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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

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SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8232

WRITER'S E-MAIL ADDRESS
fberner@sidley.com

January 6, 2003

Karl D. Gleaves, Esq.
Assistant General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
United States Department of Commerce
1305 East West Highway
Room 6111 SSMC4
Silver Spring, MD 20910

Re: Village of Croton-on-Hudson's Request for
Permission to File an *Amicus* Reply Brief
in the Consistency Appeal of Millennium
Pipeline Company, L.P.

Dear Mr. Gleaves:

We have received the December 31, 2002 letter to you from the law firm of Kirkland & Ellis, requesting that the Village of Croton-on-Hudson, New York (the "Village") be granted permission to file an *amicus* reply brief in this proceeding, and your January 2, 2003 letter regarding the timing of NOAA's response. On behalf of the appellant, Millennium Pipeline Company, L.P. ("Millennium"), we offer the following response in adamant opposition to the Village's request:

1. **The Village should not be permitted to file an *amicus* reply brief.** There is no basis at all for the Village's claim that permitting it to file an *amicus* reply brief would be "consistent with past practice and with the Secretary's previous letter granting the Village *amicus* status . . ." Letter from Neil L. Levy to Karl Gleaves dated December 31, 2002 ("K&E Letter"), at 1. To the contrary, the general rule is that the filing of a reply brief by an *amicus* is expressly prohibited. U.S. Supreme Court Rule 37(3)(a) ("The Clerk will not file a reply brief for an *amicus* . . ."). Prohibiting an *amicus* reply brief would be particularly appropriate in this case, because the Village has not provided the sort of objective, dispassionate, neutral discussion

Karl D. Gleaves, Esq.
January 6, 2003
Page 2

of the issues that would be expected from a true "friend of the court." *United States v. Gotti*, 755 F.Supp. 1157, 1159 (E.D. N.Y. 1991).

Similarly, NOAA's letter granting the Village *amicus* status nowhere states that the Village may file an *amicus* reply brief. Rather, NOAA provided only that "the Village may seek subsequent permission to file a reply brief as an *amicus* . . ." Letter from James R. Walpole to Neil L. Levy dated July 17, 2002, at 4 (emphasis added). That provision and NOAA's requirement that the Village's *amicus* brief must be filed "no later than seven days following the filing of the brief of the party the Village supports" (*id.* at 3) are seemingly modeled after Rule 29 of the Federal Rules of Appellate Procedure, which

"prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and the local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief." Advisory Committee Note on Rule 29(f), 28 U.S.C.A. (emphasis added).

2. NOAA's procedures have provided the Village with adequate opportunities to submit comments in this proceeding. The Village further claims that "limiting *amici* to one opportunity to comment in the form of an initial brief at the outset of this process would be inappropriate . . ." K&E Letter, at 2. In fact, however, NOAA has already provided the Village with at least four separate opportunities to comment on Millennium's consistency appeal. First, the Village was permitted to file an initial *amicus* brief on October 23, 2002. Second, the Village's request for a public hearing was granted, and the Village and many of its residents offered further comments at the hearing that was held on November 13, 2002. Third, the Village was permitted to file comments during the public comment period that ended on December 2, 2002. Fourth, the Village remains entitled to file comments during the reopened public comment period that ends on January 8, 2002, including any response that it may choose to submit to any comments that have been filed in this proceeding or any alleged "new information" that it may care to submit. Clearly, however, the Village may not bootstrap its *amicus* status into the full rights of a party in this proceeding, and thus it has no right to submit a final reply brief in this case.

3. The Village should not be permitted to respond to Millennium's reply brief. The Village's further, outrageous request for the right to respond to Millennium's reply brief (K&E Letter, at 2) not only conflicts with the fundamental rule that *amici* reply briefs are prohibited, but also blatantly ignores NOAA's determination that the Village is not entitled to the rights of a party in this proceeding. More pragmatically, the Village's request should be recognized for what it is -- a transparent attempt to delay this proceeding through further rounds of redundant briefs and comments. In the interests of administrative finality and closure, NOAA

Karl D. Gleaves, Esq.
January 6, 2003
Page 3

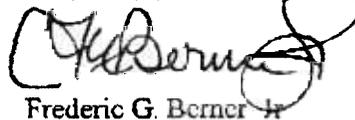
should instead maintain its practice of permitting the parties -- in this case, Millennium and the NYSDOS -- to exercise their rights to close the proceeding through the submission of simultaneous final reply briefs.

Likewise, the Village's request for "the opportunity to fully brief the Secretary" with respect to "new information concerning its water supply" and its assertion that "it is imperative" for NOAA to expedite its decision on the Village's procedural requests (K&E Letter, at 2) are veiled requests for further procedural delays that should not be countenanced. The Village has had an adequate opportunity to fully brief all issues, and its 11th hour request for more time to file a reply brief or "new information," without any justification for the untimeliness of that request, should be flatly rejected. As the U.S. Department of Energy has emphasized (Comments filed on December 2, 2002, at 3):

"The Department believes that the CZMA regulations should not be used to delay or block vital energy projects, such as the Millennium Pipeline, and that the Secretary of Commerce should consider the State of New York's objection in an expeditious manner"

For all of these reasons, the Village's request for permission to file an *amicus* reply brief should be denied.

Very truly yours,



Frederic G. Berner Jr.

Attorney for Millennium
Pipeline Company, L.P.

cc Glen T. Bruening
William L. Sharp
Neil L. Levy