IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Coalition to Reroute Nexus, *et al.*, Petitioners,	)	
v.	)	No. 17-4302
Federal Energy Regulatory Commission, Respondent.	)	
	)	Not consolidated
City of Oberlin, Ohio, Petitioner,	)	
v.	)	No. 17-4308
Federal Energy Regulatory Commission, Respondent.	)	

REPLY OF RESPONDENT FEDERAL ENERGY COMMISSION IN SUPPORT OF MOTION TO DISMISS PETITIONS FOR LACK OF JURISDICTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") submits its reply in support of its Motion to Dismiss the petitions for review in both of the above-captioned cases.

Petitioners Coalition to Reroute Nexus ("Coalition," in No. 17-4302) and City of Oberlin ("Oberlin," in No. 17-4308) filed substantially identical motions to stay the ongoing FERC proceeding pending appeal. The Commission, in responses

opposing those motions filed on February 12 and 15, respectively, demonstrated that the extraordinary and drastic remedy of stay is not warranted. For the same reasons detailed in those responses, Petitioners have failed to justify bypassing the "highly reticulated procedure" (*Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010)) and the statutory limits on appellate jurisdiction prescribed in section 19 of the Natural Gas Act, 15 U.S.C. § 717r.

The responses of Coalition, Oberlin, and the putative Grassroots Intervenors to FERC's Motion miss the mark — their arguments concerning interlocutory review of select issues, exhaustion of remedies, and delegation of authority do nothing to blunt the force of two basic points:

- Their requests for rehearing, and those of other parties, are pending before the Commission; and
- The Commission **will** act on those rehearings in a timely manner.

The Commission will address all rehearing requests, will respond to all arguments, will complete the record, and will offer the Court, at the conclusion of the administrative proceeding, all of its findings and conclusions for judicial review, just as the Natural Gas Act contemplates.[1] There is no reason to shortcut the statutory process in this case.

[1] The Petitioners here, by their own accounts, do not raise all of their objections in their premature petitions. Both (Coalition Resp. at 1, 3; Oberlin Resp. at 2) explicitly seek an interlocutory appeal of what they characterize as

A. The Certificate Order Will Not Be Final And Reviewable Until The Commission Issues Its Rehearing Order

As this Court has explained, the Act "sets forth a highly reticulated procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline." *Am. Energy*, 622 F.3d at 605. *See* Mot. at 2-4. As the Commission demonstrated in its Motion (at 7-10), that procedure has not yet resulted in a final, appealable order. And the strictures of the statute do not begin, or end, with the agency rehearing and judicial review provisions in section 19(a)-(b), 15 U.S.C. § 717r(a)-(b). All of Petitioners' arguments for sidestepping that procedure falter on the structure of the Natural Gas Act itself.

In particular, the Natural Gas Act expressly confers the right of eminent domain to "any holder of a certificate of public convenience and necessity." Section 7(h), 15 U.S.C. § 717f(h); *see Am. Energy*, 622 F.3d at 604. The Act further specifies that the filing of a rehearing request "shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." Section 19(c), 15 U.S.C. § 717r(c). Petitioners' core justification for their premature appeals is that condemnation proceedings have commenced before FERC has issued a rehearing order (*see* Coalition Resp. at 1, 5, 9, 12-17; Oberlin Resp. at 1, 9, 11-14, 16-19) — but Congress designed the Natural Gas Act to produce that

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"legal questions," apparently conceding that all their *other* objections properly remain pending further order in the FERC proceeding.

very outcome. *Cf. Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (explaining, as to the FERC-administered Federal Power Act, that, where judicial review is limited due to an operation of law, "[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy.").

In addition, Petitioners do not dispute that the D.C., First, and Fifth Circuits — all the courts that have ruled on the question, over almost half a century — have uniformly determined that the Commission appropriately extends its consideration of rehearing on the merits beyond 30 days with a tolling order, under both the Natural Gas Act and Federal Power Act. *See* Mot. at 9-10 (quoting cases); *cf. Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, et al.*, No. 7:17-CV-00492, 2018 WL 648376, at *7 (W.D. Va. Jan. 31, 2018) (noting cases).

Thus, nothing raised in the responses alters the fact that the challenged agency orders are not final orders, and that Coalition's and Oberlin's petitions for review are "incurably premature." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002); *accord B.J. Alan Co. v. ICC*, No. 90-3715 (6th Cir. Dec. 13, 1990) (citing other D.C. Circuit cases); *see also* Mot. at 7-8 (citing cases). Petitioners are therefore incorrectly "pressing [their] cause[s] concurrently upon both the judicial and the administrative fronts." *Clifton Power*, 294 F.3d at 111;

accord Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938) ("Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that . . . the mere holding of the prescribed administrative hearing would result in irreparable damage."); *accord Rice v. Walls*, 213 F.2d 693, 697-98 (6th Cir. 1954).

Moreover, even assuming, arguendo, that the October 23, 2017 Tolling Order did effectively deny the pending rehearing requests, the Certificate Order **still** would not be final. The Commission has stated, in both the Tolling Order and the January 10, 2018 order denying stay requests (*see* Mot. at 5-6), that it will issue a rehearing order addressing the substantive merits of the numerous objections raised on rehearing. The Commission's statutory prerogative to do so is clear: Until the agency record is filed in a court of appeals, "the Commission **may at any time**, upon reasonable notice and in such manner as it shall deem proper, **modify or set aside, in whole or in part, any finding or order made or issued** by it under the provisions of this chapter." 15 U.S.C. § 717r(a) (emphases added).

Accordingly, even if the Court does not dismiss the petitions for review for lack of jurisdiction, the Court should not direct the Commission to file the certified index to the record, and should consolidate the petitions and hold them in abeyance pending completion of the FERC proceeding. *Cf.*, *e.g.*, *Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992) ("It is . . . usually preferable to require the parties to wait

for appellate review until the [underlying proceeding] is ultimately resolved — to insist on the standard of one case, one appeal.").

B. Petitioner Oberlin Has Neither Affirmatively Requested, Nor Adequately Justified, The Extraordinary Remedy Of Mandamus

Petitioner Oberlin, in its opposition to FERC's Motion (at 16), suggests that the Court, if it finds that it lacks jurisdiction, "treat th[e] Petition for Review as a request for mandamus," either to compel FERC to rule on the pending rehearing requests or to review the issues itself. Oberlin Resp. at 14. Oberlin, however, has not met any of the requirements applicable to such a request. *See, e.g.*, Fed. R. App. P. 21 (governing writs of mandamus); *id.* 27(a)(3)(B) (to move for affirmative relief, "[t]he title of the response must alert the court to the request for relief."). (Oberlin does not request affirmative relief in the title, nor even in the Introduction or Conclusion, of its filing.) Therefore, this Reply is not the responsive filing on the merits that would be available under the Federal Rules and this Court's Circuit Rules and operating procedures if mandamus were actually requested.

In any event, the Commission has already demonstrated, in its responses opposing both Petitioners' motions for stay, filed February 12 and 15, that extraordinary relief is unwarranted in these cases. *Compare S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) (stay "is an extraordinary and drastic remedy") (discussing factors that courts consider),

with In re Prof'ls Direct Ins. Co., 578 F.3d 432, 437 (6th Cir. 2009) ("a writ of mandamus is an extraordinary remedy that we will not issue absent a compelling justification") (discussing factors).

C. The Selzer Petitioners And The Putative Grassroots Intervenors Do Not Meet The Strict Jurisdictional Requirements Of The Natural Gas Act

Petitioners John and Elaine Selzer (in No. 17-4302) did not file an application for rehearing pursuant to Natural Gas Act section 19(a), and are thus precluded from seeking judicial review by section 19(b). 15 U.S.C. § 717r(a)-(b). In response (Coalition Resp. at 18), they cite cases upholding associational standing for purposes of Article III, and FERC regulations concerning participation in agency proceedings — but the Commission challenged neither their constitutional standing nor their participation before FERC. *See* Mot. at 10.

The statute requires that, for "any entity" to seek judicial review, "*such entity*" must have filed an application for agency rehearing. *New Eng. Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1198 (D.C. Cir. 2018) (applying identical language in the "unusually demanding exhaustion scheme" in the Federal Power Act); *cf. ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985) (finding that Natural Gas Act's reference to "the" application for rehearing, instead of "an" application, makes plain that the judicial review provision [section 19(b)] refers to the same application described in the rehearing provision [section 19(a)],

"to wit, the application of the party who seeks judicial review"). Petitioners' effort (Coalition Resp. at 18-19) to distinguish *New England Power Generators* is meritless — that court found that the entity that sought rehearing and the entity that petitioned for review were not the same entity, *even if* some entities were in fact members of both. 879 F.3d at 1198.[2]

In addition, the putative Grassroots Intervenors seek to introduce additional issues in No. 17-4302 that Petitioner Coalition itself does not raise. In response to the Commission's Motion to Dismiss, they urge the Court to adopt an expansive approach to the scope of permissible issues on judicial review. Grassroots Resp. at 5-12. *But see* 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless *such objection* shall have been urged before the Commission in *the* application for rehearing . . . .") (emphases added); *see also Mich. Gas Co. v. FERC*, 115 F.3d 1266, 1270 (6th Cir. 1997) (noting jurisdictional limit on objections under section 19(b)); *Ky. Utils. Co. v. FERC*, 766 F.2d 239, 248 (6th Cir. 1985) (same).

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[2] Courts have long held, in strictly construing these jurisdictional requirements, that the precise matching of "the application" and "such entity" has significance in the context of technically complex, multiparty proceedings before FERC. *See generally ASARCO*, 777 F.2d at 774 ("A mandatory petition-for-rehearing requirement, with or without the additional requirement of raising the very objection urged on appeal, is virtually unheard-of, but both requirements happen to exist in all three of the major statutes administered by FERC.").

It is not necessary, however, for the Court to determine the permissible scope at this stage of litigation. As Grassroots Intervenors note (Resp. at 4), they filed their own request for agency rehearing. After the Commission issues an order on rehearing, Grassroots Intervenors may, if they remain aggrieved, file their own petition for judicial review. If, however, they elect not to do so, yet seek to expand the scope of another party's appeal by pursuing different objections to the challenged FERC orders, the Commission will renew its objection, and will more fully address the applicable statutory language and relevant case law at that time.

CONCLUSION

For the reasons stated herein and in FERC's Motion to Dismiss, the petitions for review should be dismissed. If not dismissed, the petitions should be consolidated and held in abeyance to allow the agency to issue a final, judicially-reviewable rehearing order.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ *Carol J. Banta*
Carol J. Banta
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901
Carol.Banta@ferc.gov

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(a), I certify that this Reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this Reply contains 1,957 words.

I further certify that this Reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Reply has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ *Carol J. Banta*
Carol J. Banta

CERTIFICATE OF SERVICE

I certify that on February 15, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ *Carol J. Banta*
Carol J. Banta