

135 FERC ¶ 61,163  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Empire Pipeline, Inc.

Docket No. CP10-493-000

ORDER ISSUING CERTIFICATE  
AND APPROVING ABANDONMENT

(Issued May 19, 2011)

1. On August 26, 2010, Empire Pipeline, Inc. (Empire) filed an application under sections 7(b) and 7(c) of the Natural Gas Act (NGA)<sup>1</sup> for a certificate of public convenience and necessity authorizing it to construct, operate, and replace facilities in New York and Pennsylvania (Tioga County Extension Project). As discussed below, the Commission will authorize Empire's proposals, subject to conditions.

**I. Background and Proposals**

2. When it was originally constructed in the early 1990s, Empire<sup>2</sup> consisted of a 24-inch-diameter pipeline extending from an interconnection with TransCanada Pipelines, Ltd. (TransCanada) at the international boundary between the United States and Canada near Chippawa, Ontario, eastward for 157 miles to its terminus near Syracuse, New York (Original Empire Pipeline).<sup>3</sup> The Commission issued a Presidential Permit to Empire to import gas from Canada and granted Empire authorization under NGA section 3 for the construction, operation, and maintenance of border facilities

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<sup>1</sup> 15 U.S.C. § 717f (2006).

<sup>2</sup> Empire was formerly known as Empire State Pipeline.

<sup>3</sup> Empire was certificated by the New York Public Service Commission in 1991.

between Canada and the United States.<sup>4</sup> The Commission also found that Empire was a Hinshaw pipeline, exempt from the Commission's jurisdiction under NGA section 1(c).<sup>5</sup>

3. In 2006, the Commission authorized Empire to construct and operate a 24-inch-diameter pipeline extending from Victor, New York (approximately 60 miles west of Syracuse), southward for 78 miles to an interconnection with Millennium Pipeline Company, L.L.C. (Millennium) near Corning, New York, and a new Oakfield Compressor Station in the Town of Oakfield, Genesee County, New York (together, the Empire Connector facilities).<sup>6</sup> Empire is now a jurisdictional interstate pipeline transporting gas from the United States-Canadian border to customers along its original pipeline system and through the Empire Connector to Millennium.

4. In this proceeding, Empire proposes to construct and operate: (1) approximately 15 miles of 24-inch diameter pipeline to extend the Empire Connector from its interconnection with Millennium in Corning, New York, to interconnections with two natural gas gathering systems in Tioga County, Pennsylvania; (2) an interconnection with the facilities of Tennessee Gas Pipeline Company (Tennessee) in Hopewell, New York; and (3) modifications to Empire's Oakfield Compressor Station to permit bi-directional flow on its system.

5. In addition, Empire proposes to replace approximately 1.36 miles of its existing Original Empire Pipeline near Victor (Lift-and-Lay section) with higher-rated pipe, together with modifications to its New Victor and Old Victor pressure regulating stations. The Commission authorized the replacement of the Lift-and-Lay section as part of the Empire Connector Project in 2006, but Empire subsequently filed a request, that was approved, to remove the Lift-and-Lay section from the Empire Connector Project authorization.<sup>7</sup> Empire states that the services associated with the Tioga County Extension Project now require the replacement of the existing 1.36 miles of 1,000 psig-rated section of pipe with pipe rated at 1,440 psig. Empire asserts that it will remove

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<sup>4</sup> See 54 FERC ¶ 61,050 (1991), *order on reh'g*, 61 FERC ¶ 61,091 (1992).

<sup>5</sup> 56 FERC ¶ 61,050 (1991) (holding that Empire pipeline was eligible for a Hinshaw exemption provided that it obtain a limited-jurisdiction certificate). Section 1(c) allows a pipeline located wholly within one state to engage in interstate commerce without becoming subject to the Commission's jurisdiction, if the pipeline's rates, services, and facilities are regulated by the state and the gas is consumed within the state.

<sup>6</sup> *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319 (2006).

<sup>7</sup> *Empire Pipeline, Inc.*, 124 FERC ¶ 62,177 (2008).

most of the existing pipe to be abandoned; however, it will abandon in place pipeline located under roadways or in other locations where removal is impractical.

6. The proposed facilities, designed to enable a reversal of flow on Empire's system,<sup>8</sup> will permit Empire to receive up to 350,000 Dth per day of Marcellus Shale production in Tioga County, Pennsylvania, and transport that gas to the facilities of TransCanada at the United States-Canadian border at Chippawa.<sup>9</sup> Empire also states that the proposed interconnection with Tennessee in Hopewell, New York, will create an on-the-path secondary point for the project shippers and other shippers with capacity on the Empire Connector pipeline.

7. Empire conducted an open season between November 10 and December 17, 2010, for long-term firm transportation service associated with the proposed facilities. Empire states that it entered into precedent agreements for firm transportation service for the full 350,000 Dth per day of proposed capacity for an initial term of ten years.<sup>10</sup>

8. Empire estimates that the Tioga County Extension Project will cost \$46,762,454, which includes \$1,038,808 as a total allowance for funds used during construction (AFUDC). Empire proposes to use its existing rates for service with primary delivery points on the Empire Connector as the initial recourse rate for project service. Further, Empire states that the revenues to be generated by the proposed project are expected to exceed the costs of service over a 10-year period. Therefore, Empire seeks a predetermination that rolling the costs of the project's facilities into the Empire Connector rates in Empire's next section 4 rate case will be appropriate.

## **II. Interventions**

9. The Commission published notice of Empire's application in the *Federal Register* on September 15, 2010.<sup>11</sup> The Commission received timely, unopposed motions to

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<sup>8</sup> Empire states that no reversal of flow is contemplated on the portion of its system between Victor and Syracuse.

<sup>9</sup> On September 16, 2010, the Commission granted Empire's request to amend its Presidential Permit and NGA section 3 authorization to allow for the export of gas using its existing border facilities. 132 FERC ¶ 61,229 (2010).

<sup>10</sup> Empire states that the precedent agreements contain commercially sensitive information. Empire provided copies of the precedent agreements in a non-public version of Exhibit I submitted with its application.

<sup>11</sup> 75 Fed. Reg. 56,084 (2010).

intervene from National Fuel Gas Distribution Corporation (National Fuel), Sithe/Independence Power Partners, Statoil Natural Gas LLC, and National Grid Gas Delivery Companies.<sup>12</sup> Rochester Gas and Electric Corporation (RG&E) and New York State Electric & Gas Corporation (NYSEG) filed a timely, unopposed, joint motion to intervene.<sup>13</sup> New York State Public Service Commission filed a timely notice of intervention.<sup>14</sup>

10. RG&E and NYSEG filed a protest with their motion to intervene. Empire filed an answer to RG&E and NYSEG's protest. Although the Commission's Rules of Practice and Procedure do not permit answers to protests, the Commission finds good cause to waive Rule 213,<sup>15</sup> as the additional pleadings have provided the Commission with information that has assisted in the decision-making process.<sup>16</sup>

11. In their joint protest, RG&E and NYSEG, local distribution company customers of Empire, state that they do not oppose expansion of the Empire system, but are concerned that Empire has not sufficiently explained its proposals and the effect the proposals will have on Empire's customers. The Commission will address the issues raised in the protest below.

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<sup>12</sup> National Grid includes the following: The Brooklyn Union Gas Company d/b/a National Grid NY; KeySpan Gas East Corporation d/b/a National Grid; Boston Gas Company, Colonial Gas Company, and Essex Gas Company, collectively d/b/a National Grid; EnergyNorth Natural Gas Inc., d/b/a National Grid NH; Niagara Mohawk Power Corporation d/b/a National Grid; and The Narragansett Electric Company d/b/a National Grid. Each of these are subsidiaries of National Grid USA, Inc.

<sup>13</sup> Pursuant to Rule 214(c), 18 C.F.R. § 385.214(c) (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding.

<sup>14</sup> Pursuant to Rule 214(a)(2), 18 C.F.R. § 385.214(a)(2) (2010), a state commission is a party upon filing a timely notice of intervention.

<sup>15</sup> 18 C.F.R. § 385.213(a)(2) (2010).

<sup>16</sup> In its motion to intervene, National Grid filed requests for clarification of Empire's application and a technical conference. On November 29, 2010, National Grid filed notice that it was withdrawing its requests for clarification and a technical conference, as well as an October 28, 2010 answer it made to Empire's answer.

### III. Discussion

#### A. Certificate Policy Statement

12. Since the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction, operation, and abandonment of the facilities are subject to the requirements of the NGA section 7.

13. The Certificate Policy Statement provides guidance as to how it will evaluate proposals for certificating new construction.<sup>17</sup> The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, and the avoidance of the unnecessary exercise of eminent domain or other disruptions of the environment.

14. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

15. Empire's Tioga County Extension Project proposal satisfies the no-subsidization requirement of the Certificate Policy Statement. As discussed below, the revenues to be generated by the proposed project are expected to exceed the project's costs of service over a 10-year period. As a result, the proposed project would not rely on financial subsidies from existing customers.

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<sup>17</sup> *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).

16. In their joint protest, RG&E and NYSEG allege they will be harmed by Empire's proposal, arguing that they will become backhaul customers with an inferior service priority. In response, Empire contends that RG&E and NYSEG are mistaken; Empire maintains that the proposal will result in bi-directional flow capability, which, in addition to creating access to a new supply source, will result in improved reliability and flexibility for existing customers. As discussed below, the Commission finds Empire's proposed tariff clarifications will make clear that RG&E and NYSEG will maintain their existing priority as forward-haul customers on Empire's system.

17. There is no evidence that Empire's proposal will have an adverse affect on any firm transportation services on any other existing pipelines. No other pipeline company in the area protested or raised concerns regarding Empire's application.

18. Prior to the filing of its application, Empire conducted open houses in Corning and Victor, New York for purposes of informing stakeholders of its plans. Empire contacted 120 landowners along the primary and some alternative route segments, and obtained survey permission for 95 percent of the primary corridor. Further, approximately 4.1 miles of the Tioga County Extension is located in the same right-of-way as the Texas Eastern Products Pipeline Company Linemark pipeline. The Lift-and-Lay abandonment and construction activities will occur within Empire's existing right-of-way for approximately 1.3 miles. Thus, we find Empire's proposals were designed to minimize adverse impacts to landowners or the environment.

19. Empire has entered into precedent agreements for all of the firm transportation service to be made available by the Tioga Extension Project. Based on the benefits the proposal will provide, and the lack of any identifiable adverse impacts on existing customers, other pipelines, landowners, and communities, the Commission finds, consistent with the Certificate Policy Statement and NGA section 7(c), that approval of the Tioga County Extension Project is required by the public convenience and necessity, subject to the conditions discussed below. Further, the Commission also finds that the public convenience and necessity permit Empire's abandonment of the facilities described above under section 7(b) of the NGA.

## **B. Proposed Rates**

### **1. Background**

20. Empire's existing system's costs are recovered through two sets of rates. The first rates recover the costs of the Original Empire Pipeline, running from Chippawa at the Canadian border to Victor, New York. A higher, incremental rate applies to service with

primary delivery points on the Empire Connector<sup>18</sup> and recovers costs associated with the Empire Connector pipeline and the Oakfield Compressor Station. Shippers with primary delivery points on the Original Empire Pipeline must pay a tariff-specified incremental charge to access secondary points on the Empire Connector.

## **2. Proposed Initial Rates**

21. Empire proposes to establish its existing Empire Connector rates as the applicable initial recourse rates for the Tioga County Extension Project services. Empire states that it has agreed with its Tioga County Extension Project shippers on discounted firm transportation rates for their proposed services. In addition, Empire proposes to modify section 23.3 of the General Terms and Conditions (GT&C) of its tariff to provide that the Tioga County Extension Project shippers will also be assessed a fuel charge largely attributable to the Oakfield Compressor Station.<sup>19</sup> No party protests the use of the existing Empire Connector rates to recover the non-gas costs of the Tioga County Extension Project. Moreover, those existing rates are higher than what a Tioga County Extension Project rate would be if calculated on an incremental basis. Therefore, the Commission will establish the existing Empire Connector rates as the initial recourse rates for Tioga County Extension Project service.<sup>20</sup> However, as discussed below, RG&E and NYSEG have raised concerns regarding the proposed recovery of fuel costs.

## **3. Compressor Fuel for Oakfield Station**

22. Under section 23.3 of Empire's GT&C, forward-haul firm shippers with primary point(s) of delivery on the Empire Connector, forward-haul firm shippers with service agreements for Incremental Capacity on the Original Empire Pipeline, and forward-haul interruptible shippers using point(s) of delivery on the Empire Connector are currently responsible for the fuel consumed at the Oakfield Compressor Station. In contemplation of the reversal of flow associated with this project, Empire proposes to revise GT&C section 23.3 to expand applicability of the Compressor Fuel Factor to firm shippers with primary point(s) of receipt on the Empire Connector, and interruptible shippers using

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<sup>18</sup> Empire Connector service includes transportation on the Original Empire Pipeline from Chippawa to primary delivery points along the Empire Connector.

<sup>19</sup> Empire filed revised pro forma tariff sheets to implement its proposals in the supplement to Exhibit P filed on October 12, 2010.

<sup>20</sup> See *Tennessee Gas Pipeline Co.*, 125 FERC ¶ 61,100, at P 20 (2008).

point(s) of receipt on the Empire Connector. Empire also proposes to revise section 23.3 to eliminate the references to forward-haul capacity.<sup>21</sup>

**a. Protest**

23. RG&E and NYSEG assert that the effect the proposed tariff changes will have is not clear. Currently, Original Empire Pipeline shippers are not responsible for Oakfield Compressor fuel unless they also subscribe to firm Incremental Capacity on the Original Empire Pipeline. However, in conjunction with its proposed modification of GT&C section 23.3 to ensure coverage of the Tioga County Extension Project Shippers, Empire has also proposed to modify the definition of “Incremental Capacity on the Original Empire Pipeline” at GT&C section 1.23.<sup>22</sup> RG&E and NYSEG contend that the latter revision appears to limit the applicability of the Compressor Fuel Factor to incremental capacity created by north-to-south movement of gas on the Empire Connector. They question why Oakfield Compressor fuel charges would not be assessable to Empire Connector customers no matter what direction the pipeline is flowing.

**b. Answer**

24. Empire asserts that addition of the term “north-to-south” to the definition of “Incremental Capacity on the Original Empire Pipeline” is intended merely to retain the

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<sup>21</sup> Empire proposes to modify GT&C section 23.3 to read as follows:

The Compressor Fuel Factor shall be applicable to the following shippers under Rate Schedule FT: (a) shippers with service agreements for Incremental Capacity on the Original Empire Pipeline, as defined at Section 1.23 of these General Terms and conditions, and (b) all other shippers except shippers with primary Point(s) of Receipt and primary Point(s) of Delivery located on the Original Empire Pipeline. The Compressor Fuel Factor shall also be applicable to shippers under Rate Schedule IT with respect to quantities scheduled for receipt at Point(s) of Receipt located on the Empire Connector or scheduled for delivery at Point(s) of Delivery located on the Empire Connector.

<sup>22</sup> Specifically, Empire proposes to add the phrase “north-to-south,” so that the resulting provision would read: “Incremental Capacity on the Original Empire Pipeline” shall mean capacity on the Original Empire Pipeline made possible by the use of Transporter’s Oakfield Compressor Station when there is north-to-south capacity available on the Empire Connector.”

current scope of the term. Empire states currently under section 23.3, firm shippers using incremental Original Empire Pipeline capacity made available by Oakfield compression, which was designed to move gas in a north-to-south direction, are assessed fuel costs.<sup>23</sup> Empire points out that its Tioga County Extension Project proposal contemplates bi-directional flows on its system between Corning and Chippawa; thus, going forward, at times the Oakfield Compressor Station will be pumping gas towards Chippawa (i.e., south to north). However, Empire points out that its proposed changes to GT&C section 23.3 clearly provide for the Compressor Fuel Factor to apply to all shippers who rely on the existing or extended Empire Connector facilities, regardless of the direction of flow of their service. The Commission also notes that Empire also states that it anticipates that the introduction of a significant supply of new gas into the Empire Connector Pipeline, offsetting flows of gas from TransCanada, will reduce the need to run the compressors at Oakfield, resulting in lower fuel consumption.<sup>24</sup>

**c. Commission Determination**

25. The Commission finds that Empire's proposal to modify the definition of "Incremental Capacity on the Original Empire Pipeline" by adding the term "north-to-south" serves to retain the current scope of the term in light of the addition of bi-directional capabilities to Empire's system, not to limit compressor station fuel charges to only customers flowing gas in a north-to-south direction. In addition, the Commission finds the proposed changes to GT&C section 23.3 clearly provide that the Compressor Fuel Factor will apply to all shippers except those with primary points of receipt and primary points of delivery on the Original Empire Pipeline. Thus, the Commission finds that Empire's clarification of its change to GT&C section 1.23 is sufficient to address the concerns raised by the protestors.

**C. Predetermination of Rolled-in Rates**

26. Empire states that Exhibit N shows that the revenues projected to be generated by the Tioga County Extension Project, which were derived using the subscribed volumes of new services and the agreed upon discounted rates,<sup>25</sup> will exceed the cost of service associated with the project over a 10-year period, thereby supporting its request for a

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<sup>23</sup> Currently there are no shippers contracting for Incremental Capacity on the Original Empire Pipeline.

<sup>24</sup> See Empire's Answer at 6.

<sup>25</sup> See Empire February 7, 2011 Data Request Response, Question 5.

predetermination of rolled-in rate treatment.<sup>26</sup> In fact, the cost and revenue study, using the discounted rates, shows that revenues will exceed costs in every year through 2021. The Commission notes that had Empire used the recourse rate, which is higher than the discounted rate, the projected revenues would have been even higher. Based on these projections, the Commission would expect that if the costs and revenues associated with the project were rolled in with system costs in a section 4 rate case, existing customers would benefit from resultant rates lower than they would be otherwise.<sup>27</sup> Thus, the Commission will grant Empire's request for a predetermination that it may roll the costs of the expansion project into its existing Empire Connector rates in its next NGA section 4 rate proceeding, absent any significant change in circumstances.

#### **D. Predetermination Regarding Billing Determinants**

27. The billing determinants used to develop the initial recourse rates for service on the Empire Connector facilities when they were certificated reflect the total incremental capacity of those facilities (an average of 233,142 Dth per day), which exceeded the firm contracted-capacity (150,750 Dth per day) by 82,392 Dth per day. Empire asserts that this 82,392 Dth per day of project capacity remains unsold because since the completion of the Empire Connector facilities, prices of gas imported at Chippawa have risen substantially relative to gas prices at alternative locations.

28. Empire states, however, that this same market trend has created demand for transportation on the Empire Connector in the reverse direction, and that it is proposing the Tioga County Extension Project in response to that demand. Empire states that the proposals herein will result in firm contracted-capacity of 500,750 Dth per day (150,750 Dth per day originating at Chippawa and 350,000 Dth per day originating in Tioga County, Pennsylvania) across the Empire Connector facilities, which is far more than the design capacity used to establish Empire's initial incremental rates. Empire states that, under these circumstances, it should not be "at risk" for the 82,392 Dth per day of unsold capacity originating at Chippawa. Therefore, Empire seeks a predetermination that this unsold capacity will not be imputed in its rates in rate proceedings following the in-service date of the Tioga County Extension Project.

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<sup>26</sup> Empire requests privileged treatment for Exhibit N (including page 2), which contains the volumes, recourse rate, revenues for each of the 10 years of service, and the total 10-year revenues.

<sup>27</sup> See, e.g., *ETC Tiger Pipeline, LLC*, 134 FERC ¶ 61,084 (2011); *Iroquois Gas Transmission System, L.P.*, 122 FERC ¶ 61,242 (2008); *Tennessee Gas Pipeline Co.*, 125 FERC ¶ 61,100 (2008); *Colorado Interstate Gas Co.*, 99 FERC ¶ 61,262 (2002).

### 1. Protest

29. RG&E and NYSEG disagree with Empire's proposal for a predetermination that the Commission will no longer consider 82,392 Dth "at-risk" in Empire's next rate case. RG&E and NYSEG contend that such a determination is premature, asserting that only operating experience will tell if Empire's assumptions with respect to the increase in throughput will be realized. They further contend that there is no harm to Empire to deferring consideration of this issue until Empire's next rate case.

30. RG&E and NYSEG contend that making such a determination prior to a future rate case may harm Empire's shippers by depriving them of the opportunity to review all of Empire's cost-of-service and related rate case data. They state that Empire has not yet filed any cost and revenue information with the Commission other than in the context of its various certificate proceedings, noting that Empire's Commission-mandated cost/revenue study need not be filed until three years after the in-service date of the Empire Connector facilities.<sup>28</sup> Thus, they contend that rate-related issues must wait until Empire files complete and transparent cost-related information on the Original Empire Pipeline and Empire Connector facilities.

### 2. Answer

31. Empire asserts that its Tioga County Extension Project will result in firm contracted-capacity of 500,750 Dth per day, far more than the 250,000 Dth per day of original design capacity used to establish Empire's initial incremental rates. Empire states that while it still has 82,392 Dth of unsold north-to-south capacity, this project will result in a combined utilization (north-south and south-north) that is more than double the original design capacity of the Empire Connector project. Empire urges the Commission to determine that, absent materially changed circumstances, its future rates will not be based on the assumption that it has sold the entire north-to-south design capacity of 250,000 Dth per day and the entire south-to-north design capacity of 350,000 Dth per day.

### 3. Commission Determination

32. The Commission agrees with RG&E and NYSEG that it is premature to determine, at this juncture, the level of billing determinants appropriate for use in designing Empire's rates going forward. Commission staff, Empire, and all other parties will have the opportunity, not available here, to review and present evidence on all aspects of Empire's rates in Empire's next general NGA section 4 rate proceeding (or in

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<sup>28</sup> *Empire Pipeline, Inc.*, 116 FERC ¶ 61,074, at P 73 (2006). The Empire Connector was placed into service on December 10, 2008.

any section 5 proceeding initiated after review of Empire's three-year cost and revenue filing). Moreover, denial of Empire's request for a predetermination will have no effect on Empire in the meantime. Therefore, Empire's request for a predetermination regarding the level of billing determinants appropriate for use in its next rate case is denied.

## **E. Sharing of Interruptible Revenues**

### **1. Protest**

33. RG&E and NYSEG state that in the Empire Connector certificate proceeding, Empire was required to credit interruptible revenues only to Empire Connector firm and interruptible recourse rate customers.<sup>29</sup> They contend that the Commission did not impose a revenue credit to Original Empire Pipeline customers because it accepted Empire's rationale that Empire had already allocated \$191,000 to interruptible customers on the Original Empire Pipeline in the design of the Original Empire Pipeline rates.<sup>30</sup> RG&E and NYSEG assert that since additional capacity is being constructed and the Original Empire Pipeline will continue to be used by Empire Connector customers, albeit in a different direction, the crediting of interruptible revenues to all customers must be revisited. They state that, under the original configuration of Empire's system, the Original Empire Pipeline was used to bring gas to the Empire Connector, which was then used to deliver gas to markets on the Millennium system. Now, RG&E and NYSEG assert that the reverse may be true, since Marcellus Shale supplies will be brought to market using the Original Empire Pipeline facilities. They contend that Original Empire Pipeline customers should share in interruptible revenues obtained by Empire until it files its next rate case and interruptible revenues can be imputed properly into rates.

### **2. Answer**

34. Empire states that the order authorizing the construction of the Empire Connector Project<sup>31</sup> credits interruptible revenues from transportation transactions involving the use of the Empire Connector to Empire Connector shippers because revenues from interruptible services were not imputed in the derivation of the Empire Connector recourse rates. Empire states, however, that interruptible revenues were imputed in the derivation of Empire's rates for service on the Original Empire Pipeline. Empire asserts,

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<sup>29</sup> *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319 at P 185.

<sup>30</sup> *Id.* P 186.

<sup>31</sup> *Millennium Pipeline Company, L.L.C.*, 117 FERC ¶ 61,319.

therefore, that revenues from interruptible services on that part of its system are not credited.

35. Empire states that neither the creation of bi-directional flow capability nor the addition of new markets on Empire's system would justify changing the crediting of interruptible revenues from Empire Connector transactions. Empire further states that interruptible revenues are credited to Empire Connector shippers because the shippers are subject to incremental rates that do not include those revenues, which is not changed by Empire's proposal herein.

### **3. Commission Determination**

36. RG&E and NYSEG's request pertains to a redesign of Empire's existing rates for existing services, whereas this proceeding pertains to certification of Empire's proposed Tioga County Extension. Thus, the Commission will deny RG&E and NYSEG's request. As the Commission explained above, Empire and all other parties should have the opportunity to review and present evidence on all aspects of Empire's rates in its next general section 4 rate proceeding.

#### **F. Request for a Cost and Revenue Study**

##### **1. Protest**

37. RG&E and NYSEG state that Empire is required to submit a cost and revenue study within three years of the in-service date of the Empire Connector facilities,<sup>32</sup> and contend that the Commission should require Empire to submit a second study within three years of the in-service date of the Tioga County Expansion facilities. RG&E and NYSEG state that their contracts expire in 2013 and contend that having cost and revenue information, including information regarding whether the Original Empire Pipeline customers are subsidizing Empire Connector customers (or vice versa), will be an important factor when assessing whether to renew the contracts.

##### **2. Answer**

38. Empire states that, as required by its certificate authorization, it will file a cost and revenue study following three years of operation under Commission jurisdiction. Empire states that the Empire Connector facilities went into service on December 10, 2008, and that it plans to file a cost and revenue study during the first quarter of 2012, based on data for the 12 months ending December 31, 2011. Subject to Commission approval of its application in this proceeding, Empire anticipates completion of the Tioga County

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<sup>32</sup> *Empire State Pipeline*, 116 FERC ¶ 61,074 at P 133 (2006).

Extension Project by September 2011. Empire expects the incremental costs and revenues associated with its proposals herein to be reflected in its 2012 three-year cost and revenue study; thus, it asserts a second cost and revenue study should not be required. Further, as an expansion of a pipeline already subject to Commission jurisdiction, Empire contends that the Tioga County Extension Project would not justify the filing of an additional cost and revenue study.

### **3. Commission Determination**

39. The Commission will not require Empire to file an additional cost and revenue study as a result of our authorization of an expansion of its existing system. However, since the Commission is granting Empire's requested predetermination that it may roll the costs of the expansion into its existing Empire Connector rates, the Commission will require Empire to maintain separate books and records for the Tioga Extension Project in accordance with section 154.309 of the Commission's regulations and Order No. 710<sup>33</sup> so that Commission staff and/or other parties may attempt to determine whether any cross-subsidization is occurring. Empire is directed to maintain these separate books and records and show them separately on its Form 2 or 2A until Empire's next general NGA section 4 rate proceeding or a section 5 proceeding pertaining to Empire's system-wide rates, revenues, and cost-of-service.

### **G. Allegation of Inferior Backhaul Service for RG&E and NYSEG**

#### **1. Protest**

40. RG&E and NYSEG assert that Empire has not explained adequately the effect of its proposal to reverse the flow of the pipeline on existing customers, especially Original Empire Pipeline customers like themselves. They argue that if the direction of the pipeline is reversed, existing Original Empire Pipeline customers will become backhaul customers on the pipeline. They contend that the direction of service (forward-haul versus backhaul) appears to affect service priorities on the pipeline, citing section 14.6 of Empire's GT&C.<sup>34</sup> Noting that their contracts expire in 2013, they assert that the Empire tariff must be explicit as to their rights to contract for firm capacity. They also assert that, if Original Empire Shippers will be considered backhaul shippers, the tariff must explicitly treat forward-haul and backhaul shippers equally.

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<sup>33</sup> *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs. ¶ 31,267 (2008).

<sup>34</sup> GT&C section 14.6 sets forth the general rule requiring an open season when capacity that has not been posted is requested by a shipper, and provides an exception to this general rule in the case of backhaul capacity.

## 2. Answer

41. Empire asserts that RG&E's and NYSEG's firm services will not become backhaul services. Empire asserts that bi-directional flow is different from a backhaul, which infers a reliance on a back-off of flowing volumes. Empire also notes that no section in its tariff, including GT&C section 14.6 referenced by RG&E and NYSEG, puts a backhaul service at a lower priority than a forward-haul service.

42. To clarify the effect of bi-directional flows on the meaning of backhaul and forward-haul, Empire proposes to revise these definitions to make clear that a particular combination of receipt and delivery points will be classified as a backhaul or forward-haul depending on the shipper's contractual transportation path. As a result, Empire states that RG&E's and NYSEG's services will remain classified as forward-hauls, retaining their current priority of service. In addition, Empire proposes to make the backhaul exception to the open season requirement in GT&C section 14.6 inapplicable to requests for service on Empire's bi-directional Chippawa to Corning capacity. Empire states that this recognizes that a service request for Empire's bi-directional capacity cannot be classified as a backhaul or forward-haul.

## 3. Commission Determination

43. The clarifications proposed by Empire will ensure that RG&E and NYSEG's services will remain classified as forward-hauls and that their priority of service will not be affected. The Commission directs Empire to revise its tariff as described.

### H. Interconnection Between the Original Empire Pipeline and Empire Connector

#### 1. Protest

44. RG&E and NYSEG contend that "Empire has a clear rate incentive to provide service to Empire Connector customers from receipt points on the Empire Connector to a delivery point at Chippawa" and suggest that unless the interconnection between the Original Empire Pipeline and Empire Connector is treated as an eligible receipt point on the Original Empire Pipeline in connection with the reversal of flow, Original Empire Pipeline shippers might be disadvantaged based on their location and vintage of service.

#### 2. Commission Determination

45. RG&E and NYSEG do not explain how Original Empire Pipeline customers would be disadvantaged if the interconnection between the Original Empire Pipeline and the Empire Connector is not designated as an eligible receipt point (nor do they explain how designating the interconnection as a receipt point would benefit Original Empire Pipeline customers). There are currently no interconnections with other pipelines or

sources of supply at the interconnection of the Original Empire Pipeline and the Empire Connection; thus it appears that gas flowing north on the Original Empire Pipeline would necessarily be received into the Empire System on the Empire Connector. Therefore, the Commission will not require that Empire designate the interconnection between the Original Empire Pipeline and Empire Connector as a receipt point if it had not intended to do so.

#### **I. Proposed Tariff Revisions**

46. Empire filed revised pro forma tariff sheets to implement its proposals in this proceeding.<sup>35</sup> The Commission will accept Empire's proposed tariff revisions, subject to Empire's making clarifying revisions regarding back- and forward-haul services as discussed above. Empire shall file actual tariff sheets consistent with this order at least 30 days, but not more than 60 days, prior to the commencement of service on the Tioga County Extension. Empire must comply with the Commission's electronic filing requirements set forth in Order No. 714<sup>36</sup> and Part 154 of the regulations.<sup>37</sup>

#### **IV. Environmental Analysis**

47. On January 28, 2010, in Docket No. PF10-5-000, the Commission approved Empire's request to use the pre-filing process to review the Tioga County Extension Project. As part of the pre-filing review, on April 7, 2010, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI). The NOI was published in the Federal Register<sup>38</sup> and mailed to 327 parties including federal, state, and local government officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

48. In response to the NOI, the Commission received comment letters from the U.S. Army Corps of Engineers (COE), New York State Department of Agriculture and Markets (NYSDAM), New York State Department of Environmental Conservation (NYSDEC), Pennsylvania Department of Environmental Protection (PADEP), and one individual (Robert Cobos). On April 27 and 28, 2010, Commission staff conducted two public scoping meetings in Corning and Victor, New York, respectively. The

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<sup>35</sup> Empire's proposed tariff revisions appear in the supplement to Exhibit P filed on October 12, 2010.

<sup>36</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).

<sup>37</sup> 18 C.F.R. pt. 154 (2010).

<sup>38</sup> 75 Fed. Reg. 19,641 (2010)

primary issues raised during scoping concerned construction and restoration in agricultural areas, permitting, wetlands, special status species, and noise associated with the proposed Tennessee Interconnect Meter Station.

49. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),<sup>39</sup> the Commission's staff prepared an environmental assessment (EA) for the Tioga County Extension Project. NYSDAM, NYSDEC, and COE participated in the preparation of the EA as cooperating agencies. The EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, reliability and safety, cumulative impacts, and alternatives. As summarized below, the EA also addresses all substantive comments received in response to the NOI.

50. COE and the NYSDEC submitted scoping comments which described permits and approvals that the project may require. PADEP submitted a scoping comment letter with respect to its Watershed Management Program. PADEP stated that the project would require an earthmoving/construction stormwater permit, water obstruction and encroachment permit, and a National Pollutant Discharge Elimination System permit for hydrostatic testing of the pipeline. Section A.7 of the EA addresses permits, approvals, and regulatory requirements of the proposed project, and table 5 in the EA lists the environmental permits and approvals, including the above-referenced permits and approvals from COE, NYSDEC, and PADEP. Empire is responsible for obtaining all permits and approvals required to construct the proposed project.

51. NYSDEC's comments also described species of special concern that were identified in the vicinity of the project. Section B.3.4 of the EA discusses the evaluation of effects on special status species, including six state-listed species (green floater, yellow lampmussel, timber rattlesnake, wild nodding onion, bald eagle, and twin-leaf). Based on Empire's surveys and proposed construction methods, the EA determined that there would be no impact on the green floater, yellow lampmussel, wild nodding onion, or the twin-leaf. No timber rattlesnakes were observed during Empire's surveys, but suitable foraging habitat was identified. Thus, Empire developed a timber rattlesnake monitoring plan, which the NYSDEC finds acceptable. As recommended by NYSDEC, Empire committed to follow the Bald and Gold Eagle Protection Act and Bald Eagle Management Guidelines and Conservation measures, if bald eagles are discovered in the project area.

52. NYSDAM filed a scoping comment letter in regard to its concerns related to agricultural areas. Section A.6 of the EA addressed general construction procedures; section A.6.2.2 of the EA addressed specific construction procedures in crop and

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<sup>39</sup>42 U.S.C. §§ 4321-4370f (2006).

pasturelands; and section B.1.2 of the EA addressed prime farmland. Empire will minimize impacts on agricultural areas by following its Upland Erosion Control, Revegetation, and Maintenance Plan (Empire's Plan) and Erosion Sedimentation Control and Agricultural Mitigation Plan (ESCAMP); and NYSDAM's Pipeline Construction Guidelines and Special Crop Productivity Monitoring Procedures.

53. Robert Cobos, a local landowner, submitted a scoping comment letter in regard to noise impact from the Tennessee Interconnect Meter Station in Hopewell, New York, which is adjacent to his property. Mr. Cobos requested that Empire conduct a baseline noise study of the area and recommended that Empire implement certain measures to reduce noise impacts. Section B.6.2 of the EA describes the potential noise impact of the proposed Tennessee Interconnect Meter Station, including a description of Empire's noise surveys. The EA concludes that noise levels at the landowner's residence will not increase as a result of the operation of the Tennessee Interconnect Meter Station.

54. On November 19, 2010, the EA was placed into the public record of this proceeding,<sup>40</sup> which began a 30-day comment period. In response, the Commission received comment letters from the U.S. Fish and Wildlife Service (FWS), Pennsylvania Fish & Boat Commission (PAFBC), and one affected landowner (Judy Arazoza). COE and NYSDEC also filed letters on December 8 and 27, 2010, respectively, addressed to Empire's consultant, Hatch Mott MacDonald, and copied to the Commission. The letters requested additional information for COE's Preliminary Jurisdictional Determination and Joint Permit Application Review and NYSDEC's section 401 Water Quality Certification application. Empire responded directly to COE and NYSDEC and filed copies of these responses with the Commission. Environmental condition 8 requires Empire to continue to coordinate with COE and NYSDEC and to file documentation that it has received all authorizations necessary under federal law in each respective state prior to construction.

55. FWS's comments addressed project alternatives, waterbody and wetland crossings, migratory birds, invasive species management, and cumulative impacts. The FWS stated that the EA should have addressed in more detail Tennessee's 300 pipeline located in Pennsylvania and New Jersey; Central New York Oil and Gas Company's Stagecoach storage facility located in Tioga County, New York and Bradford County, Pennsylvania; and Texas Eastern's project located in Greene, Fayette, Bedford, Franklin, Adams, Lancaster, and York Counties, Pennsylvania, all of which help deliver natural gas from Pennsylvania to New York and could serve as potential alternatives to the proposed project. The EA did not specifically consider these system alternatives regarding these projects because the capacity of the existing systems listed by FWS is fully subscribed. In order to add the Empire volume, additional facilities would need to be constructed.

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<sup>40</sup>A notice announcing the availability of the EA was published in the Federal Register on November 29, 2010, 75 Fed. Reg. 73,070 (2010).

The expansion of these systems is expected to result in environmental impacts similar to that associated with Empire's proposed project. Thus, the Commission finds that these existing systems are not reasonable alternatives to the Tioga County Extension Project.

56. FWS also suggested broad pipeline route alternatives be analyzed. FWS, however, did not identify any specific impacts or issues with the proposed route that would warrant an analysis of these alternatives. In addition, no comments were received during scoping from FWS, or any other individual or agency, that identified impacts or requested alternatives to the proposed Tioga County Extension route. The EA's review of the proposed route found no significant environmental impacts or unresolved conflicts concerning available resources that would drive an evaluation of additional route alternatives.

57. FWS stated that the EA mentions but does not describe other alternatives that Empire explored early in the project design. FWS contends that the EA should have provided more detail to support the selected alternative. As stated in section D.4.1 of the EA, Empire evaluated several alternative pipeline routes while developing its proposed route. These alternatives are described in its application and can be viewed on the Commission's eLibrary under Docket No. CP10-493-000.

58. FWS recommended certain protective measures and construction techniques (like the horizontal directional drill [HDD] method) be used for all waterbodies that would be open-trenched. As stated in the EA, all waterbody crossings will be performed using one of the approved dry-crossing methods, either dam-and-pump, flume, or HDD. No waterbodies will be crossed using the open-trench method. The Commission staff's Wetland and Waterbody Construction and Mitigation Procedures (Procedures) adopted by Empire require that waterbodies be restored to their pre-construction contours, native species be used for revegetation of riparian areas, and vegetation maintenance be limited adjacent to waterbodies. As stated in the EA, these measures provide sufficient protection for aquatic resources and effectively address FWS's concerns.

59. FWS commented that the EA should have explained why the HDD method would not be used for all perennial stream and wetland crossings. As described above, HDD is just one of three dry-crossing methods approved in Empire's Procedures. There are constructability, environmental, and economic issues associated with HDDs that make it a less practicable alternative in some instances. For the HDD method to be viable, the subsurface geotechnical properties must be conducive to the drilling and pipeline placement. The HDD method also requires extensive staging areas on both sides of the stream or wetland to set up the drilling equipment, mud pits, and a pipe assembly area. In many instances, the additional clearing and extensive mobilization could create more adverse environmental impacts than another crossing method. In addition, the financial costs associated with a HDD method is not always feasible due to the price of equipment, the setup and breakdown time and expense, the risk of setback or failure, and the relative paucity of trained operators. HDDs generally are used only to cross environmentally

sensitive rivers or other habitats where the environmental effects of other crossing methods cannot be mitigated through other means.

60. FWS commented that the EA's evaluation of wetland impacts should be expanded and that the EA should provide more information on mitigation, including compensation. The EA describes Empire's construction techniques with a separate focus on the special construction procedures Empire will follow for crossing wetlands and waterbodies. The EA states that Empire proposes to construct its project in accordance with the Commission staff's *Upland Erosion Control and Revegetation Plan* (Plan) and Procedures. The staff's Plan and Procedures are a set of construction and mitigation measures that were developed in collaboration with other federal and state agencies and the natural gas pipeline industry to minimize the potential environmental impact of pipeline projects in general. The Commission believes that proper implementation of the Plan and Procedures would adequately minimize construction-related impacts on soils, wetlands, and waterbodies. To avoid undue length, the EA briefly summarizes the measures in the Plan and Procedures and cites the location of the complete documents on the Commission's website where they are available for inspection and/or download.

61. Impacts on wetlands were quantified and presented in table 9 of section B.2.3 of the EA. Empire worked to reduce permanent wetland impacts, especially to forested wetlands by making minor adjustments to its pipeline route. The EA concluded that the project's impacts on forested and scrub/shrub wetlands outside of the permanent right-of-way would be temporary because these wetlands would be allowed to revegetate after construction. Only the wetlands within the permanent right-of-way would be permanently converted to herbaceous or scrub/shrub wetlands during operation of the pipeline. This permanent disturbance is discussed in section B.2.3 of the EA. Empire prepared a plan to mitigate for unavoidable wetland impacts and submitted that plan to COE for approval (filed on January 4, 2011). Any additional mitigation required by COE to compensate for impacts would be part of the section 404 permit.

62. Environmental condition 8 requires Empire to file documentation that it has received all authorizations required under federal law (or evidence of waiver thereof) in each respective state prior to construction. This would include the COE permit under section 404 of the Clean Water Act. The Commission sees no need to delay authorizing Empire's project until the wetland mitigation plan is developed because construction approvals are contingent upon the completion of the plan.

63. FWS commented that the pipeline would fragment at least nine blocks of forest that currently seem to be intact, which could result in habitat loss and reduction in habitat quality and other impacts on wildlife species. FWS cited a section of forest habitat between mileposts (MP) 7.5 and 8.5, where the pipeline runs down the side of a steep forested mountain, and suggested the possibility of locating the Empire pipeline east of the proposed route with an existing pipeline right-of-way. For Empire to follow this existing pipeline corridor, they would have to go approximately 6.3 miles east from the

producer interconnects to the existing right-of-way, then follow the route north approximately 11.2 miles to the existing Empire Connector pipeline. This would result in a total pipeline length of 17.5 miles, an increase of 2.6 miles. When constructing adjacent to an existing corridor, Empire would still need to clear vegetation for its project. This merely moves the forest clearing from one location to another. Due to the greater pipeline length, the Commission does not believe this alternative would be environmentally preferable to the proposed route.

64. FWS stated that the EA references documents (Empire's Plan, Procedures, ESCAMP, and Spill Prevention, Control and Countermeasure (SPCC Plan)) which contain measures to reduce impact on migratory bird habitat, but these documents were not provided directly to FWS. FWS stated that without this information, it cannot determine if Empire has complied with the requirements of Executive Order 13186, Responsibilities of Federal Agencies To Protect Migratory Birds. FWS requested that Empire provide these documents and coordinate with FWS to develop conservation measures to benefit migratory birds, if appropriate. As described in section A.6 of the EA, Empire's Plan, Procedures, ESCAMP, and SPCC Plan can be viewed on eLibrary under this docket (CP10-493-000). Empire has forwarded copies of these documents to FWS staff. Section B.3.2 of the EA describes the potential impacts on migratory birds in the project area due to construction activities during the nesting season. FWS previously stated in communications with Empire that its primary concerns were the taking of habitat during nesting season and long-term habitat loss. FWS did not identify any migratory bird species of concern. The EA concludes that the project complies with the requirements of Executive Order 13186 because no priority habitats or migratory bird species of special concern were identified in the project area by FWS in consultation with Empire or during the scoping process. In addition, while the project may have an impact on migratory bird nests or individuals, it is not expected to have a long-term or significant impact on migratory bird populations.

65. FWS recommended that Empire develop an invasive species management plan prior to project approval, which should include best management practices and measures to preclude the spread of invasive species during construction and cleaning of equipment prior to moving between work areas. The EA states that Empire has worked with the NYSDEC to develop an Invasive Species Control Plan, which is required for the NYSDEC permit. This plan was filed with the Commission on January 21, 2011. The plan describes best management practices to minimize the introduction and spread of invasive species along the construction right-of-way, including equipment cleaning.

66. FWS stated that the EA's cumulative impacts analysis should not be strictly confined to Marcellus Shale drilling and should include past, present, and future impacts of projects under Commission purview, including previously constructed pipelines and electric transmission lines in the region, as well as any that are reasonably foreseen in the future. In section C, the EA considered the cumulative impacts associated with projects

in the past, present, and reasonably foreseeable future that occur in the same general area or region as the proposed project. The review identifies and analyzes two proposed natural gas pipeline projects, current Marcellus Shale development and production well projects, and one residential subdivision under construction. The EA concludes that, due to implementation of specialized construction techniques and mitigation measures designed to minimize environmental impacts for the project, only a small cumulative effect is anticipated when the impacts of the project would be added to the identified ongoing or proposed projects in the area.

67. FWS also commented that the cumulative impacts discussion mentions water use and withdrawal but does not provide any data or analysis. Section C of the EA presents a qualitative analysis of potential cumulative impacts of the project with respect to Susquehanna River Basin water withdrawals from oil and gas development in the Marcellus Shale region. The EA concludes that because withdrawal of surface water involves project review and permitting by one or more regulatory agencies, concurrent projects involving water withdrawals would not result in significant impacts. The Commission does not believe that a quantitative analysis is necessary to reach this conclusion.

68. PAFBC's comment letter stated that no adverse impacts on rare, candidate, threatened, or endangered species under their jurisdiction are expected from the proposed project.

69. Judy Arazoza filed comments on the EA, stating that her home would be 51 feet from the pipe centerline and 16 feet from construction workspace along the proposed Lift-and-Lay section in Ontario County, New York. Section B.4.1 of the EA addresses residences within 50 feet of construction workspace, including a residence at MP 0.14 that would be 51 feet from the pipe centerline and 16 feet from construction workspace. That residence, however, is not the Arazoza residence. The Arazoza residence is located at MP 0.99 and would be approximately 60 feet from construction workspace and 77 feet from the pipe centerline. As described in the EA, Empire would notify homeowners in advance of construction activities and any scheduled disruption of utilities. Empire would attempt to leave any mature trees and landscaping intact within the construction work area. Fences, mailboxes, sidewalks, driveways, and roads would be restored as soon as practicable after construction is complete.

70. The Commission reviewed the information and analysis contained in the record, including the EA, regarding the potential environmental effect of the project. Based on the consideration of this information, the Commission concludes that if constructed and operated in accordance with Empire's application, as supplemented, and in compliance with the environmental conditions in the appendix to this Order, the Commission's approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

71. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.<sup>41</sup>

72. At a hearing held on May 19, 2011, the Commission, on its own motion, received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued in Docket No. CP10-493-000, authorizing Empire to construct, replace and operate the Tioga County Extension Facilities, as described and conditioned herein, and as more fully described in the application.

(B) Empire's proposal to use its existing rates for service with primary delivery points on Empire Connector as initial maximum recourse rates for Tioga County Extension Project service is granted.

(C) The certificate authority issued in Ordering Paragraph (A) is conditioned on the following:

- (1) Empire's completing the authorized construction and replacement of the proposed facilities and making them available for service within twelve months of the issuance of this Order pursuant to section 157.20(b) of the Commission's regulations;
- (2) Empire's compliance with all applicable Commission regulations, including paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;
- (3) Empire's adherence to the environmental conditions listed in the appendix to this Order.

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<sup>41</sup>See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

(D) Permission for and approval of the abandonment by Empire of the Lift-and-Lay section of its facilities, as described above and in the application, is granted, subject to compliance with Part 157 of the Commission's regulations.

(E) Empire shall notify the Commission of the date of abandonment within 10 days thereof.

(F) Empire and its representations made with respect to AFUDC accrual are subject to audit to determine whether it is in compliance with the revised policy and related Commission rules and regulations.

(G) The Commission grants Empire's request for a predetermination that Empire may roll the costs of the Tioga County Extension Project into its existing Empire Connector rates in its next NGA section 4 rate proceeding, absent any material change in circumstances.

(H) Empire's proposed tariff revisions are accepted, as conditioned and modified by this Order.

(I) Empire is directed to execute firm contracts equal to the level of service in accordance with the terms of service represented in its precedent agreement prior to the commencement of construction.

(J) Empire's request for a pre-determination regarding the level of billing determinants which should be used to set rates in its next section 4 rate case is denied.

(K) RG&E's and NYSEG's request to permit Original Empire Pipeline customers to share in interruptible revenues obtained by Empire until it files its next rate case is denied.

(L) Empire shall maintain separate books and records for the Tioga County Extension Project.

(M) Empire is directed to file the actual tariff sheets for its modified tariff at least 60 days, but not more than 90 days, prior to the commencement of service.

(N) Empire shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other Federal, state, or local agencies on the same day that such agency notifies Empire. Empire shall

file written confirmation of such notification with the Secretary of the Commission (Secretary) within 24 hours.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## Appendix

### **Environmental Conditions**

As recommended in the environmental assessment (EA), this authorization includes the following conditions:

1. Empire shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Empire must:
  - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;
  - b. justify each modification relative to site-specific conditions;
  - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
  - d. receive approval in writing from the Director of the Office of EnergyProjects (OEP) before using that modification.
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
  - a. the modification of conditions of the Order; and
  - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Empire shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Empire shall file with the Secretary any revised detailed survey

alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Empire's exercise of eminent domain authority granted under NGA section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Empire's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Empire shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by Empire's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
  - b. implementation of endangered, threatened, or special concern species mitigation measures;
  - c. recommendations by state regulatory authorities; and
  - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the certificate and before construction begins**, Empire shall file an Implementation Plan with the Secretary for review

and written approval by the Director of OEP. Empire must file revisions to the plan as schedules change. The plan shall identify:

- a. how Empire will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
  - b. how Empire will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
  - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
  - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
  - e. the location and dates of the environmental compliance training and instructions Empire will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
  - f. the company personnel (if known) and specific portion of Empire's organization having responsibility for compliance;
  - g. the procedures (including use of contract penalties) Empire will follow if noncompliance occurs; and
  - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    - (1) the completion of all required surveys and reports;
    - (2) the environmental compliance training of onsite personnel;
    - (3) the start of construction; and
    - (4) the start and completion of restoration.
7. Beginning with the filing of its Implementation Plan, Empire shall file updated status reports with the Secretary on a biweekly basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Empire's efforts to obtain the necessary federal authorizations;
  - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;

- c. a listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
  - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
  - e. the effectiveness of all corrective actions implemented;
  - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
  - g. copies of any correspondence received by Empire from other federal, state, or local permitting agencies concerning instances of noncompliance, and Empire's response.
8. **Prior to receiving written authorization from the Director of OEP to commence construction of project facilities in each state**, Empire shall file with the Secretary documentation that it has received all authorizations required under federal law (or evidence of waiver thereof) in each respective state.
9. Empire must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
10. **Within 30 days of placing the authorized facilities in service**, Empire shall file an affirmative statement with the Secretary, certified by a senior company official:
  - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
  - b. identifying which of the certificate conditions Empire has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
11. Empire **shall not begin construction** of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
  - a. Empire files with the Secretary:
    - (1) remaining cultural resources survey report(s);

- (2) site evaluation report(s) and avoidance/treatment plan(s), as required;
  - (3) comments on the cultural resources reports and plans from the Pennsylvania and New York State Historic Preservation Offices and any interested Indian tribes;
- b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and
  - c. the Commission's staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Empire in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CONTAINS PRIVILEGED INFORMATION - DO NOT RELEASE.**"

- 12. Empire shall monitor the noise levels attributable to the project drilling activities at each noise-sensitive area (NSA) within 0.5 mile of the HDD entry and exit sites and include these results in its biweekly status reports. Empire shall make all reasonable efforts to restrict the noise attributable to the HDD operations to no more than a day-night sound level ( $L_{dn}$ ) of 55 decibels on the A-weighted scale (dBA) at the nearest NSAs.
- 13. Empire shall file a noise survey with the Secretary **no later than 60 days** after placing the Producer Interconnect Meter Station in service. If the noise attributable to the operation of the meter station exceeds an  $L_{dn}$  of 55 dBA at any nearby NSAs, Empire shall install additional noise controls to meet that level **within one year** of the in-service date. Empire shall confirm compliance with the  $L_{dn}$  of 55 dBA requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.