



Midwestern from seeking to acquire property through eminent domain while the stay is in effect. On April 10, 2006, the Landowners and the City of Portland, Tennessee (Portland) filed requests for rehearing of the March 2006 Order. The rehearing applicants seek revocation of Midwestern's certificate and request that the Commission reopen the record to conduct a full environmental review of the project through the preparation of an environmental impact statement and a thorough analysis of the need for the project.

3. Midwestern filed an answer to the Landowners' motion for stay and to the requests for rehearing on April 18, 2006. On April 26, 2006, the Landowners filed a request to strike the portion of Midwestern's answer that responded to the Landowners' request for rehearing. Subsequently, Midwestern filed a letter with the Commission requesting expedited action on the rehearing requests, while several individual landowners filed letters urging the Commission not to rush and to take adequate time in considering the requests for rehearing and request for stay.

4. For the reasons discussed below, the Commission denies the Landowners' motion for stay and denies the requests for rehearing of Portland and the Landowners.

## **I. Background**

### **A. Procedural History and Description of the Project**

5. Midwestern conducted an open season in the spring of 2004 to solicit interest in extending its pipeline system from its existing Compressor Station No. 2101 located near the City of Portland in Sumner County, Tennessee (Portland Compressor Station). Midwestern received a single bid from Piedmont for the transportation of 120,000 Dth of natural gas per day from the Portland Compressor Station southeasterly approximately 31 miles to potential interconnections with Columbia Gulf Transmission Company (Columbia Gulf) and East Tennessee Natural Gas, LLC (East Tennessee) in Trousdale County, Tennessee. Based on the open season, Midwestern executed a precedent agreement with Piedmont for the above service. Midwestern and Piedmont subsequently executed binding, long-term firm transportation agreements for this service on March 30, 2006.

6. The service agreements provide that Midwestern will deliver 100,000 Dth per day into the Columbia Gulf pipeline system near Hartsville, Tennessee. Piedmont plans to make this natural gas available to its subsidiary, Nashville Gas, which serves residential, commercial and industrial customers in Tennessee. The remaining 20,000 Dth per day will be delivered into the East Tennessee pipeline system for ultimate delivery to Piedmont's distribution systems in North and South Carolina. Midwestern has stated that its proposed project is designed to meet Piedmont's needs for increased supply diversity and reliability to support growing natural gas demand in Tennessee and the Carolinas by providing access to natural gas supplies from the Chicago Hub.

7. On October 18, 2004, Midwestern requested to use the Commission's pre-filing process under the National Environmental Policy Act of 1969 (NEPA).<sup>4</sup> On February 24, 2005, the Commission staff held a public scoping meeting and on April 26, 2005, Commission staff conducted a public site visit for the project. The proposed project generated a substantial amount of opposition. Approximately 60 comments were received during the scoping period, including both comments made at the public scoping meeting and filed written comments. Concerns were raised regarding safety, the need for the project, the potential use of eminent domain, the impact on the use and value of property owners' land, and the environmental impacts, including the impact on soils, water resources, karst geology, and wildlife.<sup>5</sup>

8. Seven months after initiation of the NEPA pre-filing process, Midwestern filed its application to construct and operate the Eastern Extension Project on June 6, 2005. The project consists of approximately 30.9 miles of 16-inch diameter pipeline extending southeasterly from Midwestern's Portland Compressor Station to two new interconnections with Columbia Gulf and East Tennessee near Hartsville, in Trousdale County, Tennessee.<sup>6</sup>

9. The Eastern Extension Project is designed to receive and transport up to 120,000 Dth of natural gas per day and, as stated, Midwestern and Piedmont have executed a long-term firm transportation agreement for the full amount of the project's proposed capacity. Firm transportation service for Piedmont on the Eastern Extension Project will be provided under a fixed, incremental negotiated rate under new firm transportation Rate Schedule FT-B, which will become a part of Midwestern's FERC Gas Tariff Third Revised Volume No. 1. Midwestern estimates that the proposed project will cost approximately \$26.3 million to construct and install. Midwestern proposes to place the facilities in service on November 1, 2006.

10. Over 99 percent of the proposed route of the Eastern Extension Project traverses agricultural and farming areas, open land, or forest, and less than one percent is located in developed residential areas. However, virtually all of the proposed route will be located

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<sup>4</sup> 42 U.S.C. § 4321 *et seq.* Docket No. PF05-2-000 was established on October 27, 2004 for Midwestern's pre-filing proceeding.

<sup>5</sup> The complete record of the pre-filing proceeding in Docket No. PF05-2-000 has been received into and integrated with the record of this docket.

<sup>6</sup> The project also includes modifications to existing station piping at the Portland Compressor Station, and construction of various pressure control valves and pipeline block valves, as well as data acquisition control and meter enclosures at the two proposed pipeline interconnections.

in new pipeline rights-of-way, which requires that Midwestern obtain easements from the affected landowners, either through negotiation or, ultimately, through eminent domain. The proposed project crosses 134 tracts of land.

## **B. Environmental Review**

11. On October 20, 2005, the Commission issued an environmental assessment (EA) for Midwestern's proposed project, with comments due on November 21, 2005. The EA addressed geology and soils, water resources, wetlands, vegetation and wildlife, threatened and endangered species, land use, cultural resources, socioeconomics, air quality and noise, safety and reliability, and alternatives. The EA also addressed all substantive comments received in response to the Commission's notice of intent (NOI) and other comments related to the environmental aspect of the proposed project.

12. The EA recommended that the Commission impose a number of environmental conditions and compliance requirements on the approval of the project to address the potential adverse impacts of the project. The EA concluded that if Midwestern constructs and operates the proposed facilities in accordance with its application and with the mitigation measures recommended therein, approval of the Eastern Extension Project would not constitute a major federal action significantly affecting the quality of the human environment.

13. Comments to the EA were filed by the U.S. Fish and Wildlife Service (FWS), the Tennessee Historical Commission (Tennessee SHPO), the Tennessee Wildlife Resources Agency (Tennessee WRA), Portland, STOP, eleven affected property owners, and consultants, Barry Sulkin and Gregory Buppert.<sup>7</sup> These comments to the EA were addressed in the Commission's March 2006 Order certifying Midwestern's Eastern Extension Project.

## **C. March 2006 Order**

14. In its March 2006 Order, the Commission found that Midwestern's Eastern Extension Project will provide benefits that outweigh any adverse impacts from the lack of negotiated easements.<sup>8</sup> Specifically, the Commission found that the project will provide growing markets in Tennessee and North and South Carolina with access to additional, new sources of supply (*e.g.* Rocky Mountain and Canadian sources) by providing direct access to the Chicago Hub. The Commission held that the additional

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<sup>7</sup> Mr. Sulkin's and Mr. Buppert's comments were filed by Bullock, Fly and Hornsby, attorneys representing STOP.

<sup>8</sup> 114 FERC ¶ 61,257 at P 38.

infrastructure associated with the project will provide supply diversity, stability, reliability, and price competition to a region which has been largely dependent on natural gas supplies from the Gulf Coast,<sup>9</sup> and will increase the reliability and flexibility of the interstate pipeline grid.<sup>10</sup>

15. The Commission rejected arguments that Midwestern's project is not needed to meet natural gas demand growth because the projected growth in demand is overstated and because existing pipelines ostensibly can meet Piedmont's needs. The Commission concluded that the need for the Eastern Extension Project was evidenced by the long-term precedent agreements with Piedmont for 100 percent of the project's design capacity.<sup>11</sup>

16. The March 2006 Order addressed both the project's potential adverse economic impacts on landowners and potential adverse environmental impacts. With respect to the adverse impacts on landowners' farming activities and future use and value of their properties, the Commission indicated that property owners could request during the easement negotiation process minor routing changes or mitigation clauses in the easement to address landowners' special needs or requirements.

17. Environmental impacts addressed in detail by the March 2006 Order included the project's impact on the wells and springs, caves, and existing and potential sinkholes due to karst terrain existing on a portion of the proposed pipeline route, the impact from construction on groundwater and soils, the project's impact on streams and wetlands, and the impact on endangered species. The Commission adopted and imposed the numerous environmental conditions and post-certificate compliance requirements recommended by the EA to address and resolve these and other environmental issues. In particular, the conditions require Midwestern to file for approval by the Director of the Commission's Office of Energy Projects (OEP), prior to construction, field surveys and inventories and final site-specific plans relating to the karst geology, water well and spring locations, endangered species, archeological and historical properties, including proposed mitigation measures, for all areas for which access was previously denied.<sup>12</sup>

18. The March 2006 Order also addressed, through review of the EA's findings, system alternatives and route alternatives to the proposed project. The order reiterated the EA's conclusion that the specific objectives of the project in providing service for

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<sup>9</sup> *Id.* at P 31.

<sup>10</sup> *Id.* at P 39.

<sup>11</sup> *Id.* at P 38.

<sup>12</sup> On May 26, 2006, Midwestern filed its Initial Implementation Plan with the Commission, as required by Environmental Condition 6 of the March 2006 Order.

Piedmont could not be achieved by using existing pipeline facilities, and that the proposed route was environmentally preferable to five of the seven routes alternatives analyzed and preferable to the other two route alternatives for other reasons.

**D. Eminent Domain Proceedings**

19. As of the time Midwestern filed its application in June 2005, only 59 percent of the affected property owners had granted Midwestern permission to survey their land, and Midwestern had acquired only 32 percent of the necessary rights-of-way by voluntary agreement.<sup>13</sup> By the time the Commission issued its March 2006 Order, Midwestern had acquired a number of additional easements,<sup>14</sup> but still needed easements over approximately 60 tracts of land.

20. On March 23, 2006, Midwestern mailed to each landowner from which it had not yet obtained easements a form letter requesting that the landowner sign an attached pro forma easement agreement by March 31, 2006 in Order to avoid condemnation litigation. Each landowner letter was accompanied by a packet of individualized information, including plat maps showing the proposed location of the pipeline on the specific parcel of land and Midwestern's monetary offer for the pipeline easement.

21. At the end of March, Midwestern initiated condemnation actions against landowners by filing individual complaints and motions for immediate possession of the tracts of land along the proposed pipeline route owned by those landowners in the United States District Court, Middle District of Tennessee. On May 26, 2006, the court granted Midwestern temporary possession and use of the subject properties for the purpose of conducting pre-construction activities, such as survey work and property tests.<sup>15</sup> In addition, the court conditionally granted Midwestern the full right of possession of and right of entry on the subject land for the construction and operation of the pipeline upon: (1) the issuance of a Commission order on the merits of the pending requests for rehearing provided such order upholds the certificate authorization granted; and (2) approval by the OEP Director of the commencement of construction.<sup>16</sup>

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<sup>13</sup> Midwestern's June 6, 2005 Application at 16, note 7.

<sup>14</sup> As of March 31, 2006, Midwestern had acquired over 48 percent of the necessary rights-of-way. Midwestern's Motion for Possession in District Court at 2.

<sup>15</sup> *Midwestern v. Various Defendants*, Case Nos. 3-06-0255 *et al.* (U.S. District Court, Middle District of Tennessee) (May 26, 2006).

<sup>16</sup> The court also issued a second order the same day unconditionally granting Midwestern's motion for immediate possession with respect to those tracts of land for which no answer in the condemnation proceeding was filed by the landowner.

22. On May 31, 2006, Midwestern filed a motion to lodge, and make part of the record in this proceeding, the court's order granting temporary possession of the subject property interests.

## **II. Motion for Stay**

23. On April 3, 2006, the Landowners filed their motion for stay of the March 2006 Order.<sup>17</sup> In their motion, the Landowners request that the Commission stay the effectiveness of the March 2006 Order until 60 days after final action on rehearing is completed. The Landowners also request in their motion that the Commission specifically confirm that “[Midwestern] can take no action to acquire property rights through the use of eminent domain until the stay has been terminated.”<sup>18</sup> The Landowners argue that a stay of the order is necessary to prevent irreparable injury: (1) to the environment and the general public from construction activities; and (2) to landowners from Midwestern's acquisition of property rights through eminent domain without the protections the Commission anticipated Midwestern would provide during easement negotiations with the Landowners.

24. On April 12, 2006, the Landowners filed a supplement to their motion for stay, reiterating the need for a stay in light of Midwestern's initiation of eminent domain proceedings in U.S. District Court.

## **III. Requests for Rehearing**

25. On rehearing, the Landowners argue that the Commission acted inconsistently with its 1999 Certificate Policy Statement<sup>19</sup> in granting a certificate for the Eastern Extension Project because the alleged need for and benefits of the project do not outweigh the adverse economic and environmental impacts of the project. First, the Landowners argue that the Commission ignored record evidence demonstrating that the proposed project is not needed.

26. Second, the Landowners argue that the Commission failed to adequately consider and address the adverse economic impacts on landowners from the proposed project and

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<sup>17</sup> On April 6, 2006, Portland filed with the Commission a notice that it concurs with and supports the Landowner's request for stay.

<sup>18</sup> Landowners' Motion for Stay at 1.

<sup>19</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).

the taking of their property by eminent domain. The Landowners also maintain that the Commission erred in its finding that Midwestern designed the proposed route to minimize the impact on landowners and that the Commission is discriminating against owners of agricultural land.

27. Third, the Landowners raise two challenges to the March 2006 Order's handling of environmental issues. They argue both that the Commission should have prepared an EIS in this case, and that the EA failed to adequately consider the adverse environmental impacts. With respect to the latter contention, the Landowners mainly argue that the Commission's establishment of a post-certificate process to resolve the impact of construction blasting on the karst terrain, historical and archeological issues, wildlife issues, and safety and water quality issues related to the Portland's water treatment plant and water supply does not fulfill NEPA requirements.

28. In its request for rehearing, Portland argues that the Commission failed to adequately evaluate the impacts of Midwestern's pipeline on Portland's water treatment plant and the city's water supply. Portland raises concerns regarding the impacts construction of the pipeline will have on the treatment plant facilities, as well as the impacts the pipeline may have on Portland's own plans for expansion and on its compliance with anti-terrorism programs. Portland argues that the Commission erred by deferring the determination of appropriate mitigation for these impacts until after the certificate was issued. Additionally, Portland, like the Landowners, maintains that the Commission erred in failing to prepare an EIS for the project.

#### **IV. Discussion**

##### **A. Requests for Rehearing**

##### **1. Project Need and Balancing of Factors Under Certificate Policy Statement**

29. In the March 2006 Order, the Commission found that notwithstanding Midwestern's lack of negotiated easements for all necessary right-of-way, the proposed Eastern Extension Project will provide benefits that outweigh adverse impacts from project.<sup>20</sup> The Commission found that by enabling Midwestern to deliver natural gas into the Columbia Gulf system for delivery by Piedmont to Nashville Gas and into the East Tennessee system for delivery to Piedmont's distribution systems in North and South Carolina, the proposed project will provide growing markets in the Nashville, Tennessee area and in North and South Carolina with additional access to new sources of supply, and will assist in providing supply stability in the face of growing demand for natural gas.

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<sup>20</sup> 114 FERC ¶ 61,257 at P 38.

The Commission held that by providing these areas with direct access to natural gas supplies from the Chicago Hub, the proposed project will provide supply diversity, reliability, and price competition to a region which has been largely dependent on natural gas supplies from the Gulf Coast.<sup>21</sup> Specifically, the Commission stated that the Eastern Extension Project will transport natural gas originating from Canada, the Rocky Mountains, the Permian Basin, and the Mid-Continent region. The Commission also noted that the Eastern Extension Project potentially may transport supplies from future Alaskan and MacKenzie Delta sources.

30. The Commission addressed arguments raised by STOP and individual landowners that the Eastern Extension Project is not needed to meet natural gas demand growth in Nashville because Midwestern has overstated the projected growth in demand for natural gas in Nashville. The Commission held that Midwestern's precedent agreement with Piedmont for 100 percent of the proposed capacity sufficiently demonstrates market demand and need for the project, and rejected requests that Piedmont's demand growth projections be investigated and validated.<sup>22</sup>

31. The Commission also addressed parties' arguments that the Eastern Extension Project is not needed because existing pipelines can meet Piedmont's natural gas needs. The Commission rejected this argument because the suggested alternatives using existing systems would not provide direct access to natural gas from the Chicago Hub and therefore would not provide Piedmont with the same sources of natural gas supply to increase supply reliability and system flexibility.<sup>23</sup> The Commission acknowledged that Piedmont may have other supply and transportation options for serving its customers in Tennessee and the Carolina's using existing systems, but deferred to Piedmont's business decision to purchase long-term transportation on Midwestern and its underlying goals of obtaining access to additional, competitively priced supply sources.<sup>24</sup>

### **Arguments on Rehearing**

32. The Landowners' core argument on rehearing is that the Commission did not properly balance the benefits and adverse impacts of the proposed project under the Commission's Certificate Policy Statement. The Landowners emphasize that the Certificate Policy Statement requires that the public benefits to be achieved from the project outweigh the adverse effects, and that the strength of the benefit showing and

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<sup>21</sup> *Id.* at P 31.

<sup>22</sup> *Id.* at P 34.

<sup>23</sup> *Id.* at P 36.

<sup>24</sup> *Id.*

need for the project must be proportional to the proposed exercise of eminent domain and degree of other adverse impacts. The Landowners argue that in this case there are substantial adverse economic impacts from Midwestern's need to use eminent domain for the majority of the affected properties and substantial adverse environmental impacts that are not justified by any strong need for the project or significant public benefits. The Landowners state that "this is not a situation where 'a few holdout landowners' . . . are preventing the construction of a desperately needed pipeline."<sup>25</sup>

33. The Landowners argue that the Commission ignored the record evidence the Landowners provided to demonstrate a lack of need for the project. The Landowners argue that the Commission erred by disregarding the comments and reports prepared by the Landowners' consultants, Dr. William G. Foster of Foster Associates and Dr. William W. Wade of Energy and Water Economics,<sup>26</sup> and solely relying on the existence of Piedmont's precedent agreements to demonstrate project need.<sup>27</sup> Moreover, the Landowners challenge the Commission's finding the project is necessary to meet Piedmont's need to obtain gas supplies from additional sources other than the Gulf Coast to increase supply access and reliability, claiming that Dr. Foster's and Dr. Wade's reports demonstrate that additional natural gas supplies from sources other than just the Gulf Coast are already available to Piedmont using existing pipeline facilities.<sup>28</sup>

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<sup>25</sup> Landowners' Request for Rehearing at 5.

<sup>26</sup> See the following reports and comments: (1) report entitled "Alternatives to MGT's Eastern Extension Project" dated February 28, 2005 (filed on March 1, 2005 in Docket No. PF05-2-000); (2) "Comments of William G. Foster and William W. Wade on [Midwestern's] 'Analysis of the Midwestern Gas Transmission Company Eastern Extension Project under the Federal Energy Regulatory Commission Statement of September 15, 1999'" dated May 6, 2005 (filed on May 19, 2005 in Docket No. PF05-2-000); and (3) report entitled, "Evaluation of Alternatives to MGT Eastern Extension: Response to MGT Filings with The Federal Energy Regulatory Commission" dated December 5, 2005 (filed on December 6, 2005 in Docket No. CP05-372-000).

<sup>27</sup> Landowners' Request for Rehearing at 6-8. The Landowners reemphasize their position that the reports prepared by their consultants demonstrate that: (1) the demand for natural gas in the Nashville area is not expected to grow more than 25-36 MMcf per day by 2025; (2) Midwestern currently has the ability to deliver additional gas to Nashville Gas without the proposed project; (3) there are less costly and more efficient alternatives available for Piedmont to obtain additional supplies; and (4) the project will displace gas currently being delivered by Tennessee Natural Gas Pipeline Company (Tennessee).

<sup>28</sup> Landowners' Request for Rehearing at 7, citing Report of Dr. Foster and Dr. Wade dated May 6, 2005.

34. The Landowners also contend that the Commission is ignoring its responsibilities to landowners under the NGA and the Certificate Policy Statement in deference to a company's business decision. The Landowners argue that the Commission's deference in the March 2006 Order to local distribution company Piedmont's "business decision" to purchase this Midwestern capacity is inappropriate where parties are impacted by the project and where, it alleges, the Commission has acknowledged significant adverse impacts through the taking of property rights and adverse environmental impacts.<sup>29</sup>

35. Finally, citing the Commission's finding that the project "should result in more price competition, potentially lowering natural gas prices,"<sup>30</sup> the Landowners argue that the benefits of the proposed project are speculative.<sup>31</sup> The Landowners state that the Commission's position seems to be that "all pipelines are justified through and into all service areas because they *may* add one more supply source to that area and because they *may* result in increased competition."<sup>32</sup>

### **Midwestern's Response**

36. Midwestern emphasizes that under the Certificate Policy Statement and Commission precedent, the full subscription of the proposed Eastern Extension Project capacity under the Piedmont firm transportation agreements, by itself, is controlling evidence of the need for the project.<sup>33</sup> Midwestern also emphasizes that it is not the Commission's policy to examine and require justification for the supply choices made by shippers, so that the reasons why Piedmont needs the project capacity and how Piedmont will use the capacity are irrelevant. In addition, Midwestern disputes the findings of the Landowners' consultants that Piedmont can currently access certain non-Gulf Coast supplies and that the proposed project is unnecessary to serve the Nashville market. Midwestern states that these conclusions are unexplained and lack documentary support.<sup>34</sup>

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<sup>29</sup> Request for Rehearing at 8.

<sup>30</sup> 114 FERC ¶ 61,257 at P 39.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> Landowners' Request for Rehearing at 9.

<sup>33</sup> Midwestern's April 18, 2006 "Answer to Motion for Stay of Commission Certificate Order and Answer to Requests for Rehearing" at 18 and 20 (Answer).

<sup>34</sup> *Id.* at 19, n.21.

### **Commission Response**

37. Under the Certificate Policy Statement, the Commission will not authorize the construction of a project unless it first finds that the overall public benefits of the project outweigh the potential adverse consequences. The Certificate Policy Statement explains that the “[s]trength of the benefits showing will need to be proportional to the applicant’s proposed exercise of eminent domain procedures.”<sup>35</sup> However, this balancing analysis is essentially an economic test that focuses on the Landowners’ property rights and precedes an environmental analysis.<sup>36</sup> The Commission performed this balancing test and thus did not err by failing to balance project need and benefits against adverse environmental impacts.

38. We believe that most of the arguments raised by the Landowners in support of its claim on rehearing that the Commission failed to follow established policy in applying the Certificate Policy Statement to Midwestern’s proposal were addressed adequately in the March 2006 Order. Nonetheless, we will clarify our position in order to dispel any notion that we weighed adverse impacts against need and public benefit that are only speculative.

39. On the subject of market demand and need, we stated in the March 2006 Order:

Under the Certificate Policy Statement, contracts and precedent agreements, while not required to demonstrate that a project is required by the public convenience and necessity, are still important evidence of demand for a project. Moreover, the Commission does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand. Accordingly, we find that the Piedmont precedent agreement for 100 percent of the proposed capacity sufficiently demonstrates market demand and need for the project and that further investigation to determine Piedmont’s specific future requirements is not warranted.<sup>37</sup>

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<sup>35</sup> 88 FERC at 61,749.

<sup>36</sup> Id.

<sup>37</sup> 114 FERC ¶ 61,257 at P 34 (footnotes omitted).

40. This is established Commission policy.<sup>38</sup> Moreover, it makes no difference that Midwestern's showing of need at the time was premised on a precedent agreement, instead of a binding contract. Again, as is our established policy in assuring that projects will not proceed without contractual support, the March 2006 Order required Midwestern to execute a contract with Piedmont for level of service represented in the precedent agreement prior to commencing construction.<sup>39</sup> The Landowners are not satisfied that the level of protection provided by a precedent agreement is adequate to prevent Midwestern from commencing eminent domain proceedings for a project that the Landowners argue is not needed. However, we found that the project is needed and, while Midwestern could commence eminent domain proceedings on the basis of its certificate, the execution of final contracts was only one of the conditions that Midwestern must meet before it can commence construction, as discussed further below.

41. In addition, we did not merely surmise, as contended by the Landowners, that the improved infrastructure associated with Midwestern's proposal would provide "supply diversity, reliability, and price competition to a region which, for years, has been largely dependent on natural gas supplies from the Gulf Coast by providing access to a new source of supply."<sup>40</sup> The record supports this conclusion. Piedmont made a business decision that it was in its best interest to receive services through the capacity to be provided by the Eastern Extension Project. Piedmont reached this decision based on its assessment that

[i]n addition to providing an operationally efficient and cost competitive interconnect with the Chicago market center, the Midwestern capacity will provide Piedmont in the Nashville area with geographic supply diversity that will be especially important during times when production operations are curtailed or reduced in the Gulf Coast region as a result of winter freeze-offs and tropical storm events. While the Gulf Coast region will continue to be an important source of supply, the Chicago market hub is expected to benefit from

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<sup>38</sup> *Certificate Policy Statement*, 88 FERC at 61,748; *See TransColorado Gas Transmission Co.*, 106 FERC ¶ 61,276 at P 14 (2004); *Greenbrier Pipeline Co., L.L.C.*, 103 FERC ¶ 61,024 at P 12 (2003).

<sup>39</sup> 114 FERC ¶ 61,257 at P 39. *See Greenbrier Pipeline Co., LLC*, 103 FERC ¶ 61,024 at P 12 (2003) and *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 67 (2003). As noted earlier, on March 30, 2006, Midwestern and Piedmont executed binding long-term service contracts.

<sup>40</sup> 114 FERC ¶ 61,257 at P 31.

increased production originating from the Rocky Mountain region and from Canada as new pipeline projects and sources of supply continue to be developed. If the Alaskan pipeline is built, natural gas from that project is expected to flow into the Chicago hub. Absent approval of Midwestern's proposed Eastern Extension, it would be operationally more difficult and more economically expensive for Piedmont to satisfy the supply requirements of its Nashville area firm customers . . . .<sup>41</sup>

42. The Commission has repeatedly emphasized its disinclination to second-guess such reasoned business decisions by pipelines' customers.<sup>42</sup> However, we nevertheless believe Piedmont has presented compelling reasons for seeking Midwestern's agreement to construct facilities in order for Piedmont to gain enhanced supply security and potential cost-savings as the result of having access to additional supplies. It is reasonable for a local distribution company to seek additional sources of supply.<sup>43</sup> It is also reasonable to assume that Piedmont has considered the economics and reliability of other possible supply arrangements. Further, since Piedmont will use Midwestern's transportation service to access supplies for Piedmont's own local distribution services in North and South Carolina and those of its subsidiary Nashville Gas in Tennessee, the costs associated with Piedmont's business decision are subject to review by the state regulatory bodies with oversight responsibility.

43. The Landowners argue that the testimony of their expert witnesses demonstrates that natural gas supplies are currently available from sources other than just the Gulf Coast to provide the supply diversity Piedmont seeks. In their reports and comments,

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<sup>41</sup> Piedmont's Motion to Intervene at 3-4.

<sup>42</sup> See *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142 (2000); and *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, 61,635 (1996), *order issuing certificate and denying reh'g*, 79 FERC ¶ 61,280 (1997), *order amending certificate and denying stay and reh'g*, 85 FERC ¶ 61,134 (1998), *aff'd*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000). See, also, *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 67 (2002) (in finding that Commission does not look behind precedent agreements between marketers and shippers to ascertain the identities of the individual end users, Commission stated "marketers are in the business of providing gas to their customers and . . . would [not] subscribe capacity on a pipeline if they were not confident that that the capacity could be sold to end users").

<sup>43</sup> See, e.g., *Millennium Pipeline Company, L.P.*, 100 FERC ¶ 61,277 at P 201 (2002).

Dr. Foster and Dr. Wade specifically argue that Midwestern already has the capacity to bring Chicago Hub supplies (Rocky Mountain or Canadian gas) to Nashville at Portland, and that using backhaul arrangements over Tennessee and East Tennessee, Midwestern can transport such gas to the eastern side of Nashville Gas' distribution system.<sup>44</sup> However, in contracting for the subject capacity, Piedmont sought direct access to a specific additional source of supply (supplies flowing through the Chicago Hub), not merely any form of access to Chicago Hub supplies or to any other non-Gulf Coast supply sources. Once constructed, the Eastern Extension Project will provide a direct link between mid-continent supply (Chicago Hub supplies) and markets in the east (North and South Carolina). This link will connect two distinct geographic areas of the pipeline grid, benefiting not only Piedmont, but providing greater overall reliability and flexibility to the national grid. Conversely, the backhaul alternatives suggested by the Landowners' evidence do not provide direct access to natural gas from the Chicago Hub, and therefore cannot provide Piedmont with the same added supply reliability and system flexibility that direct access to Chicago Hub supplies through the Eastern Extension Project can provide. If an alternative to the proposed project exists that could directly bring gas supplies to Piedmont from the Chicago Hub sources, no pipeline has come forward offering to provide such service to Piedmont.

44. Moreover, in the EA, the Commission staff analyzed the system alternatives proposed by Dr. Wade and Dr. Foster, namely, transportation on Columbia Gulf, backhaul arrangements using the existing systems of Tennessee and East Tennessee, and backhaul arrangements using the existing system of Tennessee only.<sup>45</sup> As explained in the EA, the use of the various backhaul arrangements either would require an East Tennessee system expansion, would require construction to Nashville Gas delivery points, or would not provide Piedmont with the ability to deliver gas both to the eastern side of Nashville Gas' distribution system and to Piedmont's distribution systems in North and South Carolinas.<sup>46</sup>

45. Thus, the Commission did not ignore the expert testimony the Landowners offered to support their claim that there is no need for Midwestern's proposed Eastern Expansion Project. As stated above, the Commission considered this evidence in the context of proposed system alternatives to the projects in the EA. Further, such evidence was introduced to: (1) dispute the validity of Piedmont's demand projections to demonstrate

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<sup>44</sup> Dr. Wade's and Dr. Foster's February 28, 2005 Report at 17-18; May 6, 2005 Comments at 6; and December 5, 2005 Report at 8-9 and 29-39.

<sup>45</sup> EA at 64-67.

<sup>46</sup> *Id.* at 66-67. Transportation on Columbia Gulf would not provide access at all to the Chicago Hub natural gas supplies.

that existing pipelines are capable of transporting enough natural gas to Piedmont to meet projected growth in demand in Tennessee and the Carolinas; (2) show that currently there are adequate non-Gulf gas supplies using existing systems to meet Piedmont's stated need for supply diversity; (3) show the Midwestern can currently bring Rocky Mountain and Canadian gas to eastern Nashville using backhauls on existing systems; and (4) show that Gulf Coast supply is a better supply source than Chicago Hub supplies.<sup>47</sup> Therefore, this evidence was intended to undercut Piedmont's business conclusions that the growth in demand in Tennessee and the Carolinas requires extra supply diversity and flexibility from a new pipeline interconnection with Midwestern, and that direct access to additional supplies from the Chicago Hub, rather than from the Gulf of Mexico, is the gas source best for its needs. Under our policy as stated above, this evidence is irrelevant to the issue of need for the proposed project, which is controlled by business requirements and goals of the pipeline customer, Piedmont.

## **2. Adverse Economic Impact on Landowners**

46. In the March 2006 Order, the Commission addressed concerns raised by STOP, the Tennessee Farm Bureau, and individual landowners that the existence of the project and Midwestern's taking of landowners' property by eminent domain would deprive them of the economic use of their land, adversely impact the Landowners' ability to earn their livelihoods through farming, interfere with future development and investment plans for their land, and decrease property values.

47. The Commission, however, found that landowners will be able to continue to use the surface of the easements for normal tillage and agricultural purposes so that landowners could continue their farming operations. The Commission also stated that landowners could continue to pasture livestock on the easements. Although the Commission recognized that the existence of the easements would prevent the Landowners from altering the easement land by constructing structures or improvements on the land, the Commission noted that Midwestern would accommodate specialized farming operations that would impact the sub-soil horizons during the easement negotiation process. Similarly, with respect to the proposed pipeline's potential interference with future residential construction plans, the Commission advised that

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<sup>47</sup> See Dr. Wade's and Dr. Foster's February 28, 2005 Report, May 6, 2005 Comments, and December 5, 2005 Report. With respect to the latter point, Dr. Wade and Dr. Foster argue in their May 6, 2005 comments that Rocky Mountain gas is an expensive alternative to Gulf Coast gas, Canadian imports are declining, access to Alaskan gas supplies is a long way off, and the Gulf Coast provides beneficial access to LNG supplies. May 6, 2005 Comments of William G. Foster and William W. Wade at 3-4.

property owners could request specific routing adjustments and mitigation, including compensation for lost development potential, during the right-of-way acquisition process.

48. Further, the Commission found that Midwestern had attempted to minimize the impact of the pipeline on landowners through the route design and selection process. Finally, while the Commission in the March 2006 Order anticipated that Midwestern likely would need to use eminent domain to acquire some of the rights-of-way, and that landowners could be more dissatisfied to the extent easements are obtained through eminent domain than through the negotiation process, the Commission stressed that Midwestern has an incentive to negotiate easements agreements to avoid condemnation litigation, and that such agreements are flexible enough to shift the route alignment slightly to accommodate individual landowner needs on their property usually without further Commission approval.

### **Arguments on Rehearing**

49. The Landowners argue that the Commission failed to adequately consider and address the adverse economic impacts on landowners from the proposed project and the taking of their property by eminent domain.

50. First, the Landowners assert that the Commission incorrectly found that Midwestern designed the proposed route to minimize the impact on landowners and failed to direct Midwestern to accommodate the concerns of landowners affected by the path of the pipeline. The Landowners state that the approved route of the pipeline runs diagonally across many of the affected properties, traversing hay fields, cow pastures, and farm fields, and will disrupt farm operations.<sup>48</sup> They state that some segments of the route will cut through the planned sites of new residences, through areas where residential development has been planned and begun, and through developing residential areas. They also state that one segment of the route will cut across the middle of a parcel on which the landowner was planning to build a botanical garden. The Landowners acknowledge that Midwestern may agree to modifications of the route within a property after surveys are conducted, but that any such modifications will be minor and there is no assurance the pipeline can be rerouted around the perimeter of the landowner's property.

51. Second, the Landowners maintain that the Commission's statement that landowners can work with Midwestern to resolve potential adverse impacts through the

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<sup>48</sup> These claims includes adverse affects on grazing, livestock access to water, disqualification of organic beef operation, destruction of tree farm operations, farming biosecurity, impaired farming profitability, and property devaluation.

easement negotiation process is insufficient to address their concerns since, they allege, Midwestern is not making legitimate efforts to resolve issues regarding the use and value of their land, and is not seeking to avoid eminent domain proceedings. The Landowners point to the March 23, 2006 standard form letter that Midwestern mailed to each landowner requesting signature on the pro forma easement agreement to avoid the initiation of eminent domain proceedings. The Landowners state that the pro forma easement agreement included with the letter is the same pro forma easement agreement distributed by Midwestern in March and October of 2005, and therefore does not reference any of the factors the Commission suggested could be resolved by negotiation or provide for flexibility to address individual landowner concerns. The Landowners argue that Midwestern's April 3, 2006 initiation of condemnation suits against the Landowners demonstrates that Midwestern is unwilling to negotiate route variations and other protections and is contrary to the intent of the Commission's March 2006 Order.

52. Third, the Landowners argue that the money awarded in an eminent domain proceeding will not fully compensate landowners for the adverse impacts of the use of their land, particularly for the devaluation of their property surrounding the easement. They maintain that the adverse effect on the value of their property after the project is installed will be significant, and that the one-time eminent domain payment, based on a low valuation of a segment of easement land, will not represent the current value of the land or acknowledge the future development potential of the land.<sup>49</sup> The Landowners also claim that the amounts Midwestern has offered to landowners during negotiations have not reflected such development potential.

53. Finally, the Landowners argue that the Commission is discriminating against landowners that own agricultural land, *i.e.*, farmers, because the March 2006 Order states that "over 99 percent of the proposed route is located on open land, forest, or agricultural areas and less than one percent is located in residential areas,"<sup>50</sup> but that "[t]he Commission is "satisfied that Midwestern has designed the proposed route to minimize the impact on landowners,"<sup>51</sup> The Landowners assert that there is no preferred status in the NGA for residential areas, and contend that where a pipeline passes within 50 or 100 feet of a house, even if on agricultural land, the impact is similarly adverse to the landowner.

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<sup>49</sup> The Landowners note that some of their insurance companies have advised them that they will cancel their insurance policies when the pipeline is installed. Request for Rehearing at 20.

<sup>50</sup> 114 FERC ¶ 61,257 at P 18.

<sup>51</sup> *Id.* at P 22.

### Commission Response

54. Essentially, the Landowners contend that the Commission failed to sufficiently address and resolve their concerns regarding the adverse economic impacts that will be caused by the proposed route of the pipeline. The Landowners reiterate previously raised arguments that: (1) the construction activities to build the pipeline and the existence of the completed pipeline will have an adverse effect on their farming and cattle operations, and will interfere with their future development plans for their land; and (2) the existence of the pipeline easement will devalue their property and the compensation received through eminent domain will be inadequate.

55. As discussed below, the Commission finds that it adequately addressed the Landowners' concerns regarding the economic impact of the project on the use and value of their land. The Landowners, however, are dissatisfied with our resolution of these issues because it hinges on voluntary negotiations between Midwestern and individual landowners to work out route modifications, mitigation clauses to accommodate farming or other needs, and appropriate compensation for lost development potential, negotiations in which the Landowners maintain Midwestern is unwilling to engage in good faith.

56. First, the Commission remains convinced that Midwestern's proposed route was designed to minimize the impact of the pipeline on landowners. As we explained in the March 2006 Order, Midwestern evaluated eight route alternatives before filing its application, attempted to keep the route as short as possible, and responded to the concerns of approximately 23 landowners by modifying the proposed route to minimize its impacts.<sup>52</sup> Midwestern also selected the route with the least number of affected residences, one which crosses farmland and agricultural land, rather than developed, residential areas.

57. The Landowners fault the Commission for not directing Midwestern to accommodate landowners' concerns regarding the diagonal path of the pipeline over properties,<sup>53</sup> arguing that minor route modifications made after surveys are conducted will not adequately resolve their concerns, unless they involve re-routes of the pipeline to the perimeter of the landowner's property. Given that Midwestern had been denied survey access to many properties along the pipeline route, it would have been impossible for the Commission to order modifications to a route whose final path was still uncertain. The Commission encourages landowners seeking route alignment adjustments and

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<sup>52</sup> *Id.*

<sup>53</sup> *See* Landowners' Request for Rehearing at 16 (“[T]he March 2006 Order approves a certificate without even directing MGT to accommodate the concerns of landowners on the path that the pipeline will take through their property”).

engaged in easement negotiations to continue to work with Midwestern to resolve route alignment issues with respect to their properties. If Midwestern is unwilling to agree to what a landowner believes is a reasonable modification of the pipeline route (*i.e.*, one that does not affect other landowners or environmentally sensitive areas and is feasible and practical from an engineering standpoint), the landowner can follow the complaint resolution procedures that Midwestern is required to implement under Environmental Condition 17. That condition requires Midwestern to mail the complaint resolution procedures to each landowner whose property would be crossed by the project. Condition 17 and the complaint procedures include the Commission's Enforcement Hotline number, which a landowner can call for staff assistance if it is not satisfied with Midwestern's response to its concerns.

58. Unless a pipeline owns the entire right-of-way for a proposed project, a pipeline cannot be built without impacting some landowners. That some landowners will still be affected by the route of the pipeline after the route with the least impact has been selected does not demonstrate that the route or the pipeline itself is unreasonable or not in the public interest.

59. Second, we reiterate that the existence of the pipeline easement will not prevent landowners from continuing to use the surface of the easement for normal tillage and agricultural purposes, as well as for pasturing livestock.<sup>54</sup> While the Landowners are concerned about the impacts of the construction of the pipeline on such operations, any disruptions to landowners' farming and cattle operations will be temporary and mitigated by Midwestern's adherence to the Commission's "Upland Erosion Control, Revegetation, and Maintenance Plan." That plan provides guidelines for the preconstruction and installation of the pipeline, restoration of the right of way, and post-construction activities.

60. Moreover, we reject the Landowners' claims that we are discriminating against farmers and cattle ranchers by indicating a preference for a pipeline to cross agricultural land rather than residential land. It is preferable for a pipeline route to traverse farmland and agricultural land, rather than residential areas, because the existence of a pipeline easement generally will have a less adverse affect upon, and be much less disruptive to, an agricultural land use than to land uses associated with a developed, residential area. As stated above, a landowner may continue to use the surface of the easement for normal farming and cattle operations. On the other hand, construction of buildings and other improvements, and other activities that impact the sub-soil horizons, which are more

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<sup>54</sup> 114 FERC ¶ 61,257 at P 26.

likely to occur in developed, residential areas, are not feasible or permitted on a pipeline right-of-way.<sup>55</sup>

61. Third, landowners are entitled to be monetarily compensated for the value of the land that is taken for easements. Ideally, and in most instances, the compensation for the granting of a pipeline easement is determined as the result of negotiations between the pipeline company and the individual landowner.<sup>56</sup> Typically, the landowners themselves are in the best position to determine the sufficient level of compensation and method of payment that would best suit their situation. While landowners are free to seek in negotiations compensation for any perceived loss of property value or future development potential, we cannot require Midwestern to pay more for an easement to reflect the easement's effects on the value or potential uses of surrounding land. Thus, once the Commission has determined that a project is required by the public convenience and necessity after having taken into account, and balancing, such considerations, it is in landowners' own best interests to engage the pipeline in negotiations to pursue their personal objectives, just as it is in the pipeline's interest to negotiate to minimize the delay and expense inherent in eminent domain proceedings. In performing this balancing in this proceeding, and weighing the effect Midwestern's project will have on landowners, we have considered the extent to which Midwestern has attempted to limit the need to obtain rights-of-way by eminent domain through negotiation with landowners, as discussed below.

62. The Landowners allege that Midwestern has failed to individually negotiate with many landowners in good faith, if at all. Moreover, individual allegations of unfair, dishonest, and abusive tactics have been leveled against Midwestern.<sup>57</sup>

63. On the other hand, Midwestern contends that, contrary to the Landowners' allegations, it has affirmatively sought to engage landowners in negotiation discussions to resolve issues and continues to view eminent domain as a last resort. In support of, and to illustrate, its efforts, Midwestern summarizes in its response to the rehearing and stay requests its efforts to obtain rights-of-way through negotiation and submits its "Landowner Contact Log" for the 20 landowners that provided affidavits to the Landowners' motion for stay. Midwestern states that it initiated communications with landowners regarding survey procedures in October 2004, and that survey permission

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<sup>55</sup> *Id.* at P 24.

<sup>56</sup> *See Dominion Transmission Inc.*, 93 FERC ¶61,095 (2000).

<sup>57</sup> *See* Landowners' April 26, 2006 Request to Strike Midwestern's Answer, Attachment A.

was either outright denied, or granted and then subsequently rescinded. Midwestern asserts that its subsequent follow-up efforts to communicate with landowners in matters relating to survey access and negotiated easement settlements were met with varying degrees of resistance, up to and including hostile refusals to engage in any dialogue whatsoever. Midwestern asserts that the contact log reflects that it has continued to seek negotiated settlements with landowners even after issuance of the March 2006 Order, and that it remains willing to accommodate any further reasonable and practical routing changes consistent with the terms of the March 2006 Order.<sup>58</sup>

64. In sum, contrary to the Landowners' claims, Midwestern states that it has, in fact, taken steps to negotiate and mitigate adverse impacts on landowners.<sup>59</sup> Further, it appears that, whether justified or not, a number of landowners advised Midwestern at some point in the process not to contact them,<sup>60</sup> making any negotiation at all with those landowners impossible.

65. The Commission is aware that many individuals do not want a pipeline constructed in their communities under any circumstances. However, such opposition to a pipeline project does not warrant a finding that the pipeline is not in the public interest. In situations such as this, where, for whatever reasons, the pipeline company and property owners cannot agree on the terms and amount of compensation to be paid for rights-of-way needed to construct authorized pipeline facilities, preventing the execution of easement agreements, section 7(h) of the NGA grants powers of eminent domain to the certificate holder.<sup>61</sup> In an eminent domain proceeding, the court will require the pipeline to compensate the landowner for the economic value of the right-of-way, as well as for any damages incurred during construction. The level of compensation paid in a

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<sup>58</sup> Midwestern states that since the issuance of the March 2006 Order: (1) Midwestern has made contact with the owners or representatives of 16 of the 20 tracts owned by STOP members submitting affidavits to the motion for stay; (2) negotiations have resulted in the acquisition of rights-of-way on 21 additional tracts, 17 of which were acquired after the March 23, 2006 form letter was mailed; and (3) nine of the 21 agreements provide for the re-routing of the pipeline, while six of the 21 include non-standard easement clauses to address special concerns (*e.g.*, roadway crossings, noise abatement, erosion control and aesthetic tree planting). Midwestern's Answer at 15.

<sup>59</sup> We note, additionally, that Midwestern elected to engage in the pre-filing process in Docket No. PF05-2-000, thereby involving interested stakeholders early in the project planning process in an effort to identify and resolve issues prior to filing the certificate application.

<sup>60</sup> *See, e.g.* Landowners' request to strike Midwestern's Answer, Attachment A.

<sup>61</sup> 15 U.S.C. § 717f.

condemnation proceeding would be determined by the court. The Commission simply has no authority here to determine what constitutes just compensation.

66. In addition, the Commission wishes to emphasize that Midwestern has indicated that its initiation of eminent domain proceedings does not preclude further negotiation with landowners and negotiated settlements that include re-routing of the pipeline and landowner protections. Significantly, in the two weeks after it initiated condemnation proceedings, Midwestern sought and achieved settlement with the owners of eight tracts of land and agreed to route variations, noise abatement and erosion control clauses to accommodate landowner requests, resulting in the dismissal of those actions.<sup>62</sup> In addition, the court has granted Midwestern survey access to properties previously inaccessible, which will permit an evaluation of any minor route changes requested by landowners and lead to the negotiation of further easement agreements containing landowner accommodations. Accordingly, the number of tracts of land to be obtained by eminent domain can be further minimized.

### **3. Preparation of Environmental Analysis Versus Environmental Impact Statement**

67. In the March 2006 Order, the Commission rejected arguments that the proposed project is a major federal action significantly affected the quality of the human environment requiring the preparation of an EIS. A number of parties and commenters asserted that Midwestern's proposal required the preparation of an EIS because it is a highly controversial and significant project, and in particular, because the unique characteristics of the karstic terrain in which the proposed project will be located needed to be addressed. The Commission found that the EA had adequately addressed numerous issues relating to the karstic terrain, including potential impacts from blasting, sinkholes, caves, and springs. The Commission further found that the existence of opposition to the proposed project itself does not make the environmental impacts "controversial," as contemplated in the regulations and, thus, does not dictate that an EIS be prepared.<sup>63</sup>

#### **Arguments on Rehearing**

68. On rehearing, the Landowners continue to argue that the Commission erred by preparing an EA and not an EIS. They assert that the Commission abused its discretion by rejecting requests of several parties and commenters to prepare an EIS instead of an EA initially, and again, by failing to prepare an EIS after the EA had identified significant adverse environmental impacts related to the project.

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<sup>62</sup> Midwestern's Answer at 15.

<sup>63</sup> 114 FERC ¶ 61,257 at P 60.

69. First, the Landowners maintain that the Commission's regulations require that an EIS be prepared for any proposed pipelines for which new or additional right-of-way is required,<sup>64</sup> and that in such a case, the Commission may prepare an EA instead of an EIS only if it believes the project may not be a major federal action; the EA would then confirm whether an EIS is required. The Landowners also contend that despite requests during the scoping phase for an EIS, the Commission rushed to the issuance of an EA, provided an insufficient one-month period in which the public could respond to the EA, and denied the Landowners' request for an extension of time to file comments on the EA. These actions, the Landowners contend, provided the parties with a less-than-full opportunity for public comment. As a result, according to the Landowners, the Commission did not fulfill its obligation to ensure that the environmental analysis is complete.

70. Second, the Landowners claim that once the Commission issued the EA, it should have triggered the preparation of an EIS because the EA's finding of no significant impact was not supported by the evidence or analysis. The Landowners assert that the Commission incorrectly concluded in the EA that the adverse impacts could be sufficiently mitigated to support a finding of no significant impact. According to the Landowners, the significant environmental impacts of Midwestern's proposal were largely left unresolved by the EA. For instance, as discussed more fully in the next section of this order, the Landowners assert that the EA left the resolution or mitigation of certain environmental concerns to negotiation between landowners and Midwestern, while other environmental issues were left to be resolved through a post-certificate process that had no provision for public input. Other matters, claim the Landowners, were largely ignored. The Landowners also point to the long length of the EA (160 pages) as an indication that, under the guidelines of the Council on Environmental quality (CEQ), the preparation of an EIS was necessary.<sup>65</sup> The Landowners add that the preparation of an EIS would have provided them with a full opportunity for public review of a draft EIS and full consideration of all potential impacts, prior to certification.

71. Portland, as well, argues that an EIS should have been prepared before issuance of the certificate to address the potential impacts the proposed project would have on its

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<sup>64</sup> Landowners' Request for Rehearing at 10-11, citing 18 C.F.R. § 380.6(a)(3).

<sup>65</sup> Specifically, the Landowners refer to the CEQ's *Forty Most Asked Questions*, which states that an EA is normally no longer than 15 pages, while an EIS should normally be less than 150 pages.

water treatment plant and the city's water supply.<sup>66</sup> Portland asserts that the Commission's finding that there was no need for an EIS presumed that the adverse impacts would be mitigated, but that the EA did not even address Portland's concerns and the Commission failed to ensure that adverse impacts would be mitigated.

### **Midwestern's Response**

72. Midwestern emphasizes that either an EA or an EIS can fulfill NEPA requirements for the review of environmental impacts as long as whatever procedures are employed give the "requisite hard look" at a proposed project.<sup>67</sup> Midwestern states that under CEQ regulations implementing NEPA, an EA may be prepared by a lead federal agency at any time to help assist agency planning and decision making,<sup>68</sup> and that under Commission regulations, although certain projects specifically require an EIS review, the Commission may instead prepare an EA if it believes the proposed action may not be a major federal action significantly affecting the quality of the human environment.<sup>69</sup> Midwestern argues that the basic content, quality of information, and level of review and analysis in an EA is comparable to that of an EIS,<sup>70</sup> and, therefore, that unless the project is one for which the regulations dictate an EIS be prepared, there is no compelling reason to prefer an EIS over an EA.

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<sup>66</sup> Portland cites *Steamboaters v. FERC*, 759 F.2d 1382, 1392 (9<sup>th</sup> Cir. 1985), where the court stated that "the standard for determining whether to prepare an EIS is whether 'the plaintiff has alleged facts, which, if true, show that the proposed project *may* significantly degrade some human environmental factor.'" Portland's Request for Rehearing at 4, n.6.

<sup>67</sup> As support, Midwestern cites *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2<sup>nd</sup> Cir. 1992) and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>68</sup> Midwestern cites 40 C.F.R. § 1500, *et seq.*

<sup>69</sup> 18 C.F.R. § 380.6 (2005).

<sup>70</sup> Midwestern asserts that the Commission's internal publication, *Preparing Environmental Assessments – Guidelines for Applicants, Contractors, and Staff* (March 2001) reflects that its EAs follow the same basic content required under the CEQ for EISs. Midwestern also adds that another Commission publication, *Handbook for Using Third-Party Contracts to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects* (September 2005), applies equally to both EAs and EISs.

73. Midwestern asserts that the EA prepared in this case meets all of the procedural and informational requirements for an environmental review under NEPA. Midwestern maintains that after a comprehensive treatment of environmental and landowner issues, the EA properly concluded that Midwestern's Eastern Extension Project would not constitute a major federal action significantly affecting the quality of the human environment and, therefore, a subsequent EIS was not required. Finally, Midwestern emphasizes that the Commission did not rush to grant certification of the proposed project, noting that over 10 months passed between the issuance of the Commission's Notice of Intent to prepare an EA and the issuance of the EA, and over nine months passed between the filing of its application and the issuance of the March 2006 Order.

### **Commission Response**

74. At the outset, we point out that the Landowners misinterpret our regulations regarding the instances in which an EIS, as opposed to an EA, is required. Pursuant to section 380.6(a)(3) of our regulations,<sup>71</sup> an EIS will normally be prepared first for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using right-of-way in which there is no existing natural gas pipeline," except that the Commission will prepare an EA first if it believes that such "a proposed action . . . may not be a major Federal action significantly affecting the quality of the human environment."<sup>72</sup> Our regulations then state that "[d]epending on the outcome of the environmental assessment, an environmental impact statement may or may not be prepared."<sup>73</sup> A clear reading of our regulations reveals two things that the Landowners' argument fails to recognize. First, an EIS is not absolutely required to be prepared first in any instance, and second, only "major" greenfield pipelines normally call for EIS's being prepared first.

75. Our regulations do not define or explain what constitutes a major pipeline. However, a 30-mile, 16-inch line would not fall within the category of "major pipeline construction project" as contemplated by section 280.6(a)(3) of our regulations, unless there were unique circumstances that rendered the project to be environmentally controversial. The March 2006 Order properly addressed claims of several commenters that Midwestern's proposal is a major action because it is highly controversial and it is proposed to be developed in an area with unique karstic characteristics. Specifically, the March 2006 Order correctly notes that the existence of opposition to a proposal does not

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<sup>71</sup> 18 C.F.R. § 380.6(a)(3) (2006).

<sup>72</sup> 18 C.F.R. § 380.6(b) (2006).

<sup>73</sup> *Id.*

of itself render an action controversial for NEPA purposes.<sup>74</sup> The order correctly found that many of the objections to Midwestern's proposal involve non-environmental concerns such as need and market demand for the project, and issues centered on the subjects of eminent domain and associated land-use concerns.

76. Nonetheless, even if we determined that Midwestern's proposal rose to the level of a major federal action, the Landowners attach too much significance to our decision to first prepare an EA. As the above-referenced regulations make clear, actions which normally require an EIS do not always require an EIS.<sup>75</sup> Moreover, the CEQ regulations also contemplate that an EA has utility in connection with the later preparation of an EIS, if warranted.<sup>76</sup> While an EIS would have been required if the EA determined that Midwestern's proposal was a major federal action affecting the quality of the human environment, the EA concluded that the impacts associated with this project can be sufficiently mitigated to support a finding of no significant impact.

77. In preparing the EA for Midwestern's Eastern Extension Project, we fulfilled our obligation under NEPA to consider and disclose the environmental impacts of the proposed project. As stated in *Baltimore Gas and Electric Co. v. NRDC*,<sup>77</sup> the twin aims of NEPA are "to place upon an agency the obligation to consider every significant aspect of environmental impact of a proposed action" and to ensure that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking

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<sup>74</sup> 114 FERC ¶ 61,257 at P 60, citing *Wetlands Action Network v. United States Corps of Army Eng'rs*, 222 F.3d 1105, 1122 (9<sup>th</sup> Cir. 2000).

<sup>75</sup> See *NE Hub Partners, L.P.*, 90 FERC ¶ 61,142 at 61,444, (2000), citing *Committee to Preserve Boomer Lake Park v. Department of Transportation*, 4 F.3d 1543 (10<sup>th</sup> Cir. 1993).

<sup>76</sup> Section 1508.9 of the CEQ regulations, 40 C.F.R. § 1508.9 provides in pertinent part: "(a) Environmental assessment means a concise public document for which a Federal agency is responsible that serves to: (1) [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact, ... and (2) to [f]acilitate preparation of a statement when one is necessary." See also *Ramsey v. Kantor*, 96 F.3d 434 (9<sup>th</sup> Cir. 1996) (holding that federal regulations [40 C.F.R. §§ 1501.4 and 1508.9(a)(1)] permit an agency planning a major action to conduct an EA in order to determine whether it must prepare an EIS, and that if the EA shows that the proposed action will have no significant impact, the agency may issue a FONSI [finding of no significant impact] and then execute the action).

<sup>77</sup> 462 U.S. 87 (1983).

process.”<sup>78</sup> We find no merit in the Landowners’ claim that it or any other member of the public was in any way denied meaningful public participation as contemplated by NEPA.

78. All interested stakeholders had the opportunity to participate in the NEPA process as early as seven months prior to the filing of the application, by virtue of Midwestern’s election to utilize the Commission’s pre-filing process.<sup>79</sup> The Commission issued its Notice of Intent to Prepare an Environmental Assessment for the Proposed MGT Eastern Extension Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting (NOI) in January 2005 and held a public scoping meeting and public site visit in February and April 2005, respectively. The Commission issued the EA in October 2005, a full ten months after the NOI issued and therein addressed the concerns raised by stakeholders since the commencement of the NEPA process. Our normal procedure is to receive comments on the EA before making a final decision and we followed that procedure here, allowing for comments to be filed thirty days after issuance of the EA. In our March 2006 Order we addressed the comments received in response to the EA.

79. We are also not persuaded by the Landowners’ claim that the fact that the EA is 160 pages evidences a need for an EIS in this case. The size of the EA was driven by the extent of the opposition to Midwestern’s proposal and reflects the thoroughness of our staff’s effort to meet the NEPA requirement that we take a “requisite hard look” to identify environmental impacts.

80. As noted above, the EA concluded that the impacts associated with this project can be sufficiently mitigated to support a finding of no significant impact. We now address below the alleged deficiencies in the EA and March 2006 Order raised in the rehearing requests.

#### **4. Consideration of Environmental Impacts in the Environmental Analysis and March 2006 Order**

81. As stated *supra*, the EA prepared for the proposed project found that if Midwestern constructs and operates the proposed facilities in accordance with its application and with the mitigation measures recommended in the EA, approval of the

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<sup>78</sup> *Id.* at 97.

<sup>79</sup> As the March 2006 Order notes, approximately 60 comments were received during the scoping period, including comments made at the public scoping meeting and filed written comments, and an additional 31 comments were received from property owners and the Landowners after the application was filed and prior to issuance of the March 2006 Order.

Eastern Extension Project would not constitute a major federal action significantly affecting the quality of the human environment. After addressing parties' comments and concerns regarding the findings of the EA, the Commission concluded in the March 2006 Order that the impacts associated with the project can be sufficiently mitigated to support a finding of no significant impact, and incorporated the mitigation measures recommended by the EA as conditions to the Commission's certification of the project

82. The Landowners argue that the Commission failed to adequately address and analyze the adverse environmental impacts of the project in the EA and, as a result, erred in reaching its conclusion that the approval of the project would not constitute a major federal action significantly affecting the quality of the human environment. The Landowners argue that the Commission failed in the March 2006 Order to resolve the adverse environmental impacts by: (1) establishing a post-certificate process to address and resolve those environmental impacts; (2) directing landowners to seek protections from the adverse impacts to their land through negotiations with Midwestern; and (3) ignoring landowners' concerns, deferring to Midwestern to mitigate adverse impacts, and failing to impose express conditions to protect landowners. The Landowners contend that the manner in which the Commission acted on the environmental issues does not fulfill its NEPA responsibilities.

83. Portland argues that the Commission failed to adequately address the construction impacts of the pipeline on Portland's water treatment plant facilities and the city water supply and Portland's concerns regarding the impact the pipeline will have on its own plans for expanding the treatment plant facilities. Like the Landowners, Portland, also, maintains that the Commission erred by deferring resolution of these impacts to a post-certificate process. Portland's specific concerns and rehearing arguments are set forth in more detail below.

**a. Post-Certificate Environmental Review Process**

**Arguments on Rehearing**

84. The bulk of the Landowners' and Portland's complaints with regard to the Commission's treatment of the environmental issues in the EA and the March 2006 Order concern the Commission's "deferral" of the resolution of environmental issues to a post-certificate process. According to the Landowners, that process involves Midwestern's submission of proposals or reports to the Commission's Office of Energy Projects (OEP) for the Director of OEP's approval and grant of construction clearance, with no opportunity for landowner input. Without such landowner input or review, the Landowners express a lack confidence that Midwestern will submit accurate reports or acceptable mitigation measures or that the Commission will act to adequately protect environmental resources.

85. The Landowners argue that inadequate protection is provided by the two post-certificate conditions the order imposed to address the potential for sinkhole development and ground subsidence on karst terrain from construction activities – the requirements to complete surveys prior to construction and to have a geologist on call during construction (Environmental Conditions 11 and 12). Despite similar conditions imposed by the order requiring post-certificate survey work, agency consultations, development of mitigation measures, and the filing of completed survey reports and final site-specific construction plans for OEP approval,<sup>80</sup> the Landowners also argue that the Commission did not provide adequate protections against adverse impacts to ground water and surface water resources, endangered wildlife species, and historical and archaeological resources.

86. In addition, Portland and the Landowners assert that the Commission erred in the March 2006 Order by failing to substantively address the environmental concerns Portland and the other parties had raised regarding impacts of the project on the water treatment plant and water supply, and simply directing Midwestern to address and resolve the issues raised through coordination with Portland and the Tennessee Division of Water Supply during planning and construction and through its filing of a final site-specific construction plan for OEP approval (Environmental Condition 19). Portland and the Landowners argue that the Commission instead should have conducted a full assessment of the impact of the proposed pipeline on the water treatment plant facilities before issuing the certificate, given the importance of the integrity of the public drinking water supply.

### **Commission Response**

87. The EA and the March 2006 Order considered all substantive issues identified throughout this proceeding, including the environmental issues that were raised during the pre-filing process. During initial route planning, Midwestern set out to conduct environmental and initial engineering surveys of its proposed route, pursuant to the Commission's regulations (18 CFR Part 380) requiring that an applicant conduct surveys of 100 percent of its proposed route to enable the Commission to comply with the NEPA provisions. The EA and subsequent order acknowledged that not all surveys were completed because a number of landowners denied Midwestern access onto their properties to conduct the required surveys.

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<sup>80</sup> For example, Environmental Condition 18 requires Midwestern to file with the Commission archaeological and architectural survey and other reports and comments with the Commission prior to construction, and requires the Tennessee State Historic Preservation Office and the Director of OEP to approve all reports and plans before construction clearance is granted. *See also*, Environmental Conditions 13, 14, 15, and 16.

88. However, based on the information available from the surveys that were completed, along with our consultations with resource agencies and our own independent review of the project, including information gathered during field reconnaissance and site visits, the Commission was able to fulfill its obligation under NEPA to identify and analyze in an EA the environmental impacts associated with the construction and operation of the Eastern Extension Project. As described *infra*, our environmental review was thorough. Further, the EA contained sufficient information for the Commission to determine in the March 2006 Order that, with the imposition of mitigation measures, some of which would be developed and approved after the certificate was issued, the project is an environmentally acceptable action. The Commission issued the certificate to Midwestern expressly conditioned upon Midwestern's subsequent completion of the necessary surveys and environmental studies, its development of mitigation measures and filing of implementation plans, and further Commission review and approval of the proposed environmental protections, prior to the commencement of construction.

89. Contrary to the Landowners' contentions, the Commission did not fail to comply with NEPA or otherwise err by issuing the certificate prior to the completion of all the necessary environmental work and analysis. As discussed below, this procedure allowing the necessary environmental work and analysis to be completed after the certificate is issued, but before construction begins, reflects longstanding Commission practice, and is supported by judicial precedent.

90. Part of the Commission's normal process in carrying out its NEPA responsibilities necessarily involves much of the environmental work and analysis, on both the pipeline's and Commission's part, taking place after the certificate is issued and the authorization bestowed by the Commission's certificate being explicitly conditioned on the completion of such environmental work. In prior cases, the Commission has entertained, and rejected, arguments similar to those raised here that the Commission's issuance of a certificate before the completion of environmental surveys and studies and development of mitigation measures is premature.<sup>81</sup>

91. As we explained in those cases, the practical reality of pipeline projects is that they take considerable time and effort to develop. Their development is subject to many significant variables whose outcome cannot be predetermined. For example, in certain

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<sup>81</sup> See *East Tennessee Natural Gas Company*, 102 FERC ¶ 61,225 (2003); *Islander East Pipeline Company, L.L.C.*, 102 FERC ¶ 61,054 (2003); *Millennium Pipeline Company, L.P.*, 100 FERC ¶ 61,277 at Ps 143-144 (2002); and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 at 61,402, n. 195 (1990) ("The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or on the adherence by the applicants to environmental conditions.").

proceedings, as is the case in this proceeding, individuals may deny or limit the pipeline's access to the property on which it needs to complete its surveys and environmental studies. Depending on state law, the pipeline may need NGA section 7 certificate authorization conveying eminent domain authority under NGA section 7(h) to be able to access the property. That is, in fact, what Midwestern required in this case to enable it to gather the information needed to facilitate the further environmental analysis and review that the Landowners argue is missing. In such circumstances, the natural consequence is that some aspects of a project may remain in a planning stage even as other portions of the project are finalized and under construction.

92. The Commission conditioned construction under Midwestern's certificate on its completion of the necessary survey and environmental studies.<sup>82</sup> The United States Court of Appeals for the D.C. Circuit has upheld the Commission's authority to so condition its certificates, ruling in *Public Utility Commission of California v. FERC*,<sup>83</sup> that the Commission may issue a certificate under NGA section 7(c) before the environmental analysis has been fully completed without violating NEPA. In *WyCal I*, a challenge was made to the Commission's grant of an optional certificate. The court held that NEPA was not violated by the Commission's approval of the pipeline proposal of the Wyoming-California Pipeline Company subject to the completion of the Commission's environmental review and findings. The court stated:

While it is generally true that 'NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*,' we held in *Illinois Commerce Comm'n.* that this did not prevent an agency from making even a final decision so long as it assessed the environmental data before the decision's effective date. Here, the Commission's non-environmental approval was expressly not to be effective until the environmental hearing was completed. Similarly, the Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA.<sup>84</sup>

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<sup>82</sup> Section 7(e) of the NGA provides that "the Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f.

<sup>83</sup> 900 F.2d 269 (D.C. Cir. 1990) (*WyCal I*).

<sup>84</sup> *Id.* at 282-283 (citations omitted).

93. *Illinois Commerce Commission v. ICC*,<sup>85</sup> cited by the court in *WyCal I*, involved an order issued by the Interstate Commerce Commission (ICC) which established a class exemption for a railroad's proposed abandonment of rail lines that had fallen into disuse. Among other issues, the court addressed whether the ICC's actions complied with various environmental statutes, including NEPA and the National Historic Preservation Act (NHPA). Citing to a particular section of the NHPA requiring an agency to take into account the effect of a project on historic properties prior to the issuance of any license, the court found that so long as the record in the individual abandonments showed that the required consultation and deliberations concerning historic preservation occurred before the exemption became effective, the purposes of the NHPA would be met.<sup>86</sup>

94. We have interpreted the term "effective date" in *Illinois Commerce Commission* to mean the date the abandonment became effective, and not the effective date of the certification.<sup>87</sup> By analogy, in the context of compliance with NHPA in a certificate proceeding, we have interpreted the term effective date to mean the effective date that the pipeline is authorized to begin "destructive planning activities," such as construction.<sup>88</sup> Hence, all of the environmental work required by the conditions imposed in this case, as well as the Commission's review and approval of Midwestern's required submissions, must be completed before Midwestern is authorized to commence construction of the pipeline.

95. In this case, the March 2006 Order imposed numerous environmental conditions that must be fulfilled before the Commission will allow construction to proceed. These conditions are designed to ensure that the additional environmental work and analyses are completed and that environmental protections are in place before construction begins on the pipeline.

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<sup>85</sup> 848 F.2d 1246 (D.C. Cir. 1988).

<sup>86</sup> *Id.* at 1259.

<sup>87</sup> *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 at 61,402-03, *order on reh'g*, 53 FERC ¶ 61,194 at 61,763 (1990).

<sup>88</sup> *Id.*, 53 FERC at 61,763. *See also Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983), in which the court determined that NEPA "requires federal agencies to evaluate the environmental consequences of their actions *prior* to commitment to any actions which might affect the quality of the human environment" (717 F.2d at 1415), which is when "'the critical agency decision' is made which results in 'irreversible and irretrievable commitments of resources' to an action which will affect the environment." (717 F.2d at 1414, citing *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2<sup>nd</sup> Cir. 1977).

96. Since Midwestern has accepted the certificate, with the imposed conditions, it must work diligently to complete the required surveys and prepare the final reports based on the survey results. Midwestern is required to identify environmental features on properties through its requisite surveys, and assess how the project's impacts on environmental features such as wetlands, forests, karst areas, cultural resources, and federally-listed species can be mitigated. Midwestern will also incorporate into its final implementation plan any agency-recommended mitigation measures for Commission staff review. The Commission staff will then review the reports and finish any outstanding consultations with the appropriate agencies, including the U.S. Fish and Wildlife Service for compliance with the Endangered Species Act, and the Tennessee State Historic Preservation Office for compliance with the National Historical Preservation Act. Midwestern will also need to receive any remaining or outstanding permits from other federal and state agencies, including the U.S. Army Corps of Engineers and the relevant Tennessee state agencies for compliance with Clean Water Act provisions.

97. It is not until these stipulations are met that the Director of OEP will grant a letter order allowing construction to proceed on the proposed project. Because Midwestern's Eastern Extension Project is limited to approximately 31 miles of pipeline, the Commission does not anticipate granting Midwestern any construction clearances until all necessary surveys, reports, and permits, including clearances from other agencies, have been filed or obtained, all mitigation measures have been finalized, and the Commission's staff has determined that Midwestern has fully complied with the provisions of NEPA.

98. Part of the Landowners' concern regarding the post-certificate environmental analysis is that they feel they will not be involved in that process to ensure that their interests ultimately are protected. However, two of the conditions imposed by the March 2006 are designed to protect environmental resources and the landowners affected by the project even after the environmental review is completed and construction commences. As discussed above, Environmental Condition 17 requires Midwestern to develop and implement an environmental complaint resolution procedure to identify and resolve mitigation problems during construction and restoration of the right-of-way. Midwestern must also instruct landowners that they may avail themselves of the Commission's Enforcement Hotline if they are not satisfied with Midwestern's resolution of problems, an avenue always available to individuals affected by pipeline actions.

99. In addition, Environmental Condition 2 gives the Director of OEP broad authority to take any steps necessary to ensure the protection of environmental resources during the construction and operation of the project. This includes the authority to modify the

existing project conditions and to impose additional mitigation measures (including stop work authority).<sup>89</sup>

100. Below, we address specific claims made by the Landowners with respect to certain issues for which full environmental analysis has not yet been completed.

**b. Karst Terrain and Construction Impacts**

**Arguments on Rehearing**

101. As the March 2006 Order explained, the approved pipeline route passes over karst terrain, which is characterized by sinkholes, caves, and conduit-flow springs. The Landowners argue that the order provides no protections for the environmental features of the karst terrain, such as local wells and springs, from construction and blasting, other than two post-certificate conditions: Environmental Condition 12, which requires that Midwestern complete karst field surveys on all parcels crossed by the project that were previously inaccessible and submit its findings to OEP prior to commencement of construction, and Environmental Condition 11, which requires that Midwestern have a geologist on call during all pipeline construction. The Landowners maintain that “the requirement that MGT have a geologist on call so that construction will ‘avoid affecting pipeline operations’” is inadequate.<sup>90</sup> The Landowners add that in November 2005, a significant sinkhole opened near the proposed project route, the cause of which is believed to be blasting.

**Commission Response**

102. The EA and the Commission’s order addressed in detail both the impact the karst terrain would have on the proposed project and the impact construction of the proposed project in an area of karst terrain would have on sinkhole development and ground subsidence, as well as on local wells and springs located along the proposed pipeline route.<sup>91</sup> We disagree with the landowners that they will be inadequately protected from construction impacts on karst terrain.

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<sup>89</sup> We note that the Commission’s complaint procedures are available, and enforcement powers can be brought to bear, if Midwestern fails to comply with any environmental mitigation conditions imposed by the Commission’s certificate order or subsequently by the OEP Director.

<sup>90</sup> Landowners’ Request for Rehearing at 13-14, quoting Environmental Condition 11.

<sup>91</sup> EA at 13-15; 114 FERC ¶ 61,257 at Ps 64-70.

103. In an effort to evaluate potential impacts from pipeline construction on water supplies, karst topography, and impacts on soils and geologic features, Midwestern contracted with P.E. LaMoreaux & Associates, Inc. (PELA) to investigate and assess the karstic nature of the pipeline route and the potential for impact to the karst terrain, and to propose appropriate best management practices (BMPs) for construction to minimize potential impacts. As explained in detail in both the EA and the March 2006 Order, after data collection and analysis, PELA developed a karst hazard assessment which evaluated all of the components of the investigation, such as caves, wells, springs, and sinkholes. The PELA study found that about 21.8 miles (70.6 percent) of the pipeline route has no or few karstic features. These sections were given a low sensitivity to karst and groundwater problems, indicating that construction impacts would be unlikely. The remaining 9.1 miles (29.4 percent) were classified as moderately sensitive to construction impacts. There were no areas along the proposed pipeline route that PELA determined to have a high potential for impact. The PELA report indicated that there are sinkholes located between MP 3.7 and MP 4.0, and that the proposed pipeline route passes directly through one of these sinkholes. Thus, PELA recommended that no section of the pipeline directly cross any existing sinkholes. The PELA report recommended numerous BMPs for all karst areas where construction operations are planned.<sup>92</sup>

104. We also pointed out in the EA that Midwestern has stated that it can perform minor realignments around any known sinkholes that may occur on the construction right-of-way, but cannot finalize the alignment until surveys are conducted on lands that were previously inaccessible. If any sinkholes are identified along the proposed route that cannot be entirely avoided by rerouting and would require modification, Midwestern indicates it would map these sinkholes prior to construction and would seek approval from the Tennessee Department of Environment and Conservation for modifications of sinkholes due to pipeline construction.

105. The EA and the March 2006 Order found that the following protective measures would prevent any significant impacts on sinkholes or other karst features from the construction and operation of the pipeline: (1) adherence to the karst BMPs outlined in the PELA report appended to the EA (*e.g.*, maintaining natural surface drainage patterns as much as possible when locating trenches, rights-of-way, and turn-arounds to avoid disrupting natural surface flows); and (2) the use of proper erosion control procedures as described in the “Upland Erosion Control, Revegetation, and Maintenance Plan” Midwestern has stated it will follow. In its application, Midwestern proposed to follow our “Upland Erosion Control, Revegetation, and Maintenance Plan” (Plan)<sup>93</sup> and to

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<sup>92</sup> See EA at Appendix E.

<sup>93</sup> See Application of Midwestern, Exhibit F-1, Resource Report 1 at p. 1-1.

follow the karst BMPs included in the PELA report.<sup>94</sup> Environmental Condition 1 of the March 2006 Order requires Midwestern to follow the construction procedures and mitigation measures described in its application or data responses, as well as those identified in the EA.

106. It was in addition to the protections provided by the PELA Report's karst BMPs and our Plan, that we imposed the two conditions to allow for the development of further mitigation measures to minimize potential impacts on the karst terrain. Environmental Condition 12 provides the following:

Midwestern shall complete karst field surveys on all parcels crossed by the project that were previously inaccessible. If any caves are identified which have a known subsurface extent beneath the pipeline route, Midwestern shall identify whether it would be affected by construction activities and provide technical support demonstrating how Midwestern would mitigate and/or avoid potential impacts on these caves. The survey reports and findings shall be filed with the Secretary for review and written approval by the Director of OEP **prior to construction**.

107. The Landowners suggest that Environmental Condition 11 requiring a geologist to be on call during construction is inadequate because it is designed to protect pipeline operations. Environmental Condition 11 states:

Midwestern shall have a qualified geologist on call during all pipeline construction to plan and review construction methods and provide technical support to mitigate and/or avoid potential sinkhole locations along the pipeline. The geologist shall confirm that any reroutes are located far enough from the sinkholes to avoid affecting pipeline operations.

However, this condition is not intended only to protect the pipeline, but is also designed to protect the karst terrain from the problems that would develop from interference with an existing sinkhole, as well as to prevent the creation of additional sinkholes.

108. Given the protective measures outlined above, and the conditions imposed, the Commission continues to believe that pipeline construction will not have a significant adverse effect on karst features and groundwater.<sup>95</sup>

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<sup>94</sup> See Application of Midwestern, Exhibit F-1, Resource Report 6 at p. 6-8.

<sup>95</sup> We also note that Midwestern has great incentive to ensure that construction activities do not destabilize karst terrain since such destabilization could result in damage to its pipeline facilities and potential liability for damages beyond its easement.

c. **Impacts on Surface and Ground Water Supplies and Wetlands**

**Arguments on Rehearing**

109. The Landowners argue that the March 2006 Order did not clearly provide protections for the numerous wells, springs, ponds,<sup>96</sup> and streams located along the proposed pipeline route from blasting and other construction activities, chemicals, sediment, the alteration of flows and volumes, and erosion. The Landowners also maintain that the order provided no protections for adverse impacts to wetlands along the proposed route.

**Commission Response**

110. The Commission provided adequate protections for ground water resources by adopting the conditions recommended in the EA.<sup>97</sup> In particular, the Commission imposed Environmental Condition 13 which provides that

Midwestern shall locate and field inventory all water well and spring locations identified for domestic and livestock water supply use within 150 feet of all construction work areas. Midwestern shall develop site-specific mitigation measures for construction activities in these locations and shall, with the landowner's permission, conduct pre- and post-construction monitoring of yield and water quality for these wells and springs. Midwestern shall file a report regarding these water well and spring measures with the Secretary for review and written approval by the Director of OEP **prior to construction.**

Environmental Condition 14 further requires Midwestern to file a report with the Commission within 30 days of the in-service date of the facilities, discussing whether it received and how it resolved any complaints concerning water yield or water quality. Ostensibly, these conditions are not acceptable to the Landowners because they involve the undertaking of post-certificate work and the post-certificate development of construction and mitigation measures. However, we disagree with the Landowners with

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<sup>96</sup> The Landowners state that along one 4-mile segment of the proposed route there are 29 wells, 48 springs and 31 ponds. Landowners' Request for Rehearing at 15.

<sup>97</sup> EA at 21-23; 114 FERC ¶ 61257 at Ps 72-77.

respect to the adequacy of these protective measures, in light of our findings in the EA regarding impacts on groundwater resources.<sup>98</sup>

111. As stated in the EA, trench excavation would be five to seven feet deep and thus would intersect the water table only in low-lying areas. The EA found that clearing and grading activities could have a minor impact on shallow aquifers but that such impacts would be temporary and localized. The EA also found that although other construction activities could affect groundwater resources, most of the potential impact would be avoided or minimized by the use of both standard and specialized construction techniques. As we explained in our order, while Midwestern will primarily use mechanical means to remove bedrock encountered in the trench, if blasting is necessary, mitigation measures proposed by Midwestern, such as the use of minimum or delay charges or blasting mats, would minimize the overall impact of blasting on wells and springs and such impact would be temporary, minor, and confined to groundwater systems within the construction right of way. Also, because the trench excavation would be shallow and Midwestern would use low-velocity charges, adverse impacts beyond several feet below the blast site would not be expected. Further, the EA found that impacts on the local groundwater levels from trench dewatering, which requires the removal of groundwater, would be temporary and could be minimized by discharging the water into a vegetated upland area.

112. With respect to the project's impact on surface waters, such as streams and wetlands, the March 2006 Order indicates that Midwestern has committed to implementing the Commission's "Wetland and Waterbody Construction and Mitigation Procedures" (Procedures) to minimize potential impacts to waterbodies during and after construction.<sup>99</sup> Midwestern has also committed to its Spill Prevention, Containment, and Countermeasure Plan to reduce and resolve potential fuel and chemical spills near waterbodies.<sup>100</sup> Moreover, in response to concerns that pipeline construction through hard-bottom streams could permanently redirect the stream and or reduce downstream flow, the March 2006 imposed Environmental Condition 15 providing

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<sup>98</sup> EA at 21-23.

<sup>99</sup> 114 FERC ¶ 61,257 at P 78. *See* Application of Midwestern, Exhibit F-1, Resource Reports RR1 at 1-18 and 1-20 and RR-2; and Environmental Condition 1 of March 2006 Order. Although the March 2006 Order did not discuss the specific mitigation measures Midwestern will employ to protect impacts to wetlands, the EA summarizes these measures. *See* EA at 29.

<sup>100</sup> *See* EA at 26.

Midwestern shall prepare and file site-specific construction and mitigation plans for the crossing of each hard-bottom stream for the review and written approval of the Director of OEP **prior to construction**. These plans should identify the streambed rock type, state whether or not blasting would be required, and describe the measures Midwestern would implement to ensure its construction does not cause a loss of stream hydrology.<sup>101</sup>

d. **Impacts on City of Portland Water Treatment Plant**

113. In this proceeding, Portland raised a number of concerns regarding the potential impacts the proposed project would have on its water treatment plant and the city's water supply. These concerns included damage from construction and operation of the pipeline to the treatment plant's buildings, clearwell delivery tank, and earthen dam, interruption of water supply service, and adverse impacts to the integrity of the water supply.<sup>102</sup> Portland also maintained that the proposed pipeline could impede implementation of its own development plans to expand plant facilities because blasting for the new plant

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<sup>101</sup> The EA also pointed out that Midwestern will coordinate with the Tennessee Department of Environment and Conservation (TDEC) and the U.S. Army Corps of Engineers to ensure that stream crossings comply with the conditions included in the permits for these crossings. EA at 26-27.

<sup>102</sup> Portland raised the following specific concerns in a June 24, 2005 letter to the Commission, filed on June 28, 2005. First, because the proposed pipeline would be installed on a rock ledge adjacent to the treatment plant, Portland expressed concern that the construction blasting that would be necessary along that ledge would cause damage to the treatment plant's structures and jeopardize the integrity of the building and appurtenances. Second, Portland was concerned that the construction and operation of the pipeline could place the half-million gallon tank which holds the treated water for delivery to the citizens (the clearwell) at risk, since the pipeline would be less than 100 feet from the clearwell. Third, Portland contended that construction blasting could also damage the treatment plant's earthen dam, as the pipeline would be less than 500 feet from the dam. Fourth, because the pipeline is proposed to cross the raw water intake to the plant, Portland stated its concern for potential damage and service interruption during construction. Fifth, the proposed pipeline's close proximity to Drake's Creek, the main source of drinking water for 15,000 city residents and water supply to the City of Franklin, Kentucky, further concerned Portland. Finally, noting the karst terrain, Portland raised concerns regarding the impact of construction on the underground streams feeding in to the city's water supply.

facilities could be restricted due to their proximity to the pipeline. Portland expressed further concern that the construction and operation of the pipeline would increase the terrorism vulnerability of the treatment plant from moderately susceptible to highly vulnerable.

114. In the EA and the March 2006 Order, the Commission stated that Midwestern intends to coordinate with Portland and the Tennessee Division of Water Supply's field office manager during planning and construction to ensure that drinking water is not affected during construction of the pipeline.<sup>103</sup> However, in the order, the Commission also required Midwestern to consult with Portland and its consultants to develop a site-specific construction plan for project activity near Portland's water treatment facilities and prior to construction, to file the plan for review and approval by the Director of OEP and provide any mitigation measures it would implement to ensure that the public drinking water supplies are unaffected during construction.<sup>104</sup>

### **Arguments on Rehearing**

115. On rehearing, Portland asserts that the Commission: (1) failed to address in the EA and the March 2006 Order the environmental concerns Portland and the other parties had raised prior to the issuance of the EA and in comments to the EA regarding construction and other impacts the pipeline could have on the water treatment plant and water supply; and (2) erred by leaving the resolution of the water treatment plant and water supply issues to a post-certificate process.<sup>105</sup>

116. Portland states that after the EA had failed to address any of its concerns about the pipeline's impact on treatment plant facilities, it filed a response to the EA on November 21, 2005, reiterating its concerns about the proposed pipeline route and requesting that the route be moved to a different and safer location.<sup>106</sup> Portland states it also filed an analysis prepared by its consultant, Civil & Environmental Consultants, Inc., confirming the risks and concluding that Midwestern should be required to perform a site-specific study of the recharge area above the Portland water supply reservoir to determine impacts on the water supply before action on Midwestern's application.

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<sup>103</sup> EA at 24; 114 FERC ¶ 61,257 at P 71.

<sup>104</sup> 114 FERC ¶ 61,257 at P 71 and Environmental Condition 19.

<sup>105</sup> Here, we address the post-certificate resolution of environmental issues in more detail as it specifically relates to the water treatment plant issues.

<sup>106</sup> Portland's "Response to the Environmental Assessment Prepared by the Staff of the Federal Energy Regulatory Commission (FERC)" (dated November 11, 2005).

Portland maintains that the Commission in the March 2006 Order did not address its requests in its November 2005 filing, but instead “dodged the issue.”<sup>107</sup>

117. As noted, *supra*, Portland therefore argues that the Commission’s direction to Midwestern to file a site-specific plan construction plan, along with mitigation measures to protect the public water supply, for the OEP Director’s approval, is inadequate and ineffective. Portland asserts there is no process for it to provide comments on Midwestern’s construction plan or any requirement that the plan be acceptable to Portland. Portland also seeks clarification whether the site-specific construction plan for project activity near the water treatment facilities must be approved prior to commencement of any construction on the pipeline, or just prior to construction in the area of the plant facilities. Portland contends that if construction begins in other segments of the pipeline before the plan is approved, it may be impossible to incorporate acceptable modifications to the route to resolve the issues relating the plant facilities.

118. In addition, Portland does not believe that Midwestern will adequately address the issues raised, despite Environmental Condition 19 requiring it to do so. Portland claims that Midwestern has not followed-up after meetings held in July and October 2005, in which Portland requested Midwestern to provide insurance against damage to the plant facilities, an emergency water supply for temporary damage to the water source, and a permanent alternative water supply in the event the plant facilities are damaged. Portland further claims that Midwestern has violated the March Order and Environmental Condition 19 by initiating a condemnation suit against Portland on April 7, 2006, without contacting the city to discuss its concerns.

119. Portland requests on rehearing that the Commission revoke the certificate issued and, before reissuing a new certificate, prepare an EIS containing a full analysis of the issues presented, with a re-route of the pipeline or with substantial mitigation measures designed to protect the Portland’s water treatment plant and associated facilities.

### **Midwestern’s Answer**

120. In its Answer, Midwestern contends that the Commission has responded to Portland’s concerns by withholding final construction clearance pending Commission review of final site-specific plans identifying the exact location of the pipeline relative to the water treatment plant. Midwestern states that it has been unable to develop a site-specific plan for Portland’s property, ST-0024, because the owner of the adjacent tract, ST-0023, has refused to grant survey access to Midwestern. Midwestern explains that the proposed pipeline route enters Portland’s property at the bottom of a steep bluff located on ST-0023, and access to ST-0023 for soil borings and geotechnical study is required to

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<sup>107</sup> Request for Rehearing of Portland at 7.

determine the constructability of route variations or to identify possible construction techniques down the bluff and through Portland's property. Thus, Midwestern asserts that even if the Commission had prepared an EIS, there would still have been no means to gather the data necessary for the site-specific study and no means to specify appropriate protection and mitigation to Portland. Midwestern argues that this is why it was finally forced to initiate a condemnation action.

121. Midwestern disputes Portland's contention that Midwestern has not adequately attempted to coordinate and resolve the issues with Portland. Midwestern attaches to its answer its landowner contact log for the City of Portland detailing surveying activities and site visits, and correspondence and meetings between Midwestern and Portland officials, treatment plant representatives, and the mayor of Portland. Midwestern also attaches a September 30, 2005 letter it sent to Mayor Kenneth Wilbur suggesting a number of pre-construction, construction, and post-construction proposals. Further, Midwestern refutes Portland's claim that it failed to provide follow-up after Midwestern's meeting with Portland representatives in October 2005. Midwestern states that it contacted Mayor Wilbur's office the week of November 7, 2005, as well as subsequent to the issuance of the March Order, to schedule a meeting, but received no response. In addition, Midwestern states that its karst geology consultant, PELA, field surveyed Portland's property for karst on March 15, 2006. Finally, Midwestern states that Portland also did not respond to its March 23, 2006 letter notifying Portland that it would be seeking condemnation if an easement agreement could not be reached by March 31, 2006.

### **Commission Response**

122. The Commission did not err by directing Midwestern to coordinate with Portland and the Tennessee Division of Water Supply to address and resolve the issues raised by Portland subsequent to the issuance of the certificate. The majority of Portland's concerns largely center on the potential adverse impacts the construction of the pipeline could have on the water treatment plant's buildings, clearwell delivery tank, and earthen dam, the integrity of the water supply, and the continuity of water supply service. In granting the certificate prior to the resolution of these issues, the Commission relied on its experience with a vast number of pipeline projects demonstrating that the construction impacts of natural gas pipeline projects on other utilities can be successfully minimized by careful planning of the project's design and the application of appropriate construction methods. Thus, it was neither necessary, nor even possible due to the lack of site-specific information, as explained below, for the Commission to complete its environmental analysis of the impacts of the project on Portland's water treatment plant and water supply prior to the issuance of the certificate.

123. Notwithstanding Portland's claims to the contrary, the record in this proceeding indicates that Midwestern has attempted to consult and work with Portland to develop a

plan for construction of the pipeline that will avoid impacts to Portland's water treatment plant, and has considered various designs and construction methods in an effort to take into account Portland's concerns.

124. In its July 20, 2005 answer to various comments on the project,<sup>108</sup> Midwestern noted that it had not yet completed the design details of the pipeline near the water treatment plant in large part due to the lack of survey access to adjacent properties. Midwestern further stated that:

“aside from alignment, other factors will determine the final design and construction methods at this location. The pipeline design in the area depends on the depth of intake water line and the type of terrain that the buried pipeline will pass through. MGT has asked Portland officials for as-built information so that the location and depth of the water intake line can be included in the Midwestern pipeline design. Geotechnical information required for detail[ed] pipeline design will be gathered when pipeline survey activities resume.”<sup>109</sup>

Midwestern also discussed two different trenching construction techniques it was considering for use at this location – blasting and horizontal directional drill (HDD). Midwestern explained that if blasting is necessary due to the known presence of rock near the water treatment plant, it would be done in a controlled manner in accordance with a blasting plan developed by a blasting expert that would give consideration to nearby structures and facilities.

125. Alternatively, Midwestern explained that the use of HDD would allow the pipeline to cross under the water intake line without affecting it and could accommodate Portland's future expansion plans for the water treatment plant. However, Midwestern indicated that it cannot make a decision on the suitability of HDD at this location without establishment of the final pipeline alignment and detailed geotechnical information necessary to determine possible geologic constraints and the subsequent likelihood of success.

126. In a letter dated August 31, 2005, from Midwestern to the Greater Nashville Regional Council, Midwestern stated that it met with Portland officials on July 18, 2005, regarding Portland's plans for improvements to its existing water supply system, both regarding supply and treatment capability. In that letter, Midwestern indicated that it

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<sup>108</sup> July 20, 2005 Answer of Midwestern to Comments Concerning the MGT Eastern Extension Project (Answer to Comments)

<sup>109</sup> *Id.* at 15.

“will continue to consult with Portland regarding extension and relocation of the City’s water, sewer, and gas mains identified in their response letter and minimize impacts to those projects by incorporating them in the design of Midwestern’s facilities and appropriately accommodating them during our construction.”

127. Further, in a letter to Portland’s mayor dated September 30, 2005, Midwestern proposed for Portland’s consideration a number of mitigation measures that could be included in an easement agreement, including preconstruction protective measures for construction through the water treatment property.<sup>110</sup> One measure reflects that Portland would be able to review and provide input on the construction technique to be used by Midwestern. Another provides that, depending on the construction method, Midwestern would work cooperatively with Portland to design a section of Portland’s water intake line to be “pre-built” by Midwestern at the time of pipeline construction. Yet another measure provides that Midwestern would work cooperatively with Portland to develop and agree on a construction plan that outlines construction schedule, extra workspace placement, access issues, spill prevention plans and review of a blasting plan, if necessary.

128. In these mitigation proposals, Midwestern additionally offered that during construction, it would use a Portland-approved utility inspector to monitor construction in the immediate area of the water intake line, provide a minimum one week’s notice to Portland in advance of planned construction near Portland’s water treatment plant, and go forward with building the section of Portland’s water intake line (discussed above). During post-construction, Midwestern would provide as-built drawings to Portland showing the location of the pipeline on the property, would provide an inspector for any construction or maintenance by Portland on the water intake line in the vicinity of the Midwestern pipeline, and participate in Portland’s homeland security planning and reporting process, as necessary. In its letter, Midwestern sought an opportunity to meet with Portland to discuss the mitigation options it had proposed. Midwestern reports in its April 18, 2006 Answer that it met with the mayor and Portland officials on October 20, 2005, and that Portland accepted Midwestern’s offer to pre-install a water main with the Midwestern right-of-way as a potential mitigative measure.<sup>111</sup>

129. Thus, Midwestern has presented ideas and proposals for protecting the Portland water treatment plant during construction, and has attempted to communicate and work with Portland to ensure the safety of the water treatment plant and water supply. Midwestern has also attempted to address Portland’s concern regarding the impact the existence of the pipeline will have on Portland’s future expansion plans by indicating that

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<sup>110</sup> See Midwestern’s Answer, Attachment C.

<sup>111</sup> *Id.* at 23.

it will design the pipeline in such a way as to minimize potential conflicts with Portland's plans.

130. However, due to both the lack of survey access to one adjacent property and the inability of Midwestern and Portland to work together cooperatively, Midwestern has been unable to finalize the route of the pipeline as it relates to the plant and to undertake geotechnical studies of the land, and consequently has been unable to further develop and commit to construction methods and mitigation measures. Given these circumstances, it was not unreasonable for the Commission to issue the certificate conditioning commencement of construction on the completion of the environmental work with respect to the water treatment plant site. In fact, this is exactly the type of situation that necessitates completion of the environmental work and analysis after the certificate is issued. Midwestern needed to obtain the certificate so that it would be able to access the property in order to complete its environmental studies and route alignment. Without such information, the Commission could not proceed further in its evaluation of the impact of the pipeline on the water treatment plant and approval of final pipeline alignment, construction methods, and mitigation measures.

131. As discussed above, Midwestern has stated its preference for using an HDD crossing on the water treatment facility property and its need to conduct a geotechnical survey on the water treatment facility property to determine whether a HDD could be used. We agree that if the geotechnical survey is performed, and an HDD crossing is determined to be feasible, Midwestern should design its pipeline using this construction technique to avoid Portland's property. The Commission's past experience with HDD indicates that if the drill is successful, there would be no impacts to Portland's facilities.

132. If the geotechnical study results indicate that an HDD is not feasible, an open cut crossing, with special planning, could be undertaken instead. Once Portland identifies the as-built design for the water treatment plant facility, Midwestern then could construct its pipeline through the property in mini-spreads and with other special construction techniques, such as stove-piping or implementation of a horizontal bore, that could avoid special features of the facility.

133. Based on our experience with these specialized construction technologies, we believe that Midwestern, using any of these techniques, can safely construct and operate the 16-inch-diameter pipeline through the water treatment plant facility. The Commission staff's finding of "no significant impact" for this project includes and incorporates our evaluation of Portland's property, for these reasons listed above. Moreover, because Midwestern ultimately will be responsible for any damage to the

treatment plant facilities caused by the construction or operation of the pipeline,<sup>112</sup> Midwestern naturally has a strong incentive to construct the pipeline in a safe manner and to avoid construction methods and other actions that could adversely impact the water treatment plant.

134. As stated, Condition 19 of the March 2006 Order requires Midwestern to consult with Portland and its consultants to develop a site-specific construction plan for project activity near Portland's water treatment facilities and prior to construction, to file the plan for review and approval by the Director of OEP and provide any mitigation measures it would implement to ensure that the public drinking water supplies are unaffected during construction. The Commission clarifies that in order for Midwestern to prepare this plan, Midwestern must seek Portland's cooperation in its development. The intent of the condition is not for Midwestern to prepare the plan on its own, and simply file it at the Commission for the Director of OEP to review. The Commission's intent is for the plan to include Portland's engineering input up-front, so that it represents a plan that has been agreed upon by both parties. The Commission also clarifies that the site-specific construction plan for the treatment plant area must be approved by the Commission's staff prior to commencement of construction of that segment of the pipeline. However, as stated, *supra*, the Commission does not anticipate granting construction clearance for any portion of the pipeline until Midwestern complies with all required conditions and construction clearance can be granted for the entire pipeline.

135. As noted, Midwestern has proposed to Portland mitigation measures in the September 30, 2005 letter that the Commission finds should be incorporated into the site-specific construction plan. In addition, Portland has asked for posting of a surety bond or other special insurance against damage to the plant facilities and for the provision of emergency and permanent alternative water supplies in the event of damages to the plant. These measures also deserve merit and should be considered in the overall plan.

136. Finally, while the Commission acknowledges Portland's concern that the introduction of a natural gas pipeline alongside its water treatment plant may add new responsibilities in its compliance with anti-terrorism programs, the Commission does not agree that the placement of the 31-mile pipeline in proximity to the water treatment plant will make the plant a "ready target" for terrorism.<sup>113</sup> First, there will be no above-ground

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<sup>112</sup> Midwestern states that the language of the proposed pipeline easement provides that Midwestern has an obligation for the life of the pipeline to pay the landowner for "any damages to landowner's property caused by the construction, maintenance, operation, inspection, repair, replacement, protection, alternation, removal, or abandonment in place of the pipeline. *See* Midwestern's Answer to Comments at 22.

<sup>113</sup> Opposition Comments of Portland in June 24, 2005 Letter to Commission at 2.

pipeline facilities near the water treatment plant. Second, the Commission has taken actions to prohibit public access to sensitive information, such as removing energy facility design plans and location information from its Internet website, creating a Security Task Force to address ways to improve pipeline security practices, and working with other federal agencies to develop a coordinated approach to protecting the nation's energy facilities. Third, Midwestern has stated that it is committed to cooperating with Portland to provide it prompt information and consultation regarding its facilities to enable Portland to comply with the homeland security regulations administered by the Tennessee Emergency Management Agency and the drinking water security programs under the federal Bioterrorism Act administered by the TDEC, Division of Water Supply.<sup>114</sup>

**d. Impacts on Federally-Listed Endangered Species**

137. The Landowners maintain that Environmental Condition 16, requiring Midwestern to survey for federally-listed wildlife species in previously inaccessible areas, prepare and file a survey report, and consult with the FWS regarding impacts to wildlife, does not adequately address the concerns raised about wildlife species by the Landowners and the Tennessee WRA.

138. In its comments to the EA, the Tennessee WRA expressed concern that the requirement in this environmental condition that prior to initiation of surveys, Midwestern "consult with the FWS for appropriate survey methods and timing windows," as well as for proposed mitigation actions, excludes input from the Tennessee WRA and the Tennessee DEC. The Tennessee WRA states that because all wildlife in the State of Tennessee is under the management authority of the State of Tennessee, the Tennessee WRA and the Tennessee DEC should also be consulted regarding appropriate survey methods, timing windows, and mitigation measures for federally-listed (as well as state-listed) species.

139. Although not discussed in the March 2006 Order, the EA indicated in its discussion of federally-listed species that Midwestern would continue to consult with the Tennessee WRA to determine if species-specific surveys are required and the survey methodology and appropriate timeframe for the surveys if they are required,<sup>115</sup> but did not require consultation with the Tennessee WRA as part of the recommended environmental condition. Under Section 7 of the Endangered Species Act, the Commission is required to consult with the FWS and therefore conditioned the commencement of construction on the completion of consultation with the FWS and the

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<sup>114</sup> Midwestern's July 20, 2005 Answer to Comments at 19-20.

<sup>115</sup> EA at 36.

receipt of comments from the FWS. However, the Commission clarifies that Midwestern should continue its consultation with the Tennessee WRA and the Tennessee DEC with regard to federally listed species and include their input in the completed survey report that is filed with the Commission.

140. Some landowners had argued that their properties are sanctuaries for wildlife such as deer, wild turkeys, hoot owls, and raccoons, which they try to feed and protect. As explained in the EA, the primary impact of the pipeline on wildlife would be the temporary loss of habitats and displacement during construction.<sup>116</sup> The populations of affected species would be expected to return to previous levels within a short time after construction. Moreover, the EA and the March 2006 Order requires Midwestern to implement the mitigation measures identified in both our Plan and Procedures to minimize any impacts on wildlife habitat.<sup>117</sup> The EA concluded, and we affirm, that wildlife species in the project area would not sustain long-term or significant impacts as a result of construction and operation of the proposed project.<sup>118</sup>

e. **Alleged Resolution of Environmental Impacts Through Negotiation**

**Arguments on Rehearing**

141. With respect to some issues, the Landowners fault the Commission for directing landowners to seek protections from the adverse impacts to their land through negotiations with Midwestern, rather than providing environmental conditions for those issues in the certificate order. They argue this does not fulfill NEPA requirements. The Landowners point to the construction impacts on their use of the right-of-way as it relates to soil cover, cattle farming, and nursery operations, the construction impacts on cross-contamination and biosecurity, and the impact from the method of right-of-way timber disposal, as those issues the Commission advised landowners to resolve through negotiations with Midwestern.<sup>119</sup>

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<sup>116</sup> *Id.* at 34.

<sup>117</sup> *Id.* at 35; Environmental Condition 1 of March 2006 Order.

<sup>118</sup> EA at 35.

<sup>119</sup> Landowners' Request for Rehearing at 12.

### **Commission Response**

142. The Landowners are incorrect in stating that the Commission advised the landowners to negotiate protections for environmental impacts with Midwestern. The types of impacts cited above regarding soil cover, cattle, nursery operations, timber disposal, and biosecurity, while possessing environmental aspects, are not considered of an “environmental” nature in terms of the project’s impact, but, rather, are economic considerations. The majority of issues raised concern the impacts on the landowners’ use of the pipeline right-of way during and after construction. The Commission continues to encourage the applicant and affected landowners to discuss these and other construction and right-of-way issues within the easement agreement negotiations, to ensure that property owners’ interests are considered.

143. With respect to the cross-contamination and biosecurity concerns, some landowners had maintained that the crossing of the construction crew and construction vehicles from farm to farm could infect livestock with a variety of diseases and pathogens.<sup>120</sup> These concerns pertain to the impacts construction of the pipeline could have on landowners’ cattle ranching and agricultural operations. The Commission continues to encourage landowners’ to work with Midwestern to develop solutions that will protect against or alleviate these concerns. For example, it may be possible for Midwestern to agree to wash its construction vehicles and equipment after work is completed on each separate property or farm.

#### **f. Alleged Failure to Address Issues Raised by Landowners**

### **Arguments on Rehearing**

144. With respect to other issues, the Landowners assert that the Commission essentially ignored the Landowners’ concerns by simply deferring to Midwestern to mitigate the adverse impacts with express protections to landowners. The Landowners maintain that this treatment was given to the project’s impact on agricultural production, and reseeded procedures.

145. Moreover, as a result of the Commission’s reliance on a post-certificate process to resolve these issues, the Landowners argue that with respect to certain issues that were raised, the Commission provided insufficient protections or no conditional protections at all. Specifically, the Landowner’s assert that the March 2006 failed to include conditions or protections for adverse impacts to: (1) the forested areas along the pipeline route,

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<sup>120</sup> See, e.g., Letter of Robert Law dated March 1, 2005 filed in Docket No. PF05-2-000.

including an area dedicated to a State of Tennessee Forest Management Plan; and (2) air and noise quality from blasting operations.<sup>121</sup>

146. Lastly, the Landowners argue that the Commission did not adequately analyze the social impacts of the project.

### **Commission Response**

147. In the March 2006 Order, the Commission noted that the Tennessee Farm Bureau had concerns that the installation of a pipeline would negatively affect agricultural production by decreasing crop yields, but found that landowners would be able to continue to grow crops on the surface of the easement.<sup>122</sup> In the environmental portion of the March 2006 Order, the Commission addressed concerns regarding the impact construction of the pipeline could have on soils, including the loss of soil productivity. As we indicated there, Midwestern will restore and revegetate all disturbed areas by following the Commission's Upland Erosion control, Revegetation, and Maintenance Plan.<sup>123</sup> Further, the EA analyzed in detail the various impacts on soils from construction of the pipeline, and found that any loss of soil productivity would be short-term, limited to the construction phase of the project.<sup>124</sup> As stated in both the EA and the March 2006 Order, impacts to annually cultivated fields and prime farmland soils will be minimized by segregating topsoil and restoring it following construction, as agreed upon with the respective landowners, and all disturbed soils will be restored and stabilized or revegetated following construction.<sup>125</sup> We also noted in the order, that under our Plan, Midwestern is responsible for monitoring revegetation success in agricultural areas, including crop yields.<sup>126</sup> However, to the extent that landowners nevertheless feel that the decrease in agricultural production will not be temporary or will last for an extended period of time, landowners are free to attempt to seek compensation for decreased crop production in easement negotiations with Midwestern.

148. With regard to reseeded procedures, landowners had complained that the EA permits Midwestern and the local soil conservation authority to determine what seed mix

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<sup>121</sup> Landowners' Request for Rehearing 13-15.

<sup>122</sup> 114 FERC ¶ 61,257 at Ps 23-24.

<sup>123</sup> *Id.* at P 89.

<sup>124</sup> EA at 17-19.

<sup>125</sup> 114 FERC ¶ 61,257 at P 89; EA at 19.

<sup>126</sup> *Id.* at P 91 and n.68.

to use on the easements after construction,<sup>127</sup> without landowner input. The EA, however, also separately discussed the restoration of the right-of-way, and stated:

All temporary rights-of-way would be restored in accordance with the agreement with the landowner. All work areas would be seeded, and pipeline markers and warning signs erected at roads and other points, as required. All restoration activities would be conducted in accordance with our Plan and Procedures.<sup>128</sup>

The EA further states that “[i]n accordance with our Plan, in upland areas, MGT would use seed mixes and rates recommended by the local soil conservation authority or by landowner agreement.”<sup>129</sup> Specifically, section V.D.3.b. of the Commission’s Plan, which Midwestern has agreed to adopt during construction, states that the project sponsor (Midwestern) must “seed disturbed areas in accordance with written recommendations for seed mixes, rates, and dates obtained from the local soil conservation authority or as requested by the landowner or land management agency. Seeding is not required in actively cultivated croplands unless requested by the landowner.” Thus, landowners are not prevented from providing input on appropriate seed mixes or from otherwise participating in the reseeded, and as the last sentence of the cited Plan section reflects, Midwestern need not even become involved in the reseeded of easements in actively cultivated croplands. We note that this section was drafted to apply to the revegetation of all pipeline easements, not just easements located on active farmland.

149. Further, the Commission did not fail to provide protections against adverse impacts to the forests along the route. The EA recognized that the establishment of the 50-foot-wide permanent right-of-way would result in a permanent loss of about 39.4 acres of forested land. However, the EA indicated that Midwestern’s proposed construction techniques and Midwestern’s implementation of the measures in our Plan and our Procedures to limit temporary and permanent impacts to vegetation would minimize impacts to vegetation.<sup>130</sup>

150. In addition, the Commission did not find it necessary to impose additional mitigation measures to protect the approximately 1,000-foot portion of the route that is within a tract of land both dedicated to a Tennessee Forest Management Plan and subject to the Agricultural, Forest and Open Space Land Act of 1976 (Greenbelt Law) for tax

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<sup>127</sup> EA at 19.

<sup>128</sup> *Id.* at 7.

<sup>129</sup> *Id.* at 35.

<sup>130</sup> *Id.* at 33.

assessment purposes. Midwestern has stated that this tract of land that is subject to these properties will not be affected by its project.<sup>131</sup> As we explained in the EA, approximately 28.4 acres of this 29.4 acre parcel are wooded, but the project will require the clearing of only approximately 1.82 acres of land and, therefore, the project will not significantly reduce the forest cover on this parcel to a point below the 15-acre threshold established by the Greenbelt Law.<sup>132</sup>

151. Moreover, while a 10-foot-wide corridor centered on the pipeline will be maintained in an herbaceous-only, or grassy, state with no woody vegetation or trees, post-restoration, Midwestern has stated that it will selectively cut and remove only certain large trees within the 10 feet on either side of the 10-foot herbaceous corridor.<sup>133</sup> Also, property owners can negotiate with Midwestern for the replanting of small shrubs within those 10 feet along either side of the herbaceous corridor and for the replanting of trees within the remaining 20 feet (10 feet on each side) of the 50-foot-wide right-of-way.<sup>134</sup> In any event, landowners are entitled to be fully compensated for the market value of the lost trees if replanting is not feasible.

152. With respect to adverse impacts on air and noise quality from construction blasting, the EA separately discussed both the impacts from construction blasting and the construction impacts on air and noise quality. The EA found that construction of the pipeline would cause a temporary reduction of local ambient air quality due to dust and emissions generated by construction equipment, but that proper maintenance of the construction equipment would minimize impacts due to emissions.<sup>135</sup> In addition, the EA found that the overall noise impacts from construction would be temporary and intermittent. These impacts should be no greater as a result of any construction blasting that might be undertaken. If anything, cumulative adverse impacts on air and noise

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<sup>131</sup> Midwestern's Application, Exhibit F-1, Resource Report 8 at p. 8-5.

<sup>132</sup> EA at 45; and Midwestern's Application, Exhibit F-1, Resource Report 5 at p. 5-4.

<sup>133</sup> In its application, Midwestern stated that it would maintain "a 30-foot-wide corridor centered on the pipeline clear of trees larger than 15-foot right-of-way by selective cutting and removal; a 10-foot wide corridor centered on the pipeline will be maintained in a herbaceous-only state." Midwestern's Application, Exhibit F-1, Resource Report 3 at p. 3-3.

<sup>134</sup> Midwestern is required to restore the temporary construction right-of-way to its prior vegetative state.

<sup>135</sup> EA at 56.

quality from blasting should be less than those caused by other construction activities, since blasting may not even be required, and if it is, its use will be minimized.

153. Finally, the Commission considered the social impacts of Midwestern's project on the Tennessee communities affected. In the EA, the Commission staff addressed the socioeconomic impacts of the project, including whether the project will result in any disproportionately high and adverse human health or environmental effects on minority and low-income communities or Native American groups, as required by Executive Order 12898 on Environmental Justice.<sup>136</sup> The Commission staff determined that any socioeconomic impacts associated with the construction of the project would be short-term and localized, that such impacts would include positive impacts on the local economy, and that there would be no disproportionately high adverse human health or environmental effects on minority, low-income, or Native American communities.

### **B. Motion for Stay**

154. In their April 3, 2006 motion for stay of the March 2006 Order, the Landowners request that the Commission stay the effectiveness of the March 2006 Order until 60 days after final action on rehearing is completed.<sup>137</sup> The Landowners also request in their motion that the Commission specifically confirm that “[Midwestern] can take no action to acquire property rights through eminent domain until the stay has been terminated.”<sup>138</sup>

155. The Landowners argue that a stay of the order is necessary to prevent irreparable injury to the environment and the general public from construction activities. They maintain that the construction of pipeline will cause irreversible environmental impacts such as the loss of trees, vegetation, wetland areas, and forests, and damage to the karst terrain with the potential for sinkhole development and ground subsidence. The Landowners also assert that a stay is necessary to prevent irreparable economic injury to

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<sup>136</sup> *Id.* at 52-55. As we have previously held, Executive Order 12898 is not binding on this Commission. *See, e.g., Southern Natural Gas Co.*, 115 FERC P 61,328 at P 58 (2006). Nevertheless, we examined the impacts of this project in light of the goals of the Executive Order and, as noted above, determined that there would be no disproportionately high adverse human health or environmental effects on minority, low-income, or Native American communities.

<sup>137</sup> The Landowners explain that they are seeking a stay of the order until final action on rehearing is completed, plus an additional 60 days thereafter to allow sufficient time for STOP to file a request for stay with the court, if necessary.

<sup>138</sup> Landowners' Motion for Stay at 1. The motion for stay does not reflect that Midwestern had already begun filing condemnation pleadings in court.

landowners from Midwestern's acquisition of property rights through eminent domain without the protections the Commission anticipated Midwestern would provide during easement negotiations with the landowners. The Landowners argue that the construction of the pipeline will adversely affect the livelihood of landowner by interfering with their farming, livestock, or dairy operations. The Landowners' stay request attaches affidavits from 20 members of STOP detailing how the proposed pipeline will cause harm to each member's livelihood and property.<sup>139</sup>

156. In its answer to the motion for stay, Midwestern states that it is the Commission's general practice to deny stays "in order to assure definiteness and finality in Commission proceedings."<sup>140</sup> Midwestern asserts that the Commission will grant a stay only when "justice so requires" and only where movant discharges its burden of demonstrating that: (1) irreparable harm will result absent a stay; (2) other parties will not be substantially harmed by grant of a stay; and (3) the stay is otherwise in the public interest.<sup>141</sup>

157. The crux of Midwestern's opposition to the stay lies in the courts' view that a movant must show that its injury is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm."<sup>142</sup> According to Midwestern, the Landowners' claim of irreparable injury, and in particular, the "imminence" component, fails to take into account the realities of certificate authorization, which is subject to a variety of time-consuming, pre-construction compliance requirements. For instance, states Midwestern, construction cannot begin until all necessary federal permits obtained, easement agreements are negotiated or condemnation proceedings are completed.

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<sup>139</sup> Motion for Stay of Certificate Order at Appendix B. On April 6, 2006, Portland filed with the Commission a notice that it concurs and supports the Landowner's request for stay, and as stated, *supra*, on April 12, 2006, the Landowners supplemented their motion for stay, due to Midwestern's initiation of eminent domain proceedings in U.S. District Court. The Landowners included in their supplement sample pleadings filed by Midwestern in the court condemnation proceedings. The Landowners claim that the initiation of eminent domain proceedings has been without any attempt on Midwestern's part to negotiate easements that would address landowners' concerns.

<sup>140</sup> Midwestern's Answer at 4, *citing Islander East Pipeline Co.*, 102 FERC ¶ 61,054 at P31 (2003).

<sup>141</sup> *Id.*

<sup>142</sup> Midwestern's Answer at 5, *citing Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), *quoting Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

Moreover, Midwestern asserts, economic loss due to eminent domain proceedings is not sufficient to constitute irreparable harm.<sup>143</sup>

### **Commission Determination**

158. In considering requests for a stay, the Commission has applied the standards set forth in section 705 of the Administrative Procedure Act,<sup>144</sup> and has granted a stay “when justice so requires.”<sup>145</sup> In deciding whether justice requires a stay, the commission generally considers several factors, which typically include : (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.<sup>146</sup> The Commission’s general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.<sup>147</sup> If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.<sup>148</sup> The Landowners’ request for stay fails to meet this first criterion.

159. First, the Landowners assert that absent a stay there will be irreparable injury to the environment. The Commission determined in the March 2006 Order, after a thorough environmental review, that if the proposed Midwestern facilities are constructed and operated in accordance with the recommended and proposed environmental mitigation measures, it would not constitute a major federal action significantly affecting the quality of the human environment.<sup>149</sup> As detailed above, the Commission has rejected the Landowners’ rehearing arguments that there will be irreparable injury involving the loss of trees, vegetation, wetland areas, and forest, as well as damage to the karst terrain as a result of blasting. The Commission placed numerous environmental conditions on the

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<sup>143</sup> Midwestern’s Answer at 7, *citing Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>144</sup> 5 U.S.C. § 705.

<sup>145</sup> *See, e.g., Independence Pipeline Company*, 91 FERC ¶ 61,102 at 61,363-64 (2000) (Independence).

<sup>146</sup> *See, e.g., Sea Robin Pipeline Company*, 92 FERC ¶ 61,217 at 61,710 (2000) (*Sea Robin*).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> 114 FERC ¶ 61,257 at P 103.

construction of the pipeline and required numerous mitigation measures to minimize the effect of the construction on the environment.

160. The Landowners also claim that absent a stay there will be irreparable injury to them as a result of the taking of their property rights by eminent domain and the resulting construction activities that will ensue. As noted above, these claims includes adverse affects on grazing, livestock access to water, disqualification of organic beef operation, destruction of tree farm operations, farming biosecurity, impaired farming profitability, and property devaluation. Additionally, the Landowners contend that the money that might be awarded them in an eminent domain proceeding will not fully compensate them for the adverse impacts of the use of their lands. The Landowners find support for this claim in the Certificate Policy Statement, where the Commission stated that “[e]ven though the compensation received in such a proceeding is deemed legally adequate, the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner and this is a valid factor to consider in balancing the adverse effects of a project against the public benefits.”<sup>150</sup>

161. In *Wisconsin Gas Co. v. FERC*,<sup>151</sup> the court developed several principles to determine if the requirement of irreparable harm has been met for a judicial stay:

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief “will not be granted against something merely feared as liable to occur at some indefinite time.” It is also well settled that economic loss does not, in and of itself, constitute irreparable harm . . . . Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is “likely” to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.<sup>152</sup>

162. We find that the Landowners have not met these principles of showing irreparable harm. First, regardless of the fact that Midwestern may have commenced eminent domain proceedings, it is still possible for individual landowners to work with Midwestern to accommodate some of their needs. Further, any economic loss, by itself, is not sufficient to constitute irreparable harm. Further, the Landowners have not

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<sup>150</sup> See 90 FERC ¶ 61,128 at 61,398.

<sup>151</sup> 758 F.2d 669 (D.C. Cir. 1985).

<sup>152</sup> 758 F.2d at 674.

quantified or qualified the uncompensated damages they will suffer. Any such injury is speculative at best, depending on whether and to what extent any accommodation can be reached between the landowner and Midwestern. Finally, the Commission did not mean to suggest in the Certificate Policy Statement any dissatisfaction that a landowner might have with the monetary award in an eminent domain proceeding rises to the level of irreparable injury. Were that the case, then Commission's general policy would seem to be to generally grant stays, when in fact our general policy is, as stated above, to deny stays. For the above reasons, we find that the Landowners have not demonstrated that justice requires the requested stay of the March 2006 Order.

The Commission orders:

The requests for rehearing and the request for stay of the March 2006 Order in this proceeding are denied, as discussed above.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.