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 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FINAL OPENING BRIEF OF PETITIONERS

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March 29, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF OBERLIN, OHIO **PETITIONER** **v.** **FEDERAL ENERGY REGULATORY COMMISSION,** **RESPONDENT.**	**Docket No. 18-1248**

CITY OF OBERLIN, OHIO STATEMENT AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to this Court's Order dated September 15, 2018, the City of Oberlin, Ohio hereby submits its Statement as to Parties, Rulings & Related Cases

I. PARTIES

A. Parties Seeking Rehearing Before FERC

City of Oberlin, Ohio
Coalition to Reroute NEXUS (CORN)
Sierra Club
Neighbors Against NEXUS
Communities for Safe & Sustainable Energy
Sustainable Medina County

B. Parties Before the Court

1. Petitioners

City of Oberlin Ohio, Coalition to Reroute NEXUS (CORN)

2. Respondent

Federal Energy Regulatory Commission

3. Intervenors

NEXUS Gas Transmission

C. Related Cases

Appalachian Voices v. FERC, Docket No. 17-1271 was pending before this court and challenged the reasonableness of a 14 percent return on equity (ROE) and the extent to which the Commission must evaluate evidence of market demand in assessing project need when a project is supported by precedent agreements. A *per curiam* ruling was issued on February 19, 2019 and is discussed in the brief.

Respectfully submitted,

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October 15, 2018

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Coalition to Reroute Nexus	)	
	)	
Petitioner	)	**No. 18-1248**
	)	
v.	)	
	)	**Agency No. CP16-22**
Federal Energy Regulatory Commission,	)	
	)	
	)	
Respondent		

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 15 of the D.C. Circuit Rules and Federal Rule of Appellate Procedure 26.1, Petitioner, the Coalition to Reroute Nexus (CoRN) submits this Corporate Disclosure Statement. CoRN is a volunteer-driven, non-profit corporation organized under the laws of Ohio for the purpose of defending the rights of certain residents and land-owners affected by the Nexus pipeline.

As a non-profit corporation, CoRN has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in CoRN.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

*Authorities upon which we chiefly rely are marked with asterisks.

CONSTITUTIONAL PROVISION

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

City	City of Oberlin, Ohio
Coalition	Coalition to Reroute Nexus
DEIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Management Safety Administration

INTRODUCTION AND OVERVIEW

This petition challenges a Commission certificate of convenience and necessity granted to the Nexus Pipeline for a 303-mile greenfield pipeline that is undersubscribed -- only 59 percent of the pipeline's capacity is backed by contracts, many with affiliates or exporters -- and overpriced due to a 14 percent return on equity far in excess of the 9.5 - 11 percent returns that are typical for the utility industry. Lacking any discernible public benefits, the pipeline will nevertheless inflicts grave harm on the Petitioners, the City of Oberlin, Ohio and the Coalition to Reroute Nexus' landowner members by jeopardizing safety and taking municipal and private property through eminent domain. Because the project does not serve the public convenience and necessity under Section 7 of the Natural Gas Act, this Court must vacate the Certificate.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Section 717r of the Natural Gas Act, 15 U.S.C. § 717r over this Petition for Review. On December 28 and 23, 2015, the City of Oberlin (City) and the Coalition to Reroute Nexus Pipeline (Coalition), respectively, each filed timely and unopposed motions to intervene (JA467, 477) which were granted by operation of law. *See* 18 C.F.R. § 385.214(c) (providing for grant of party status if no opposition is filed within 15 days of timely motion to intervene). Within thirty days of the Commission's order granting

a certificate for the NEXUS Pipeline,[1] the Coalition and the City each filed timely petitions for rehearing on September 22 and 25, 2017. JA 1124, 1133, 1156. On July 25, 2018, the Commission in a 3-2 ruling denied all rehearing requests, thus rendering the orders final for judicial review under Section 15 U.S.C. § 717r(a).[2] The Petitions for Review filed by the City on September 14, 2018 and by the Coalition on September 21, 2018 were timely filed within sixty days of the Commission's order on rehearing. *See* 15 U.S.C. §717r(b).

STATEMENT OF THE ISSUES

1. Was the Commission's finding of project need -- over the dissent of Commissioner Glick -- arbitrary, capricious and unsupported by substantial evidence when only 59 percent of the pipeline capacity is subscribed - much of it by affiliates - and when evidence in the record demonstrated a lack of market demand for the project?

2. Section 3 of the Natural Gas Act governs authorization of gas projects for import and export, while Section 7 applies to Commission approval of certificates of convenience and necessity for projects that transport natural gas in interstate commerce. Did the Commission violate Sections 3 and 7 of the Natural Gas Act by

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[1] *NEXUS Pipeline*, Order Issuing Certificates and Granting Abandonment, 160 FERC ¶61,022 (August 25, 2017), JA1036.

[2] *NEXUS Pipeline*, Order on Rehearing, 164 FERC ¶ 61,054 (July 25, 2018), JA 1206.

awarding a certificate for the Nexus Project under Section 7 when the project will transport gas for import and export?

3. Did the Commission's Certificate Order violate the Takings Clause of the United States Constitution because the finding of public use was arbitrary and capricious?

4. Was the Commission's approval of Nexus' excessive 14 percent return on equity and its above-market 5.75 percent debt unsupported by substantial evidence and therefore in violation of *Sierra Club v. FERC*, Docket No. 16-1329 (D.C. Circuit August 22, 2017)?

5. Did the Commission order fail to ensure project safety as required under Section 7 of the Natural Gas Act and the National Environmental Policy Act (NEPA) when the Commission (1) impermissibly delegated safety considerations to another agency (2) refused to consider siting alternatives such as moving the pipeline away from population centers or requiring compliance with local land use, zoning and safety ordinances to reduce the risk of catastrophic harm to City residents and other landowners in close range to the pipeline.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF THE CASE

On November 20, 2015, Nexus filed an application under Section 7 of the Natural Gas Act for a certificate to construct and operate the $2 billion Nexus natural gas pipeline system (Nexus Project) designed to provide up to 1,500,000 decatherms per day of firm transportation service from the Appalachian Basin to markets in Ohio, Michigan and Canada. The Project would include construction of the 257-mile greenfield Nexus pipeline which runs from northeast Ohio to the Canadian border, crossing through property owned by Petitioners.

On December 28, 2015 and December 23, 2015, the City and Coalition each filed timely motions to intervene opposition to the Nexus Project. JA477, 467. The City filed additional comments on May 23, 2016. JA 679.

On July 14, 2016, the Commission published notice of the draft environmental impact statement (DEIS). The City and Coalition each filed timely comments on August 29, 2016 and August 25, 2016. JA803, JA718. The Final EIS was released on November 30, 2016. JA854.

On August 25, 2017, the Commission granted a certificate of convenience and necessity to Nexus. The City filed a combined request for rehearing and a stay of the Commission Order on September 25, 2017, JA1156. The Coalition filed two rehearing requests on September 22, 2017, one pertaining to eminent domain and the other pertaining to safety related issues. JA1124, 1133.

Following the grant of the Certificate Order (and while the City and Coalition's rehearing requests were pending), Nexus filed an eminent domain action against the City and the Coalition under Section 7f(h) of the Natural Gas Act to condemn property that Nexus claimed was necessary for the construction and operation of the pipeline. *Nexus Gas Transmission, LLC v. 2.00 Acres Permanent Easement, et al*., 5:17-cv-02062-SL (N.D. Ohio 2017).

On July 25, 2018, the Commission issued an order on rehearing rejecting both the City's and the Coalition's challenges to the Certificate Order. The Rehearing Order rendered the Commission's action final for purposes of review under Section 717r(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). This petition ensued.

STATEMENT OF THE FACTS

I. DESCRIPTION OF THE PARTIES AND PROJECT

A. Petitioners

The City of Oberlin is located in Lorain County in Northern Ohio with a population of 8286 people. Founded concurrently with Oberlin College in 1833, the City is known for its rich and diverse history of progressive thought, innovation and social activism and are leaders in the environmental movement. City Intervention at 5-6, JA481-2. Concerned about accelerating natural gas development within the state, in 2013, the City's electorate initiated and approved the passage of an ordinance now codified at Section 521.13 of the Oberlin

Codified Ordinances. Section 521.13(b)(3) makes it unlawful for any corporation to "engage in the siting of extracting, production and delivery infrastructures within the City." *See* JA 823-825.

The Coalition is a 501(c)(3) organization comprised of landowners adversely affected by the Nexus Project. *Selzer Aff't* at ¶ 5, Addendum. It advocates on behalf of the landowners and the general public, protecting their interests with respect to the Nexus Project and its adverse impacts. *Id*.

B. Description of the NEXUS Project

Nexus is a new company organized under Delaware laws. It is jointly owned by Enbridge, Inc., a Canadian company and DTE Energy Company with each company owning a fifty percent share of Nexus. Abbreviated Application of Nexus for an Amendment to the Certificate at p. 2, JA1205. The $2 billion Nexus Project consists of approximately 257 miles of greenfield 36-inch diameter pipeline four new compressor stations totaling 130,000 horsepower and various facility upgrades and capacity leases. *See* NEXUS Application at 9-11, JA 28-30. The Project will provide 1.5 million dth/day of firm natural gas transportation services from the Appalachian Basin to markets in North Ohio, Michigan and the Dawn Hub in Ontario, Canada. Certificate Order at P.9, JA 28.

Despite having conducted three open seasons for the Project, Nexus secured precedent agreements for just 59 percent of the total project capacity or 885,000

dth/day. Certificate Order at P.9, JA1039. This amount that has not changed since Nexus filed an application for a certificate in November 2015. A list and brief description of current project subscribers and their contractual commitments for transportation service are shown below:[3]

Subscriber	Status	Contract commitment for transportation service
Union	Canadian gas transmission and distribution company and Enbridge subsidiary/affiliate	150,000 Dth/day
DTE Gas	Michigan local distribution company and DTE energy subsidiary/affiliate	75,000 Dth/day
DTE Electric	Michigan electric company and DTE Energy subsidiary/affiliate	75,000 Dth/day
CNX Gas Company	Independent oil and gas company	150,000 Dth/day
Noble Energy	Independent oil and gas company	75,000 Dth/day
Chesapeake Energy Marketing	Provider of gas marketing services	200,000 Dth/day
Columbia Gas of Ohio	Local distribution company	50,000 Dth/day
Enbridge Gas Distribution	Canadian local distribution company and Enbridge Subsidiary/affiliate	110,000 Dth/day

[3] Source for Table: Certificate Order, P.9, JA1039.

The majority of the Project's total capacity will be devoted to export. According to the Ontario Energy Board, 760,000 Dth/day of capacity has been contracted to flow to the Dawn Hub. *See* Report for Purpose and Need and Alternative Routes for NEXUS filed March 4, 2016, Exhibit at fn. 16, JA 589. Nexus has leased 455,000 Dth/day of existing firm capacity from Vector Pipeline L.P. on two pipeline segments which extend from interconnections with DTE Gas of Michigan to the Canadian border. Certificate Order at P. 3, 4. JA1037. Nexus has also leased pipeline capacity from DTE Gas to transport 150,000 Dth per day gas to the Union-St. Clair interconnect between DTE Gas and Union Gas Limited (Union) at the U.S./Canada border. *Id.* P. 19, JA 1043. Thus, the record shows that the Project will transport 605,000 Dth/day per day to Canada. Conversely, the record also shows that just 200,000 Dth/day of project capacity -- representing the combined commitments of DTE Electric, DTE Gas and Columbia Gas three local distribution companies -- have been reserved for customers in the United States. *See* Table, *supra*. Although as the Commission suggests, it is possible that the remaining shippers - CNX Gas Company, Noble Energy and Chesapeake Energy

Marketing **may** also serve domestic end users (Rehearing Order at n. 113, JA1228), the record lacks any evidence to support the Commission's conjecture.[4]

II. THE CERTIFICATE PROCESS

A. Initial Comments

The certificate proceeding was initiated on November 20, 2015 with Nexus' filing of an application for a certificate of convenience and necessity under Section 7 of the Natural Gas. JA 15. The City moved to intervene in opposition to the project, arguing that the lack of precedent agreements for all of the project's capacity and declining market demand showed that the project was not needed. City Motion to Intervene at 11-14, JA488-492. The City also described the safety risks posed by the project and its incompatibility with Oberlin Municipal Ordinance Section 521.13(b)(3) which prohibits the siting of extraction, production and delivery infrastructure within City limits. The City reiterated these objections in comments filed on May 20, 2016, JA679 where it also argued that Nexus' proposed 14 percent return on equity (ROE) was excessive, and on August 29, 2016 in response to the Commission's release of the DEIS. *See* City Comments on DEIS at 9-15, JA812-818. The Coalition also submitted comments

[4] In addition, it can be inferred that Chesapeake has contracted with Nexus to export natural gas. Of the eight shippers who have subscribed capacity in the NGT Project, only Chesapeake has subscribed for 200,000 Dth per day. Nexus disclosed in responses to FERC inquiry that the shipper which contracted for 200,000 Dth per day was to have its gas delivered to the dawn hub in Ontario. Attachment 1A, April 15, 2016 Responses to FERC Requests, JA 597.

in opposition to the Nexus Project. The Coalition argued, *inter alia*, that the setbacks for residential dwellings were insufficient to protect the safety of the inhabitants along the pipeline route. Comment on DEIS, pp. 5- 6, JA 722-33; Motion or Request to Consider Safety Aspects, pp. 4- 5, JA 702-703; Comments on report for purpose and need, p. 18, JA 553. The Coalition also questioned the domestic need for the Project. Reply to Answer of Nexus on Motion to Examine Ohio Interconnects, pp. 2-4, JA 693.

B. The FEIS Did Not Respond to Petitioners' Comments, Particularly Their Concerns Regarding Safety.

The Commission did not address either the City's or the Coalition's concerns in the FEIS. The FEIS did not make a determination on project need and instead deferred this matter to the Commission. FEIS at 1-3, JA883. With regard to safety issues, the FEIS merely made a generic finding that "natural gas transmission pipelines continue to be a safe, reliable means of energy transportation." FEIS at 4- 252, JA1034. The FEIS also refused to consider that the pipeline's proximity to populated areas resulted in added safety risks, finding that "proximity to people is not a factor with respect to public safety because the pipeline must meet DOT safety standards." FEIS at 3-3, JA887. Indeed, the FEIS concluded that none of the safety risks raised had any validity because the pipeline must be designed, constructed and operated and maintained in accordance with

DOT safety standards which would ensure adequate protection. *See* FEIS at 3-42, 3-95, 3-101, 4-247; JA 979, 985, 1029(finding compliance with PHMSA regulations would ensure adequate protection for the public and nearby homeowners); FEIS at 3-99, 3-108, 4-189; JA983, 992, 1017 ("the Projects must be constructed in accordance with DOT's safety regulations, and would be considered safe regardless of population density.") (FEIS at 4-186- 87, JA 1014-5(noting that PHMSA guidelines safe for a high pressure pipeline near public schools, daycare and elder care facilities) The FEIS even disregarded the potential hazard of fire or explosion because "PHMSA ensures that people and the environment are protected from the risk of pipeline incidents." FEIS at 4-238, JA1020.

The FEIS further acknowledges that Federal Regulations provide for a mandatory set-back to homes and structures from pipelines containing hazardous materials. Id. at 4-243, JA 1025. The FEIS dismisses this set-back, stating:

> [T]his regulation is only applicable to pipelines transporting hazardous liquids. The DOT regulations applicable to the NEXUS and TEAL Projects under 49 CFR 192 for pipelines transporting natural gas do not have a similar setback provision. As discussed throughout this section, the DOT maintains and enforces pipeline safety regulations. The Commission sites pipelines in cooperation with the DOT under a memorandum of understanding. At this time there are no established setback requirements for natural gas pipeline facilities.

Id., JA 1025.

According to the FEIS, there are 178 residential structures within 50 feet of the pipeline. FEIS at ES-10, JA 873. The FEIS also identifies 62 planned or

ongoing residential or commercial development projects impacted by Project. FEIS at ES-11, JA 874. Further, the FEIS is even more explicit: "PHMSA **ensures** that people and the environment are protected from the risk of pipeline incidents." Id. (emphasis added). The FEIS explains the reason for FERC's referral to DOT safety standards:

> Under a Memorandum of Understanding on Natural Gas Transportation Facilities (Memorandum) dated January 15, 1993, between DOT and FERC, DOT has the exclusive authority to promulgate federal safety standards used in the transportation of natural gas. Section 157.14(a)(9)(vi) of FERC's regulations requires that an applicant certify that it would design, install, inspect, test, construct, operate, replace, and maintain the facility for which a Certificate is requested in accordance with federal safety standards and plans for maintenance and inspection, or certify that it has been granted a waiver of the requirements of the safety standards by the DOT in accordance with Section 3(e) of the Natural Gas Pipeline Safety Act. FERC accepts this certification and does not impose additional safety standards.

Id. at 4-238, JA 1020.

The FEIS also states that certain steps would be taken which were over and above those required by the PHMSA. Included in these "extra" safety steps is the inspection and examination of welds. Id. at 4-245, JA 1027. From 1996 through 2015, 356 pipeline incidents were caused by "Pipeline material, weld, or equipment failure." Id. at 4-248, JA 1030. Experts within the field of natural gas distribution have studied the accidents occurring on high pressure natural gas pipelines and recommend safety setbacks for pipelines such as Nexus between

approximately 1000 to 1500 feet (500 meters) radius. These studies were filed on the FERC docket for the Projects but were ignored by FERC and not even mentioned in the EIS or FEIS.

C. The Commission Order

On August 25, 2017, the Commission granted a certificate to Nexus. On the matter of need, the Commission order found that the Precedent Agreements served as adequate proof of need - notwithstanding that they accounted for only 59 percent of project capacity. However, the Commission acknowledged that the project was overbuilt, noting that 78,000 horsepower of compressor were not necessary for the project. Certificate Order at P. 42, JA1050. The Certificate Order also approved the proposed 14 percent return on equity. To mitigate rate impacts the Commission required Nexus to revise its 60/40 equity/debt structure and apply a hypothetical 50/50 debt equity structure instead. Certificate Order at P. 81, JA28. On the issue of safety, the Commission stated that it may rely entirely upon the PHMSA to formulate safety guidelines and oversee compliance with those guidelines. Commission Order at P. 137, JA 1085, and that a project will be found to operate safely so long as Nexus complies with the PHMSA guidelines.

On rehearing, the Commission affirmed the Certificate by a 3-2 majority. In addition, the Commission dismissed the takings issues raised by the City and the Coalition with a vague reference to its opinions in other dockets. *See* Rehearing

Order at P. 46, JA 1229. Commissioner Glick dissented, finding that precedent agreements for 59 percent of the pipeline capacity and the applicant's willingness to invest in the project were not sufficient alone to establish need. Glick Dissent at 2, JA1280. Glick also faulted the Commission for cherry-picking the evidence from the record to support its position while ignoring evidence to the contra and dissented from the grant of the certificate.

SUMMARY OF THE ARGUMENTS

This Court must vacate the Commission orders granting a certificate of convenience to Nexus Pipeline. To approve a project under Section 7 of the Natural Gas Act, the Commission must find that need exists for the project based on substantial evidence and the standards of the Certificate Policy Statement. The Commission's order falls short. The record shows that the project is only 59 percent subscribed, with a large percentage of that capacity committed to affiliates (which are not meaningful evidence of need) or for export (which does not count towards need under Section 7 of the Natural Gas Act). Moreover, as dissenting Commissioner Glick pointed out, the Commission ignored evidence in the record showing lack of project need, and instead cherry-picked facts to support its own position without any explanation.

Next, the Commission erred in granting Nexus a certificate under Section 7 of the Natural Gas Act because the Nexus pipeline is an export facility that

required authorization under Section 3 of the Natural Gas Act. More than half of the pipeline capacity under contract will be transported in foreign commerce, and not interstate commerce which is covered by Section 7. In addition, because the project will transport gas for export, it does not qualify for eminent domain which attaches only to domestic projects approved under Section 7 and not export projects covered by Section 3. Nor does an export project serve a public use, and thus, the certificate's authorization of eminent domain is unconstitutional.

The Commission orders are also incompatible with the public convenience because they approve an excessive return on equity of 14 percent, which is higher than what is typical for the utility industry and not justified given the minimal financial risks that the Nexus project faces. The Commission itself acknowledged that the return on equity was excessive because it required Nexus to change its capital structure to mitigate rate impacts - but there is no evidence to suggest that changing the capital structure is as effective in protecting ratepayers as simply reducing the 14 percent return.

Finally the Commission order fails to adequately protect public safety. The Commission improperly delegated its obligation to ensure safety to another agency, ignored local ordinances intended to protect City residents and Coalition members and refused to consider siting alternatives such as relocating the pipeline or adopting minimum setbacks. Accordingly, for all of these reasons, the Nexus

Pipeline does not serve the public convenience and necessity, and the Commission orders approving the pipeline must be vacated.

STANDING

Both Petitioners satisfy the test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which requires a showing of (1) injury-in-fact; (2) causation; and (3) redressability. The City is directly harmed by the pipeline which runs through several parcels within the City (City Motion to Intervene at 6-8, JA 484-6) including municipally-owned property that is in the process of being taken through eminent domain. *See Nexus Gas Transmission, LLC v. 2.00 Acres Permanent Easement, et al*., 5:17-cv-02062-SL (N.D. Ohio 2017). The pipeline also abuts a residential community within the City and in close proximity to recreational facilities and the Oberlin Fire Station, creating a safety hazard for City residents. This Court recently found these same impacts- a pipeline transecting municipal property and creating safety hazards - to "constitute sufficient injury in fact to substantiate standing." *See City of Boston Delegation v. FERC*, 897 F.3d 241, 250 (D.C. Cir. 2018); *also Moreau v. FERC*, 982 F.2d 556 (D.C. Cir. 1993) (finding landowner has standing to challenge pipeline on abutting property because of safety hazards).

The Coalition has representational standing, *i.e.* standing to bring suit on behalf of its members when they otherwise have standing to bring suit in their own

right, and where standing is germane to the organization's interests. *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). The Coalition is a 501(c)(3) organization formed under the laws of the State of Ohio. *Selzer Aff't*, ¶5, Addendum at 1. The Coalition's purpose is the advocate on behalf of landowners concerning the impact of the Nexus Project. *Id*. The Coalition intervened in the proceeding below. Motion to Intervene, JA 467. Several of the Coalition's members have had their property taken by Nexus. *Id*. at ¶3, 4. The construction of the pipeline across the member's property resulted in the removal of trees and loss of the highest and best use of the property. *Id*. at ¶ 2. In addition, the close proximity of the pipeline to the Coalition members' residences puts them at risk of serious bodily harm should a pipeline incident occur. *Id*.

The pipeline is the cause of both Petitioners' aggrievement, and the harm to both may be redressed by a ruling vacating the Commission's certificate orders. Accordingly, Petitioners satisfy standing.

STANDARD OF REVIEW

The Commission must support determinations under the Natural Gas Act with "substantial evidence." 15 U.S.C. § 717r(b). Where the agency has neglected pertinent facts or "refus[ed] to come to grips" with evidence in the record, the Commission order will crumble under judicial review. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992).

Although a deferential standard of review applies to the Commission's interpretation of its Policy Statement and other precedent, the Commission may not depart from existing practices without 'provid[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *West Deptford Energy, LLC v. Federal Energy Regulatory Commission*, 766 F.3d 10, 17 (D.C. Cir. 2014), *citing Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009), (quoting *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003)).

A court's review of constitutional challenges to the Commission's orders . . . is *de novo.*" *Cullman Reg'l Med. Ctr. v. Shalala*, 945 F. Supp. 287, 293 (D.D.C. 1996). "[A] reviewing court owes no deference to the agency's pronouncement on a constitutional question," and must instead make "`an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making.'"

Lead Indus. Ass'n v. Envtl. Prot. Agency, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980).

ARGUMENT

I. THE COMMISSION FINDING OF PROJECT NEED WAS ARBITRARY, CAPRICIOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE PROJECT IS ONLY 59 PERCENT SUBSCRIBED, THE BULK OF THE COMMITMENTS ARE FROM AFFILIATED OR EXPORT TRANSACTIONS AND MARKET DEMAND FOR GAS IS DECLINING.

To award a certificate under Section 7 of the Natural Gas Act, the Commission must find that the proposed service "is or will be required by the present or future convenience. 15 U.S.C. § 717f(c)(1)(A). *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014)(describing Section 7 standard). "The Commission must consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the Natural Gas Act, which is to encourage development of adequate natural gas supply at reasonable prices." *South Coast Air Quality Mgmt. v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010).

The Commission implements the Natural Gas Act through its 1999 Certificate Policy Statement ("Certificate Policy") which identifies those factors relevant to an evaluation of project need. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶61,128, 61,748 (Feb. 9, 2000), *further clarified*, 92 FERC

¶61,094, 61,373 (July 28, 2000) ("Certificate Policy"). Under the Certificate Policy, an applicant may demonstrate project need through evidence such as "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." The evidence necessary to establish the need for the project will usually include a market study…[including] available studies by EIA (Energy Information Administration)... for example, showing projections of market growth. *Id*. Where a proposed project such as the Nexus pipeline has adverse effects on the environment and results in a taking of private and property the amount of evidence necessary to establish project need is heightened. *Id.*

The Policy Statement provides that precedent agreements with multiple parties for **most of the new capacity** are strong evidence of market demand. *Id.* at 61,749. But "[u]sing contracts as the primary indicator of market support for the proposed pipeline project raises additional questions when the contracts are held by pipeline affiliates." *Id*. at 61,744. Thus, affiliate agreements are considered a less meaningful indicator of need under the Policy Statement than agreements negotiated at arms' length. *Id*. at 61, 748.

A. The Commission's Finding of Need Is Unsupported By the Record

The Commission's finding of project need is unsupported by substantial evidence and inconsistent with the Certificate Policy Statement. Most glaringly,

only 885,000 dth/day of the project's overall 1.5 million dth/day capacity -- just 59 percent -- of the project is committed under precedent agreements, even though Nexus has been marketing the project since 2012. *See* Certificate Order at P. 9, JA 9. Contracts with the project sponsors' affiliates -- which are less probative of need under the Certificate Policy -- account for 410,000 dth/day or nearly half of the 885,000 dth/day under subscription. DTE affiliates, DTE Gas and DTE Electric hold contracts for a 150,000 dth/day while Enbridge's Canadian affiliates, Union and Enbridge Gas Distribution have subscribed for a combined 260,000 dt/day. *See* Table *supra* (summarizing project subscribers). In addition, a substantial portion of Nexus capacity is dedicated for exports which are authorized under Section 3 of the Natural Gas Act and therefore, may not be used to justify project need under Section 7 which governs certificates for projects in interstate commerce. *See* 15 U.S.C. § 717f(c)(2); Part II *infra* (discussing jurisdictional scope of Section 3 and 7 of the Natural Gas Act).

Other evidence corroborates the lack of need for the Nexus Project. The Commission itself determined that the project as currently proposed is so overbuilt that three compressor stations totaling 78,000 horsepower in compression could be eliminated and the project would still comfortably accommodate 885,000 dt/day. The FEIS also identified six other existing pipelines in the area along with the recently completed Rover Pipeline and two others under development which could

potentially transport gas for Nexus customers. *See* FEIS at 3-4 -3-5, JA888-9. Although the Commission found that no system alternatives could accommodate the 885,000 dth/day of subscribed capacity to support its finding of need (Rehearing Order at P. 30, JA1221), the record lacks evidence to support the Commission's finding. This is because the FEIS never examined whether other pipeline systems could carry 885,000 dth/day, but instead only whether they could accommodate the Project's full 1.5 million dht/day capacity -- which the FEIS found was not possible. *See* FEIS at 3-4, JA 888 (evaluating alternatives' ability to carry 1.5 million dth/day); City Rehearing Request at 17, JA1172 (asserting that FEIS failed to examine whether alternatives could accommodate 885,000 dth/day); *accord*, City DEIS Comments at 12, JA 814. The difference between the Nexus' pipeline's actual capacity under contract and its full capacity is 600,000 dth/day -- a large enough amount that there may have been room on other systems for Nexus' actual capacity even if not the full 1.5 million dth/day. Thus, the Commission's conclusion that a new pipeline is needed because other systems lacked space for the 885,000 dth/day is not supported by either the FEIS or other evidence in the record.

Finally, the record contained evidence to show that demand for natural gas is declining. The City referenced a Department of Energy Report showing that only 54 percent of current pipeline capacity is being used and higher utilization of existing interstate natural gas pipelines will additionally reduce the need for new

pipelines.[5] Moreover, while only 8.4 bcf/d are needed to accommodate Marcellus shale gas,[6] the Commission had pending applications for gas pipelines totaling at least 49 bcf/d in capacity as of March 2016.[7] Other evidence referenced by the City to show declining market need included flat growth of domestic demand for gas, soaring growth of renewables and the uncertain future of the Clean Power Plan which was expected to spur gas demand. City Rehearing Request at 17-18 (and sources therein), JA 1172-3. To the extent that future gas demand exists, it will be driven by exports which cannot be used to support project need under Section 7. *See* City Rehearing Request at 18-19, JA 1173-4.

B. The Commission Departed From the Certificate Policy Statement In Finding A Need for the Project Based Entirely on Partially Subscribed Precedent Agreements With Affiliates

The Commission ignored the overwhelming evidence showing lack of project need, choosing instead to rely solely on the partially-subscribed precedent agreements. Dismissing the market reports cited by the City, the Commission asserted that "projects regarding demand often change…[and] given the

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[5] *See* Department of Energy report ("Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector" (February 2015), online at http://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf).

[6] *Id.* at 22.

[7] FERC State of the Markets (March 2016) at 2, online at https://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2015-som.pdf?csrt=13593134113433247359.

uncertainty associated with long-term demand projections…the Commission deems the precedent agreements to be better evidence of demand." Rehearing Order at P. 34, JA 1222. The Commission continued that "where specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreements to find that the project is needed." *Id*. The Commission added that the substantial financial commitment required under these contracts by project shippers shows evidence of market demand. *Id*. at P. 27., JA 1218.

The Commission's decision turns the Certificate Policy on its head. The Certificate Policy did not create a bright-line rule that precedent agreements alone can serve as evidence to support a project, but at best, a presumption that contracts are strong evidence of need when they account for **most of the new capacity**. Certificate Policy Statement at 61,749. Moreover, the reason that the Certificate Policy Statement identified other indicators of need was to assist developers in making a case for a pipeline that was not supported by contracts. *Id*. at 61,744 (explaining that pipelines can rely on other indicators of need if they lack contracts for most of the capacity).

Nexus' precedent agreements accounts for a paltry 59 percent of new capacity. Thus, it presents a very different scenario from a project where "most of the new capacity" is under contract and where the reliance on the precedent

agreements alone as proof of need is arguably justified under the Certificate Policy (assuming that the agreements were not with affiliates). For this reason as well, this case is a far cry from *Myersville v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) and *Minisink*, 762 F.3d 97, 101 at n. 10 where this Court found 100-percent, fully subscribed contracts sufficient proof of need. Likewise, the recent string of Commission orders involving major greenfield pipeline projects similar to Nexus which found need based entirely on precedent agreements reached this conclusion only where "most of the pipeline capacity" was under contract.[8] In this context, the Commission's approval of the Nexus pipeline based on only a 59 percent subscribed precedent agreement is an outlier that is neither supported by the Certificate Policy or past caselaw.

The Nexus' contracts fall short as evidence of need under the Certificate Policy for a second reason: four of the agreements, accounting for 410,000 dth/day were executed with affiliates of the project sponsors. Affiliate agreements are not

[8] *See Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶61,125 (2017)(finding need for 178-mile pipeline based on 100 percent contract subscription) (February 3, 2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶61,042 (2017)(need for 600-mile pipeline based on 96 percent subscription rate); *Rover Pipeline LLC*, 158 FERC ¶ 61,109 (2017)(need for 510-mile pipeline based on 95 percent subscription rate); *Mountain Valley Pipeline*, 163 FERC ¶61,197 (2018)(need for 300 mile pipeline based on 100 percent subscription). The Commission's finding of need has been challenged in these cases - not because of reliance on precedent agreements alone, but because those agreements were with affiliates and thus, are less meaningful indicators of need.

necessarily the product of arms-length negotiations and therefore, are not meaningful evidence of need. *See* Certificate Policy at 61,748; Glick Dissent at n. 5 (discounting affiliate agreements in assessing project need). Nor is the shippers' financial willingness to enter into the contracts a permissible factor to consider under the Certificate Policy. Glick Dissent at 1. Given that four of the shippers are affiliates of the project sponsors, their "financial willingness" to enter the contracts may derive more from the potential 14 percent return on equity that the project will reap for the project sponsors than existing, genuine market demand. The Commission cannot speculate that the shippers' financial commitment reflects their perception of project need on the one hand while refusing to "look behind" their contracts on the other. Rehearing Order at P. 26, JA 1217.

Because the precedent agreements do not serve as adequate proof of need, the Commission was obligated to consider other evidence in the record. *Tennessee Gas*, 969 F.2d at 1214 ("If FERC is going to have a rebuttable presumption, it may not ignore evidence calling that presumption into question.") Yet "while the Commission declined to rely on record evidence [such as market reports] for purposes of establishing need, it nonetheless points to just such comment letters, memoranda of understanding and expressions of expected demand as evidence of growing demand...without explaining why the additional evidence in support of the Project is meaningful and the evidence against it is not." Glick Dissent at 4,

JA 1282. The Commission's attempt to cherry-pick evidence to support its desired outcome is arbitrary and capricious. *Cf. Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 540 (D.D.C. 2016)"("Such cherry-picking embodies arbitrary and capricious conduct.")

In any event, the evidence that the Commission cites (Rehearing Order, n. 83, JA 1222) hardly supports project need. The Ohio Market Study (which was commissioned by NEXUS) speaks generally to potential conversion of Ohio coal plants to electric but does not provide any data specific to the Nexus Project. NRG (an energy generator) may have filed a letter to support the project but it also declined to subscribe and for the time, intends to operate its Avon Lake facility as a coal plant and not a gas-fueled plant that would be served by the Nexus Project. *See* Sourcewatch, https://www.sourcewatch.org/index.php/Avon_Lake_Power_ Plant. Columbia Gas. Columbia Gas, another project supporter eventually subscribed to the project for 50,000 dth/day - hardly enough to justify a 1.5 million dt/day project. The Commission also places faith in Nexus' commitment to "continue to market the project" to show need while failing to mention that Nexus has been marketing the project since its first open season in 2012 without takers for all of the capacity after more than five years of effort. The handful of scattershot data points that the Commission referenced in its order lacks the same probative value as the Department of Energy and Commission Market Reports that the City

submitted in the record - and which are the types of objective analysis that the Certificate Policy Statement itself recommends as proof of need. Certificate Policy at 61,747 (noting that applicant may rely on Energy Information Administration studies for market projections).

For all of these reasons, the Commission's finding of need for a partially subscribed pipeline that has resulted in a taking of City-owned and private property cannot stand. The Commission's determination of need is unsupported by substantial evidence and departs from the guidance in the Certificate Policy which permits the Commission to rely solely on precedent agreements only when they account for most or all of the project capacity and are executed by non-affiliates, neither of which is true here. To affirm the Commission would render the Certificate Policy and the public convenience standard of Section 7 meaningless and open the door to Commission approval of unneeded gas infrastructure driven solely by the financial goals of private parties that will encumber private properties in perpetuity. This Court cannot abide this result and must vacate the Certificate.

II. THE COMMISSION ERRED BY AUTHORIZING AN EXPORT PROJECT UNDER SECTION 7 OF THE NATURAL GAS ACT WHICH APPLIES ONLY TO DOMESTIC PROJECTS IN INTERSTATE COMMERCE

The Nexus Project will transport gas to the Dawn Hub in Ontario, Canada. Certificate Order at P. 1, JA 1036, with at least 605,000 dth/day of the project's 885,000 dth/day the Nexus Project destined for export. *See* Statement of Facts,

supra. Section 3 of the Natural Gas Act governs authorization of gas exports while Section 7 applies to transportation of gas in interstate commerce. *See Distrigas Corp. v. Federal Power Commission*, 495 F.2d 1057 (1974) (distinguishing between Sections 3 and 7 of the Natural Gas Act). Nexus did not take the necessary steps required by law to export natural gas under Section 3 of the Natural Gas Act, and the Commission erred by granting Nexus a certificate under Section 7 as if the Nexus Pipeline were purely for domestic use only. Accordingly, the Certificate must be vacated.

A. Exports Are Treated Differently Under the Natural Gas Act

The Natural Gas Act treats applications to construct and operate *export* pipelines differently from applications concerning pipelines to transport natural gas domestically or within interstate commerce. Section 3 deals with importing and exporting Natural Gas and provides: "[N]o person shall export **any** natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." 15 U.S.C. § 717b(a)(emphasis added). Section 7, on the other hand, only applies to "natural gas companies" which the Act defines as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6). Interstate commerce is defined as "commerce between any point in a State and any point

outside thereof, or between points within the same State but through any place outside thereof, **but only insofar as such commerce takes place within the United States**." 15 U.S.C. § 717a(7)(emphasis added).

This Court addressed the distinction between these two sections in *Border Pipeline Co. v. FPC*, 171 F.2d 149 (D.C. Cir. 1948). The pipeline at issue in *Border* was "located wholly within the State of Texas. It sells its gas at its terminus near the Rio Grande River to an industrial consumer which transports the gas into Mexico and uses it there." *Id*. at 150. FERC imposed the Section 7 requirement upon Border and Border appealed. The Court found the pipeline to be subject to Section 3 of the NGA reasoning that "the exportation of natural gas from the United States to a foreign country, or the importation of natural gas from a foreign country is not 'interstate commerce' as that term is contemplated by the Act." *Id*. at 151. This Court based its decision upon the text of the NGA:

> We are asked by the Commission to interpret 'interstate commerce' so as to include foreign commerce, or to read the statutory definition as though it contained the phrase originally included but later eliminated by Congress in the legislative course of the Act. This we cannot do. We cannot write into an act of Congress a provision which Congress affirmatively omitted.

Id. at 152.[9]

[9] In addition, the *Border* court chastised FERC for attempting to overreach its statutory authority: "Questions such as the one presented in this case are properly for the Congress. The circumstances upon which they arise are familiar. Congress uses expressions of established meaning. It takes action of recognized

The Commission did not agree with the outcome of the *Border* decision and contested its validity in the case of *Distrigas Corp.*, 495 F.2d 1057. The *Distrigas* court declined to reverse *Border*, noting that FERC has asked Congress on fourteen (14) separate occasions to legislatively overrule *Border* and that Congress had declined on each occasion. *Id*. at 1063. Additionally, the Court in *Distrigas* stated:

> Because the Commission did not invoke Section 3 as its authority for the present order, it did not provide the hearing that that Section expressly mandates. . . . Because the Commission, holding imports included in interstate commerce, viewed its exercise of jurisdiction as mandatory, it did not make the necessary Section 3 determination here.

Id. at 1066-67.

Border remains controlling law. Exports are treated differently than domestic transportation of natural gas and must be approved under Section 3 of the NGA.

B. The Commission Does Not Have Authority to Approve Exports under Section 3 of the NGA

Authorization by a federal agency is a prerequisite to the importation or exportation of natural gas. *W. Virginia Pub. Servs. Comm'n v. U. S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982). The authority to accept or reject an

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implications; e.g., it strikes from a pending bill a clause of clear import. But the administrative body finds a sufficient penumbra of meaning to justify a claim to more authority than appears upon the face of its grant. It asserts the extended authority and thus forces the issue upon the courts. It asks the courts to divine an intent on the part of Congress and then to decree that the words of the statute spell that intent." *Id*.

application for the export of natural gas under Section 3 of the NGA is currently held by the Department of Energy. See *TransCanada Pipelines Ltd. v. F.E.R.C.*, 878 F.2d 401, 405 (D.C. Cir. 1989). The Commission is prohibited from exercising authority over the export of natural gas unless the Secretary of Energy assigns this function to it. 42 U.S.C.A. § 7172 (West); *EarthReports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 952 (D.C. Cir. 2016)(the Department of Energy has exclusive authority over the export of natural gas). The Secretary of Energy has not assigned authority over the export of natural gas to the Commission. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 59, 63 (D.C. Cir. 2016). ("The Commission . . . lacks the power to authorize the actual import and export of natural gas; the Secretary has delegated that section 3 function to the Assistant Secretary of Energy for Fossil Energy.")

Nexus did not apply for an export permit with the Department of Energy. Instead, Nexus sought and received a Certificate under Section 7 of the NGA.

C. The Nexus Project is an export pipeline

On rehearing, the Coalition argued that Nexus was required to seek authority to export under Section 3 of the NGA. Coalition Request for Rehearing Regarding Eminent Domain, pp. 3-5. JA 1126-8. In denying the Coalition's request, the Commission held that Section 3 approval was not necessary because the project is not an export facility. In support of its conclusion, Commission cited various

project transactions that would take place domestically, including the substantial number of shipper commitments to delivery points in the United States, commitments for secondary delivery rights and the project's 11 interconnections representing 1.4 million Dth/day with domestic customers. Rehearing Order at P. 45, JA 1228.

The Commission's conclusion is unsupported by substantial evidence and mischaracterizes the record. The record shows that Nexus has currently leased pipeline capacity which is sufficient to export 68% of its current precedent agreements and that 52% of current precedent agreements are for export. *See* Statement of Facts, *supra*. Only 22.5% of the current subscribers in pipeline capacity are for domestic use. *Id.*

In support of its assertion that Nexus has a "substantial amount" of firm commitments for delivery points in the United States, the Commission states that "[O]nly two shippers, Canadian companies, subscribed for 260,000 Dth per day, are anticipated to possibly supply gas to Canadian customers: Union (150,000 Dth per day) and Enbridge Gas Distribution (110,000 Dth per day)." Rehearing Order at fn. 113, JA 1228. Even if this assertion is correct, the Commission lacks authority to authorize the export of **any** natural gas. Moreover, this assertion grossly underestimates the amount of gas to be exported. The Commission has intentionally understated the export component of Nexus and has historically down

played the significance of Section 3 of the NGA. By doing so, the Commission greatly expanded its authority without Congressional approval.

Nexus has not leased capacity to transport gas to Canada on a mere possibility. It informed the Ontario Energy Board that it would be supplying 760 Dth per day to the dawn hub. Further, the record indicates that Chesapeake has contracted to deliver 200 Dth per day to the dawn hub in Ontario, which would be over and above the 260 Dth per day of exports claimed by the Commission.

The Commission also points to eleven interconnections within the United States could potentially result in domestic delivery of natural gas. However, the Commission acknowledges, as it must, that "The tee-tap locations on the NGT Project represent locations where Nexus is presently negotiating gas delivery contracts with potential customers. These locations do not necessarily represent the locations where gas will eventually be delivered because negotiations may not be successful and result in a gas delivery contract." *Id*. at fn. 115, JA 1229.

Finally, the Commission notes that "all shipper commitments have secondary firm delivery rights within the U.S." *Id*. at P. 45, JA 1228. As with the tee tap locations, these "rights" are meaningless unless a domestic user chooses to exercise them. This is simply another attempt by FERC to give the appearance that there is more domestic need and use for the Nexus Project than actually exists.

The Commission does not have authority to authorize the export of natural gas. Rather than requiring Nexus to petition the appropriate entity for authority to export, FERC attempts to recharacterize the nature of the pipeline to provide cover for the Applicant and its failure to comply with the law. Its efforts must fail—the pipeline's current subscribers use it to export the majority of the gas which flows through it. The Commission was in error in denying CoRN's Requests for Rehearing.

D. Nexus may not utilize condemnation under Section 7 of the NGA

Interstate gas pipelines are entitled to invoke the power of eminent domain under Section 7f(h) of the Natural Gas Act after receiving a certificate from the Commission. By contrast, export projects authorized under Section 3 of the Natural Gas Act are not statutorily authorized to utilize eminent domain. *Compare* 15 U.S.C. § 717b and 15 U.S.C. § 717f; *see also Weaver's Cove Energy*, 112 FERC ¶ 61,070 at n. 26 (2005)(observing that Section 3 of Natural Gas Act does not convey eminent domain rights). Nexus wants to construct an export pipeline and receive the benefits Congress reserved for an interstate pipeline while avoiding regulatory oversight under Section 3 of the NGA. However, this strategy violates the federal law and the rights of property owners in the U.S.

As interpreted by the Commission and Nexus, the Natural Gas Act would permit condemnation to construct an export pipeline so long as any amount of

domestic gas delivery was contemplated or integrated into the project. Section 717f's interstate commerce requirement is rendered meaningless by such an interpretation. The Nexus Project is an export pipeline. Section 3 of the Natural Gas Act is the means by which such pipeline can be approved and it does not provide for condemnation. The Commission was arbitrary and capricious in awarding a Section 7 certificate to Nexus for an export project. Accordingly, the certificate must be vacated.

III. THE CERTIFICATE ORDER'S AUTHORIZATION OF USE OF EMINENT DOMAIN VIOLATES THE TAKINGS CLAUSE AND SECTION 7 OF THE NATURAL GAS ACT

The Certificate Order authorizes Nexus to use eminent domain to take property necessary for the project. Certificate Order, Appendix B, ¶4, JA 1112. The Order's authorization of eminent domain is unconstitutional because the project will not serve a public use and violates Section 7 of the Natural Gas Act which allows eminent domain for interstate natural gas pipelines but not export pipelines like the Nexus Project.

A. The Nexus Project Does Not Serve A Public Use

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment contains two requirements which must be met in

order for a taking to pass constitutional muster: the public use requirement and the just compensation requirement. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32, 123 S. Ct. 1406, 155 L.Ed.2d 376 (2003).

The Nexus Project fails these constitutional imperatives because it does not serve a public use. In enacting the Natural Gas Act in 1938, Congress declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest…" Section 1(a), Natural Gas Act, 15 U.S.C. 717(a). The Fifth Circuit found that these goals of the Natural Gas Act - interstate transport of natural gas for delivery to the public - is a public use. *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950)(upholding constitutionality of delegation of eminent domain powers under Natural Gas Act because pipelines serve a public use within the meaning of the Natural Gas Act). Conversely, *Thatcher* did not reach the issue of whether a project serving export was a public use and therefore, it has limited applicability to this case.

More recently, the Supreme Court examined whether a government requirement that raisin farmers give a percentage of their crop to the government in order that the government might promote a stable market constituted a taking. In concurring, Justice Thomas wrote:

> The Takings Clause prohibits the government from taking private property except for public use, even when it offers just compensation. That requirement, as originally understood, imposes a meaningful constraint on the power of the state—the government may take property only if it actually uses or gives the public a legal right to use the property. It is far from clear that the Raisin Administrative Committee conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments. To the extent that the Committee is not taking the raisins for public use, having the Court of Appeals calculate just compensation in this case would be a fruitless exercise.

Horne v. Department of Agriculture, __ U.S. __, 135 S. Ct. 2419, 192 L.Ed.2d 388, 83 U.S. L.W. 4503, (2015) (J.Thomas concurring)(internal quotations and citations omitted).

The Pipeline does not serve a public use within the meaning of *Thatcher* or *Horne*. Of the 885,000 dth/day under subscription, only 50,000 dth/day will be transported to Columbia Gas a non-affiliated local utility that will distribute gas to the public. The remaining capacity is allocated either for export or to DTE Gas and DTE Electric, Nexus affiliates that have manufactured demand for the project for their own gain.

The Commission's ruling is not aided by *Kelo v. New London*, 545 U.S. 469 (U.S. 2005) which held that legislatures have broad latitude to determine what types of public needs justify the use of the takings power including economic revitalization. But *Kelo* does not apply here because the Commission is an executive agency, not a legislative body. Only Congress can determine whether a

project's public benefits satisfy public use, and it has not done so here. The only public use that Congress recognizes under the Natural Gas Act is the "transportation of gas in interstate commerce for ultimate distribution to the public" *See Thatcher*, *supra* 180 F.2d 644. Irrespective of the economic benefits that a project may confer, unless the project will "transport gas in interstate commerce for ultimately distribution to the public," it does not serve a public use that would justify eminent domain. Because the Nexus Project is driven by the demands of affiliated companies, gas marketers and foreign companies and not "distribution of gas to the public," it is not a public use within the meaning of the Natural Gas Act, irrespective of any purported economic benefits that the Commission may have found.

Moreover, *Kelo* also cautioned that property may not be taken under a pretext of a public purpose when its actual purpose fails to provide for public benefit. See *Id*. at 478. In concurring, Justice Kennedy elaborated on the "mere pretext" taking:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Id. at 491 (2005)(J. Kennedy concurring.) Here, the limited service to local distribution utilities is a mere pretext for the transfer of property for the benefit of Nexus and its foreign owners.

On rehearing, the Commission summarily dismissed the Taking Clause claim, citing prior agency precedent which it claims addressed the takings issue. Rehearing Order at P. 46, JA 1229. The Commission precedent cited, however, relies on the same line of reasoning: that Congress authorized the taking when it enacted the Natural Gas Act provided that the Commission finds that the pipeline is required by public convenience and necessity, it is therefore for the public good, and the taking is authorized. *See Transcontinental Gas Pipe Line Co.*, LLC, 161 FERC ¶ 61,250, at PP 30-35(2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at PP 76-81; *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at PP 58-63. But as already discussed, Congress determined only that transport of gas to the transporting and selling natural gas for ultimate distribution to the public is affected with a public interest (*i.e.,* a public use) but not foreign commerce. Section 1b, Natural Gas Act.[10] Thus, the cases cited by the Commission do not apply.

[10] Section 1b also determined that federal regulation of gas sales in foreign commerce is necessary for the public interest - but that is different from stating that transportation of gas in foreign commerce itself is a public use.

B. The Pipeline Will Transport Gas for Export and Does Not Qualify for Use of Eminent Domain

Export of gas is not a public use, but even if it were, export pipelines do not qualify for use of eminent domain under Section 7f(h) of the Natural Gas Act which applies only to interstate pipelines and not foreign commerce. *See Distrigas v. FERC*, 495 F.2d 1057 (holding that definition of interstate commerce under Natural Gas Act excludes foreign commerce). Moreover, the Commission lacks the authority to extend its jurisdiction under Section 7 of the Natural Gas Act to projects engaged in foreign commerce. *Border Pipeline*, 171 F.2d 149 (setting aside FPC order requiring export pipeline to obtain a certificate under Section 7 of the Natural Gas Act). Thus, the Commission is barred from granting a certificate to Nexus (which in turn authorizes the holder to invoke eminent domain) which will export gas to Canada.

The Commission's grant of eminent domain power under Section 7 to an export project has far reaching implications. Currently, only 13 percent of the total capacity of Nexus is destined to domestic markets. Nexus hopes that by mixing in a little domestic gas with its exports, it will be able to take advantage of the condemnation provisions in Section 7 of the NGA without compliance with Section 3. Of course, this results in enormous monetary savings to Nexus, relieving it of the obligation to negotiate easements across hundreds of parcels of

real property at arm's length or without the strong arm of eminent domain and burdens of defending such actions.

As a result of the fracking boom, the United States has a surplus of natural gas for a while. Companies need to get their gas into foreign markets in order to increase profitability and recoup a return on investment. However, a corporation can easily game the legal system by providing a small fraction of the gas it transports and delivers domestically, then claiming a public benefit and purpose. The challenge for this court is how to balance the rights of property owners against the needs of foreign corporations engaged in export. The solution is simple--failure to comply with Section 3 of the NGA renders the certificate invalid and the takings illegal. Accordingly the Court should vacate the certificate.

IV. THE COMMISSION'S APPROVAL OF A 14 PERCENT RETURN ON EQUITY IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND WILL RESULT IN EXCESSIVE RATES.

In reviewing proposed rates that a newly authorized pipeline may charge, the Commission has an obligation to ensure that pipeline investors do not receive an excessive return. *Sierra Club v. FERC*, 867 F.3d 1357, 1377 (D.C. Cir. 2017). The Commission must closely scrutinize a pipeline's proposed rates and support its chosen return on equity with substantial evidence. *Id*. *Atlantic Ref. Co. v. Pub. Serv. Comm'n.*, 360 U.S. 378 (1959). The Commission failed to do so in approving Nexus' proposed 14 percent return on equity.

A. The Commission Reliance on Generic Caselaw To Support Return on Equity Is Inadequate.

Nexus' proposed 14 percent return on equity eclipses the returns on other utility investments approved by state commissions and the Commission which range between 9.75 percent and 12 percent. *See* City Rehearing Request at 23 (citing various reports on return on equity in gas and electric sector). The Commission ignored this evidence. Instead, the Commission determined that Nexus' proposed 14 percent return on equity was appropriate solely based on past cases involving greenfield pipelines where an identical return was approved. Certificate Order at P. 81, JA 1063. As this Court holds, "reliance on a bare citation to precedent derived from another case and another pipeline does not quality as the requisite substantial evidence" to support a return on equity. *Id*., *citing N.C. Utils. Comm'n v. FERC (NCUC)*, 42 F.3d 659, 661 (D.C. Cir. 1994).

On rehearing, the Commission attempted to shore up its basis for the 14 percent return on equity, explaining that a higher rate of return was justified because of the risk that Nexus' will not recover the cost of unsubscribed capacity justified the higher return P. 58, JA 1235. The Commission's defense of the elevated return cannot survive review. Even accepting that a new pipeline faces more risk, the Commission does not explain why a 14 percent return - at least 3 full points over the highest state approved return - is warranted. Nor does the Commission discuss why a flat 14 percent return should apply to all new pipelines irrespective

of geographic location, size and cost and need. In short, the Commission's rehearing order still offers little more insight into its decision than bare citation to cases involving other pipelines (which themselves do not include a justification for a 14 percent return).

The Commission did make one finding unique to Nexus: that its 59 percent subscription rate creates financial risk because Nexus may not recover the full cost of unsubscribed capacity from customers. Commission Order at P. 62, JA 1236. Even so, Nexus' risks are minimal and certainly do not warrant a 14 percent return. If the project is driven by genuine market demand as the Commission found, (*See e.g.* Rehearing Order at P. 35, JA 1223 (describing future benefits of project)), then Nexus should not have any difficulty in finding additional customers for remaining capacity and therefore, faces little risk of bearing the cost of under-subscription. On the other hand, if market demand is lacking as the City contends, then the Commission should not have approved the project to begin with -- and the only purpose served by the elevated return is as a perverse incentive for Nexus to construct unnecessary greenfield infrastructure. This result is not consistent with the public convenience.

B. The Commission Did Not Explain Why A Modified Capital Structure Will Protect Ratepayers

A 14 percent return on equity is so far out of line with other utility investment returns that even the Commission was troubled by the potential harm to

ratepayers. Certificate Order at 81, JA 1063 (noting that Nexus return, as proposed was "costly to ratepayers") To mitigate the effect of a bloated return on equity, the Commission required Nexus to apply a hypothetical capital structure of 50 percent debt/50 percent equity for ratemaking rather than its existing structure 60 percent equity/40 percent debt which to make the project less costly to ratepayers" Certificate Order at P. 81, JA 1063. [11] Yet the record lacks any evidence that would show that the 50-50 capital structure would more effectively protect ratepayers than slashing the proposed return on equity down to 10 or 11 percent to bring it in line with the return on other utility investments as the City urged on rehearing. *See* City Rehearing Request at 24-25, JA 1179-80. [12] *Sierra Club* allows the Commission to use a hypothetical capital structure to minimize rate impacts, but even so, "substantial evidence must support the capital structure FERC ultimately uses in

[11] Equity is more costly than debt, so reducing the percentage of the capital structure attributed to equity will in turn lower rates. See *Sierra Club*, 867 F.3d at 1377-78 (discussing capital structure for pipeline).

[12] A rough calculation demonstrates that reducing the return on equity is far more effective means to mitigate rate impacts than merely changing the capital structure. Project rates are based on the weighted average cost of capital which is comprised of the weighted return on equity and cost of debt. Under a 60/40 capital structure the rate of return is equal to (60% equity * 14% ROE) + (40% debt * 5.75%) = 10.7% but under a 50/50 capital structure the weighted average cost of capital goes down to 9.875% (50% equity * 14% ROE) + (50% equity * 5.75 % debt). *See* City Rehearing at 20, JA 1175. By contrast, leaving the capital structure intact but reducing the return on equity to 11 percent would yield a weighted cost of capital of 8.9 percent. (60% * 11%) + (40% * 5.75%) - far lower than the result of the 50/50 capital structure. *See* City Rehearing Request at 20, JA1175.

the rate calculation, hypothetical or not." 867 F.3d at 1378. As with the 14 percent rate of return, the Commission likewise failed to support its chosen hypothetical capital structure with substantial evidence. Accordingly, neither may be sustained.

V. THE COMMISSION IMPERMISSIBLY DELEGATED SAFETY CONSIDERATIONS TO PHMSA IN VIOLATION OF FEDERAL LAW AND REGULATION AND SUBORDINATED ITS SITING AUTHORITY UNDER SECTION 7 OF THE NATURAL GAS ACT BY REFUSING TO MOVE THE PIPELINE AWAY FROM POPULATION CENTERS.

The Commission must find based on substantial evidence that a project will operate safely to satisfy the public necessity and convenience standard under Section 7 of the Natural Gas Act. *Washington Gas v. FERC*, 532 F.3d 928 (D.C. Cir. 2008). Moreover, under NEPA the Commission must take a hard look at all of the project's adverse impacts including safety. *See e.g., Fuel Safe v. FERC*, 389 F.3d 131 (10th Cir. 2004)(challenging adequacy of the Commission's NEPA review, including safety impacts). This Court reviews Commission's compliance with NEPA to ensure that the Commission's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *EarthReports, Inc.* 828 F.3d at 954 (reviewing safety issues raised by LNG facility). "Simple conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). Furthermore, the Commission must conduct an independent

analysis of project impacts and may not rely on another agency's conclusions regarding project impacts to satisfy its obligations under NEPA. *See Idaho v. ICC*, 35 F.3d 585, 595 (DC Cir 1994) (finding that agency improperly deferred review of project impacts by relying on another other agency's certification); *also North Carolina v. FAA*, 957 F.2d 1125, 1129 (4th Cir. 1992) (agency does not satisfy NEPA "by simply relying on another agency's conclusions about a federal action's impact on the environment"). Applying these principles, the Commission's review of the project's significant safety impacts fell short.

A. The Project Poses Safety Risks to the City and Other Communities and Residents

The project's safety risks are well-documented throughout the record. For starters, the parties repeatedly raised concerns about project safety particularly given the pipeline's proximity to residents and facilities. *See* City Motion to Intervene at 7-8, JA 1162-3 (describing proximity of project to City residential community, fire station, nursing home and parks) City DEIS Comments at 13-15, JA 815-17, Motion or Request to Consider Safety Aspects, pp. 4- 5, JA 702-703; Comments on report for purpose and need, p. 18, JA 553. The Final EIS also acknowledges the project's dangerous proximity to residences and businesses, describing that the project's proposed construction work area is within 50 feet of 178 residential structures (including homes, garages, and associated structures) (ES-10, JA 873) and that "Sixty-two

planned or ongoing residential and commercial/industrial development projects have been identified within .025 mile of the proposed Project facilities." FEIS at ES-11, JA 874. And at the same time, the FEIS also recognized that "The transportation of natural gas by pipeline involves some incremental risk to the public due to the potential for an accidental release of natural gas. The greatest hazard is a fire or explosion following a major pipeline rupture." Id. at 4-237, JA 1019.

The project's risks to public safety are heightened because the Commission certificate process generally preempts existing local regulations designed to protect the public from the danger of natural gas infrastructure. Section 521.13(b)(3) of the Oberlin Codified Ordinances, approved by the voters in 2013 was designed to give Oberlin an added measure of protection from gas pipelines by making it unlawful for any corporation to "engage in the siting of extraction, production and delivery infrastructure within the City." Similarly, the City of Green and New Franklin, located in Summit County, Ohio, also both have zoning codes and land use plans which prohibit industrial processes such as Nexus within City limits which were brought to the Commission's attention in the docket.[13]

[13] The Commission refused to give any consideration to local zoning and land use laws in the siting process despite federal precedent emphasizing the importance of local land use regulations: "We have consistently recognized the legitimate state pursuit of such interest as compatible with the Commerce Clause, which was 'never intended to cut the States off from legislating on all subjects relating to the

B. The Commission Improperly Delegated Responsibility for Evaluating Safety Impacts Under NEPA to PHMSA

In spite of recognizing the pipeline's proximity to residences and buildings and the inherent dangers of natural gas pipelines, the FEIS did not evaluate the heightened safety risks caused by siting a 36-inch diameter high pressure pipeline within, or in close proximity to populated areas. Instead, the FEIS dismissed these risks, finding that "Proximity to people is not a factor with respect to public safety because the pipeline must comply with [Department of Transportation/PHMSA] standards. FEIS at 3-3, JA 887. Indeed, the pipeline's rather unremarkable commitment to comply with PHMSA safety standards (after all, the company has no choice but to comply with the law or face penalties) served as the Commission's stock response to every safety issue raised. *See, e.g.,* FEIS at ES-17, JA 880 ("Pipelines must be designed, constructed, operated, and maintained in accordance with safety standards. Further, the EIS demonstrates that the likelihood

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health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997)(citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876)). NEPA requires an analysis *See* 40 C.F.R. § 1502.15, providing that "The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. . . . (c) Possible conflicts between the proposed action and the objectives of federal, regional, state, and local . . . land use plans, policies and controls for the area concerned." (See § 1506.2(d).) Because the Commission defers all safety considerations to PHMSA, and PHMSA cannot conduct such an analysis pursuant to law, no analysis of land use planning was considered.

of an incident is very low at any given location, regardless of population density."); FEIS at 3-42, 3-95, 3-101, 4-247, JA 926, 979, 985, 1029 ("The pipeline must be designed, constructed, operated, and maintained in accordance with DOT safety standards, which are intended to ensure adequate protection for the public and nearby homeowners."); FEIS at 3-99, 3-108, 4-189; JA 983, 992, 1017. PHMSA guidelines safe for a high pressure pipeline near public schools, daycare and elder care facilities. FEIS at 4-186-87, JA 989-90 ("the Projects must be constructed in accordance with DOT's safety regulations and would be considered safe regardless of population density.").

The Commission's reliance on Nexus' commitment to comply with safety standards improperly delegates the Commission's responsibility for independently reviewing safety impacts under NEPA to PHMSA. Although a Memorandum of Understanding between the Commission and Department of Transportation provides that PHMSA has exclusive authority to establish safety standards for gas pipelines (Final EIS at 4-238, JA 1020), the Memorandum does not absolve the Commission of its obligation under NEPA to evaluate whether Nexus' compliance with PHMSA regulations will adequately protect public safety or to explore siting alternatives - such as moving the pipeline away from population centers - that could reduce project risks. *See e.g.,* City Rehearing Request 29-30, JA 1184-5(faulting Commission for failing to use siting authority to move project

to mitigate risk). In fact, given that the Department of Transportation claims that it is expressly prohibited from making recommendations relating to "setbacks, location or routing of the pipeline" 49 U.S.C. § 60104, the Commission's responsibility for siting decisions takes on heightened importance in reviewing project safety.

Because of its responsibility to independently review safety and consider safer siting alternative as part of NEPA, the Commission's reliance on Nexus' certification is precisely the type of impermissible delegation that this Court invalid taking its own hard look [at the environmental impacts of salvage of rail materials], the Commission deferred to the scrutiny of others by authorizing salvage subject to conditions that require [the company] to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions." The Court explained review by certifying agencies is inadequate under NEPA because these agencies "attend to only one aspect of the problem. and do not attempt to balance environmental damage" or consider alternatives. *Id*.

By finding that the project's serious safety issues could be resolved by compliance with PHMSA safety issues, the Commission likewise outsourced its NEPA obligations to another agency as in *Idaho v. ICC*. Moreover, because PHMSA lacks authority over siting or the ability to require relocation of the pipeline, its certification of safety is unduly narrow and "attends to only one aspect

of the problem"[14] and therefore, is inadequate to satisfy the Commission's NEPA obligations.

C. The Commission's Refusal to Relocate the Pipeline to Ensure Adequate Safety Setbacks Was Arbitrary and Unsupported by Evidence.

The Commission was arbitrary and capricious in failing to consider moving the project away from residences and buildings.

The Commission utterly failed to provide any details on why it believes the current proximity of residential building to the Nexus Project is safe. The Environmental Impact Statement in section 4.13 sets out what the PHMSA regulations require for pipeline safety, but nowhere is there an analysis of why these requirements are sufficient. Indeed, the data show that the specifications are not sufficient since there have been fatalities from pipeline incidents in the past 20 years.[15] Not only does the Commission abdicate its responsibility to consider the safety of current setbacks. PHMSA did not consider what constitutes a safe

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[14] Members of the Coalition petitioned the Department of Transportation to revise its setback rules relating to high-pressure gas pipelines. Remarkably, the Department responded that it does not have jurisdiction over this issue and deferred to the Commission. *See* Submittal 20160502-5074 at p. 2, JA 647.

[15] The EIS claims that Nexus is going above and beyond what is required by the PHMSA by inspecting the pipeline welds. This assertion is breathtaking in its implication: the PHMSA does not require pipeline welds to be inspected. Considering that 356 pipeline incidents were caused by "Pipeline material, weld, or equipment failure," it is inconceivable that the PHMSA does not require inspection of the welds.

setback from a natural gas pipeline. As set forth above, the Department claims citing 49 U.S.C. § 60104(e) that it is expressly prohibited from making recommendations relating to the setbacks, location, or routing of the pipeline. Consequently, no government agency looked or provided analysis or comment as to pipeline safety setbacks or ways to mitigate risks on this Project as it relates to the siting of the pipeline. The Commission points to the Department of Transportation safety regulations as ensuring safety while the Department of Transportation points to the Commission as having jurisdiction to examine safety setbacks since it does not have jurisdiction over this area. See Document Submittal 20160502-5074 at p. 2, JA 647. **No one has examined whether it is safe to have residences within 50 feet of a 36" high-pressure gas pipeline**.

The Commission has placed convenience for the Applicant above safety especially when alternatives exist as was demonstrated in the Nexus case. *See* FEIS discussion of City of Green Alternate Route, supported by the Coalition and City. JA 907-929. NEPA requires such an examination. Accordingly, the FEIS is deficient as a matter of law and the Certificate must be vacated.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, the City and the Coalition respectfully request that this Court vacate the Commission orders issuing a certificate for the Nexus Project.

Respectfully submitted,

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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

/s/ Carolyn Elefant
Counsel for Petitioner –
The City of Oberlin, Ohio

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of March, 2019, I caused this Page Proof 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 all the registered CM/ECF users:

/s/ Carolyn Elefant
Counsel for Petitioner –
The City of Oberlin, Ohio

ADDENDUM

TABLE OF CONTENTS

Addendum Page

Declaration in Support of Standing

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

City of Oberlin,	)	
	)	
Petitioner,	)	**DOCKET No. 18-1248**
	)	**CONSOLIDATED WITH**
vs.	)	**No. 18-1261**
	)	
FEDERAL ENERGY REGULATORY COMMISSION	)	
	)	
Respondent.	)	

DECLARATION IN SUPPORT OF STANDING

My name is Elaine Selzer and I am over the age of 18, competent to testify and have personal knowledge of the facts set forth in this declaration. Under penalty of perjury, I declare the following:

1. My husband John Selzer, Judy Hamrick, and I together own a tract of land in Summit County, Ohio known as Tax Map Parcel 2812141. The property lies directly in the path of the Nexus Pipeline ("Nexus"), a 36-inch diameter, 350-mile natural gas pipeline owned by Nexus Gas Transmission LLC.

2. My family and I have opposed Nexus since it was originally proposed more than three and a half years ago because of the irreparable harm and safety risks that it will cause. Nexus has cut through approximately 48 acres of our property, and has resulted in removal of mature trees, degradation of productive soil and loss of potential highest and best use of the land. As if these

hazards were not enough, the pipeline's close proximity to our family's farm and residence means that we will face the constant risk of catastrophic explosion 24/7.

3. Nexus also deprives me and my family of our constitutionally protected property rights. Nexus is a private company, partially foreign owned, and will use the pipeline to transport gas for the benefit of its private corporate affiliates and/or for potential export. Yet, Nexus was been granted early, pretrial possession of our property by a federal court in *Nexus Gas Transmission LLC v. City of Green, et al. 5:17-2062* in the Northern District of Ohio, Akron.

4. Because of our opposition to Nexus, my sister-in-law, husband, and I joined the Coalition to Reroute Nexus (CoRN) by providing financial support and attending meetings.

5. CoRN is a 501(c)(3) organization formed under the laws of Ohio; it advocates on behalf of landowners and the general public with respect to Nexus and its use of eminent domain. CoRN is a network comprised of hundreds of landowners in Ohio who opposed use of eminent domain for pipeline infrastructure. Many of the landowners who are part of CoRN reside in the Ohio and, like my family, own property directly in the path of Nexus that has been subject to eminent domain or were impacted by its construction and face death or injury in the event of a catastrophic event.

6. On behalf of landowners, CoRN filed a motion to intervene before the Federal Energy Regulatory Commission in opposition to Nexus, and this motion was granted. CoRN filed a petition for rehearing of the FERC Certificate. This petition for rehearing was denied, and CoRN filed this petition for review.

7. I believe that the harms to my family and other landowners are the direct result of the Commission's approval of Nexus.

8. I state under penalty of perjury that the foregoing Declaration is true and accurate to the best of my knowledge.

Elaine Selzer

Elaine Selzer

Sworn to before me

Notary Public

Addendum of Statutes and Regulations

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing. Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity.

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section

temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

(A)natural gas sold by the producer to such person; and

(B)natural gas produced by such person.

(d) Application for certificate of public convenience and necessity. Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity. Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act [*15 USCS §§ 717* et seq.] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the isssuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate customers.

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served. Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc. When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $ 3,000.

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VIII. Pipelines
Chapter 601. Safety (Refs & Annos)

49 U.S.C.A. § 60104

§ 60104. Requirements and limitations

Effective: December 17, 2002
Currentness

(a) Opportunity to present views.--The Secretary of Transportation shall give an interested person an opportunity to make oral and written presentations of information, views, and arguments when prescribing a standard under this chapter.

(b) Nonapplication.--A design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted.

(c) Preemption.--A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

(d) Consultation.--(1) When continuity of gas service is affected by prescribing a standard or waiving compliance with standards under this chapter, the Secretary of Transportation shall consult with and advise the Federal Energy Regulatory Commission or a State authority having jurisdiction over the affected gas pipeline facility before prescribing the standard or waiving compliance. The Secretary shall delay the effective date of the standard or waiver until the Commission or State authority has a reasonable opportunity to grant an authorization it considers necessary.

(2) In a proceeding under section 3 or 7 of the Natural Gas Act (15 U.S.C. 717b or 717f), each applicant for authority to import natural gas or to establish, construct, operate, or extend a gas pipeline facility subject to an applicable safety standard shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain a gas pipeline facility under those standards and plans for inspection and maintenance under section 60108 of this title. The certification is binding on the Secretary of Energy and the Commission except when an appropriate enforcement agency has given timely written notice to the Commission that the applicant has violated a standard prescribed under this chapter.

(e) Location and routing of facilities.--This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1308; amended Pub.L. 107-355, § 3(a), Dec. 17, 2002, 116 Stat. 2986.)

Notes of Decisions (21)

49 U.S.C.A. § 60104, 49 USCA § 60104
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-281. Title 26 current through P.L. 115-309.

End of Document

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984]

§385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, a State Commission must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person, other than the Secretary of Energy or a State Commission, seeking to become a party must file a motion to intervene.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention,

the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

§ 385.216 Withdrawal of pleadings (Rule 216).

(a) *Filing.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to withdraw a pleading by filing a notice of withdrawal.

(b) *Action on withdrawals.* (1) The withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period and the decisional authority does not issue an order disallowing the withdrawal within that period. The decisional authority may disallow, for a good cause, all or part of a withdrawal.

(2) If a motion in opposition to a notice of withdrawal is filed within the 15 day period, the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal.

(c) *Conditional withdrawal.* In order to prevent prejudice to other participants, a decisional authority may, on motion or otherwise, condition the withdrawal of any pleading upon a requirement

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) After six months from the date on which this Act takes effect [effective June 21, 1938] no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas--

(1)the importation of such natural gas shall be treated as a "first sale" within the meaning of section 2(21) of the Natural Gas Policy Act of 1978 [*15 USCS § 3301(21)*]; and

(2)the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Except as specifically provided in this Act [*15 USCS §§ 717* et seq.], nothing in this Act affects the rights of States under--

(1)the Coastal Zone Management Act of 1972 (*16 U.S.C. 1451* et seq.);

(2)the Clean Air Act (*42 U.S.C. 7401* et seq.); or

(3)the Federal Water Pollution Control Act (*33 U.S.C. 1251* et seq.).

(e)

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this Act [*15 USCS §§ 717* et seq.], nothing in this Act is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall--

(A)set the matter for hearing;

(B)give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 3A [*15 USCS § 717b-1*];

(C)decide the matter in accordance with this subsection; and

(D)issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not--

(i)deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii)condition an order on--

(I)a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II)any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III)a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f)(1) In this subsection, the term "military installation"--

(A)means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B)does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

History

(June 21, 1938, ch 556, § 3,*52 Stat. 822*; Oct. 24, 1992, *P.L. 102-486*, Title II, § 201, *106 Stat. 2866*; Aug. 8, 2005, *P.L. 109-58*, Title III, Subtitle B, § 311(c), *119 Stat. 685*.)

Annotations