. Ms. Bankey fails to explain how these impacts in any way translate to economic loss to anyone other than those entitled to be compensated through eminent domain proceedings.

### **Actual Need**

16. Ms. Bankey questions the need for the Greenbrier Pipeline Project because public announcements indicate that three of the four power projects that Greenbrier proposed to serve have been cancelled, leaving most of the pipeline's capacity unsubscribed.<sup>9</sup> Ms. Bankey contends that the Commission should not certificate a project where only 11.7 percent of the project's capacity is subscribed under a firm agreement. Moreover, Ms. Bankey argues that the certificate's condition that construction not commence until contracts for 90 percent of the project's capacity are filed does not protect landowners

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<sup>9</sup>Ms. Meadows and Mr. Warren also question the need for the project for the same reason in their requests for rehearing.

from the burdens and expenses, or avoid the consequences, of eminent domain proceedings. Finally, Ms. Bankey states that it is not enough to say that significant increases in demand will support the project, since its location is based on the proposed customers, who no longer appear to exist.

### **Commission Response**

17. It is without doubt that the Southeast region of the United States is growing and that additional infrastructure will be needed to meet energy needs associated with this growth. The questions regarding the need for the project center on the contention that three of the four power plants have been cancelled, thus rendering the project substantially unsubscribed. We disagree with this line of reasoning. While we have seen various changes in the energy markets in the last few years, one fact remains clear; there is a continuing need for energy across the various consuming sectors in the region, including industrial, commercial, and residential.

18. Specifically, localized gas consumption, in North Carolina and Virginia in particular, has shown rapid growth over the past five years. For example, gas used by all consumers in North Carolina almost tripled between 1997 to 2002, growing from 90,915 MMcf to 244,399 MMcf. Likewise, natural gas use in Virginia increased significantly in the same time period, rising from 135,800 MMcf in 1997 to 210,727 MMcf.<sup>10</sup> Similarly, natural gas deliveries to electric power consumers in North Carolina showed a marked increase, almost quadrupling between 2001 and 2002 alone, rising from 12,265 MMcf to 46,304 MMcf. Virginia showed a more modest increase during the same time frame, but use nevertheless rose from 33,124 MMcf in 2001 to 34,104 MMcf in 2002.<sup>11</sup> What this actual usage data demonstrates is that there is continuing growth in energy demand in the specific regions the Greenbrier pipeline will traverse. While we believe that the energy growth projections set forth in the April 9 order are still valid, the data showing actual usage trends clearly demonstrates that this region is continuing to grow and will need additional natural gas infrastructure to meet its expanding energy requirements.

19. Contrary to Ms. Bankey's assertion, we did not certificate this project with only 11.7 percent of the capacity subscribed. Greenbrier has 90 percent of the project's

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<sup>10</sup>See the Energy Information Administration's Natural Gas Monthly, April 2003 (Table 19 - Natural Gas Deliveries to Consumers by State). The 2002 data for Virginia was for 10 months only; no data was available for October and November 2002.

<sup>11</sup>See the Energy Information Administration's Natural Gas Monthly, April 2003 (Table 18 - Natural Gas Deliveries to Electric Power Consumers, by State).

capacity under firm precedent agreements, and must execute firm contracts equal to that level of subscription prior to commencing construction. If, as Ms. Bankey asserts, Greenbrier cannot turn its precedents agreements into more than the one firm transportation agreement that it currently has executed, Greenbrier cannot start constructing its pipeline facilities. In the April 9 order, we recognized that energy markets have been volatile recently and subject to frequent adjustment and change. However, that, in and of itself, does not carry sufficient weight to question the validity of this project. Greenbrier's shippers are still committed to the project. As we noted in the April 9 order, the fact that the development of certain power plants may not be undertaken at this time does not discount the need for infrastructure to be in place so that growing demand can be met in a timely manner and not subject to delays. While Greenbrier does not propose to commence service until May 1, 2005, it still must have its markets in place in time to have the facilities constructed and available for service.

20. Ms. Bankey asserts that changes in markets would not support the project because the facilities are sited specifically for the locations set for the proposed customers. To the extent that some portion of the current market for the project does not materialize, Greenbrier will need to find replacement shippers to meet the 90 percent requirement before it can commence construction. If markets develop in locations that require Greenbrier to change its certificated route, then Greenbrier would have to seek approval for such changes. However, Greenbrier remains confident that growth in the region will foster markets for the project. Thus, reports at this time about the cancellation of certain proposed power plants does not preclude the development of other markets in their place.

21. It is further argued that the certificate condition requiring contracts before construction does not protect landowners from the burdens associated with eminent domain proceedings. While certificates of public convenience and necessity contain the power of eminent domain, the Commission prefers that project sponsors work cooperatively with landowners in acquiring easement agreements. To the extent that a pipeline exercises the power of eminent domain, that right is governed by applicable state law and ensures compensation to the affected landowner. The issue of compensation is a local issue and separate and apart from the contract requirement, which insures that a project is viable prior to a pipeline commencing construction.

### **Lack of Communication and Notice**

22. Jerry A. Warren and George W. Keatley complain that not enough public meetings were held, dates of meetings held were not adequately publicized in local newspapers and the media contacts were inadequate, and that the DEIS was not distributed to the public

library in Princeton, Mercer County, West Virginia. Mr. Warren states that these facts suggest that Mercer County residents were discriminated against.

### **Commission Response**

23. Mr. Keatley's and Mr. Warren's complaint regarding the adequacy of meetings and notices was fully and appropriately addressed in Appendix M of the FEIS. As explained there, a more than reasonable effort was made to notify the public about this project. Initially, environmental notices were sent to all known landowners consistent with our regulations. Some of these notices were returned by the post office for various reasons (e.g., no forwarding address, no such address, insufficient address, etc.). The initial notices required interested stakeholders to either return the notice or send a comment letter to the Commission in order to remain on the mailing list. Thereafter, we mailed the DEIS to interested stakeholders, interveners, and federal, state, and local officials.<sup>12</sup>

24. In short, all critical notices for this project were appropriately published in the Federal Register, and copies of the EIS were mailed to stakeholders.<sup>13</sup> In addition, the public has access to all information filed in both Docket Nos. CP02- 396-000 and PF01-1-000. In fact, Greenbrier also sent copies of the filed information to some public libraries in the project area to enhance access to this information.

25. Additionally, information has been available from the FERC website, and notices have been sent to media outlets along the route. We also supplied some public libraries along the route with a copy of the DEIS and FEIS for public review. When it was brought to our attention that certain public libraries did not receive a copy of the DEIS, we mailed a copy of the DEIS to those libraries, and they were placed on the mailing list for the FEIS. In fact, this occurred in the case of the Princeton, West Virginia library.

26. Although neither NEPA nor the CEQ regulations require holding public comment meetings for a DEIS, nonetheless, our staff held meetings where practicable or possible to provide an additional method for the public to submit their comments to us. The Commission does not have unlimited resources, and cannot hold meetings in every local jurisdiction crossed by a major project. The Commission uses the mail service to reach affected stakeholders and publishes our notices in the Federal Register. In turn, all stakeholders had the capability of documenting their concerns and filing them with the Commission, by mail or electronically, regardless of public meeting locations and dates.

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<sup>12</sup>See Appendix A in the DEIS for this list.

<sup>13</sup>See Appendix A of the FEIS.

### **Affect on Aquifer/Groundwater**

27. Ms. Bankey, FULA, and Floyd County state that the Commission has not adequately addressed their concerns that construction activities and blasting will adversely impact aquifers, aquifer recharge areas and drinking water. Floyd County and FULA assert that a site-specific ground water study of the Floyd County region is required. Floyd County contends that absent such a study, the Commission has failed to meet its NEPA obligation to take a "hard look" at this issue. Floyd County requests that Greenbrier post a \$250,000 bond to cover any damage to wells or groundwater, and FULA supports this request.

### **Commission Response**

28. As noted in the April 9 order, the FEIS addressed the ground water issues raised by Floyd County and FULA during the NEPA process. Neither Floyd County nor FULA raised the specific question of what effects blasting might have on recharge areas of the aquifer during the NEPA pre-filing process, scoping, or in comments on the DEIS. The issue of blasting effects on the aquifer related specifically to the need for a local study to identify recharge areas was not raised until after the FEIS was issued.<sup>14</sup>

29. Nonetheless, the FEIS acknowledged that aquifers might be affected by the project and the potential impact of trenching on recharge to aquifers. It states the "effect is likely to be minor because of the small area of the pipeline trench and right-of-way relative to the total potential recharge area."<sup>15</sup> The FEIS continues with more analysis of the impacts from blasting to open a trench for the pipeline, and environmental conditions 1, 12, 14, 15, and 16 in the April 9 order include measures recommended in the FEIS to protect water resources in the project area.

30. We remain convinced that Section 3.3.1.2 of the FEIS adequately assesses impacts on recharge to aquifers and that the measures recommended in the FEIS and required in the April 9 order are sufficient to protect landowners from impacts. The disturbance for pipeline construction only affects a shallow layer on the earth's surface (typically about an

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<sup>14</sup>We note that Floyd County's March 24, 2003 letter identified for the first time this specific concern as a component of a groundwater study that it believes needs to be conducted in order to appropriately mitigate the effect of construction on its aquifer. FULA identified this concern for the first time in its May 8, 2003 request for rehearing.

<sup>15</sup>FEIS, Section 3.3.1.2, at 3-24.

8-foot-deep trench) and does not create impermeable areas such as roads or buildings which would prevent recharge. Blasting may increase the porosity and permeability of the rock within and near the trench which in turn may enhance recharge along the trench line because increased infiltration would increase the amount of water that does not immediately runoff. Greenbrier would install trench breakers to prevent water from rapidly migrating along the trench line. In addition, Greenbrier has agreed to monitor wells within 500 feet of the trench. This distance is significantly greater than that routinely required by the Commission (150 feet) and was requested by our staff in response to the concerns expressed by commenters.

31. Contrary to Floyd County's claim in its rehearing request that the FEIS has made a "determination that the groundwater of the county will be untouched by the project" and that "[m]ore data is needed to adequately assess such a sweeping conclusion," the FEIS clearly identifies potential impacts to groundwater and wells and recommends appropriate mitigation for these potential impacts. The FEIS has indicated that wells and springs should be monitored and if damaged the owner should be compensated for damages, including providing a new source of water.<sup>16</sup> Therefore, we believe our FEIS has sufficiently analyzed ground water impact and that no further study is necessary.<sup>17</sup>

32. On June 30, 2003, Floyd County filed a motion to amend and supplement its rehearing request.<sup>18</sup> Floyd County's motion included two reports/studies: Floyd County Scope: Hydrogeologic Conditions and Potential Impacts of Proposed Greenbrier Gas Pipeline and Monitoring Strategy to Assess Impacts (Monitoring Strategy Report) by Thomas J. Burbey, and William J. Seaton's dissertation Aquifer Characterization in the Blue Ridge Physiographic Province, January 2002. Floyd County submits that these documents provide new information that the hydrogeology of Floyd County is unique and

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<sup>16</sup>See, e.g., FEIS at 2-31, 3-4, and 3-5, and specifically Section 3.3.1.2, at 3-23.

<sup>17</sup>We also note that Greenbrier indicated that it was willing to, and did, work with Floyd County to determine the need to perform another ground water study. We provided in the April 9 order that while we did not believe such a study was needed, the party paying for the study should be able to select the firm, and that the Commission's staff would give appropriate consideration to such a study.

<sup>18</sup>On July 7, 2003, the Honorable Wm. Roscoe Reynolds, Virginia State Senator, 20th Senatorial District, filed a motion joining in Floyd County's June 30, 2003 motion. Although Sen. Reynolds is not a party to these proceedings, the Commission is, as he requests, considering the June 30, 2003 motion in this order.

complex, that further in-depth examinations of the potential impacts need to be completed, and that the aquifer recharge areas must be identified to ensure their integrity.

33. Floyd County believes that these recently filed reports justify the need for further study because many wells in Floyd County rely upon the saprolite layer (shallow layer soils) for their water supply and fracturing in the underlying bedrock may cause "the shallow wells to sink." Floyd County contends that we have ignored Drs. Burbey's and Seaton's cautions about the need to conduct monitoring and sampling of the water supplies within a 1000-foot corridor centered on the pipeline.

34. We have not ignored these precautions. The April 9 order requires Greenbrier to conduct this monitoring.<sup>19</sup> These conditions (mitigation measures) apply regardless of whether a well taps a shallow or deep aquifer. The Monitoring Strategy Report filed by Floyd County also states that an evaluation of the potential effects imposed by the construction or existence of the pipeline on potable water supplies, which include wells and springs, indicates that impacts are likely to be negligible and/or temporary in nature. The Monitoring Strategy Report also states that of the possible impacts (primarily to the shallow aquifer), increased or enhanced recharge is likely to be the largest. The Monitoring Strategy Report further indicates that based on existing evidence and recent research activities in the area, a detailed investigation is unwarranted. It is believed that the evidence provided in this assessment is sufficient for quantifying potential impacts.

35. The information provided by the Monitoring Strategy Report is consistent with the information previously presented in our staff's EIS, and it provides more site-specific information for our record. Therefore, we do not agree that it provides a basis for the need to conduct additional studies on this resource.

36. Finally, the April 9 order rejected Floyd County' request for a bond to indemnify against damage to Floyd County's ground water, and neither Floyd County nor FULA, on rehearing, have provided any new basis for reconsidering that request.

### **Alternative Routes not Considered**

37. Jim Williams, an affected landowner, claims in his rehearing request that the FEIS did not sufficiently address alternatives that would make greater use of "various existing North/South right-of-way corridors" to bring Gulf Coast gas to the project area. Mr. Williams believes the FEIS should have evaluated the use of various, unspecified existing

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<sup>19</sup>See environmental conditions 1 and 12 and page 2-31 of the FEIS.

rights-of-way down the coastal plain from northern New Jersey to North Carolina to transport Canadian natural gas, including an extension of the Millennium Pipeline Project that was authorized on September 19, 2002 under Docket No. CP98-150-000, et al.

38. Mr. Williams also states his opinion that there are other energy source alternatives, such as wind and solar energy, that would make better energy alternatives. Mr. Williams argues that the project could have been divided up among these energy sources, and that installation of the pipeline capacity could be delayed until it is needed at a future date.

39. Ms. Bankey maintains that because of changed circumstances in the natural gas market, including the cancellation of power plants Greenbrier's project was originally intended to serve, the Commission should review anew the no action alternative or postponed action alternative, as well as the two Major System Alternatives, since they were rejected for reasons related to Greenbrier's original objectives, which no longer apply.

### **Commission Response**

40. Mr. Williams' newly identified "generic" system alternatives are not reasonable, practical, or timely. NEPA does not provide parties with an endless opportunity to create new issues or concerns that require further study. Section 4.2 of the FEIS discussed system alternatives that are considered reasonable and closer to the project area. Mr. Williams did not identify any routes for his system alternatives. As for Mr. Williams' reference to an extension of the Millennium Pipeline Project, we note that although authorized, the Millennium Pipeline Project does not exist and is not under construction. We will not speculate on whether or when this new pipeline will be placed in service. As for Mr. Williams' reference to alternative wind and solar energy sources, the FEIS has addressed these alternative energy source concepts in Chapter 4 and we do not believe any further analysis is necessary.

### **Other Comments Regarding Alternatives**

41. In addition to these rehearing requests, several parties commented that the FEIS did not sufficiently address alternatives. Dr. Daniel Porter filed comments which included a map that appears to be a realignment of the route of the Porter-Galla Variation that he would now like considered. Dr. Porter also believes the map presented in the FEIS does not conform to the photo alignment map for the proposed route. We disagree. Comment Response 3.3-2 in Appendix M of the FEIS discussed how we used the filed topographic maps and the aerial photo-alignment sheets. The maps in the FEIS are sufficient. Furthermore, comments on the DEIS were due on December 16, 2002. On

February 28, 2003, the Commission issued the FEIS. Therefore, Dr. Porter's request to study a revised alignment for this variation, filed on April 9, 2003, is untimely.

42. EPA contends that it is difficult to determine from the FEIS whether the chosen route is the least damaging alternative overall. The FEIS did not make such a determination. NEPA does not mandate selection of the least damaging alternative. Use of this selection criteria would result in the "No Action Alternative" being selected for all projects. NEPA requires decision makers to make informed decisions and to take a hard look at what the environmental impacts of a project are. However, other considerations besides the environment must be factored into decisions that affect the public convenience and necessity.

43. EPA also states that the FEIS does not provide the type and quality of maps or alternative comparison tables and figures needed for the reader to gain an understanding of the scope of the project and of the relative impacts of the alternatives that our staff developed. EPA also suggests that the FEIS needs to study the alternatives that the company considered while it was developing its project.

44. The EIS contains more than adequate maps for identifying the project's location and contains the necessary comparisons. EPA also suggests that the FEIS should have studied the alternatives that Greenbrier considered while it was developing its project. Our staff used scoping to identify what the significant issues were for the affected federal, state, and local governments and other stakeholders in the project area, and studied all of the stakeholder-identified alternatives and variations, including alternatives our staff identified, in the EIS. Greenbrier's application included information on these alternatives, yet no party, including EPA, identified these alternatives as preferred. Since our staff studied all the alternatives the stakeholders were interested in, we find that the FEIS sufficiently considered all reasonable alternatives. Therefore, we believe that the discussion of the alternatives in the FEIS is sufficient.

#### **Lack of Due Process/NEPA violations**

##### **Changes in Crossing Method for the Little River and West Fork Little River**

45. FULA asserts that the decision to change the crossing method on the Little River and West Fork Little River, without adequate disclosure and opportunity for comment, constitutes denial of due process. FULA states that it would prefer that horizontal direction drilling (HDD) be used to complete these crossings in lieu of the cofferdam

construction method. FULA suggests that an HDD would afford increased protection to potential recharge zones for the aquifer.

### **Commission Response**

46. NEPA does not require an agency to essentially restart its environmental review for a project every time an adjustment is made to it. As disclosed in the FEIS, use of the cofferdam method would decrease the area required by the project since it would eliminate the need to clear/use a "false right-of-way" and reduce the clearing of forested areas. Therefore, less total acreage would be needed with the use of the cofferdam method. Both the HDD and cofferdam construction methods are considered "dry" stream crossing construction methods and information provided by Greenbrier and our contacts with the appropriate state agencies indicate that the cofferdam construction method is acceptable. This information was filed as part of our public record and the information was properly disclosed and discussed in the FEIS that was mailed to the public. The public has also been afforded an opportunity to comment on the FEIS.

### **NEPA Pre-filing Procedures**

47. FULA contends that in a number of ways, the NEPA pre-filing process has undermined the landowners' and communities' rights to due process. First, FULA claims that there were no filing procedures in place to ensure the public's opportunity to knowledgeably participate in the process. Moreover, FULA states that due to the informality of the pre-filing process, Commission staff appeared not to be impartial, but rather to play an advisory, promotional role. Second, concerned citizens had little or no information to use as a basis to comment in scoping meetings held prior to the application being filed, and the comment period closed before the application was posted on FERRIS or available at public locations. Third, FULA claims that pre-filing comments were sent to a "black hole," and not made a part of the record proceedings once the certificate application was filed. FULA concludes that the overall effect of the pre-filing process was to speed up the filing process and shorten the time period needed by landowners to understand, identify, and comment on environmental issues. According to FULA, the FEIS was completed, and the certificate was issued in record time.

### **Commission Response**

48. The Commission established an exclusive PF docket number, Docket No. PF01-1-000, for the project to use during the NEPA pre-filing process, in which Greenbrier filed information for its project. Other information received by the Secretary of the Commission for the project, including letters from stakeholders, Commission notices, and

memorandums of meetings our staff participated in, were also filed under this docket and all of this information was available to the public via FERRIS, telephone request, or written contacts with our Public Reference and Files Maintenance Branch or other offices that interact with the public. Greenbrier's filings were also placed in public libraries after stakeholders identified difficulties with gaining access to the information. In addition, after the application was filed, Greenbrier was required to comply with the Landowner Notification requirements of Section 157.6 of our regulations.

49. Our May 21, 2002 Notice of Public Scoping Meetings and Site Visit for the Greenbrier Pipeline Project and Request for Comments on Environmental Issues requested that comments be received on or before June 20, 2002. Greenbrier filed its application on July 3, 2002. However, on July 8, 2002, we issued a Notice of Applications for the project, in which it was stated that Greenbrier had participated in the NEPA pre-filing process. The Notice of Applications also reopened scoping and provided instructions for filing environmental comments on the project, without providing a closing date. Consequently, the public had reasonable access to the filed information, an opportunity to participate in the proceeding, and an unrestricted opportunity to provide scoping comments on the project.<sup>20</sup>

50. Moreover, the October 31 order granted intervenor status under Docket No. CP02-396-000, et al., to all parties who filed motions to intervene in Docket No. PF01-1-000. The April 9 order reaffirms this and identifies more intervenors from Docket No. PF01-1-000.

51. We find FULA's complaints regarding our staffs' conduct during the pre-filing process to be without merit. The Commission also did not waive the ex parte rule for its environmental staff during the NEPA pre-filing process. Our environmental staff is allowed to discuss the project with all stakeholders but must document information that is not procedural. The record developed in Docket No. PF01-1-000 provides numerous memoranda to the file that show this obligation was fulfilled.

52. FULA's allegation that the pre-filing comments were not transferred to Docket No. CP02-396-000 and the concerns were sent to a "black hole" is also baseless. The DEIS discusses the concerns that were identified by stakeholders during the NEPA pre-filing process and thereafter, and fully discloses the procedural process that was used. The

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<sup>20</sup>Normally 30 days are allowed to provide timely scoping comments. The DEIS was issued more than 90 days after the July 8, 2002 notice.

record before the Commission has been placed under two docket number prefixes and our record and orders reflect this information and that it was considered.

53. Contrary to FULA's claim, the NEPA pre-filing process did not shorten the time period that was required by our staff to complete the FEIS. The project was assigned Docket No. PF01-1-000 on September 27, 2001, and then our staff began to work on the project. The DEIS was issued 13 months later (October 24, 2002). The FEIS was issued on February 28, 2003. Thus, a total of 17 months passed before the FEIS was completed. The NEPA pre-filing process allowed some of the environmental work to occur prior to the filing of the CP docket by shifting the time period during which our staff engaged a third-party environmental contractor, conducted some site visits in the project area, started its coordination with state and Federal agencies, and initiated the scoping process for the project. Scoping, agency contacts, and site visits continued after the certificate application was filed.

54. The NEPA pre-filing process did allow the Commission to process the certificate application in less time after it was filed because the environmental record (FEIS) was completed closer to the filing date. The NEPA pre-filing process also allowed stakeholders, Greenbrier, and the Commission's staff to work together in an attempt to resolve some issues before a "final" project was developed and filed by Greenbrier. We believe that this process helped to resolve some issues and allowed Greenbrier to ultimately file a "better" application that reflected the concerns of some stakeholders in the affected region.

55. In summary, the pre-filing NEPA process was used to involve stakeholders earlier in the route selection process. The pre-filing process identified issues and made it possible for more variations and adjustments to be made to the route by Greenbrier before it filed its application on July 3, 2002. With the filing of Greenbrier's application, the pre-filing NEPA stage was over. The public has had full access to all information consistent with the requirements of our regulations since the application was filed. Information filed under Docket No. PF-1-000 became available as it was filed.

### **Other Comments on the FEIS**

56. Dr. Porter also indicates that, "[t]he most blatant inaccuracy in the FEIS is the statement that our proposal [the Porter-Galla Variation] crosses the headwaters of Beaver Creek [when it is] "not even close"." We note that Dr. Porter has misread the FEIS. The FEIS does state that the variation would cross Beaver Creek. The FEIS also indicates that the Porter-Galla Variation would place the new pipeline adjacent to the headwaters of several streams that feed the Little River. These streams are intermittent and located on

the west-northwest segment of the variation after it crosses State Route 8 east of milepost C-44.5 along the proposed route. Beaver Creek is crossed further east on the variation, and it is the intermittent streams that are in the area being discussed as a "headwaters" crossing. The FEIS is correct in its characterization of these crossings.

57. VADEQ has filed more information on federally listed threatened and endangered species with requests for surveys and coordination with state and Federal agencies. NCDAs has also indicated that it believes that the extent of adverse impacts to listed species cannot be identified without survey information, and that Greenbrier should continue to consult with agencies on listed species.

58. We have prepared our environmental impact statement assuming that the listed species are present and require mitigation. Surveys will have to prove that a species is not present before the requirement for mitigation is removed, and the April 9 order requires this. Environmental condition 28 in Appendix B of the April 9 order ensures that proper coordination and compliance with the requirements of the Endangered Species Act are fulfilled before construction or use of mitigation occurs in an area.

59. VADEQ also seeks to have copies of all survey reports for species sent to the appropriate state agency. Greenbrier is free to provide copies of these reports directly to the Virginia agencies, however, they will be available from our public files. VADEQ and other state agencies can also establish an "eSubscription" on our FERRIS information system, and have filed information automatically sent to them electronically.

60. VADEQ states that Greenbrier's contractors should follow Virginia Department of Transportation guidance IMM-228 for sinkhole repairs as a standard, and that Greenbrier should coordinate with the Virginia Karst Program. Environmental condition 14 of the April 9 order requires Greenbrier to prepare a report that identifies the mitigation measures that will be used during construction if route adjustments cannot avoid a karst feature.<sup>21</sup> Greenbrier must consult with the appropriate state agencies and incorporate the necessary measures in the report for our staff's review and approval.

61. VADEQ comments, incorrectly, that pollution prevention was not addressed in the EIS. VADEQ referenced its December 12, 2002 comment letter on the DEIS which contained a list of pollution prevention principals that could be used by Greenbrier in the

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<sup>21</sup>Karst is a term applied to limestone or dolomite areas that possess a topography characterized by sinkholes, streamless valleys, and streams that disappear into the underground, all developed by the action of surface and underground water.

design and/or operation of its facilities. This comment was previously and adequately addressed in response 3.6-8 in Appendix M of the FEIS .

62. NCDA recommends that agencies be consulted if any method other than a horizontal directional drill (HDD) is used to cross the Dan River in North Carolina. The NCDA's recommendation has already been incorporated. Environmental condition 18 requires Greenbrier to file a plan for the crossing of the Dan River if the HDD is unsuccessful. The Director of the Office of Energy Projects must review and approve the plan in writing before Greenbrier can use an alternative crossing method. We further note that page 3-43 of the FEIS states that construction using alternative plans would not be granted until the necessary state and Federal reviews have been completed and the appropriate permits have been obtained.

63. NCDA has indicated that the EIS does not address the extent of cumulative and secondary impacts in the service area of the pipeline. Specifically, NCDA is concerned about impacts from future development resulting from increased capacity of the pipeline and is particularly interested in coordination to develop measures to reduce impacts to North Carolina's rare aquatic species. NCDA seeks further information on how Public Service Company of North Carolina, Inc., Piedmont Natural Gas Company, Inc., and the other customers might use the natural gas for other development with emphasis on water quality and aquatic and terrestrial wildlife resources. We do not believe it is necessary to expand our analysis even further from the project impacts into areas such as speculating how enhanced gas supply may affect municipalities' development patterns and land uses. Details concerning future development by either the non-jurisdictional companies, power plants, and/or municipalities within the states of North Carolina, South Carolina, and/or Virginia are simply too speculative to include as part of a meaningful environmental analysis.

64. NCDA suggests that measures listed within the North Carolina Wildlife Resources Commission's "Guidance Memorandum to Address and Mitigate Secondary and Cumulative Impacts to Aquatic and Terrestrial Wildlife Resources and Water Quality" (Guidance Memorandum) and other documents addressing secondary and cumulative impacts filing would provide guidance on how to assess impacts such as degradation of streams due to increases in storm water runoff, sedimentation and other pollutants, and riparian habitat loss. The measures to minimize these cumulative and secondary impacts include the preservation of forested stream buffers, the use of proper erosion and sedimentation control measures, the reduction of impervious surfaces, and effective storm water treatment.

65. We note that the Guidance Memorandum is directed more toward mitigating impacts from new developments such as residential subdivisions. Once constructed, the pipeline right-of-way would not hinder water infiltration or require storm water treatment. The pipeline right-of-way would be maintained in a vegetated state and allowed to return to preconstruction conditions in most cases, as recommended in the Guidance Memorandum. Furthermore, a 25-foot-wide strip of riparian vegetation would be maintained adjacent to water bodies to mitigate for secondary impacts. Because of the nature of pipeline projects and with the utilization of Greenbrier's Soil Erosion and Sedimentation Control Plan, we do not believe that the Greenbrier Pipeline Project would have a significant cumulative or secondary impact on the natural environment.

66. EPA also suggests that reducing the number of access roads could significantly reduce project impacts. Greenbrier has identified 212 access roads that it plans to use. However, only about 2.7 miles of new access roads would be constructed. Most of the roads Greenbrier will use are existing access roads and most of the new length is associated with extending existing roads. Greenbrier will widen some roads especially along curves because pipe stringing trucks need to negotiate the curves. Much of this project crosses terrain with severe changes in topography and the roads/trails contain tight curves. Using existing roads to access the construction right-of-way will be more practical than constructing "haul roads" along the construction right-of-way. Furthermore, the analysis in the EIS has assumed a worst case situation and reports on the affected access road acreage during construction and for permanent use as if there is no existing roadway in place. Therefore, the project will impact significantly less access-road acreage than what is identified in FEIS Table 3.8-3.

The Commission orders:

(A) FULA's, George W. Keatley's, Jim Williams', and Michelle Bankey's requests for rehearing of the April 9 order are denied, as discussed in the body of this order.

(B) The motions to intervene out-of-time of Phoebe A. Meadows and Jerry A. Warren are denied, and their requests for rehearing of the April 9 order are dismissed.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.