

July 29, 2020

Mark J. Langer
Clerk of the Court
United States Court of Appeals for
the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue N.W.
Washington D.C. 20001

Re: *City of Oberlin et. al. v. FERC*. Nos. 18-1248 *et. al.*
Rule 28(j) Supplemental Authority
Oral Argument Held May 6, 2019

Dear Mr. Langer,

On September 6, 2019, this Court issued a decision in *City of Oberlin v. FERC*, which directed the Commission to explain “why it is lawful to credit precedent agreements for export toward a Section 7 finding that an interstate pipeline is required by the public convenience and necessity” when approving a certificate for the NEXUS Pipeline. Slip Op. at 22. The Court explained that the Commission’s reliance on demand for export in issuing a Section 7 certificate potentially runs afoul of both the Natural Gas Act and the Takings Clause of the United States Constitution. Slip. Op. at 13. On November 4, 2019, this Court issued a mandate thereby making the judgment effective.

Nearly nine months have now passed since the mandate issuance and the Commission has yet to comply with this Court’s judgment. The Commission’s delay is troubling given this Court’s recent *en banc* decision in *Allegheny Defense Project v. FERC*, Docket No. 17-1098 (June 30, 2020) which held that the Commission could not delay review of orders under Section 717r of the Natural Gas Act by withholding action through use of a tolling order. Judge Griffith, writing for the concurrence, noted that the Commission’s delay particularly problematic when property rights are implicated:

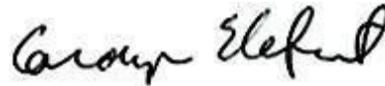
One cannot review the procedural history of this case, and others like it, without concluding that something is amiss. Landowners watch as

their property is handed over to pipeline companies and irreparably transformed, all without judicial consideration of the crucial question: Should the pipeline exist?

The City did not challenge the legality of the Commission's tolling order, but its case presents a similar fact pattern: rehearing request filed September 25, 2017, property condemned October 17, 2017 and rehearing decided ten months later on July 25, 2018. *City of Oberlin*, Slip Op. at 6-7. In fact, the City very nearly lost the ability to challenge the merits of the Commission's action after the pipeline moved to dismiss the case as moot because the City's property had already been taken and compensation settled in the eminent domain proceeding. *Id.* at 7-8.

The Court's ruling in *City of Oberlin* raises significant questions as to the legality of the Commission's order approving and the constitutionality of the taking of property for the pipeline. The Commission's delayed response to this Court's mandate has enabled the NEXUS pipeline to continue to operate on the City's property notwithstanding potential statutory and constitutional infirmities and in violation of the spirit, if not the holding in *Allegheny Defense Project*. Accordingly, the City asks this Court to establish a deadline by which the Commission must comply with the mandate in *City of Oberlin v. FERC*.

Respectfully submitted,



Carolyn Elefant
Law Offices of Carolyn Elefant
on behalf of the City of Oberlin

cc: FERC Docket, NEXUS Pipeline, CP16-22

