

**BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Dominion Transmission Inc.)
)Docket No. CP12-72
Allegheny Storage Project)

**MYERSVILLE CITIZENS FOR A RURAL COMMUNITY (MCRC)
MOTION TO DISMISS DOMINION TRANSMISSION
INCORPORATED'S (DTI) APPLICATION FOR ALLEGHENY
STORAGE PROJECT**

I. OVERVIEW

The Myersville Citizens for a Rural Community (MCRC), intervenors in the above-captioned proceeding, hereby move to dismiss Dominion Transmission Incorporated's (DTI) application for the Allegheny Storage Project. As a matter of law, the proposed Myersville Compressor Station cannot comply with the requirements of the federal Clean Air Act, as implemented by Maryland state law and associated regulations pursuant to an EPA-approved state implementation plan (SIP) because the Myersville Council denied DTI's request for a zoning variance for the project which is a prerequisite to obtaining the necessary air quality permits for construction and operation of the compressor station. Moreover, Maryland's air quality and emissions permitting requirements are part of the state's EPA-approved SIP, which means that they are backed by federal law and not subject to preemption by the Natural Gas Act.

Prior to issuing a license, the Commission must also determine that a proposed action generally conforms to applicable Clean Air Act requirements. Because DTI can never obtain the emissions permits for the compressor station without approval by the zoning board, approval which has been denied, there is no point in the Commission continuing to process DTI's application for the Myersville Compressor Station at this time because the Commission will never be able to issue a conformity finding under the CAA. Accordingly, DTI's entire application should be dismissed, or at a minimum, the Myersville Compressor Station should be eliminated from the larger storage project proposal.

II. BACKGROUND

A. Description of the Proposal

On February 17, 2012, DTI filed an application for a certificate under Section 7 of the Natural Gas Act (NGA) for the Allegheny Storage Project, Docket No. CP12-72. The Allegheny Storage Project includes the proposed Myersville Compressor Station, a 16,000 horsepower facility that will operate just four months per year.¹ Nevertheless, DTI insists that the proposed Myersville Compressor Station is necessary to provide 125,000 decatherms (Dt)/day of firm transportation services to two customers, Washington Gas & Light (WGL) and Baltimore Gas & Electric

¹ DTI states that the proposed compressor station will operate four months per year but at the same time, says that it will limit operations to 6000 hours per year which is 250 days or 8.33 months. DTI should explain this inconsistency.

(BGE).

B. MCRC's Comments

In March 2012, the Myersville Citizens for Rural Community (MCRC) filed a timely motion to intervene and comments in Docket No. CP12-9. Both MCRC and its individual members filed lengthy comments highlighting inaccuracies, describing adverse project impacts and questioning DTI's claim of need for the proposed compressor station.

Following the Commission's release of the Environmental Assessment (EA) in June 2012, MCRC and its individual members sought an extension of time to file comments in light of several pending requests for Critical Energy Infrastructure Information (CEII) flow data and hydraulic studies relevant to feasibility of alternative routes and Freedom of Information Act (FOIA) information on impacts on historic sites and landowner lists. The Commission granted a two-week extension even though only one MCRC member received CEII and MCRC's FOIA requests on historic impacts and landowner lists were still pending.² Despite the lack of access to the complete record, MCRC and its members challenged the adequacy of the EA and the need for the project and commented on the project's adverse impacts. MCRC also urged the Commission to refrain from issuing a final EA or certificate until DTI

² In August 2012, the Commission denied MCRC's FOIA request. MCRC filed a timely appeal of the denial and is currently awaiting a ruling.

received all required federal and state authorizations for the project.

C. The Myersville zoning proceedings

Simultaneous to pursuing a Section 7 certificate at the Commission, DTI filed an application with the Myersville Planning Board seeking a modification to the Myersville Master Plan to allow construction of the compressor station. On August 1, 2012, just days after the July 31, 2012 EA comment deadline, the Myersville Town Council denied DTI's application, finding the proposed compressor station inconsistent with the town site plan and highway overlay and hazardous to the community. On August 27, 2012, Myersville Mayor Wayne S. Creadick and the Council submitted a copy of the Council's decision to FERC (Accession No. 201220120828-0012), requesting an update to the EA to note the denial of the DTI's application to the planning board. The Town also noted that without zoning authorization, the Maryland Department of the Environment (MDE) cannot accept or process DTI's air quality permits. *See also* MD. CODE ANN. ENVIR. § 2-404(b)(1)(i) (LexisNexis 2007) (requiring applicant to demonstrate approval of project by local zoning board).

III. SUMMARY OF ARGUMENT

The Commission must dismiss DTI's application. The proposed Myersville Compressor Station is a new emissions source that must comply with the Clean Air Act (CAA), 42 U.S.C. §7401 *et. seq* (2006).

Without local zoning authorization, DTI cannot receive the necessary air quality required by the CAA. In addition, as a federal agency authorizing a project subject to the CAA, the Commission must issue a conformity determination that the project is consistent with the requirements of the CAA prior to granting a certificate. *See* Determining Conformity of Federal Actions to State or Federal Implementation Plans, 40 C.F.R. pt. 93 (“Conformity Rule”).

The CAA is administered by the states through federally-approved state implementation plans (SIP). Maryland’s SIP incorporates the Code of Maryland Regulation (COMAR) Part 26, Title 11 (Air Quality) which in turn is subject to the Maryland Environmental Code § 2-404. Section 2-404 requires an applicant seeking to construct a new emissions source to demonstrate that its proposal has been “approved by the local jurisdiction for land and zoning requirements.” MD. CODE ANN. ENVIR. § 2-404(b)(9).³ The Myersville Town Council denied DTI’s zoning application, so the Maryland Department of Environment (MDE) is prohibited from accepting DTI’s permit application. Therefore, DTI can never obtain the permits required by the CAA to operate the project, making a conformity determination by the Commission impossible.

³ *See* Index of State Implementation Plans, <http://yosemite.epa.gov/r3/r3sips.nsf/SIPIndex!OpenForm&Start=1&Count=1000&Expand=3.2&Seq=3> (Last visited September 28, 2012)(listing all COMAR regulations incorporated in Maryland’s SIP, including Part 26 Title 11)

Rather than waste resources on a certificate that the Commission can never grant,⁴ the Commission should simply dismiss DTI's application now.

DTI cannot invoke the preemption doctrine to bypass the zoning approval requirement. Though ordinarily, the Natural Gas Act preempts most state and local decisions,⁵ here, DTI's obligation to obtain zoning approval arises out of Maryland's emissions permitting program which is part of a federally-approved SIP. Consequently, the zoning approval requirement is backed by federal law and does not give way to the Natural Gas Act.⁶ The result is the same whether the proposed Myersville Compressor Station is considered a major emissions source as MCRC has contended, or a minor source as DTI claims.⁷

⁴ *Islander East Pipeline v. McCarthy*, 525 F.3d 141 (2d. Cir. 2008)(affirming denial of state water quality certificate required by federal act, effectively vetoing the project).

⁵ *Schneidewind v. ANR Pipeline*, 485 U.S. 293, 300 (1988)(holding that NGA preempts the field of regulation on interstate gas pipeline siting).

⁶ *Islander East Pipeline v. Conn. Dept. of Env'tl. Prot.*, 482 F.3d 79 (2d. Cir. 2006)(quoting *Islander East Pipeline Co.*, 102 F.E.R.C. p 61,054, at 61,130 (2003)) ("While state and local permits are preempted under the NGA, state authorizations required under federal law [such as the Clean Water Act] are not.")

⁷ The major source threshold for Nitrous Oxide (NOx) and Volatile Organic Compounds (VOCs) emissions in a non-attainment area like Frederick County where the project will be located is 25 tons per year. Emissions are based on a project's actual emissions or its potential to emit (PTE). A pipeline's willingness to commit to operational limits to cap emissions at a lower level does not change the project's PTE unless the operational limits are enforceable by federal law. As discussed *infra*, DTI has agreed to an operational cap of 6000 hours, but these limits are not federally enforceable and therefore do not reduce the project's PTE below the 25 tons per year threshold. *See* MD. CODE REGS.26.11.17.01 (2012; *also National Mining Ass'n. v. US EPA*, 59 F.3d 1351,

IV. ARGUMENT

A. Without local zoning approval, the Commission cannot issue a certificate to DTI because DTI cannot obtain the necessary permits to comply with the Clean Air Act.

A federal agency must determine that a proposed action conforms to the requirements of the Clean Air Act (CAA). 40 C.F.R. pt. 93.

Although Commission staff issued a preliminary conformity determination in the Environmental Assessment (EA), since the issuance of the EA, the Myersville Town Council denied DTI's application to amend the town's master plan to site the compressor station. Without zoning approval, DTI is barred from even applying for, let alone obtaining, various emissions permits required by the Maryland, which administers the CAA in accordance with a federally-approved SIP.

1. Maryland's emissions program requires local authorization as a prerequisite to issuance of emissions permits.

The CAA is a federal statute administered by the states through federally-approved state implementation programs (SIPs). Maryland has adopted dozens of requirements governing emissions levels and permitting needed to attain clean air standards in the Code of Maryland Regulations (COMAR). The Environmental Protection Agency (EPA) has approved the various provisions of Maryland's COMAR, and subsequent

1362 (D.C. Cir. 1995)(explaining that operational restrictions will not cap project's "potential to emit," unless restrictions are enforced by federal law.)

amendments implementing CAA requirements.⁸ DTI has already attempted to apply for a general permit from Maryland to construct a new emissions source (MD. CODE REGS. 26.11.02 (2012)) and is also required to apply for a Part 70 construction permit (MD. CODE REGS.26.11.02.03 (2012)) because the compressor station is a major source of emissions in a non-attainment area.⁹

The Maryland Department of the Environment (MDE) administers the permitting process under COMAR. Under Section 2-404 of the Maryland Environment Code, MDE cannot accept an application for an air quality permit under COMAR unless the applicant submits documentation that:

- demonstrates that the proposal has been approved by the local jurisdiction on for all zoning and land use requirements; or
- The source meets all applicable zoning and land use requirements.

MD. CODE ANN. ENVIR. §§ 2-404(b)(i)-(ii).

2. DTI cannot apply for a COMAR permit under MD Env. 2-404 because the Myersville Compressor Station does not conform to local zoning law.

⁸ See Index of State Implementation Plans, <http://yosemite.epa.gov/r3/r3sips.nsf/SIPIndex!OpenForm&Start=1&Count=1000&Expanded=3.2&Seq=3> (Last visited September 28, 2012)(listing all COMAR regulations incorporated in Maryland's SIP, including Part 26 Title 11).

⁹ DTI did not apply for a CAA Title V Operating permit or comply with Subpart KKK, YYY or new source requirements because it claims that it is not a major emissions source since the station will emit below the 25 tons per year major source threshold for NOx and VOC. As described *infra* Part IV.C, the compressor has a PTE of more than 25 tons per year since DTI's operational cap of 6000 hours (which puts the compressor station outside of major threshold limits) is not federally enforceable. See also Comments of Ted Cady (December 13, 2011).

The draft EA assumes that DTI would apply for state emissions permits under COMAR. *See* EA at 69 (noting that DTI will submit the appropriate applications and comply with applicable air quality regulations). In fact, DTI attempted to submit a general air emissions application with MDE. But on August 1, 2012, the Town Council rejected DTI's request for an amendment to the Town master plan that would have allowed DTI to site the compressor station. As a result of the Council's decision, DTI could not provide documentation that its compressor station had been approved by the local jurisdiction and therefore, MDE rejected DTI's application.¹⁰

3. Without the emissions permit, the Commission cannot issue a conformity finding.

Without an emissions permit, the Commission cannot find that DTI's proposal conforms to the CAA requirements. Although DTI may argue that the general, minor source permit for which it unsuccessfully applied is required only by state law, Maryland's general permit program is an integral component of its federally-approved SIP. In fact, as recently as August 2012, EPA recognized that Maryland's ability to attain federal compliance depends in on the "robust" minor permitting requirements of

¹⁰ MCRC has been unable to obtain a copy of the application filed by DTI. The Commission should ask DTI to file copies of all state applications in the FERC docket and to provide an update on the status of its air quality permits in light of the Town's denial of the zoning amendment.

its state program.¹¹ Because EPA's approval of Maryland's SIP depends upon Maryland's continuation of its state permitting program, Maryland's ability to alter its state requirements is restricted by federal law since doing so might upset the federally-approved SIP. Therefore, as a practical matter, all of Maryland's emissions permit requirements carry force of federal law and DTI cannot avoid compliance by invoking the preemption under the NGA.¹²

4. There is no point in processing the Myersville application without permits that can never be obtained.

Because DTI cannot obtain the required CAA permits under COMAR as incorporated by Maryland's the federally-enforced SIP, the Commission should dismiss DTI's application or at least remove the compressor station from the larger Allegheny Storage project. DTI stated that it wants the project to go into service quickly and as a result, the Commission has hewed to a tight schedule for processing the application.

However, there is no point in the Commission continuing to process the application if DTI cannot obtain the required permits.

¹¹ Approval and Promulgation of Air Quality Implementation Plans; Maryland; Preconstruction Requirements-Prevention of Significant Deterioration and Nonattainment New Source Review, 77 Fed. Reg. 45950, 45951 (August 2, 2012)(approving changes to SIP but only upon finding that federal standards would not be compromised due to Maryland's equivalent state regulations and robust nature of its minor permitting program).

¹² Moreover, as discussed in Part IV.A, DTI must comply with various federal requirements such as Part 70 operating permit and KKK and YYY regulations since it is a federal source based on its PTE.

Without the required permits, the Commission cannot issue a conformity finding under the CAA. Even if the Commission was to issue a conditional certificate (making commencement of construction conditional on a conformity finding), the project would remain in a state of regulatory limbo: DTI could never construct the compressor station component without the required permits or a conformity finding.

Moreover, dismissing the application or removing the compressor station from the proposal at this stage serves DTI's interests as well. Rather than going forward with a project that can never be certified or constructed, DTI could amend the Allegheny Storage Application to remove the Myersville Compressor and move forward with the storage components of the project while evaluating project alternatives. By contrast, if DTI waits until the end of the proceeding and the Commission denies its application, DTI will have to initiate the certification process all over again.

B. Because local zoning approval is required for CAA compliance, it is not preempted by the NGA.

DTI cannot invoke the preemption doctrine to bypass the zoning approval requirement. Though ordinarily the Natural Gas Act preempts most state and local decisions,¹³ here, DTI's obligation to obtain zoning

¹³ *Schneidewind v. ANR Pipeline*, 485 U.S. 293, 300 (1988)(holding that NGA preempts the field of regulation on interstate gas pipeline siting); *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D.R.I. 2000)(holding that NGA preempts conflicting zoning and building code requirements).

approval arises out of Maryland's emissions permitting program which is part of a federally-approved SIP. Consequently, the zoning approval requirement is backed by federal law and does not give way to the Natural Gas Act.¹⁴

C. The Myersville Compressor Station is a major emissions source.

DTI argued – and the EA inaccurately determined – that the compressor station is a minor source that is not subject to federal requirements such as a Part 70 operating permit, KKK or YYY regulations. *See* EA discuss at 65-70. These federal requirements are triggered by new sources that emit, or have the potential to emit (PTE), more than 25 tons per year of Nitrox Oxide (NOx) or Volatile Organic Compounds (VOCs) in a non-attainment area such as Frederick County.¹⁵

DTI claims that the compressor will emit 23.76 tons per year of NOx, just slightly less than the major threshold limits. However, an identical compressor station proposed by El Paso has emissions of 31.25

¹⁴ *Islander East Pipeline v. Conn. Dept. of Env'tl. Prot.*, 482 F.3d 79 (2d. Cir. 2006)(quoting *Islander East Pipeline Co.*, 102 F.E.R.C. p 61,054, at 61,130 (2003))("While state and local permits are preempted under the NGA, state authorizations required under federal law [such as the Clean Water Act] are not.")

¹⁵ MD. CODE REGS. 26.11.02.09 (2012); *see also* 2008 Guide to Environmental Permits and Approvals, http://energy.maryland.gov/documents/2008_MDE_Permitguide.pdf (Last visited October 1, 2012).

NOx.¹⁶ DTI argues that it will achieve emissions below the major source threshold level by capping its operation of the facility to 6000 hours.

DTI's operational limits do not change the PTE of its facility, which is likely closer to that of the 31.25 tons per year of El Paso's identical compressor station than the 23.76 that DTI claims. Under Maryland's COMAR regulations which track federal law, PTE means:

(a) the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.

(b) Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable.

MD. CODE REGS.26.11.17.01 (2012).¹⁷ Under Maryland's regulations, operational limits are not treated as part of the project's design and therefore do not change a project's PTE unless those limits are federally enforceable. The Maryland regulations define "federally enforceable" as "all limitations and conditions which are enforceable by the U.S. Environmental Protection Agency (EPA)." *Id.* Because DTI's 6000 hours per year operational limits are not enforceable by EPA, they do not count

¹⁶ See July 2009 Resource Report 9 from El Paso Company. NO₂ estimates for the exact same Gas Compressor is 31.25 tons per year.

¹⁷ See MD. CODE REGS. 26.11.17.01; *see also* National Miners' Ass'n. v. US EPA, 59 F.3d 1351, 1362 (D.C. Cir. 1995)(explaining that operational restrictions will not cap project's "potential to emit," unless restrictions are enforced by federal law.)

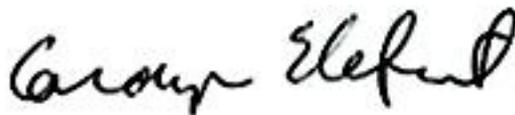
towards reduction of the project's overall PTE. The EA mentions the operational caps, apparently assuming that they bring the project's PTE within minor threshold limits. But as noted, unless the operational caps are federally enforceable by EPA, the application emissions number is the project's maximum capacity to emit under its design.

Thus, the proposed compressor's PTE is more likely to be the 31.25 tons per year of the El Paso station rather than the 23.76 tons per year that DTI contends. As such, DTI is subject to the major source requirements, and the EA should be revised accordingly.

V. CONCLUSION

For the foregoing reason, MCRC respectfully requests that the Commission DISMISS DTI's application or modify it to eliminate the Myersville Compressor Station component. Further, the Commission should revise the EA to correct its calculation of the facility's PTE and to show that DTI is a major emissions source.

Respectfully submitted,



Carolyn Elefant
LAW OFFICES OF CAROLYN ELEFANT
2200 Pennsylvania Avenue NW, Fourth Floor
Washington D.C. 20037
202-297-6100
carolyn@carolynelefant.com

Dated October 1, 2012

Document Content(s)

MCRC's MOTION TO DISMISS DTI APPLICATION.pdf.PDF.....1-14