



Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

RE: CP13-36-000 Proposed Rockaway Delivery Lateral Project

Dear Secretary Bose,

The CUNY School of Law Center for Urban Environmental Reform (“CUER”) is writing to express its strong opposition to the proposed Rockaway Delivery Lateral Project (“Rockaway Lateral”). The draft Environmental Impact Statement (“DEIS”) for the Rockaway Lateral, released by the Federal Energy Regulatory Commission (“FERC”) on October 4, is improperly limited in scope, and violates the National Environmental Policy Act (“NEPA”). Contrary to clear precedent under NEPA, this DEIS improperly segments the pipeline project in order to avoid federal review of the whole project, and to minimize the impacts of the Rockaway Lateral. *See Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987); *Hammond v. Norton*, 370 F.Supp.2d 226, 244 (D.D.C. 2005) (finding it well established that “an agency preparing an EIS may not segment its analysis so as to conceal the environmental significance of the project or projects”). Because the DEIS does not comply with NEPA’s requirements, the FERC must reject the application by Williams Companies Inc.’s Transcontinental Gas Pipeline Company (“Williams Transco”) for a Certificate of Public Convenience and Necessity concerning this project. This letter also incorporates and supports the environmental justice comments submitted on behalf of CUER by CUER Fellow Ethan Middlebrooks.

The DEIS’s principle deficiency is that it reviews only one portion of a series of connected actions that must be considered together in order for the agency to satisfy its NEPA obligations. Williams Transco’s ambition for this project is to create a new pipeline network to distribute natural gas from its existing 10,200-mile Transco pipeline off the Atlantic Coast to the New York City market. The proposed 3.2-mile long Rockaway Lateral pipeline, however, will only deliver gas from the Transco pipeline to a location on the Rockaway Peninsula operated by local distributor National Grid plc (“National Grid”). To bring its natural gas to the larger New York City market, Williams Transco is relying on a series of actions from National Grid, collectively known as the Brooklyn-Queens Interconnect (“BQI”), which have not been reviewed in this DEIS. As part of the BQI, National Grid must build a new Metering and Regulating Station (M&R station) at Floyd Bennett Field in Brooklyn, to prepare Williams Transco’s natural gas for local distribution. In addition, National Grid must construct new pipeline, through the Gateway National Recreation Area, to transfer the gas from the Rockaway Peninsula location to the

proposed M&R station. Finally, National Grid must build new pipeline to transport the gas from the proposed M&R station to its existing station at Hendrickson Street and Avenue U in Brooklyn, where it can be distributed to the New York City market. In December 2011, the New York City Office of the Mayor, after conducting an Environmental Assessment (“EA”) of the BQI, issued a negative declaration, meaning that it would not conduct its own EIS pursuant to the State Environmental Quality Review Act (“SEQRA”). *See Brooklyn-Queens Interconnect Assessment*, Office of the Mayor, CEQR No. 1200M001K (Dec. 2011).

As explained below in detail, the Rockaway Lateral and the BQI are “connected actions” and thus must be reviewed, pursuant to NEPA, in the same Environmental Impact Statement (“EIS”). *See* 40 C.F.R. 1508.25(a). Indeed, Williams Transco is well aware of this requirement. It has previously attempted to improperly segment other pipeline projects in order to circumvent NEPA review. *See Hammond*, 370 F.Supp.2d at 226 (overturning a Bureau of Land Management (“BLM”) EIS that reviewed only one segment of a larger Williams Transco pipeline proposal). Moreover, the Environmental Protection Agency has voiced its concerns about this improper segmentation, with little response from FERC. *See Letter to Secretary Kimberley D. Bose; RE: Docket Nos PF09-08*, Environmental Protection Agency, Region 2 (June 11, 2012). Finally, FERC’s failure to analyze these projects as a connected action raises serious questions about the adequacy of the DEIS’s cumulative impacts analysis.

The Rockaway Lateral and Brooklyn-Queens Interconnect are connected actions and must be reviewed in a single Environmental Impact Statement

To determine whether a project has been improperly segmented, the proper inquiry is whether the different projects are connected for the purposes of the NEPA. Under 40 C.F.R. 1508.25(a)(1), actions are connected, meaning that they must be analyzed under the same EIS, if they:

- i) Automatically trigger other actions which may require environmental impact statements
- ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or
- iii) Are interdependent parts of a larger action and depend on the larger action for their justification

In making the determination of whether projects are connected, courts also consider “whether the proposed [project] (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.” *Hammond*, 370 F. Supp.2d at 247; *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987); *Piedmont Heights Civic Club v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981). The purpose of this rule is to “prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1228(10th Cir. 2008); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). In other words, this rule prevents applicants and agencies from

thwarting their NEPA obligations by improperly segmenting projects into smaller components in order to avoid considering their collective impact.

Under this definition, the Rockaway Lateral and the BQI are plainly connected actions that must be considered together under NEPA. Indeed, the Rockaway Lateral and the BQI satisfy all three of the alternatives listed in 40 C.F.R 1508.25(a)(1).

- i) The Rockaway Lateral cannot proceed as planned until the BQI is finalized. *See Coalition on Sensible Transportation*, 826 F.2d at 69 (“the proper question with regard to independent utility is whether one project will serve a significant purpose even if a second related project is not built). As described on Williams Transco’s website, “The project will also involve the construction of a meter and regulator station, which is necessary to measure, condition and control the flow of natural gas before it enters the local natural gas distribution system.” (*emphasis added*). Until the BQI’s pipelines and M&R station are constructed, the Rockaway Lateral’s sole purpose will be to “provide a redundant supply source of natural gas.” *See* DEIS at 1-12 (*emphasis added*). In other words, the Rockaway Lateral pipeline lacks any independent utility without the M&R station and accompanying pipelines included in the BQI. Therefore, it is only when the Rockaway Lateral is coupled with the BQI that Williams Transco can provide natural gas for distribution to the New York City market.
- ii) The Rockaway Lateral and the BQI are interdependent projects intended to serve Williams Transco’s ambition to supply natural gas from its existing Transco pipeline directly to New York City customers. As explained above, the Rockaway Lateral is devoid of any independent utility. Similarly, the primary purpose of the BQI project is to “provide a new delivery point that offers a long-term solution to meet the supply needs of National Grid’s system.” *See* DEIS at 1-12. This purpose is contingent on the construction of the Rockaway Lateral to deliver gas from the existing Transco pipeline. *Id.* (“If the proposed Rockaway project is constructed, then National Grid’s 26-inch-diameter pipeline would serve as a transmission pipeline operating at higher pressures to transmit natural gas over longer distances.”). As is clear, the Rockaway Lateral has no justification when separated from the larger proposal.
- iii) As a stand-alone project, the BQI also raises a number of concerns that should automatically trigger an EIS, none of which have been reviewed in the DEIS. As the city’s EA noted, the Gateway National Recreation Area, where the proposed M&R station would be situated, is home to several observed endangered species. *See Brooklyn-Queens Interconnect Assessment*, New York City Office of Mayor at A-11. Since the Rockaway Lateral has been subjected to a full EIS, Williams Transco has sought an incidental harassment with the National Marine Fisheries Services, pursuant to the Marine Mammal Protection Act, for six marine mammals, including the endangered North Atlantic Rights Whale. *See Request for Incidental Harassment Authorization Under the Marine Mammal Protection Act*, Williams Transco (March 2013). Contrarily, Williams Transco did not even

bother to take these steps for the BQI because this segment of the project was subject to weaker environmental review. In addition, the proposed M&R facility would be located in two historic hangers at the Floyd Bennett Field, which is listed on the National Register of Historic Places. Both the EA and the DEIS state that Williams Transco has not yet submitted a clear plan for how it intends to construct the M&R station, in accordance with National Historic Preservation Act requirements. *See* DEIS at ES-5. The EA that resulted in a negative declaration for this portion of the pipeline project was conducted by the Office of the Mayor. However, Mayor Michael Bloomberg's often-stated desire to expand the city's natural gas pipeline infrastructure creates an inherent conflict with the Office's ability to appropriately conduct such an investigation. *See PlaNYC: A Greener, Greater New York: Updated 2011*, Office of the Mayor, 106 (April 2011) ("We will accelerate the phase out of highly polluting residual heating oil and mitigate future supply constraints by aiding in the development of appropriately-sited natural gas transmission pipelines."). All of these concerns have been insulated from federal review, as intended by Williams Transco. By segmenting this project, Williams Transco not only seeks to avoid a true comprehensive review of its proposal, but a likely stricter federal review of the BQI.

In short, the Rockaway Lateral is a wholly arbitrary subdivision of a larger project, apparently created for the purpose of thwarting NEPA review. The Rockaway Lateral "has no independent justification, no life of its own, [and] is simply illogical when viewed in isolation." *Friends of Magurrewock, Inc. v. U.S. Army Corps v. Engineers*, 498 F.Supp.2d 365, 374 (D. Me. 2007). Courts have repeatedly found that NEPA prohibits this kind of segmented evaluation. *One Thousand Friends v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004); *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1139 (5th Cir. 1992). The DEIS fail to evaluate the Rockaway Lateral in conjunction with the BQI even though the two projects are clearly connected. Therefore the FERC must reject the DEIS, and must refuse to issue the requested Certificate of Public Convenience and Necessity until and unless an appropriately inclusive EIS is conducted.

Williams Transco has not responded to the EPA's concerns about the improper scope

In improperly segmenting the Rockaway Lateral and the BQI, Williams Transco acted contrary to the EPA's advice. In a letter responding to FERC's Notice of Intent to prepare an EIS, the EPA sent a letter, dated June 15, to FERC Secretary Kimberly D. Bose raising its concerns about the scope of the project. The EPA letter states, in relevant part, that:

"A comprehensive evaluation of cumulative, indirect, and secondary impacts should be presented. The cumulative impact analysis should consider the environmental impacts of the National Grid pipeline, without which the Rockaway Delivery Lateral would not be constructed." (*emphasis added*).

This concern is not addressed anywhere in the DEIS. Although FERC included a brief cumulative impacts section in the DEIS, it clearly did not respond to the EPA's recommendation that the Rockaway Lateral and the BQI be considered into one EIS. In other contexts, agency failure to respond to EPA concerns about segmentation has been grounds for reversal. *Citizens*

Against Burlington v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991) (finding that BLM's failure to address EPA concerns "brings into question the sufficiency of the agency's analysis."); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 297–99 (D.C. Cir. 1988) (agency's failure in FEIS to meaningfully address EPA concerns about cumulative effects analysis in DEIS contributed to determination that FEIS did not comply with NEPA). In this case, the FERC's failure to consider the clearly related projects in one EIS is a red flag. The Rockaway Lateral has no independent utility, and would not be constructed without the BQL. There is no rational basis for failing to include both projects in a single EIS.

Williams Transco has previously violated NEPA by segmenting its pipelines

The Rockaway Lateral is not the first time that Williams Transco has attempted to circumvent the NEPA process by improperly segmenting one of its pipeline projects. In an eerily parallel case in 2005, the D.C. District Court concluded that Williams Transco had segmented a pipeline to conceal the environmental significance of the project as a whole. *Hammond v. Norton*, 370 F.Supp. 2d 226, 244 (D.D.C. 2005). Indeed, the *Hammond* court pointed to precisely this kind of improper segmentation as grounds for concluding that Williams Transco's proposed EIS, which only reviewed one segment of a larger pipeline project, failed to meet the requirements of NEPA. *Id.*

In *Hammond*, Williams Transco proposed a new pipeline project between Bloomfield, New Mexico and Salt Lake City, which consisted of 260 miles of new pipeline and 220 miles of natural gas pipeline that would be converted for the use of petroleum products. These pipelines, however, consisted of only the northern portion of a larger project to connect the Salt Lake City market to the refineries on the Texas Gulf Coast. To build the southern portion, which consisted of pipeline between Bloomfield and Odessa, Texas, Williams Transco partnered with Equilon Pipeline. When the BLM made it clear that it would review the projects together in 1999, Williams Transco and Equilon terminated their partnership, at which point the two companies applied separately for permits covering only their respective portions of the project. Even though the EPA commented that this segmentation ran afoul to NEPA, BLM approved the Williams Transco's permit application for its portion of the project—an application that made no mention of the Equilon portion of the pipeline project. *Hammond*, 370 F.Supp. 2d at 234-35. The plaintiffs in the case argued that the Williams Transco's pipeline lacked independent utility and "cannot function" without being supplied by the Equilon Pipeline. *Id.* at 248. Williams Transco responded that it would have alternative sources of supply its proposed pipeline. *Id.*

The D.C. District Court determined that BLM decision to allow the environmental impacts of this pipeline to be evaluated in two separate EISs was arbitrary and capricious. *Id.* at 247-253. The *Hammond* court concluded that the two pipeline segments were connected actions under NEPA. *Id.* Indeed, the court chastised William Transco for demonstrating a "manifest intention to circumvent the NEPA review process" and reproached the agency for failing to consider whether the project had been divided into segments that were "of real or only formal significance." *Id.* at 251.

William's Transco's Rockaway Lateral proposal is arguably an even more egregious attempt to bypass NEPA review. In *Hammond*, Williams Transco attempted to segment its pipeline project

so there would be two, incomplete, EISs. Here, Williams Transco is attempting to segment a pipeline project so that it can entirely avoid an EIS for the BQI portion of the project. Much like the improperly segmented pipeline rejected in *Hammond*, the Rockaway Lateral lacks any independent utility without the BQI. The EPA specifically pointed out this problem—its letter explicitly states that without the BQI, “the Rockaway Lateral would not be constructed.” Williams Transco has offered nothing to contradict EPA’s clear-eyed assessment of the Rockaway Lateral, nor has Williams Transco demonstrated, as it must, the independent utility of the Rockaway Lateral. *Hammond*, 370 F. Supp. at 248-49 (“any finding of independent utility must substantiate...with record evidence...beyond the mere assertions of Williams representatives or BLM personnel, the existence of...circumstances indicating with reasonable clarity that the Williams pipeline will not rely on the proposed Equilon pipeline.”). Once again, Williams Transco has also disregarded the EPA’s advice and sought to sidestep the well-established NEPA regulatory process. In light of Williams Transco’s track record, the FERC must do more than merely accept the company’s unsupported assertions of independent utility. The agency has an independent obligation of to establish whether the Rockaway Lateral has any independent utility. This DEIS fails utterly to meet that threshold of agency activity and therefore cannot satisfy the FERC’s obligations under NEPA.

The DEIS does not adequately examine the cumulative impacts of the Rockaway Lateral and National Grid Pipelines

NEPA mandates that a proper EIS include a full discussion of the cumulative impacts of a proposed project. *See* 40 C.F.R. 1508.25(a)(2); *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) (“Cumulative environmental impacts are, indeed, what require a comprehensive impact statement”). An EIS must include the cumulative effects of projects outside the agency’s jurisdiction if those projects are “interrelated and functionally interdependent” to the proposed action. *Stewart v. Potts*, 996 F.Supp. 668, 683 (S.D. Texas 1998). Courts have been very clear that projects must be evaluated together whenever “proceeding with one project, will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects. *Fritiofson v. Alexander*, 772 F.2d 1225, 1241 n. 10 (5th Cir. 1985). Under 40 C.F.R. 1508.7, cumulative impacts are defined as:

“the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The DEIS’s brief, boilerplate, cumulative impacts section falls far short of this mandate. Although the DEIS includes a small section on cumulative impacts, it is unclear whether FERC gathered or received this information independently on the BQI, or relied entirely on the city’s negative declaration. In addition to the reasons described above, FERC should not rely on the Office of the Mayor’s EA because this review did not consider the environmental impact of the BQI in light of the cumulative effects with the Rockaway Lateral. In fact, the EA includes no mention of the potential environmental impacts of Rockaway Lateral and regardless, an EA is only meant to provide a brief, preliminary environmental review of a proposed project, and is not

meant to provide the type of extensive environmental analysis conducted in an EIS. *See* 40 C.F.R. 1508.9. Although the BQI is outside FERC's jurisdiction, the agency must still review the impacts of this project, in order to fully analyze the Rockaway Lateral in accordance with the NEPA. *See Stewart*, 996 F.Supp. 668. Since the Rockaway Lateral and BQI are connected actions, and thus "interrelated and functionally interdependent," the present DEIS does not suffice to analyze these projects cumulative effects. *Stewart*, 996 F.Supp. at 683.

Conclusion

The DEIS for the proposed Rockaway Lateral violates federal law. Under clear NEPA precedent, the Rockaway Lateral and the BQI are connected actions and must be reviewed under the same EIS. Given its track record, Williams Transco should be well aware of this. Indeed, in past similar situations, Williams Transco has demonstrated a manifest intention to circumvent the NEPA process by improperly segmenting its pipeline proposals. There is no dispute that the entire purpose behind the Rockaway Lateral is to connect its existing Transco pipeline to the New York City market. William Transco says as much, as does the EPA. The Rockaway Lateral is only a small portion of a much larger project that involves the National Grid and the construction of the BQI. The people of New York have a right to know the full environmental harms and impacts produced by these projects. If this DEIS moves forward in its present form, FERC will have abdicated its duty and allowed Williams Transco to unjustifiably skirt its NEPA obligations.

Sincerely,

Andrew Jones
Fellow, Center for Urban Environmental Reform

About the CUNY Center for Urban Environmental Reform (CUER)

CUER is a justice initiative at CUNY School of Law dedicated to developing new avenues of participation and new opportunities for citizen empowerment in environmental decision-making. Drawing from the emerging human rights norms of participation, access to information, transparency and intergenerational equity, CUER seeks to revitalize participatory environmental decision-making to help community members, scholars and policymakers communicate in a way that leads to better, more sustainable decision-making. In doing so, the Center facilitates important social conversations about the acceptability of environmental risks and the need for their equitable distribution.

Many of the standard techniques of environmental decision-making reduce society's ability to include issues of distributive justice and overall fairness in the decision. As a result, environmental policies have been repeatedly accused of perpetuating environmental injustice — with poor and minority communities consistently allocated a larger share of environmental bads while having access to fewer environmental goods. CUER's emphasis on environmental citizenship is an attempt to surface these justice dynamics that are too often ignored. Framing environmental choices as questions of fundamental equality in a political community, rather than

as private choices about property, helps emphasize the role that power, access to information, and inequality play in shaping environmental outcomes.