RECORD NOS. 18-1248(L), 18-1261

ORAL ARGUMENT SCHEDULED FOR MAY 6, 2019

In The

United States Court of Appeals

For The District of Columbia Circuit

CITY OF OBERLIN, OHIO and COALITION TO REROUTE NEXUS,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

NEXUS GAS TRANSMISSION, LLC,

Intervenor for Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

FINAL REPLY BRIEF OF PETITIONERS

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STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Opening Brief.

INTRODUCTION

In their respective briefs, neither the Commission nor NEXUS cite a single case where the Commission has granted, or where a federal appellate court has affirmed, either a certificate under Section 7 of the Natural Gas Act (NGA) or a return on equity (ROE) of 14 percent for a greenfield pipeline that remains substantially undersubscribed despite seven years of marketing, and where at least forty percent of the project's total capacity is dedicated to export. Unable to find precedent to fit the facts, the Commission and NEXUS instead contort the facts to fit the precedent. And so, to make this case resemble past approvals of fully or almost-fully subscribed projects (*see. e.g.* Petitioners' Br. 25, n. 8) the Commission trivializes the pipeline's 59 percent subscription rate, claiming that NEXUS' contractual commitments account for "most" of the project capacity (Commission Br. 17) and engages in wishful thinking that the project will serve future customers despite NEXUS' inability to find present-day takers after seven years of trying. (Commission Br. 27). To shoehorn this case into the Section 7 framework which confers eminent domain power on pipelines carrying gas domestically in interstate commerce, the Commission and NEXUS ignore the open season announcements

touting the project's Canadian service and the record evidence showing that anywhere from 410,000 dth/day to 605,000 dth/day of gas will travel across the border. To further downplay the pipeline's foreign roots, the Commission brief includes a graphic that excises the pipeline's Canadian connection depicted in NEXUS' early filings. Commission Br. 10. Finally, to bring this case in line with this Court's recent ruling in *Appalachian Voices v. FERC*, Docket 17-1271 (D.C. Cir. Feb. 19, 2019), the Commission and NEXUS take the position that the same standard 14 percent on equity applies regardless of whether a greenfield pipeline will serve demonstrated demand as in *Appalachian Voices* or as here, is substantially undersubscribed and essentially built on spec. Commission Br. 42, NEXUS Br. 27-29.

Unfortunately for the Commission and NEXUS, saying that a pipeline is "mostly" fully subscribed or that it serves only domestic needs or is entitled to a 14 percent return for a largely speculative pipeline does not make it so. Because the Commission failed to support its orders with substantial evidence or to explain why the same practices that govern certification of fully subscribed domestic pipelines apply with equal force to an undersubscribed project destined for export, this Court must vacate the certificate order. *See e.g., Columbia Gas Transmission Corp. v.*

FERC, 448 F.3d 382, 388 (D.C. Cir. 2006) (The Commission's failure to explain itself renders its decision in this case arbitrary and capricious).

SUMMARY OF ARGUMENT

This Court must vacate the Commission orders granting a certificate of convenience for the NEXUS Pipeline. Despite the Commission's artful language in characterizing the amount of pipeline capacity consumed by precedent agreements, the fact remains that the NEXUS Project is woefully undersubscribed, demonstrating that the Commission's finding of need was arbitrary and capricious and unsupported by substantial evidence. That much of the subscribed capacity is with affiliate entities and destined for export, along with the Commission's disregard of its own Certificate Policy Statement, further underscores the lack of need for the NEXUS Project.

Next, the Commission continues to claim that the NEXUS Project is properly certificated under Section 7 even though it is an export facility subject to Section 3 of the Natural Gas Act, 15 U.S.C. §717b. But relying largely on its own precedent, the Commission insists that only the portion of a pipeline facility which physically crosses a border is subject to Section 3 of the NGA. This position is contrary to the language of the Natural Gas Act and this Court's precedent.

Further, the Commission's finding of public convenience and necessity determination for this project violates the Takings Clause of the Fifth Amendment to the United States Constitution. Such a determination was irrational and arbitrary given the lack of domestic need for the project. Contrary to the Commission and NEXUS' assertions, this Court must determine whether the Commission's issuance of the Certificate violates the Constitution. No court has ruled on this issue, contrary to a spurious claim by NEXUS contending that a Sixth Circuit ruling in *NEXUS Gas Transmission v. City of Green*, Docket No. 18-3325 (Dec. 7, 2018). collaterally estopped Petitioners from bringing their constitutional challenges to the Certificate Order before this Court.

Additionally, the Commission and NEXUS fail to rebut Petitioners' argument that a 14 percent return on equity (ROE) is excessive in this case. The lack of need for the NEXUS Project distinguishes the this case from precedent cited by the Commission and NEXUS and highlights the Commission's arbitrary decision to permit such a large return.

On issues pertaining to safety either the Commission nor NEXUS refute Petitioners' claims that no federal agency actually examined the safety of placing a high-pressure, 36-inch natural gas pipeline in close proximity to residences as part of preparing the Final Environmental Impact Statement. The failure to even

consider options such as moving the pipeline farther from population areas violates the clear mandates of the National Environmental Policy Act as well as the Commission's obligation to site the project in a manner consistent with the public interest under Section 7 of the Natural Gas Act.

As a remedy, the Petitioners have asked this Court to vacate the certificate. Vacateur is not only appropriate, but necessary in this case given that the certificate implicates the City's and Coalition members' constitutionally protected property rights.

ARGUMENT

I. THE COMMISSION DID NOT SHOW PROJECT NEED.

Both the Commission and NEXUS attempt to rebut the City's and Coalition's numerous arguments that there is neither present or future need for the project. Commission Br. 23-30, NEXUS Br. 11. Below, Petitioners respond to those points not already addressed in our opening brief.

A. Precedent Agreements Are Not Proof Of Need When the Project Is Not Fully Subscribed

The Commission's Certificate Policy Statement[1] provides that precedent agreements are strong evidence of need in circumstances where they account for **all or most** of project capacity (Petitioners' Br. 24). Nonetheless, the Commission invokes the Certificate Policy to to defend its principal reliance on precedent agreements to show need, asserting that 59 percent is in fact, actually "most" of the project capacity as that term is used in the Certificate Policy Commission Br. 23, n. 6. The Commission's perception of the meaning of the term "most" stands at odds with its synonyms which include "lionshare," "largest" and "maximum" (*see* https://www.thesaurus.com/browse/most) -- words that do not bring a value of 59 percent to mind. Moreover, the Commission's claim that the project is "mostly" subscribed departs from its own finding in the Certificate Order admitting that "the proposed [NEXUS] pipeline has a significant portion of its capacity that remains unsubscribed." Certificate Order at P. 41, JA 1051.

Next, the Commission notes that prior to adopting the Certificate Policy Statement, it only required a scant 25 percent capacity commitment which NEXUS has admittedly satisfied here. Commission Br. 24. The Commission's reference to

[1] *Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶61,227 (1999)(*Policy Statement)*, 90 FERC ¶61,128, *further clarified*, 92 FERC ¶61, 094 (2000) (Certificate Policy).

a no-longer-applicable policy is not only irrelevant, but it is also wrong: the Commission's practice prior to the Certificate Policy Statement required an applicant to show a commitment of at least 25 percent of new capacity in order **for its application to be processed**, but still required a showing of 10-year firm commitments for all of the project capacity **to receive** a traditional certificate of public convenience and necessity. Certificate Policy at 61,743.[2]

Finally, the Commission attempts to rely on cases where a finding of need was affirmed based on precedent agreements for *all* of the project capacity - which Petitioners previously distinguished in our opening brief. *See e.g. Bordentown v. FERC*, 903 F.3d 234, 263 (3rd. Cir. 2018) (finding precedent agreements for full project capacity proof of need for a compressor station); *also* Petitioners' Br. 25. In short, the Commission fails to justify its reliance solely on precedent agreements to demonstrate project need when the project is only 59 percent subscribed, given that the the Certificate Policy and past precedent endorse reliance on precedent agreements alone only when they are for "most" of the project capacity.

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[2] *See also Midcoast Interstate Transmission, Inc.*, 85 FERC ¶61,219, 61,905 (1998) ("Thus, the Commission did not intend, and the order does not reflect...the proposition that a long-term precedent agreement for 25 percent of new capacity will satisfy the Commission's at-risk requirements.")

B. Affiliate Agreements Are Weaker Evidence of Need

Approximately 410,000 dth/day of the 885,000 dth/day of subscribed capacity is attributable to affiliate contracts. *See* Petitioners Br. 10 (Table listing affiliates). The Commission and NEXUS argue that these affiliate agreements are sufficient proof of need, citing this Court's recent ruling in *Appalachian Voices v. FERC*, Docket 17-1271. NEXUS Br. 12, FERC Rule 28(j) Letter (Feb. 19, 2019). *Appalachian Voices* may be distinguished because it did not explore whether the 14 percent ROE lured shippers into unnecessary contracts to enrich the affiliated pipeline's investors as the City and the Coalition have contended here. *See e.g.*, Petitioners' Br. 44. In any event, even if this Court credits the affiliate agreements as evidence of need here, only 59 percent of the project capacity would be committed, falling short of a persuasive showing of need. *Compare Appalachian Voices* (finding need based on full subscription).

C. The Commission Improperly Relied on Exports As Proof of Project Need.

Not only did the Commission err in using precedent agreements as proof of need, but it compounded its error by failing to examine whether the agreements are for domestic or foreign transport. Distinguishing between domestic and foreign use is critical because the Commission may not rely on exports -- which are

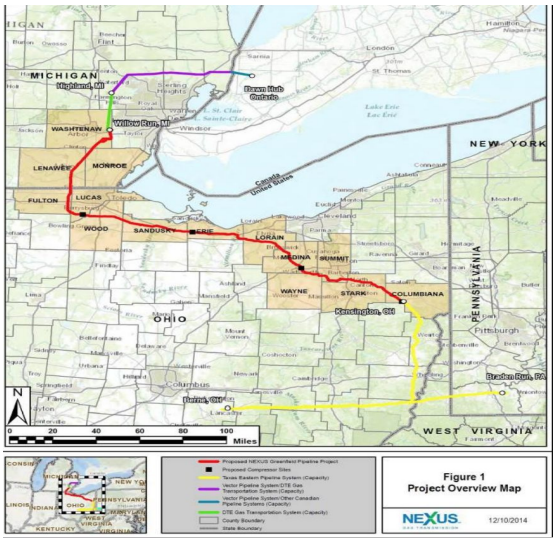
governed by Section 3 of the Natural Gas Act -- to justify project need under Section 7. Not only are Section 3 and 7 separate statutory provisions with distinct standards for approval (*See W. VA. Pub. Serv. Commn. v. U.S. Dept. of Env.* , 681 F.2d 847, 854-57 (D.C. Cir. 1982) (discussing difference between Section 3 and 7 standard)), but in contrast Section 7f(h), Section 3 does not authorize export facilities to use eminent domain. Petitioners' Br. 35. Thus, by relying on exports as a basis for a Section 7 pipeline, the Commission would do indirectly that which it may not do directly - *i.e.*, grant eminent domain powers to export facilities. *Public Utilities Commission v. Federal Energy Regulatory Commission*, 143 F.3d 610, 616 (D.C. Cir. 1998) ("FERC had no authority to do indirectly what it could not do directly.").

For these reasons, the Commission cannot count exports as part of a showing of project need. Thus, this case is distinguishable from from *Town of Weymouth v. FERC*, Docket No. 17-1135 (D.C. Cir. Dec. 27, 2018) where the Court found that the petitioners had failed to explain why an export project authorized under Section 3 would not "would not advance the public convenience." By contrast, here, the Petitioners have shown that Sections 3 and 7 are two distinct provisions of the Natural Gas Act and the need analysis under one section is not interchangeable with the other, particularly because Section 3 does not allow eminent domain.

The Commission and NEXUS do not take issue with Petitioners' description of Section 3 and Section 7. Instead, they claim that they can include all capacity as evidence of need by simply denying that the pipeline serves an export purpose to begin with. These claims belie the evidence. First, both the NEXUS Announcement of Open Season[3] and its Application stated that the project would transport gas to Canada. NEXUS Application at 1, JA 20. Second, both the maps accompanying NEXUS' open season and posted at its electronic bulletin board show that the gas will flow to Canada.[4]

[3] *See* NEXUS Open Season (2014) *online at* https://infopost.spectraenergy.com/GotoLINK/GetLINKdocument.asp?Pipe=10076&Environment=Production&DocumentType=Notice&FileName=NEXUS+Supplemental+Open+Season+Brochure.pdf&DocumentId=8a7842dd475a5bd6014764804f120185 ("Providing a seamless transportation path for Marcellus & Utica shale gas supplies from Ohio to growing liquid markets in Michigan, Chicago and Dawn, Ontario"), JA 1311.

[4] *See Id*, NEXUS Open Season (2014) and NEXUS Bulletin Board Graphic, *online* at https://infopost.spectraenergy.com/infopost/NXUSHome.asp?Pipe=NXUS.



Compare Commission Br.10 (omitting depiction of pipeline segment connecting to Canada).

Third, the Commission and NEXUS obfuscate the amount of gas to be exported. The Petitioners demonstrated through lease agreements held by NEXUS and other information gleaned from public records that at least 605,000 dth/day of natural gas will be transported by the Nexus Project to Canada. Petitioners Br. 6-7. The fact that some amounts may be diverted for domestic consumption, as argued by NEXUS, misses the point that approval was based upon commitments destined for export.

On brief, the Commission challenges the Petitioners' calculation of the export volume stating: "[T]here is no evidence that 605,000 dekatherms per day — which would include virtually all of the gas shipped by the U.S. producers and

marketers — will be exported." Commission Br. 28. What is confounding about the Commission's position is that the Commission does not simply say exactly how much of the gas shipped by U.S. producers and marketers is being exported. Presumably the Commission is in possession of this information. How could the Commission make a determination regarding a need for the NEXUS Project without knowing where the natural gas transported by the project is destined to be delivered? Being in a position of knowing how much gas will be exported, the Commission should simply inform the Court of the actual amount being exported instead of using vague terms (Commission Br. 27, referencing that "substantial amount" is for domestic supply) rather than accusing Petitioners of lacking sufficient proof.

Meanwhile, NEXUS admits that EAP Ohio, successor to Chesapeake Energy Marketing, will transport 200,000 dth/day to the Down Hub in Ontario and that two additional two shippers will transport a combined 260,000 dth/day to Canada. NEXUS Br. 22. But NEXUS then states that Noble Energy and CNX have 225,000 dth/day in firm delivery rights to domestic delivery points which is misleading because these same shippers also have firm delivery rights of 225,000

dth/day to export natural gas to Canada.[5] Notably, neither NEXUS nor the Commission can say where Noble Energy and CNX are actually shipping their natural gas, only that they have the option to deliver in the United States.

D. The Evidence Outside the Precedent Agreement Does Not Support A Finding of Need.

As Petitioners argued, when precedent agreements do not suffice to support a project, an applicant may demonstrate market need through other studies or a showing that the Project furthers the goals of the Certificate Policy Statement. The Petitioners attempted to make this showing, only to have their cited market studies evidence rebuffed by the Commission in favor of applicant-sponsored studies and self-serving statements by shippers at the very outset of the proceeding. Petitioners Br. 13, 27; *also* Glick Dissent (citing Commission's selective reliance on evidence). The Commission and NEXUS attempt to bolster the case for the project by referencing its myriad benefits such as access to midwest markets or expanding gas service in the future (Commission Br. 31) or creation of competitive

[5]This information was obtained using a link provided by NEXUS in footnote 6 of its brief: https://infopost.spectraenergy.com/infopost/NXUSHome.asp?Pipe=NXUS. This same source indicates that NEXUS had several shippers buy capacity for the month of January 2019, for a total of 150,000 dth/day all of which was exported to Canada. Thus, for the month of January the Nexus Project was exporting 755,000 dth/day, over 50% of its total capacity.

supply alternatives (NEXUS Brief 12). Both arguments are flawed. The Commission's rosy vision of the future ignores the hard, cold present: that NEXUS has marketed the project since 2012 and has not exceeded 59 percent in subscription.[6] Meanwhile, the competitive supply alternatives alluded to by NEXUS were never offered as a rationale for the project (*See* NEXUS Application at 1-2, JA 20-21 (describing pipeline purpose as a seamless route for suppliers to ship to Michigan and Canada) or recognized in the Commission order as a project benefit. Thus, they cannot now be used to justify the project.

Moreover, the Commission's assessment of project benefits is one-sided. Although the Certificate Policy encourages expansion to meet need and competitive supply, it also was intended to guard against overbuild -- a very real problem here with at least four other pipelines in the vicinity -- not to mention adverse landowner impacts. *See* Certificate Policy, 88 FERC at *61,736. To avoid these impacts, the Certificate Policy thus requires a higher showing of need for projects built on speculation. *Id*. at *61,749. Yet here, the Commission relies on speculative benefits such as future expansion to justify a speculative, under-subscribed project in contravention of the Certificate Policy.

[6] NEXUS cites a few short-term contracts that bumped up the capacity temporarily to around 61 percent [NEXUS Br. 7- 8] but short term agreements have never been treated as evidence of need under the Certificate Policy.

Finally, the Commission notes that the pipeline is also justified because existing pipelines in the region lack the bandwidth to serve NEXUS' contracted capacity, citing data from various pipeline's publicly available electronic bulletin boards. *See* Commission Br. 32, citing Order, JA 40. Yet the Commission offers no details such as the date it checked the bulletin boards, whether the information (which is fluid) had changed or which pipeline data was examined. Indeed, not even NEXUS contends in its brief that the Commission's exercise in eyeballing capacity on these unidentified pipelines would justify its a finding of need for a $2 billion project.

For all of these reasons, as well as those discussed in Petitioners' opening brief, the Commission failed to comply with its own Certificate Policy in assessing project need and to support its finding of need with substantial evidence of through reference to contracts for domestic gas or credible For these reasons, the certificate cannot stand.

[7] The Commission admitted that the EIS only evaluated whether other systems had capacity for the 1.5 million dth full pipeline capacity and did not examine whether there was room for the actual 885,000 dth/h that NEXUS will actually transport. Commission Br. at 33 citing FEIS 5-15.

II. THE COMMISSION ERRED IN EVALUATING THE PROJECT UNDER SECTION 7 of THE NATURAL GAS ACT

The Commission and NEXUS assert that Section 3 of the NGA applies only to "cross-border" (NEXUS Br. 19) or "border-crossing" (Commission Br. 36) facilities. This language is not found in the text of the Natural Gas Act. Section 3 governs construction of "export facilities," not simply border crossings. *Big Bend Conservation All. v. Fed. Energy Regulatory Comm'n*, 896 F.3d 418, 420 (D.C. Cir. 2018)(citing *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

NEXUS cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) for the proposition that once gas crosses a state line, it is interstate commerce and could never be considered an export. However, another passage from the *Maryland* decision undercuts NEXUS' assertion: "[W]e do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce." *Id*. at 755. NEXUS contends that the Nexus Project is not an export pipeline because its flow to Canada is interrupted by a connection to another pipeline which physically crosses the border. However, *Maryland* dictates that the entire flow of gas must be considered, not simply a segment of its journey, viewed in isolation.

The Commission and NEXUS both rely heavily on the Commission's prior determinations that only the segment of pipeline that physically crosses the border requires Section 3 authorization. However, the Commission's prior decisions stand in contravention of this Court's decision in *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149 (D.C. Cir. 1948). The fact that a court has not had the opportunity to review the Commission's interpretation of the NGA does not validate the interpretation.

An argument against the Commission's narrow Section 3 interpretation was raised in *Big Bend Conservation All. v. Fed. Energy Regulatory Comm'n*, 896 F.3d 418 (D.C. Cir. 2018) when the petitioner challenged the Commission's position that only the portion of the pipeline which physically crossed the border was subject to Section 3, rather than the entire pipeline. However, the issue was not properly preserved and this Court lacked jurisdiction to consider it. *Id*. at 421. The issue has been preserved in this case and is ripe for this Court's consideration.

However, another argument raised in *Big Bend* may be instructive in this case. The pipeline in *Big Bend* was wholly contained within the state of Texas and, therefore, the Commission declined to assert Section 7 authority over its construction. *Id*. at 420. Petitioners argued that the pipeline should have been considered an interstate pipeline because it would ship natural gas which has

crossed state lines. *Id*. at 422. This Court agreed with the Commission on the basis that the pipeline would "initially will only transport natural gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants." *Id*. Further, the Court agreed with the Commission's determination that the pipeline was only directly connected to other intrastate pipelines, not to sources of interstate gas.

The Commission's Section 7 analysis in *Big Bend* stands in stark contrast to its Section 3 analysis in this case. The Commission insists that only the actual portion of the pipeline facility which crosses an international border is subject to Section 3. Commission Br. 36 (and cases cited therein). The Commission cites to its own precedent to support this conclusion. However, when considering whether a pipeline is subject to Section 7, the Commission, as it did in *Big Bend*, must take a broader perspective and look at the overall flow of natural gas in relation to the facility at issue.

When looking at the Nexus Project through such a lens, its nature as an export facility is clear. The Nexus Project will initially transport more gas destined for export than destined for domestic use. The Nexus Project is directly connected to export pipelines that will transport natural gas to the Dawn Hub in Canada. As *Big Bend* demonstrates, a pipeline is not to be viewed in a vacuum in determining

which section of the NGA applies. NEXUS and the Commission ask this Court to do precisely that, asserting that the termination of new construction in Michigan ends the inquiry. It does not. The pipeline connects to another that proceeds out of the United States and the majority of gas in the Nexus Project follows this path into Canada. This is an export facility plain and simple and the NGA requires it to be treated as such.

Finally, the Commission notes that Section 3 authorization shall be granted regarding exports to Canada. It is uncertain what relevance this has on whether a Section 7 Certificate was authorized by the NGA. Even though authorization under Section 3 may be easy to obtain, such ease does not obviate the requirement of an application to export. Moreover, any construction would still be subject to the requirement of NEPA. In addition, the Commission could impose additional requirements normally reserved for Section 7 applications. *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974). Finally, Section 3 would not give NEXUS the automatic right to condemn property in support of construction.

The Nexus Project is an export facility. As such, NEXUS was required to seek approval under Section 3, not Section 7 of the NGA.

III. THE NEXUS PROJECT DOES NOT SERVE A PUBLIC NEED

Neither the Commission nor NEXUS chose to directly address Petitioners' arguments concerning the public use requirement of the Takings Clause of the Fifth Amendment. Rather, they focus on the Commission's issuance of a Certificate, Section 7 of the NGA and its grant of eminent domain authority to certificate holders, and make a clearly mistaken estoppel argument, without directly addressing the public versus private taking issue. This is not the proper analysis to determine whether an unconstitutional taking has occurred in this case.

A. The Sixth Circuit has Not ruled on whether NEXUS has the right to condemn property.

NEXUS makes a breathtakingly false assertion in its brief, claiming that the Sixth Circuit determined that NEXUS has the right to exercise eminent domain. NEXUS Br. 24-25. The appeal to which NEXUS refers is *Nexus Gas Transmission, LLC v. City of Green*, No. 18-3325. This case was an appeal of the order of the district court granting an affirmative quick take preliminary injunction to NEXUS under F.R.C.P. 65, allowing it to take possession of the property without compensation being paid. *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No. 18-3325, 2018 WL 6437431, at *2 (6th Cir. Dec. 7, 2018). In discussing whether NEXUS had demonstrated a likelihood of success on the merits, the Court

reasoned that the record "suggests" that NEXUS had established a right to condemn the property. *Id*. at *3. First, this statement is dicta. Second, a suggestion is not a definitive finding.

What makes NEXUS' argument particularly egregious is the fact that the landowners who challenged the preliminary injunction had previously appealed to the Sixth Circuit in a direct challenge to the district court's granting of summary judgment earlier in the condemnation proceedings in favor of NEXUS on the eminent domain issue.[8] NEXUS moved to have the appeal dismissed for lack of jurisdiction on the grounds that the partial summary judgment order was not a final appealable order despite the district court encouraging the participants to appeal his decision. *Nexus Gas Transmission, LLC v. City of Green*, No. 18-3113, 2018 WL 2072606, at *1 (6th Cir. Apr. 3, 2018). NEXUS prevailed and the Sixth Circuit dismissed the action: "The December 28 partial summary judgment in favor of Nexus is not a final, appealable order. A summary judgment ruling as to liability

[8] In the condemnation proceeding, the Selzers, among others, moved to have the case dismissed and opposed summary judgment on the grounds that NEXUS did not have the right to condemn. *Nexus v. Land Located in the City of Green*, 5:17-cv-02062-SL Doc #: 210, 268. NEXUS responded arguing, *inter alia* , that landowners could not challenge NEXUS' right to condemn in the condemnation proceedings. *Id*., Doc # 245, 317. The district court agreed, denying the Motion to Dismiss and granting partial summary judgment in favor of NEXUS. *Id*., Doc # 381.

that does not resolve damages is not immediately appealable." Id. at *2. The issue of damages is still unresolved as the property owners have not been compensated so that no appeal of the granting of eminent domain is possible even at this stage.

NEXUS' characterization of Sixth Circuit case no. 18-3325 as "challeng[ing] the condemnation orders before the Sixth Circuit", NEXUS Br. n. 19, is false and misleading. The landowners attempted to challenge the district court orders in a separate appeal, and NEXUS persuaded the Sixth Circuit that the appeal was premature. Now NEXUS argues that a case dealing with the wholly separate issue of a preliminary injunction has a preclusive effect. As explained, it does not.

B. The Commission and NEXUS fail to fully explain why the Nexus Project Serves a Public Need

The Commission and NEXUS do not squarely address Petitioner's argument that the taking is for a private, rather than public use or purpose. Instead, they advance several arguments which are indirectly relevant. NEXUS observes that the NGA grants eminent domain authority to the holder of a Certificate. NEXUS cites cases for the proposition that a finding by the Commission of public convenience and necessity constitutes a determination that the Takings Clause of the Fifth

Amendment has not been violated. NEXUS Br. 24. NEXUS overstates the holdings of the cited cases and the power vested in the Commission.

First, NEXUS' position attempts to remove the power of judicial review over acts of the Commission and the NGA, implying that these issues have been delegated to the Commission. Of course, this is incorrect. It is the Courts, not the Commission or Congress, who determine whether a statute or order violates the Constitution. *Marbury v. Madison*, 5 U.S. 137, 178 (1803)("Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.")

The cases relied upon by NEXUS do not require this Court to defer to the Commission's public convenience and necessity determination as it relates to the "public use" requirement of the Fifth Amendment. NEXUS places great weight upon this Court's decision in *Appalachian Voices v. FERC*, No. 17-1271, slip op. (D.C. Cir. Feb. 19, 2019). The pipeline at issue in *Appalachian Voices* was 100% subscribed and all of the transported gas would be used domestically. *Id*, at p. 1, *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017). Under these facts, this Court stated that "FERC's **rational** public convenience and necessity determination satisfies the Fifth Amendment's "public use" requirement." *Id*. at pp.

2- 3 (emphasis added). This Court did not give the Commission unfettered discretion to declare a project's use to be public without judicial review. Its decision must be, at a minimum, rational, and remains subject to review.

The fact that the Commission has the power to declare a pipeline project to be in the public interest does not mean that this decision cannot be reviewed for compliance with other aspects of federal law. The fact that Congress granted certificate holders the power of eminent domain does not mean that the use of such authority is Constitutional in any particular case. . "The [agency] must exercise its discretion . . . within the bounds expressed by the standard of 'public convenience and necessity.' And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962)(internal citation omitted). It is for the courts to decide whether an agency has overstepped its constitutional bounds.

In order to grant a certificate of public convenience and necessity, the Commission must find that "that the proposed . . . construction . . . is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717(f)(West). In issuing a Certificate to NEXUS, the Commission did not set forth

a rational basis that the proposed pipeline would satisfy this standard and did not give a clear indication that it had considered compliance with the United States Constitution. The Commission took the position that the Nexus Project is not an export pipeline, dismissing the fact that the majority of the current commitments are for export. The Commission's decision cannot be rational without consideration of the relevant facts.

NEXUS states that courts have consistently upheld eminent domain authority by certificate holders. Although this is generally true, it does not follow that there can be no case where the domestic need for natural gas would be so slight that a pipeline cannot constitutionally be considered to constitute a public use, even if the Commission were to issue a certificate. The previous courts to examine this issue have, by necessity, determined that on the facts presented this point had not been reached. NEXUS and the Commission do not, and cannot, point to any case where the percentage of natural gas destined to domestic consumers was so small. This case presents such an issue of whether such a small percentage of domestic use satisfied.

IV. THE COMMISSION FAILED TO EXPLAIN WHY A 14 PERCENT ROE WAS JUSTIFIED

The Commission and NEXUS cite this Court's ruling in *Appalachian Voices*, Docket 17-1271 to support a 14 percent ROE.[9] But the reference to *Appalachian Voices* proves the Petitioners' point that the 14 percent return was arbitrary. Commission 28(j) Letter, NEXUS Br. 27-28. In *Appalachian Voices*, the Court found a need for the project and based on that finding, determined that the Commission reasonably found that the 14 percent ROE was appropriate to compensate the pipeline for the risks associated with a greenfield project. Here, the Commission approved an identical 14 percent ROE even though the pipeline is only 59 percent subscribed after 7 years of marketing. The Commission never explains its justification for applying a cookie cutter 14 percent return for entirely different projects.

[9] The Commission half-heartedly suggests that the Petitioners lack standing to challenge the ROE. However, *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017) the Court ruled that a petitioner harmed by a grant of certificate may challenge any deficiency including those not directly tied to specific injuries. Here the Petitioners are harmed by the Certificate and like the petitioner in *Sierra Club*, can challenge the 14 percent ROE which is part of the certificate order.

V. THE COMMISSION ABROGATED ITS AUTHORITY OVER SITING BY DELEGATING SAFETY CONSIDERATIONS TO ANOTHER AGENCY.

The Commission and NEXUS both insist that DOT regulations do not prohibit pipelines from being constructed in close proximity to residences. NEXUS Br. 31; Commission Br. 45. Thus, they assert hat the Commission approval of the Nexus Project which contains residences within 50 feet of the pipeline was in compliance with DOT safety standards and this is all that NEPA requires.

This position is entirely misleading: DOT does not regulate the proximity of residences to a pipeline because the DOT is prohibited from promulgating regulation concerning the location and routing of natural gas pipelines. 49 U.S.C. § 60104(e). The DOT recognizes that the Commission has sole authority to determine where a pipeline will be constructed. *Hazard Mitigation Planning: Practices for Land Use Planning and Development near Pipelines*, Federal Emergency Management Agency 2015, p. 6.[10]

NEXUS and the Commission argue that DOT has more stringent requirements for pipelines located in close proximity to occupied building and, therefore, DOT approves of placing pipeline close to such structures. This is

[10] A copy of this publication is available at https://www.fema.gov/media-librarydata/1422297186422e43ce828d6821027c258e96eae10fd6d/PIPA_Hazard_Mitigation_Primer_Final.pdf

incorrect. Because the DOT cannot control where the Commission decides to place a pipeline, it cannot approve of its placement near residences. Moreover, it is logical that the DOT would place greater requirements on pipelines which abut residences. This does not indicate approval—it is the DOT's attempt to make an unsafe circumstance beyond its control as safe as possible.

NEXUS and the Commission insist that the FEIS appropriately considers safety issues because the Commission refers to DOT regulations and standards. The Commission goes as far as stating that "Pipeline Safety Administration regulations are key." Commission Br. 45. *There are no DOT regulations proscribing the proximity of residences to a natural gas pipeline*.

NEXUS asserts that if the City and the Coalition have an issue with the sufficiency of DOT standard, those concern are properly addressed through the DOT rulemaking process. NEXUS Br. 33- 34. Again, there is no regulation proscribing the proximity of residences to a natural gas pipeline because the DOT does not have jurisdiction over this safety aspect. No rulemaking process took place because there is no rule.

The Commission and NEXUS cite *EarthReports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 958 (D.C. Cir. 2016) in support of their position, but their reliance is misplaced. In *Earthreports* this Court found that

compliance with "relevant federal, state, and local requirements and coordinating with relevant agencies" was a "reasonable component" in considering safety implications. *Id*. at 958. In this case, there are no federal requirements for safety setbacks because no one has made a determination as to the necessity or distance of setbacks of residences from a high-pressure natural gas pipeline. NEXUS and the Commission point to the DOT, and the DOT points back to the Commission on this issue. NEPA requires a "hard look." In this case, the Commission did not look at all.

Finally, the FEIS fails to address "residential land use impacts" or specific local land use restrictions designed to protect residential uses. Although NEPA requires considering land use regulations[11], the Commission gives the topic short shrift. It never addressed the "local . . . land use plans, policies and controls for the area concerned." NEXUS argues that these zoning regulations are preempted, NEXUS Br. 35-37, but does nothing to explain the Commission's failure to address "any inconsistency of a proposed action with any approved State or local plan and laws" and "the extent to which the agency would reconcile its proposed action with

[11] 40 C.F.R. § 1502.16 (Requiring a discussion of "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned.")

the plan or law." As required under NEPA. 40 C.F.R. § 1506.2(d). The FEIS contains an entry in its table of contents for such discussion (JA 4-862), but the referenced section, 4.9.3.1, does not appear in the body of the FEIS.

VI. VACATEUR IS WARRANTED

NEXUS argues that vacateur is not warranted, optimistically asserting that even if the certificate is remanded, the Commission is likely to reach the same result. Not so. For starters, the Petitioners have raised statutory and constitutional challenges which are not so easily remedied through an explanation on remand. Moreover, where a ruling implicates a petitioners' property rights, vacateur is an easy call. *See Ameren Services v. FERC*, 880 F.3d 571, 584 (2018) (vacating Commission order approving generator-funded upgrades due to confiscatory impact of ruling on transmission owner investors). Both the City's and Coalition members' property have been taken in eminent domain so similar considerations regarding impacts to their property interests apply and justify vacating the certificate.

CONCLUSION

For the foregoing reasons, Petitioners City and the Coalition respectfully request that this Court vacate the Certificate or in the alternative remand the proceeding to the Commission for further review.

Respectfully submitted,

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Dated March 29, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):
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Dated: March 29, 2019

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Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of March, 2019, I caused this Reply Brief of Petitioners to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-3325, *Nexus Gas Transmission, LLC v. City of Green, Ohio, et al*
Originating Case No. : 5:17-cv-02062

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Sandy Opacich

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0613n.06

No. 18-3325

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEXUS GAS TRANSMISSION, LLC, Plaintiff-Appellee, v. CITY OF GREEN, OHIO, Defendant, JUDY JANE HAMRICK; JOHN SELZER; ELAINE SELZER, Defendants-Appellants.	**FILED** Dec 07, 2018 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO OPINION

BEFORE: NORRIS, STRANCH, and LARSEN, Circuit Judges

JANE B. STRANCH, Circuit Judge. Ohio landowners John Selzer, Elaine Selzer, and Judy Jane Hamrick (Landowners) have been in a longstanding dispute with Nexus Gas Transmission, LLC (Nexus) regarding Nexus's right to use a 1.4-acre tract of land on Landowners' property to build part of an interstate natural gas pipeline. During the first stage of this dispute, the Federal Energy Regulatory Commission (FERC) gave Nexus the authority to condemn private tracts of land along the pipeline's route, including Landowners' property. Nexus then obtained a preliminary injunction in the district court requiring Landowners to give Nexus immediate access to their property. In this appeal, Landowners argue that (1) the district court erred in issuing that injunction and (2) the court should not have issued the injunction without

first allowing further discovery and holding an evidentiary hearing. Though we acknowledge Landowners' concern for the property rights at stake in this litigation, we find no basis for vacating the district court's injunction. Because the district court properly considered the relevant factors and no additional discovery or evidentiary hearing was necessary, we **AFFIRM**.

I. BACKGROUND

In November 2015, Nexus asked FERC for authorization to build an interstate natural gas pipeline cutting across parts of Ohio and Michigan. FERC began lengthy notice-and-comment proceedings in response to Nexus's application. Almost two years later, FERC issued a certificate of public convenience and necessity giving Nexus permission to build and operate the pipeline.

Although Nexus soon negotiated voluntary easements on 97% of the 2,070 tracts of land that lay in the path of the pipeline, several dozen owners of land—including Landowners—refused to grant easements. Under the Natural Gas Act (NGA), if a company with a FERC certificate in hand cannot reach voluntary agreement on the terms of an easement with an affected landowner, then the company may acquire the landowner's property "by the exercise of the right of eminent domain in the district court . . . in which such property may be located." 15 U.S.C. § 717f(h). Nexus accordingly filed suit in the district court seeking to condemn the remaining landowners' properties under the NGA. Owners of the remaining properties later settled or provided immediate access, with the exception of Landowners.

In December 2017, the district court granted partial summary judgment in favor of Nexus, finding (among other things)[1] that Nexus had established its statutory right to condemn Landowners' property under the NGA. But Nexus and Landowners still could not agree on the compensation owed to Landowners for the easement. In March 2018, Nexus filed a motion requesting immediate access to Landowners' property to start construction while the parties negotiated the terms of the easement. Nexus attached an affidavit submitted by Lawrence D. Smore, the Senior Project Manager of Nexus, stating that the disputed 1.4-acre tract on Landowners' property was an integral part of Nexus's construction plan, that building around Landowners' property would cause significant delays, that Nexus would have to spend as much as $800,000 per day to retain its construction crew during those delays, and that circumventing the property would cost Nexus around $553,000 in additional construction costs.

Although the district court initially scheduled an evidentiary hearing, the court later canceled that hearing and discovery in a written order. The court stated: "At this stage, the Court sees no cause to schedule an evidentiary hearing or argument. . . . No further discovery shall be conducted on the motion absent leave from the undersigned." On April 5, 2018, the district court granted Nexus's motion and ordered Landowners to give Nexus immediate access to the property. The court also ordered Nexus to post a bond of $100,000 pending calculation of the proper compensation owed to Landowners.

[1] The district court's December 2017 order also gave Nexus the right of immediate access to Landowners' property for the narrow purpose of conducting certain surveys, tree felling, clearing, and environmental and utility work. Landowners appealed that injunction, but we granted Nexus's motion to dismiss the appeal on mootness grounds because Nexus had already completed those preliminary tasks by the time Landowners' appeal had reached this court. *See Nexus Gas Transmission, LLC v. City of Green*, No. 18-3113, 2018 WL 2072606 (6th Cir. Apr. 3, 2018). Nexus has not similarly moved to dismiss on mootness grounds in this appeal, so we assume that Nexus remains on the property.

In this appeal, Landowners argue that the district court (1) erred in issuing the April 5 preliminary injunction order and (2) should not have issued that order without first allowing additional discovery and holding an evidentiary hearing.[2]

II. ANALYSIS

A. Preliminary Injunction Order

We review a district court's decision to grant a preliminary injunction for abuse of discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). We will not disturb that decision unless it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (citation omitted).

District courts weigh four factors when deciding whether to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of

[2] A third party, Goldman & Braunstein, LLP (Goldman), has moved for leave to file an amicus brief. We grant this motion and have considered Goldman's relevant arguments. Goldman's principal claim is that the district could should not have granted this preliminary injunction because Congress never granted federal courts the authority to give private parties the right to take immediate possession of another's property. The Fourth Circuit rejected that very claim in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004). Since *Sage*, dozens of courts have held that after a federal court determines the petitioner has a substantive right to condemn the disputed property, it possesses inherent equitable power to grant this type of injunction. *See, e.g.*, *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres in Conestoga Twp., Lancaster Cty., Pennsylvania*, No. 17-3075, 2018 WL 5571434, at *8 (3d Cir. Oct. 30, 2018); *Texas E. Transmission, LP v. 3.2 Acres Permanent Easement*, No. 2:14-CV-2650, 2015 WL 152680, at *4–5 (S.D. Ohio Jan. 12, 2015) (collecting cases). These cases adhere to the well-established principle that, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1392 (2015) (citation omitted); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (observing that injunctions in equity "reflect a practice with a background of several hundred years of history, a practice of which Congress is assuredly well aware . . . [and courts] do not lightly assume that Congress has intended to depart from established principles") (citation and internal quotation marks omitted). We find no such "necessary and inescapable inference" here.

an injunction." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 526–27 (6th Cir. 2017) (citation omitted). These factors "simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc) (citation omitted). Our review of the district court's balancing of these factors is highly deferential. *See Hunter*, 635 F.3d at 233.

As an initial matter, we disagree with Landowners' claim that the district court balanced the wrong factors in its preliminary injunction order. Landowners suggest that the district court relied on the preliminary injunction standard used in *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), which they argue "was rejected" by the Supreme Court in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). But the district court never mentioned *Sage* in its discussion of the preliminary injunction standard; instead, it cited the four factors we laid out in *McPherson*, 119 F.3d at 459. Those are the same factors we apply today—*see, e.g.*, *Hall*, 878 F.3d at 526-27; *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 615 (6th Cir. 2018)—and they are entirely consistent with *Winter*. *See Winter*, 555 U.S. at 20-26. We address each factor in turn.

1. Likelihood of Success on the Merits

The first factor looms large in this case. The ultimate merits question is whether Nexus has a substantive right to condemn Landowners' property. The NGA gives companies that right if (1) they hold "a certificate of public convenience and necessity" issued by FERC, (2) the tract of land at issue is "necessary to construct, operate, and maintain a pipe line," and (3) they are unable to negotiate a voluntary easement by contract. *See* 15 U.S.C. § 717f(h); *see also Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 550 F.3d 770, 776 (9th Cir. 2008) (discussing the same three factors).

In its earlier order granting partial summary judgment to Nexus—decided well before the preliminary injunction order at issue here—the district court determined that Nexus had satisfied

each of these three factors. And our own review of the record strongly suggests that Nexus has established the elements necessary to condemn Landowners' property. On appeal, Landowners do not dispute that Nexus holds a FERC certificate, that the 1.4-acre tract of land is necessary to build and maintain the pipeline, and that the parties have been unable to negotiate a voluntary easement by contract. This case appears to present a question not of *whether* Nexus has the statutory right to condemn Landowners' property, but only of *when* it may exercise that right. While that distinction may be significant in other cases, it is not here. The alleged harms resulting from the district court's injunction, discussed below, do not depend on the timing of Nexus's possession. Declining to issue an injunction would serve little purpose other than to delay Nexus's access to the property and increase the cost of completing the project. The district court properly used its injunctive power to avoid that outcome. *See McGirr*, 891 F.3d at 614 ("The preliminary injunction serves an important purpose—to allow a victory by [the plaintiffs] to be meaningful.") (citation and internal quotation marks omitted).

2. Irreparable Harm

While Landowners do not address Nexus's likelihood of success on the merits, they do take issue with the district court's assessment of the alleged harm to Nexus absent an injunction. In finding that Nexus would suffer irreparable harm without an injunction, the district court relied on Smore's sworn statement that building around Landowners' property would cost approximately $553,000.[3] Landowners challenge that figure on the basis that it is "pure conjecture," but it is in the nature of preliminary injunctions that they rely on forward-looking evidence. As Nexus's Senior Project Manager, Smore was well positioned to estimate the cost of building around

[3] The district court's opinion says the cost would be "roughly $530,000." That appears to have been a typo, as the number quoted in Smore's affidavit is $553,000.

Landowners' property. The district court did not abuse its discretion in choosing to credit Smore's sworn statement.

Landowners also claim that the district court should have rejected Smore's estimate because it "contradict[ed]" a statement he made in a previous affidavit. Landowners refer to an affidavit filed by Smore at an earlier stage of this litigation, when Nexus sought access to Landowners' property for the narrow purpose of conducting "survey, tree felling, clearing, environmental, and utility" work before pipeline construction began. In that affidavit, Smore stated that Nexus "must pay the contractor move-around costs every time survey, tree felling, clearing, environmental, and utility crews are forced to move around a no access property," and estimated that the "cost at each no access property for these crews can be up to $78,750 for each property skipped." Almost six months later, when Nexus sought the broader injunction at issue here, Smore projected that skipping Landowners' property "during full mainline construction"—which "would require Nexus to demobilize and remobilize equipment and personnel around" the property—would lead to additional construction costs totaling $553,000.

These affidavits estimate two different costs—first, the cost of skipping Landowners' property during preliminary "survey, tree felling, clearing, environmental, and utility" work, and second, the cost of "demobiliz[ing] and remobiliz[ing] equipment and personnel" after "full mainline construction" has begun. Contrary to Landowners' claims, the record fully supports this distinction. Landowners are correct that both of Smore's affidavits describe activities related to full mainline construction but fail to note that the affidavits do so in an initial section that summarizes the sequential construction process for the *entire* pipeline project. This section makes clear that different construction crews are responsible for each phase of the project; Smore explains that "[a]s one specialized crew completes its work, the next crew will move into position to

complete its portion of the construction process." In the section of the first affidavit estimating the harm to Nexus absent an injunction, Smore projects that it would cost $78,750 to skip Landowners' property during only the first phase of that process—"the sequential survey, tree felling, clearing, environmental, and utility" work. The section discussing move-around costs in Smore's second affidavit, by contrast, refers to the costs associated with skipping Landowners' property "during full mainline construction." The district court did not clearly err in crediting Smore's estimates of the costs for those different services.

At any rate, Landowners do not argue that Nexus would suffer no financial harm absent an injunction; they simply dispute the dollar amount of that loss. Regardless of the precise loss amount, the record supports Nexus's claim that skipping Landowners' property would result in significant harm to Nexus. In addition to the $553,000 noted in the district court's order, for example, Smore estimated that Nexus would have to spend up to $800,000 per day to retain its construction crew during any associated delays, that those delays would increase the likelihood of Nexus missing its target in-service date for the pipeline, and that such delays would risk harming Nexus's business reputation.

Landowners further claim that even if Nexus would suffer harm without an injunction, the district court should not have considered that harm to be "irreparable" because "it is conceivable" that Nexus could deduct its move-around costs from the compensation it eventually pays Landowners. Landowners forfeited that argument by failing to raise it in the district court. Regardless, this claim assumes that the money owed to Landowners would be enough to compensate Nexus fully for all the harm flowing from denial of the injunction. *See Langley v. Prudential Mortg. Capital Co., LLC*, 554 F.3d 647, 649 (6th Cir. 2009) (noting that "fully compensable" harm may not be irreparable) (citation omitted). We find nothing in the record to

support that assumption. While it may be "conceivable" that such a set-off would fully compensate Nexus, the court did not clearly err in finding otherwise. And even if Landowners could compensate Nexus fully for its loss, that would not change the outcome of this case because, as we explain above and below, the other relevant factors also favor injunctive relief.

3. Harm to Others

The next factor requires us to "balance the harm that [Nexus] would face" absent an injunction "against that which [Landowners] would face if we uphold the injunction." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). Landowners complain that because of the injunction, they have been "forced to continue to pay the property taxes on the property occupied by Nexus without any rents being paid for the use and occupancy of the land." But these are the types of "fully compensable" harms that courts do not consider irreparable. *Langley*, 554 F.3d at 649 (citation omitted). The purpose of the pending proceedings in the district court is to calculate the proper compensation owed to Landowners for Nexus's use of the property. *See* Fed. R. Civ. P. 71.1(h). There Landowners will have the opportunity to present their position regarding what is necessary to compensate them fully.

We note also that the harm to each party must be considered alongside the likelihood that Nexus will succeed on the merits. If the plaintiff's success is certain, then harm to the defendant is usually inevitable, while harm to the plaintiff is avoidable. And in this case, the district court has already determined that Nexus has a substantive right to condemn Landowners' property. Although that order is not at issue on appeal, we conclude that there is a strong likelihood Nexus will succeed on the merits of its condemnation claim. With this same likelihood in mind, the district court reasonably decided that the balance of harms tipped in favor of Nexus. *See Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) ("[W]e have observed that the degree of likelihood

of success that need be shown to support a preliminary injunction varies inversely with the degree of injury the plaintiff might suffer.")

4. Public Interest

The final factor asks whether the injunction would serve the public interest. This factor "primarily addresses impact on non-parties." *Hunter*, 635 F.3d at 244 (citation omitted). The district court found that the public interest supported a preliminary injunction here because (1) "expeditious completion of the pipeline is in the public interest," (2) Congress "gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices," and (3) FERC "carefully considered the pipeline and concluded that it will fulfill the goals detailed by Congress."

Landowners disagree with the district court's analysis for two reasons. First, they emphasize that much of the natural gas transported by the pipeline "is destined for Canada and international markets," so the benefits of the pipeline will not be "primarily" enjoyed by U.S. consumers. But the public-interest analysis does not require a balancing of the benefits inured in foreign countries against those enjoyed in the United States. That the pipeline may benefit consumers in foreign countries does not preclude a finding that it will also benefit consumers in the United States. And Landowners admit that a substantial amount of the natural gas transported by the pipeline will serve U.S. consumers.

Second, Landowners claim that the district court "merely defer[red]" to FERC's public-interest findings instead of conducting an independent assessment.[4] But the district did not simply defer to FERC. Rather, the court noted Congress's desire to provide U.S. consumers with an

[4] Landowners argue that FERC should not have issued Nexus a certificate of public convenience and necessity and briefly challenge FERC's statutory authority to do so. To the extent that Landowners wish to pursue a collateral attack on FERC's certificate, a separate proceeding is the proper vehicle for that challenge. *See* 15 U.S.C. § 717r(b) (spelling out the procedure for seeking review of a FERC order).

adequate and efficient supply of natural gas and recognized that FERC had "carefully considered" whether Nexus's pipeline would serve those goals. The almost 90-page order to which the district court referred—which was part of the district court record—reflected a two-year investigation and consideration of hundreds of live speakers and thousands of written comments. FERC issued that order under Congress's express directive to evaluate whether projects like this one will serve the public interest. *See* 15 U.S.C. § 717f(e) (providing that a certificate "shall be issued" upon FERC's finding that a project "is or will be required by the present or future public convenience and necessity"). District courts may reasonably credit the findings in such "carefully considered" reports, and it was not an abuse of discretion for the district court to do so here. *See Sage*, 361 F.3d at 827 (noting that FERC had issued a certificate after spending "sixteen months evaluating the need for" a pipeline project, and finding that "[i]t was therefore appropriate for the district court to weigh the public benefit of expeditious project construction in deciding that it could use its equitable power in this case").

B. Evidentiary Hearing

Finally, Landowners argue that the district court should have permitted additional discovery and held an evidentiary hearing before issuing the preliminary injunction. Nexus claims that "[a]ll due process arguments have been waived" because after the district court canceled the evidentiary hearing and prohibited further discovery "absent leave from the" court, Landowners "did not thereafter seek leave to conduct discovery, nor did [they] object to the order cancelling the hearing." But the district court granted Nexus's preliminary injunction motion only two days after the court canceled the hearing and discovery. Landowners could not have anticipated the district court's sua sponte cancellation order, nor could they have known that they would have only two days to seek additional discovery. We find no "waiver" on these facts.

Under Federal Rule of Civil Procedure 26(b)(1), district courts may limit discovery if, among other things, they determine that "the burden or expense of the proposed discovery outweighs its likely benefit." Such restrictions make sense, for example, where "claims may be dismissed based on legal determinations that could not have been altered by any further discovery." *Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003) (citation and internal quotation marks omitted). Likewise, "where material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought, district courts generally need not hold an evidentiary hearing." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) (citation omitted).

Landowners maintain that additional discovery and an evidentiary hearing were necessary to resolve factual disputes about (1) whether the pipeline would serve the public interest and (2) the financial harm that Nexus would suffer absent an injunction. Landowners do not explain what material factual disputes related to the pipeline's effect on the public interest. And Landowners' bases for challenging the district court's public-interest analysis—namely, that the pipeline benefited foreign consumers and that the court should not have deferred to FERC's findings—do not implicate any material factual dispute. Nexus does not dispute that the pipeline will serve foreign consumers, and even if it did, this dispute would be immaterial because the parties agree the pipeline will also serve U.S. consumers. And Landowners' claim that the district court gave too much deference to FERC is a legal argument that Landowners have addressed fully in their briefing.

We likewise find no material factual dispute related to the expense Nexus would incur without an injunction. Landowners contend that a hearing was necessary to address the "discrepancies" in the loss calculations provided by Smore in his two affidavits. As we explain

above, however, these estimates refer to two different categories of loss, and thus there was no discrepancy for the district court to resolve. And even if there were some factual dispute about the precise loss amount Nexus would suffer absent an injunction, this dispute would be immaterial because the record demonstrates that the harm to Nexus in that scenario—including project delays, the cost of retaining personnel during those delays, and additional construction costs—would be significant.

III. CONCLUSION

For the foregoing reasons, we **GRANT** the motion to file an amicus brief and **AFFIRM** the district court's preliminary injunction order.