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

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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

PETITIONERS' RESPONSE TO INTERVENOR'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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June 17, 2019

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OVERVIEW

Following the December 2017 seizure of their property by the Nexus Pipeline Transmission Company LLC (Nexus) in an eminent domain proceeding for construction and operation of a pipeline which was placed into service in October 2018, Petitioner, the City of Oberlin, Ohio and Elaine Selzer, a landowner member of Petitioner Coalition to Reroute Nexus Pipeline (CoRN), were forced by Nexus to execute easement agreements to formalize the terms of the judicial take. Now, Nexus and Respondent Federal Energy Regulatory Commission (Commission) move to dismiss the City's and CoRN's petition for review of the Commission certificate orders[1] authorizing the Nexus Pipeline, arguing that the Petitioners' compulsory execution of the easement agreements deprives them of standing to challenge the Commission certificate authorizing the pipeline and renders their petitions moot. Because the City and CoRN remain aggrieved by the Commission order which subjected their property to condemnation the moment it issued and authorized a pipeline that imperils the safety of City residents and CoRN members, and because the harm suffered by Petitioners is capable of redress by a court order vacating the Commission certificate orders, Petitioners continue to

[1] *See Nexus Pipeline*, Order Granting Certificate, 160 FERC ¶ 61,022 (2017) JA 1036 and Nexus Pipeline, Order on Rehearing, 164 FERC ¶ 61,054 (2018), JA 1206.

have standing to pursue their claims. For this reason, this Court must DENY Nexus' Motion to Dismiss and the Commission's Response.

Equally importantly, this Court must see the Nexus motion for what it really is: a last-ditch attempt to prevent the Petitioners' challenges to the Commission Certificate Orders from ever seeing the light of day. Prior to seeking review of the Certificate Orders in this Court, the City and CoRN members sought relief in three other forums -- only to be told that their claims were premature (Exh. 11, *CoRN v. FERC* Docket 17-4302 and *City of Oberlin v. FERC*, Docket No. 17-4308 (6th Cir. March 15, 2018)); filed in the wrong court (*Urban v. FERC,* No. 17-1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017); had already been fully considered by the Commission (Exh. 10, *Nexus v. City of Green et. al*., Docket No. 18-3325 (Dec. 7, 2018) at pp. 10-14) or could be redressed later even if the project went forward because the Commission could order Nexus to remove its facilities (Exh. 12, *Nexus Pipeline*, Order Denying Stay, 162 FERC ¶ 61,011 (Jan. 2018). A dismissal of this case would deprive aggrieved landowners of their due process rights to challenge the lawfulness of the Certificate Orders that authorized the taking of their property and would embolden private pipeline companies — which are mere bystanders in petitions for review of Commission pipeline certificate orders — to engage in the type of strategic shenanigans engineered by Nexus in this proceeding to block

judicial review of administrative agency actions which is a necessary component of the constitutional system of checks and balances on executive power. This Court cannot abide this result.

BACKGROUND

I. THE COMMISSION CERTIFICATE PROCEEDING

On August 25, 2017, the Commission granted a certificate to NEXUS. Certificate Order, JA 1036. As relevant here, the Certificate acknowledged Nexus' authority to exercise eminent domain under Section 7(h) of the Natural Gas Act to construct and operate the projects authorized. JA 1112. Both the City and CoRN filed timely rehearing requests of the Certificate Order, and sought a stay of the Commission certificate to avoid commencement of eminent domain proceedings while the Petitioners' rehearing requests were pending before the Commission. *See* City Rehearing and Stay Request, JA 1190-1193; CoRN Stay Request (October 2, 2017).

On December 22, 2017 while the Petitioners' rehearing and stay requests were pending, the City and CoRN filed a petition for immediate review of the Certificate Order along with writ of mandamus to stay the order. *See* Exh. 11, *Coalition to Reroute NEXUS v. FERC*, Docket No. 17-4032 (6th Cir. December 21, 2017); *accord City of Oberlin v. FERC*, Docket No. 17-4038 (6th Cir.

December 22, 2017). The petitions raised many of the same challenges to the Commission's authority to award a Section 7 certificate and eminent domain power to a pipeline for export that are pending before this court. *See*, *e.g.*, CoRN Motion for Stay Pending Review, Docket No. 17-4302 (Doc. 24).

Meanwhile, on January 10, 2018, the Commission denied the Petitioners' stay requests, finding among other things that the parties would not suffer irreparable harm if NEXUS gained possession of the properties and commenced construction because if the orders were overturned on appeal, Nexus could be required to remove the facilities at that point. *See* Exh. 12, *Nexus Pipeline*, Order Denying Stay, 162 FERC ¶61,011 (2018) at P. 7. Subsequently, on March 15, 2018, the Sixth Circuit dismissed the Petitioners' appeals of the Certificate Order as incurably premature because the Commission had not yet acted on the stay request, and concluding that the Commission's delay in ruling on the rehearing request was not sufficiently egregious to warrant the extraordinary remedy of mandamus. *See* Exh. 11, *CoRN et. al. v. FERC*, Docket No. 17-4302 (March 15, 2018); *accord City of Oberlin v. FERC*, Docket No. 17-4308.

On July 25, 2018, the Commission denied Petitioners' pending rehearing requests (JA 1206) which rendered the Certificate Order final for purposes of review under Section 717r(b) of the Natural Gas Act.

II. THE EMINENT DOMAIN PROCEEDING

While the Petitioners sought review and a stay of the Certificate Orders, Nexus pressed forward with eminent domain. On October 2, 2017, just six weeks after the Certificate Orders issued, Nexus filed a condemnation complaint and motion for summary judgment affirming Nexus' right to eminent domain in federal district court for the Northern District of Ohio. *Nexus Gas Transmission LLC v. City of Green*, 5:17-cv-2026, and Exh. 13 (Docket Sheet, ECF # 1, #3). In response, the City and CoRN members argued that Nexus did not have a substantive right to exercise eminent domain under the Commission certificate because the project was for private benefit and would be used for export (Clark Declaration ¶12, Mucklow Declaration ¶11-¶12).[2] On December 27, 2017, the federal district court determined that the certificate conferred the right of eminent domain based on the Commission's assessment of public convenience and granted immediate possession. Clark Declaration ¶13 and Exh. 9 (Court Order Granting Possession); Mucklow Declaration ¶12. Following the summary judgment ruling, Nexus filed motions for immediate access to property owned by the City and the Selzers, which were granted over their objection on March 16, 2018 and April 3,

[2] The Clark Declaration is attached as Exhibit 1, and the Mucklow Declaration as Exhibit 4 and are referenced throughout by name rather than exhibit number.

2018. Clark Declaration ¶14, Mucklow Declaration ¶13-¶14. Nexus began construction of the pipeline on the properties some time in May 2018 (Clark Declaration ¶15) and put the project in service in October 2018. Clark Declaration at ¶¶15-16.

CoRN members appealed the Order Granting Possession to the Sixth Circuit, arguing that the Nexus was not entitled to injunctive relief because the pipeline would export gas overseas and was inconsistent with the public interest. Clark Declaration ¶16, Mucklow Declaration ¶15. On December 7, 2018, the Sixth Circuit affirmed the federal district court's grant of immediate possession. Clark Declaration ¶16, *citing NEXUS v. City of Green*, Docket No. 18-3325.

III. THE SO-CALLED VOLUNTARY EASEMENT AGREEMENTS

Once the Sixth Circuit affirmed the order granting possession, Nexus had already acquired all the rights needed to complete the pipeline and put it in service. Therefore, the sole matter left to resolve was compensation. Clark Declaration ¶18; *see also* F.R.C.P. 71.1(j)(2) (requiring court to expedite payment of compensation once condemnor exercises eminent domain). On February 7, 2019, the federal district court held a status conference to determine how to move forward with the compensation phase of the eminent domain proceeding. Clark Dec. ¶17. Counsel for the City proposed to file a stay of the eminent domain proceeding pending

resolution of the petition for review at the D.C. Circuit which by this time, was nearing the completion of briefing, explaining that Nexus would not have been prejudiced by the delay because its pipeline was already in service. Clark Declaration ¶17.[3] The court indicated that it would deny any motion to delay compensation proceeding, so the City did not file a formal stay request. *Id; see also* Mucklow Declaration at ¶17.

For the City, the location of the pipeline easement presented a conflict between the pipeline and the future construction of a long-planned and critically important municipal public water supply line which would traverse the area that Nexus had already taken for its pipeline. Clark Dec. ¶19. However, a compensation hearing would not resolve the matter of the water line because the court only has authority to award monetary damages. *See* F.R.C.P. 71.1(j)(2)(authorizing court to distribute deposit and expedite payment of financial compensation); *also* Clark Dec. ¶20. To secure rights for a municipal water line, the City had no choice but to negotiate and eventually execute an easement agreement with Nexus in May 2019. *Id*.

[3] It bears noting that most rational condemners would welcome the opportunity to stay the compensation phase of an eminent domain proceeding to postpone payment of compensation as long as possible while continuing to retain possession of rights needed to operate the project - as was the case for Nexus. *See* Clark Declaration ¶24.

As with the City, Ms. Seltzer was also stream-rolled into a settlement agreement. Shortly after oral argument, counsel for Nexus made an offer of judgment to Ms. Seltzer to resolve compensation for the easement, and threatened to hold her liable for fees and other damages if she declined the settlement offer and recovered lesser amount at a hearing. Mucklow Dec. ¶¶19-22 and Exh. 5 (email chain). Nexus' threats induced Ms. Seltzer to accept an easement agreement. *Id*.

The easement agreements did nothing to change the fact that the City and Ms. Seltzer were aggrieved by the seizure of their property rights by the court's order granting immediate possession. Nevertheless, in an abundance of caution, the Petitioners took additional measures to preserve their right to petition for review of the Commission orders. First, both the City and Ms. Selzer entered into a Stipulation that provided that:

> It is expressly acknowledged and agreed that the dismissal of the Claims in above-captioned proceeding shall have no application to the claims made by the [the City of Oberlin/Coalition to Reroute NEXUS ("CoRN")] in the pending appeal of the Order of the Federal Energy Regulatory Commission Issuing Certificates and Granting Abandonment dated August 25, 2017 and the Order on Rehearing dated July 25, 2018, Docket No. CP16-22-000 in the United States Court of Appeals for the District of Columbia Circuit."

See Exh. 3 (City Stipulation, ¶3), Exh. 7 (Selzer Stipulation, ¶3)

Second, Paragraph 13 of the Easement Agreements provide that:

> This Grant of Easement shall terminate or be deemed to have terminated if and only if (i) the Federal Energy REgulatory Commission or its successor agency has issued an authorization for Grantee to abandon the Pipeline Facilities, (ii) the easement agreement is terminated by a court of competent jurisdiction and after lapse or final disposition of all means of appeal…In the event of termination of this Grant of Easement, Grantee at Grantor's option...shall remove it Pipeline Facilities...In the event that Grantee removes its Pipeline Facilities under the terms of this Paragraph, it shall restore the area of the Property...

See Clark Dec. ¶22 and Exh. 2 (City Easement) and Exh. 6 (Selzer Easement).

This provision of the Easement Agreement protects the redressability of the Petitioners' claims because in the event that this Court vacates the Commission Certificate Orders, the Commission must then issue an order authorizing abandonment of the facilities. *See Regency Field Services LLC*, 154 FERC ¶ 61,103 P. 6-7 (2016)(explaining that company must seek FERC order under Section 7(b) of the Natural Gas Act to abandon service that when certificate is vacated for jurisdictional facilities already in service). Once the Commission orders abandonment, the easement agreements terminate.

Taken together, the Stipulation and the Easement Agreements demonstrate that even after resolution of the eminent domain proceeding in the federal district

court, Petitioners continued to oppose the Commission orders authorizing the project and took deliberate steps to preserve the viability of their challenges. Yet notwithstanding the parties' preservation of their rights to pursue this appeal, on June 6, 2019, Nexus filed this motion to dismiss -- before the ink was even dry on the Ms. Selzer's easement agreement. *See* Mucklow Declaration ¶¶21-23. A day later, the Commission filed a response backing Nexus' position.

ARGUMENT

I. THE EASEMENT AGREEMENTS DO NOT DEFEAT THIS COURT'S SUBJECT MATTER JURISDICTION OVER THE CITY'S AND CoRN'S PETITIONS FOR REVIEW

A. The Petitioners' Standing to Challenge the Commission Orders Remains Intact.

To establish standing, the City must show (1) injury-in-fact; (2) causation; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), while CoRN must show that at least one of its members has standing to bring suit in their own right. *See e.g., Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (defining organizational standing). Both the City and CoRN (relying on a declaration from its member and impacted landowner Elaine Selzer) established standing at the inception of this case based on (1) the pipeline's adverse environmental and safety

impacts on the City and its residents and (2) the taking of property by eminent domain that flows from the Commission authorization. (Petitioners' Opening Brief at 16-18; Clark Dec. ¶¶5-6).

1. The City and CoRN Suffered Injury in Fact Which Is Not Changed by the Easement Agreements.

This Court holds that a landowner made subject to eminent domain by a decision of the Commission has been injured in fact because the landowner will be forced either to sell its property to the pipeline company or to suffer the property to be taken through eminent domain. *See Gunpowder Riverkeeper v. Fed. Energy Regulatory Comm'n*, 807 F.3d 267, 271-72 (D.C. Cir. 2015); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017)("A landowner forced to choose between selling to a FERC-certified developer and undergoing eminent domain proceedings is also "aggrieved" within the meaning of the Act."). Moreover, that landowners will eventually be compensated for the taking of the property does not negate the harm caused. As this Court explained in *BJ Oil and Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004):

> Indeed, if FERC's and Dominion's theory[that compensation erases injury] were correct, homeowners would be unable to challenge construction of a road through their homes, no matter how arbitrary or unjust the decision. The public entity building the road would simply argue, as here, that the homeowners lack Article III standing because eminent domain proceedings will fully compensate them for the value

> of their homes. No wonder neither FERC nor Dominion cites any supporting authority.

Like the petitioners' in *Sierra Club*, *Gunpowder Riverkeeper* and *BJ Oil*, the City and CoRN members were aggrieved by the Commission order approving the pipeline which presented them with a Hobson's choice of being forced to sell their property to the pipeline or having it seized through eminent domain. Once the City and CoRN refused to sell their property, Nexus filed an eminent domain action six weeks after the Commission issued its Certificate Order, took possession of Petitioners' property pursuant to a federal district court order (Exh. 9), and having gained possession, constructed the pipeline and placed it in service. Because Petitioners property was taken through eminent domain and against their will, they are aggrieved.[4]

The easement agreements do not erase the Petitioners' legally cognizable injury. Once the federal district court awarded possession and deprived the Petitioners of their property rights, the damage was done, "with the only open issue being the compensation the landowner defendant will receive in return for the easement." *See In re Penneast Pipeline Co.*, First Filed Civ. A. No.: 18-1585, at

[4] Nexus is simply wrong when it claims that the City was not "forced to accept a contract against its will or have its property condemned." Nexus Motion at 11. The City's property as well as Ms. Selzer's property was condemned.

*24-26 (D.N.J. Dec. 14, 2018) *citing Columbia Gas Transmission*, *LLC v. 1.01 Acres*, 768 F.3d 300, 304 (3d Cir. 2014). The Nexus easement agreements were presented as part of the compensation phase of the eminent domain proceeding and as *BJ Oil v. FERC*, 353 F.3d at 75 definitively establishes, compensation for a taking does not defeat standing to challenge it. Moreover, because Nexus took the property via court order of December 2017 (Exh. 9), the May 2019 easement agreements were merely a formality that memorialized the rights that Nexus long before taken by force.

Even if the easement agreements executed by the City and Ms. Seltzer are somehow viewed as conveyance of rights beyond what Nexus had already expropriated, the Petitioners remain aggrieved. This is because the City and Ms. Selzer had no option other than to accept the agreements. Indeed, even Nexus concedes that landowners forced to sell their property suffer from injury in fact under this Court's precedent (*See* Nexus Motion at n. 3 *citing B&J Oil v. FERC*, *supra*).

The record shows that the Petitioners did not enter the easement agreements voluntarily. Clark Dec. ¶22-¶24, Mucklow Dec. ¶¶25-27. After unsuccessful efforts to stay a compensation proceeding pending resolution of this appeal, the City ultimately entered into the easement agreement because it was the only way

for the City to ensure that it could construct a municipal water line to serve City residents. Clark Dec. ¶¶20-21. Meanwhile, Ms. Seltzer was threatened with significant financial liability if she did not execute the easement agreement and accept Nexus' offer of compensation. Mucklow Dec. ¶¶24-26 and Exh. 5 (email chain correspondence) Because the execution of the easement agreements was involuntary, Petitioners suffered aggrievement by the sheer act of being forced to enter into them. *See BJ Oil*, 353 F.3d 74-75, *citing Idaho Power Co. v. FERC*, 312 F.3d 454 (D.C. Cir. 2002)(finding injury in fact where FERC order compels a company to enter into a short term contract).

In addition to suffering a taking of property by force, "a party is "aggrieved" by a Commission order if it challenges the order under NEPA and asserts an environmental harm." *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1365; *Moreau v. FERC*, 982 F.2d 556, 564 n.3 (D.C. Cir. 1993). Both the City and CoRN residents alleged that the pipeline imperils their safety and that the Commission failed to adequately address safety concerns. Petitioners' Opening Brief at 16-18. Nothing in the easement agreements abates the pipeline's safety risks or otherwise reduces the harm suffered by the petitioner as a result of the Commission's approval of a pipeline that sits in close proximity to City residents, landowners and other infrastructure. Clark Declaration ¶25, Mucklow Declaration

¶28. Moreover, because the Petitioners allege concrete injury from the certificate orders, they retain standing to object to any deficiency in the Commission order even if not directly tied to Petitioners' specific injuries. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1365 (D.C. Cir. 2017). In *Sierra Club*, this Court found that the petitioners -- community members who suffered local environmental damage due to the Commission's approval of a pipeline -- also had standing to challenge the Commission's failure to consider the pipeline's contribution to climate change and its arbitrary methodology for setting the project's rates because a favorable ruling on those challenges would result in a vacateur of the Commission order and redress for the petitioners' environmentally-based injuries. *Sierra Club*, 867 F.3d 1367 and n. 3. Thus, even in the highly unlikely event that the easement agreements are viewed as neutralizing Petitioners' harm, the Petitioners still retain standing to challenge all aspects of the Commission orders based on the ongoing injury that they suffer as a result of the pipeline's safety hazards which are neither abated nor addressed by the easement agreements.

2. Petitioners' Injuries Are Capable of Redress

Petitioners' injuries - both the unlawful taking of its property for an unnecessary pipeline that will transport gas for export and the heightened safety

hazards created by the project - flow from the Commission order approving the Nexus Pipeline[5] and are capable of redress through a decision by this court vacating or remanding the certificate order. Nothing in the easement agreement deprives the Petitioners of redress for their claims.

For example, if the Court finds that the Commission approval of the pipeline fails to adequately protect public safety, the Court may vacate the order and remand it to the Commission to consider additional mitigation such as imposition of minimum setbacks, additional monitoring or other measures that would reduce the risk and harm of a pipeline rupture or explosion. *See also* Clark Declaration ¶25. Should the Court rule that the project does not serve the public convenience because the pipeline is only 59 percent subscribed or because gas is destined for export or because the Commission orders effectuate an unconstitutional taking of property, this Court may either remand the case to the Commission for further analysis or vacate the certificate - which in turn would necessitate a Commission order approving the abandonment of facilities no longer authorized in the absence of a valid certificate. *See Regency Field Services LLC*, 154 FERC ¶ 61,103 P. 6-7 (explaining that Commission must grant order approving abandonment following

[5] Neither Nexus nor the Commission contend that the easement agreements vitiate the causation prong of standing analysis.

vacation of a certificate). In short, nothing in the easement agreements precludes any of this relief.

In fact, both the Stipulation and the Easement Agreement, by their own terms, preserve the Petitioners' ability to seek redress. The Stipulation provides that the resolution of the claims in the eminent domain proceeding will not have any effect on Petitioners' claims in this proceeding. *See* Exh. 3 (City Stipulation ¶3) and Exh. 7 (Selzer Stipulation ¶3). Likewise, under Paragraph 13 of the Easement Agreements, in the event that the Court orders the Commission to vacate the certificate and an abandonment order is issued, the easement will terminate. *See* Exh. 2 (City Easement), Exh. 6 (Selzer Easement). In short, nothing in the easement or settlement agreements between Nexus and the City constrain this Court from review of the Commission orders and granting redress for the harm suffered by Petitioners as a result.[6]

3. Nexus Improperly Conflates This Court's Review of the Commission Order With The Eminent Domain Proceeding.

[6] Nexus contends that the Stipulation's provision that the dismissal of the condemnation claims has no application to claims before this Court does not salvage the City's standing "because no action of the parties can confer subject matter jurisdiction," *citing Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1021 n. 3 (D.C. Cir. 1998). Nexus misunderstands the provision's purpose which was intended to clarify that the Easement Agreements were not intended as a universal settlement of *all* claims involving Nexus but only those arising out of the condemnation proceeding. Because the City never agreed to forfeit its petition for review under the Easement Agreement with Nexus, the agreements do not bar the City from moving forward with this case.

Nor *could* an agreement in a separate proceeding between the Petitioners and Nexus -- which is only an intervenor in the review proceeding before his Court -- ever resolve Petitioners' claims against the Commission. Nexus mistakenly attempts to conflate the Petitioners' challenge to the lawfulness of the Commission's certificate orders now pending before this court with the eminent domain action in the federal district court for the Northern District of Ohio. But the proceedings are not one and the same. Most significantly, the Commission and not Nexus is the object of the Petitioners' challenges, in contrast to the eminent domain proceeding filed by Nexus against specific property owners. Furthermore, just as private agreement cannot create subject matter jurisdiction in this Court (Nexus Brief at 3), neither can a private agreement between Petitioners and an ancillary party in a separate proceeding block this Court from review of the lawfulness of the Commission orders which continue to harm the Petitioners. This Court should resist Nexus' efforts to encroach upon and limit the reach of its subject matter jurisdiction.

II. THE EASEMENT AGREEMENTS DO NOT MOOT THE PETITIONERS' CHALLENGE

In addition to arguing that the easement agreements defeat Petitioners' standing, the Nexus and the Commission similarly contend that the easement

agreements resolve Petitioners' complaints and therefore moot their challenge to the Commission order. Not so.

First, the Commission's claim that the easement agreements render Petitioners' claims moot backtracks on its earlier assurance that Petitioners' claims would not be mooted even if their property were taken in eminent domain prior to the Commission's ruling on Petitioners' rehearing request. Rebuffing Petitioners' January 2018 request to stay the effectiveness of the certificate order to avoid rendering their claims moot, the Commission promised that:

> To the extent that NEXUS elects to proceed with construction, it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal. If this were to occur, NEXUS might not be able to utilize any new facilities and could be required to remove them or to undertake further remediation.

Exh. 12, *Nexus Pipeline*, Order Denying Stay, 162 FERC ¶ 61,011 (2018) at P. 7. The Commission's attempt to pull the rug out from under the Petitioners' claims by painting them as moot when it had previously committed that Petitioners would have a means of redress in the absence of a stay is the essence of arbitrary and capricious decision-making and should not be tolerated by this Court.

In addition, there is no evidence that the easement agreements ever addressed Petitioners' concerns regarding the lawfulness of the Commission certificate orders or the pipeline's safety hazards. Although the Commission

boldly asserts that "the parties expressly accepted construction and operation of the pipeline on their property" (*See* Commission Response at 3), the facts belie the Commission's presumption. As discussed at the outset, by the time the easement agreements were executed, the pipeline was already operating on Petitioners' property that had been seized in eminent domain. There was nothing for the parties to accept in the easement agreement since the pipeline was already done deal. Moreover, if the Petitioners actually had "expressly agreed" to accept construction of the pipeline on their property, why did they insist on provisions in the stipulation agreement to preserve their ability to continue their challenge to the Commission orders approving the pipeline now before this court? As with Nexus' characterization of the easement agreements as "voluntary," the Commission's depiction of the easement agreement as an express acceptance by Petitioners of construction of the pipeline on their land and all of its attendant harms is similarly divorced from reality.

III. GRANTING NEXUS' MOTION WILL LIMIT THIS COURT'S JURISDICTION AND ALLOW PRIVATE PARTIES TO MANIPULATE REVIEW OF AGENCY ACTIONS

Petitioners recognize that standing and mootness are Article III mandates that lie at the core of this Court's subject matter jurisdiction. For that reason, Petitioners have taken Nexus' motion to dismiss seriously and gone to great

lengths to demonstrate that the recently executed easement agreements have done nothing to vitiate the Petitioners' standing or to moot their claims. Nevertheless, while standing is a constitutional imperative, it is not is a "gotcha" trap that can be haphazardly trotted out to dispose of meritorious claims by aggrieved petitioners. *See American Library Ass'n v. F.C.C*, 401 F.3d 489, 493-94 (D.C. Cir. 2005).

Since 2017, the Petitioners -- whose property was forcibly seized -- have been whipsawed between three different tribunals - the Commission, the federal district court of Ohio and the Sixth Circuit - in search of a forum where they could challenge the legality of Commission's orders that authorized the taking of their property. *See* Overview *supra*. Two years later, Petitioners have finally landed in the right court, briefed their case and argued their claims before an engaged panel. And then - on the cusp of substantive ruling on their challenges after all this time, Nexus steamrolled Petitioners into easement agreements that formalized a taking of property had occurred two years before, and now contends that it is too late for the Petitioners to seek relief because their claims have been extinguished by the forced easement agreements.

To dismiss this case at this juncture will deprive both the City and CoRN members of their constitutional due process rights to challenge the lawfulness of the Certificate Orders that authorized the taking of their property. Worse, a

dismissal would embolden private pipeline companies — which are mere bystanders in petitions for review of Commission pipeline certificate orders — to engage in the type of strategic shenanigans engineered by Nexus in this proceeding to block judicial review of administrative agency actions which is a necessary component of the constitutional system of checks and balances on executive power.

As Judge Wilkins astutely recognized at oral argument, the Commission continues to approve projects such as the Driftwood LNG Facility (*Driftwood Pipeline*, 167 FERC ¶61,054 (2019) which like this case, push the boundaries of this Court's precedent by relying on exports to justify approval of a certificate for an interstate natural gas pipeline under Section 7 of the Natural Gas Act which in turn confers eminent domain powers on certificate holders. Absent review of the Commission's orders in this case, the Commission's authority to approve projects that jeopardize private property rights will go unchecked, resulting in the conveyance of eminent domain powers to private gas companies in a far more expansive manner than Congress ever intended under the Natural Gas Act. The easement agreements foisted on Petitioners by Nexus -- which stands to benefit richly from the Commission's unfettered grant of certificates to private companies that carry the power of eminent domain -- neither negate nor unwind the injury

that Petitioners suffered as a result of Nexus' forcible taking of property by judicial fiat. Nor do the easement agreements restrict this Court's power to remand or vacate the Commission's certificate to redress Petitioners' claims. For these reasons, this Court retains subject matter jurisdiction over the petition for review and must reach the merits of the City and CoRN petition for review.

CONCLUSION

WHEREFORE, Petitioners City of Oberlin and CoRN urge this Court to DENY Nexus' Motion to Dismiss and the Commission's Response in Support Thereof, award costs and attorneys fees to Petitioners and grant any other relief that this Court deems just and appropriate.

Respectfully submitted,

/s/ Carolyn Elefant

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June 17, 2019

CERTIFICATE OF COMPLIANCE

1. This response 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: June 17, 2019

/s/ Carolyn Elefant
Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of June, 2019, I caused this Petitioners Response in Opposition to Intervenor's Motion to Dismisses for Lack of Subject Matter Jurisdiction 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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Intervenor for Respondent

I further certify that I caused the required copies of the Petitioners Response to Intervenor's Motion to Dismisses for Lack of Subject Matter Jurisdiction to be hand filed with the Clerk of the Court.

/s/ Carolyn Elefant
Counsel for Petitioners