



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

MAY 21 2003

Neil L. Levy
Christian C. Semonsen
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005

Re: Comments of Villages of Croton-on-Hudson and Briarcliff Manor on Millennium's Surreply Brief - Consistency Appeal of Millennium Pipeline Company, L.P.

Dear Messrs. Levy and Semonsen:

This responds to your letter of May 12, 2003, in which you submitted written comments on behalf of the Villages of Croton-on-Hudson and Briarcliff Manor regarding two aspects of Millennium's surreply brief dated April 21, 2003. Your letter also requested that these comments be made part of the public record for the Millennium consistency appeal.

As a general matter, the Department and parties to an appeal have a significant interest in the finality of the administrative process. This is especially true in the latter stages of a proceeding, such as when all scheduled briefs have been filed, as is the case here. In addition, we note that there is no obligation to consider public comments received after the close of the comment period, despite the fact the administrative record for the appeal remains open.¹ In this appeal, the period for public comment closed on January 8, 2003.² To consider comments, such as the ones at issue here, would invite a series of additional replies from interested parties. It would also

¹ The administrative record remains open during the review and analysis of timely submitted materials to allow the Department, if necessary, to supplement the record on issues particularly significant or relevant to the Secretary's decision. This reduces the likelihood that there will be a need to revisit the record or the decision in the future. Usually, information submitted during comment periods and by the parties has been found to create a sufficient administrative record. Supplements to an administrative record addressing a deficiency identified by the Department during its review typically involve either briefs from the parties or scientific/technical information that would be expected to be provided to the parties for comment.

² Shortly before the close of the public comment period, and at the time it was considering whether to submit public comments, the Village of Croton-on-Hudson (Village) requested permission to file an *amicus* reply brief for the appeal. NOAA advised the Village that a decision on that request might not be reached until after the public comment deadline. The Village subsequently decided to submit a portion of its comments prior to the close of the public comment period. The Village of Briarcliff Manor submitted comments on the appeal in conjunction with: (1) the *amicus* brief filed by the Village of Croton-on-Hudson on October 23, 2002; and (2) comments provided on January 8, 2003, by the Village of Croton-on-Hudson.



necessitate considering all late comments³ from the public and providing the parties with an opportunity for review and comment. We find no compelling justification in your request that warrants the attendant delay associated with this possibility.

In addition, the Villages' request to comment on Millennium's surreply brief seeks to obtain a right belonging to a party to an appeal,⁴ and is similar to a matter we have previously considered in this proceeding. In February 2003, we denied the Village of Croton-on-Hudson's petition to file an *amicus* reply brief, in part, because one purpose of the filing would have been to rebut possible forthcoming comments from Millennium on the Village's initial *amicus* brief.⁵ Consideration of the comments before us today would serve the same purpose, thereby providing the Villages with "the last word." Ironically, if we were to grant the current request, we would afford the Villages an opportunity not provided to the Appellee, namely, to respond to issues raised by Millennium's surreply brief.

For the foregoing reasons, we decline to consider your recently submitted comments. Thank you for your continuing interest in this important matter.

Sincerely,



James R. Walpole
General Counsel

cc: Frederic G. Berner, Jr.
Glen T. Bruening

³ Late filed comments are not posted on the Department of Commerce's CZMA appeals website; however, they are retained as part of the appeal record.

⁴ The Village's petition for intervention as a party was denied. Letter from James R. Walpole, NOAA, U.S. Department of Commerce, to Neil L. Levy and Christian C. Semonsen, Kirkland & Ellis (representing the Village of Croton-on-Hudson, New York), July 17, 2002.

⁵ Letter from James R. Walpole, NOAA, U.S. Department of Commerce to Neil L. Levy and Christian C. Semonsen, Kirkland & Ellis, February 3, 2003, at 3.