In the United States Court of Appeals for the Sixth Circuit

No. 17-4308

CITY OF OBERLIN, OHIO,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING REVIEW

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INTRODUCTION

Movant-Petitioner City of Oberlin ("Oberlin") asks this Court for the extraordinary remedy of indefinitely delaying the NEXUS pipeline project ("the Project"). The Federal Energy Regulatory Commission ("Commission" or "FERC") granted a certificate of public convenience and necessity to the NEXUS Project; requests for agency rehearing of the Commission's certificate decision are pending. The Project is an interstate natural gas pipeline that the Commission has

determined, in its expert judgment and after thorough consideration and balancing of competing values, is in the public interest.[1]

But Oberlin fails to establish extraordinary circumstances justifying a stay. Oberlin's motion for stay ("Motion") ignores one-half of the Commission's public interest balance: whether the need for, and benefits from, the Project outweigh potential adverse impacts. The Commission found benefits from access to new sources of natural gas for Ohio and Michigan consumers.

The requested stay would upset the Commission's public interest balance and imperil the Project. Courts have repeatedly and uniformly rejected similar efforts to halt the effectiveness of the Commission's natural gas infrastructure decisions prior to judicial review on the merits. In fact, in the past seven years, courts of appeals have denied all 18 requests for stays of the effectiveness of FERC natural gas certificate orders, including:

- *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.* (D.C. Cir. Feb. 2, 2018) (denying stay of pipeline construction based on challenge to FERC's environmental analysis);
- *N.Y. State Dep't of Envtl. Conservation & Protect Orange Cty. v. FERC*, Nos. 17-3770 & 17-3966 (2d Cir. Dec. 7 & 15, 2017) (denying stays of pipeline construction based on Clean Water Act waiver and bald eagle protection);

[1] Coalition to Reroute Nexus ("Coalition"), petitioner in No. 17-4302, seeking review of the same FERC order, filed a similar motion for stay on February 2, 2018. The Commission filed a similar response to that motion on February 12.

- *Allegheny Def. Project v. FERC*, Nos. 17-1098, *et al.* (D.C. Cir. Nov. 8, 2017) (denying stay of pipeline construction based on challenge to FERC's indirect impacts analysis);

- *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016) (denying stay of pipeline construction based on challenge to FERC's indirect impacts analysis); and

- *City of Boston v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016) (denying stay of pipeline in-service date based upon challenge, in part, to FERC's cumulative impacts analysis).[2]

In addition, several district courts recently have denied requests for injunctive relief as to FERC natural gas certificate orders — including a motion by landowners for a preliminary injunction to prevent the Commission from issuing the Certificate Order concerning the NEXUS Project. *Urban v. FERC*, No.

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[2] Other court orders denying stays of FERC natural gas infrastructure orders are: *Catskill Mountainkeeper v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Envtl. Pres. & Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Responsible Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); and *Summit Lake Paiute Indian Tribe & Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28 & Feb. 22, 2011).

Yet another request for a stay — concerning the NEXUS Project at issue here — was dismissed as moot when the movant, Sierra Club, voluntarily dismissed its petition for review (and its companion petition for a writ of mandamus), after the Commission had filed its response. *Sierra Club v. FERC*, Nos. 17-1236 & 17-1240 (D.C. Cir. Dec. 13, 2017).

5:17CV1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017). *See also Berkley v. Mountain Valley Pipeline & FERC*, No. 7:17-cv-00357 (W.D. Va. Dec. 11, 2017) (denying preliminary injunction to stop pipeline construction based on constitutional eminent domain objections), *on appeal*, No. 18-1042 (4th Cir. filed Jan. 11, 2018); *Adorers of the Blood of Christ v. FERC*, No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017) (denying preliminary injunction to stop pipeline construction and operation based upon religious freedom challenge), *on appeal*, No. 17-3163 (3d Cir. Oct. 13, 2017) (denying injunction pending appeal).

Oberlin has not presented any legitimate reason why this Court should reach a different decision here.

BACKGROUND

This case arises from the Commission's issuance of three conditional certificates of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). One certificate authorized NEXUS Gas Transmission, LLC ("NEXUS") to build and operate the NEXUS pipeline project; another certificate authorized Texas Eastern Transmission, LP to expand its existing system in Pennsylvania and Ohio and interconnect with the NEXUS pipeline; and the third certificate authorized DTE Gas Co. to expand its existing system and lease some of its pipeline capacity to NEXUS. *See NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, PP 1-3, 5 ("Certificate Order"), *reh'g*

pending. Oberlin's petition and motion for stay challenge only the conditional certificate granted to NEXUS.

The Certificate Order authorizes NEXUS, upon satisfying necessary environmental conditions, to construct new facilities to transport, in total, approximately 1.5 million dekatherms of natural gas per day from the Appalachian Basin to Ohio and Michigan — including to markets along the NEXUS pipeline system. *See id.* PP 1, 6-10; Final Environmental Impact Statement 1-3 ("Environmental Statement").[3] The Project also will connect with existing pipeline facilities in Michigan that will allow natural gas to be transported to the Dawn Hub in Ontario, Canada. *See* Certificate Order PP 1, 9, 22.

The Commission balanced the public benefits of the Project against potential adverse consequences. *See* Certificate Order PP 33-34. The Commission found evidence of public need for the Project based on "growing demand" for natural gas in the region. *See id.* PP 37-38. NEXUS entered into long-term agreements for firm service with eight shippers to use close to 60 percent of the Project's total capacity. *See id.* P 41. NEXUS also explained that many new natural gas-fired power plants have been planned in the region, and the owners of some of those plants filed letters of support in this proceeding. *See id.* P 38.

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[3] The Environmental Statement is available at https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14411409.

In addition to its need assessment under the Natural Gas Act, the Commission conducted a detailed environmental review consistent with its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* Its review of the application resulted in the 541-page Environmental Statement.

Before issuing the Environmental Statement, the Commission reviewed over 7,000 written comments, and considered oral comments from more than 580 people who spoke at twelve public meetings. Certificate Order PP 105, 107. NEXUS also considered and adopted 239 route variations, a 91 percent change to its original route design, to avoid or reduce effects on environmental or other resources, resolve engineering issues, or address stakeholder concerns. *See id.* P 141. The Commission imposed 39 mandatory conditions to avoid, minimize, and mitigate potential adverse environmental impacts associated with the Project. *See id.* P 108; Certificate Order App. B.

Oberlin and other parties requested rehearing and asked the Commission to stay the Project. Those rehearing requests are still pending before the Commission.[4] On October 23, 2017, the Secretary of the Commission issued a

[4] Oberlin asserts that its petition and motion raise "purely legal issues" that it contends have become final (Mot. at 6), but Oberlin also raised "many other issues" (*id.* at 5 n.2) in its request for rehearing as to the Commission's factual findings and environmental analysis.

procedural order tolling the period of time for the Commission to issue an order addressing the matters raised in the requests for rehearing of the Certificate Order. *NEXUS Gas Transmission, LLC*, Docket No. CP16-22-001 (Oct. 23, 2017) ("Tolling Order") ("[R]ehearing of the Commission's order is hereby granted for the limited purpose of further consideration.").

On January 10, 2018, the Commission issued an order denying the stay requests. *NEXUS Gas Transmission, LLC*, 162 FERC ¶ 61,011 (2018) ("FERC Stay Order"). The Commission noted that it had "yet to consider the merits of any of the requests for rehearing." *Id.* P 3 n.5.

On January 29, 2018, the Commission moved to dismiss the petition for review in this case (as well as another petition that seeks review of the same Certificate Order, in *Coalition to Reroute Nexus, et al. v. FERC*, Case No. 17-4302), for lack of jurisdiction, based on the absence of a final order. (That motion remains pending, the Commission having filed its reply on February 15.)

ARGUMENT

Oberlin seeks judicial intervention too soon — the Commission has not yet acted on the merits of requests for rehearing of its Certificate Order, and thus has not yet issued a final order in this proceeding.

Nor has Oberlin justified the extraordinary remedy of a stay. *See Munaf v. Geren*, 553 U.S. 674, 689 (2008) (stay pending appeal "is an extraordinary and

drastic remedy; it is never awarded as of right"); *accord S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) (quoting *Munaf*); *Nken v. Holder*, 556 U.S. 418, 427 (2009) ("A stay is an intrusion into the ordinary process of administration and judicial review, . . . and accordingly is not a matter of right . . . .") (internal quotation marks and citations omitted).

In considering whether to award such extraordinary relief, the Court must consider: (1) whether Oberlin has made a strong showing that it is likely to succeed on the merits; (2) whether Oberlin will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies. *Nken*, 556 U.S. at 434; *accord Ohio State Conference of NAACP v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014). Courts "must balance the competing claims of injury and must consider the effect . . . of the granting or withholding of the requested relief," and "pay particular regard for the public consequences . . . ." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotation marks and citations omitted). Oberlin bears the burden of showing that extraordinary relief is warranted. *Nken*, 556 U.S. at 433-34; *see also Winter*, 555 U.S. at 22 (extraordinary remedy "may only be awarded upon a clear showing that the [movant] is entitled to such relief"), *quoted in S. Glazer's Distribs.*, 860 F.3d at 849.

I. OBERLIN SEEKS EXTRAORDINARY RELIEF FROM A NON-FINAL FERC ORDER

Courts have long held that they "have jurisdiction to review only final orders of the Commission." *Transw. Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995) (discussing Natural Gas Act section 19(b), 15 U.S.C. § 717r(b)) (citing, *e.g.*, *Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1376-77 (D.C. Cir. 1990) (discussing both Natural Gas Act section 19(b) and its parallel provision in Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b)[5]). Final agency action "mark[s] the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted); *accord Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 633 (6th Cir. 2016). *See, e.g.*, *Dayton Power & Light Co. v. FERC*, No. 84-3542 (6th Cir. June 16, 1986) (unpublished) (dismissing appeal, under the Federal Power Act, of a non-final FERC order; citing *Marshall v. Health Review Comm'n*, 635 F.2d 544, 548 (6th Cir. 1980)).

As the Commission explains in its January 29, 2018 motion to dismiss and its February 15 reply, the Certificate Order is not final agency action. As this Court has described, "[t]he Natural Gas Act sets forth a highly reticulated

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[5] Relevant provisions of the Federal Power Act and Natural Gas Act are "in all material respects substantially identical." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *accord Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) ("This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.").

procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline." *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Specifically, an aggrieved party may file a request for rehearing of a Commission order within 30 days after the Commission issues that order; once the Commission issues its rehearing order, the party may seek judicial review in the court of appeals within 60 days. Natural Gas Act section 19(a)-(b), 15 U.S.C. § 717r(a)-(b). *See Am. Energy*, 622 F.3d at 605; *see also Ky. Utils. Co. v. FERC*, 789 F.2d 1210, 1214 (6th Cir. 1986) (failure to comply with substantially identical provisions of Federal Power Act "creates a jurisdictional bar to judicial review"); *Mun. Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1051 (6th Cir. 1995) (same); *New Eng. Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1197-98 (D.C. Cir. 2018) (courts have "no discretion to ignore this express statutory limitation on [their] jurisdiction" pursuant to "this unusually demanding exhaustion scheme") (citations omitted).

The rehearing requests by Oberlin, Coalition, and other parties, which are pending before the Commission, rendered the Certificate Order non-final. *See Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002); *see also Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying the requests for rehearing is the

final, reviewable agency order); *Am. Energy*, 622 F.3d at 605 ("Once FERC concludes the rehearing, the aggrieved party may petition for review . . . ."). As the D.C. Circuit has explained, "[t]here is good reason to prohibit any litigant from pressing its cause concurrently upon both the judicial and administrative fronts: a favorable decision from the agency might yet obviate the need for review by the court," or the agency rehearing might alter the issues ultimately presented for review, possibly "mak[ing] the case moot and [the court's] efforts supererogatory." *Clifton Power*, 294 F.3d at 112.

Oberlin's conjuring of an implicit "de jure and de facto denial" of rehearing requests (Mot. at 6) — notwithstanding the Commission's repeated statements that it has not yet ruled on the merits of any rehearing requests — does not create finality. Courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days. Rather, the Commission appropriately "acts upon the application for rehearing" by providing notice within the 30-day period that it intends to further consider a rehearing request, as it did here. *See Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) ("the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent"); *see also Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) ("The statutory language, . . . although requiring FERC to 'act' upon the application for

rehearing within thirty days after filing, lest the application is deemed denied, does not state . . . that FERC must 'act on the merits' within that time lest the application is deemed denied."); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969) (same).

By filing a premature petition for review, and now a motion to stay the agency proceeding, Oberlin seeks to shortcut the "highly reticulated procedure" set forth in the Natural Gas Act. *See Am. Energy*, 622 F.3d at 605. But the All Writs Act "does not authorize [federal courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985), *quoted in United States v. Perry*, 360 F.3d 519, 533 (6th Cir. 2004). Nor does it "authorize a court to circumvent bedrock finality principles[.]" *In re Murray Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015); *cf. Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (writ of mandamus "is not to be used as a substitute for appeal, . . . even though hardship may result from delay").

The primary concern underlying Oberlin's stay motion is that pipeline construction can commence before the completion of the agency rehearing and judicial review process. *See* Mot. at 1-2. But this does not undermine the validity of the statutorily-prescribed remedy. Indeed, Congress designed the Natural Gas Act to produce that default outcome. *See* 15 U.S.C. § 717r(c) ("The filing of an

application for rehearing under [15 U.S.C. § 717r(a)] shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."); *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (explaining in the context of the analogous 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.").

II. THE RELEVANT FACTORS DO NOT JUSTIFY EXTRAORDINARY RELIEF

"[D]rastic and extraordinary remedies" are to be "reserved for really extraordinary causes," in which "appeal is clearly an inadequate remedy." *In re McDonald*, 489 U.S. 180, 185 (1989) (citation omitted). Oberlin has not shown that extraordinary relief is warranted in this case.

Although the Commission's order and Environmental Statement addressed numerous issues, Oberlin raises just one legal issue in its stay motion to this Court: whether the Commission appropriately certificated the NEXUS Project under section 7 of the Natural Gas Act, 15 U.S.C. § 717f (requiring an interstate natural gas pipeline to obtain a certificate of public convenience and necessity), rather than under section 3 of the Act, 15 U.S.C. § 717b (concerning authorization of the importation or exportation of natural gas). (Oberlin's subsidiary argument that any condemnation related to the NEXUS Project is an unconstitutional taking (Mot. at

13-16) rests on its contention that the Project must be treated as an export pipeline. *See* Mot. at 13 ("Because the . . . Project is an export pipeline and, therefore, not for a public purpose, eminent domain in aid of its construction is unconstitutional.").)

Oberlin also ignores the Commission's explicit findings of public need for the Project. *See* Certificate Order PP 40-42, 48, 51; *see also Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (because the Commission determined that the subject pipeline would serve the public convenience and necessity, the takings by condemnation of land for its construction did serve a public purpose).

A. Oberlin Cannot Show A Likelihood Of Success On The Merits

Oberlin's principal claim — from which all of its remaining arguments about condemnation, irreparable harm, and the public interest flow — is that the Commission "applied the incorrect section" of the Natural Gas Act. Mot. at 8. Specifically, Oberlin contends that the NEXUS Project must be considered as an export pipeline, subject to Natural Gas Act section 3, rather than as an interstate pipeline subject to section 7. *See* Mot. at 8-13.

Oberlin bears the burden of making a "strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 434; *NAACP*, 769 F.3d at 387. That showing requires "more than the mere 'possibility' of success . . . ." *Mich. Coal.*

of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); *see also Nken*, 556 U.S. at 434 ("It is not enough that the chance of success on the merits be 'better than negligible.'") (citation omitted). Oberlin, however, offers only its own views on the Natural Gas Act and unsupported assertions about the purposes of the NEXUS Project. *Cf. NAACP*, 769 F.3d at 388 (denying stay where movants "[did] not cite legal authority to substantiate [their] claims.").

The Commission itself has not yet addressed Oberlin's argument, which goes not only to the agency's interpretation of the statute that Congress charged it to administer, but also to its expert judgment and to its careful consideration of the specific record evidence in the underlying proceeding. *See generally FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016); *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). Oberlin and other parties (including Coalition) raised this argument in their requests for agency rehearing, which the Commission has made clear that it will address in a rehearing order. *See* Tolling Order ("Rehearing requests . . . filed in this proceeding will be addressed in a future order."); FERC Stay Order P 3 n.5 ("The Commission has yet to consider the merits of any of the requests for rehearing."). Therefore, this Court is unable assess the reasonableness of the ruling that the Commission has not yet made. Nevertheless, the Commission's longstanding section 3 precedent amply refutes Oberlin's argument.

Natural Gas Act section 3(a) provides that any natural gas exports from or imports to a foreign country require Commission authorization, which the Commission "shall issue" unless it finds that the proposed exportation or importation "will not be consistent with the public interest." 15 U.S.C. § 717b(a). In *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir. 1974), the court determined that Natural Gas Act section 3 provides the Commission authority over the construction and operation of natural gas import or export facilities. *See Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 n.10 (2014).

The Commission has long interpreted its authority over imports and exports to apply only to facilities close to the border: "when companies construct a pipeline to transport import or export volumes, only a small segment of the pipeline close to the border is deemed to be the import or export facility for which section 3 authorization is necessary . . . ." *S. LNG Inc.*, 131 FERC ¶ 61,155 n.17 (2010); *see also*, *e.g.*, *Oasis Pipeline, LP*, 127 FERC ¶ 61,263 P 18 (2009) (finding section 3 authorization necessary only for proposed 836-foot border-crossing facility, not for proposed 188-mile intrastate pipeline connecting to it); *Valero Transmission, L.P.*, 57 FERC ¶ 61,299, at pp. 61,954-55 (1991) (same, as to 1,000-foot border-crossing facility, not for connected intrastate pipeline); *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140 P 31 (same, as to 1,093-foot border-crossing facility connected to 148-mile intrastate pipeline), *on reh'g*, 157 FERC ¶ 61,081

(2016), *appeal pending sub nom. Big Bend Conservation All. v. FERC*, No. 17-1002 (D.C. Cir. filed Jan. 3, 2017). The rest of the pipeline may or may not be FERC-jurisdictional, depending on whether it qualifies as an interstate or intrastate pipeline. *Southern*, 131 FERC ¶ 61,155 n.17.

The Commission's longstanding interpretation of its authority under the Natural Gas Act is reasonable. The Act treats interstate pipelines differently than import/export facilities. *See, e.g., Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151 (D.C. Cir. 1948) (finding reasonable that Congress would be "concerned only with the fact of exportation or importation in the case of foreign commerce, but with rates, practices, accounting, facilities and financing in the case of domestic companies"). Indeed, section 3 requires the Commission to approve an application unless the Commission finds it would not be consistent with the public interest and, therefore, sets out a general presumption favoring authorization. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016). That is, the requisite public interest finding under section 3 is the inverse of the affirmative finding of public need required for a section 7 certificate. *See Border Pipe Line*, 171 F.2d at 152 (explaining that, under section 3, "the permit must issue unless the proposed exportation 'will not be consistent with the public interest,' whereas, [under section 7], a certificate can issue only if the proposed sale, etc., 'is or will be required' by the public interest"). Moreover, where the proposed imports or

exports will be from or to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas," section 3 requires that the application "*shall* be deemed to be consistent with the public interest, and applications for such importation and exportation shall be granted without modification or delay." Natural Gas Act section 3(c), 15 U.S.C. § 717b(c) (emphasis added).

Thus, under Oberlin's interpretation of the Natural Gas Act, because some natural gas will ultimately pass over export facilities, Commission approval of the entire NEXUS Project, including a nearly 260-mile pipeline in two states, must be considered under the presumptive standards of section 3. The Commission, however, properly considered the NEXUS Project as domestic interstate commerce under section 7. No part of the NEXUS Project crosses the U.S.-Canada border; to the extent that any gas will be exported to Canada, that transportation will necessarily be provided by a border-crossing facility that was not included in this Project.

Consistent with the section 7 standard, the Commission made affirmative findings of (domestic) public need for the Project. *See* Certificate Order PP 40-42, 48, 51; *see also Midcoast Interstate Transmission*, 198 F.3d at 973 (because the Commission declared that the subject pipeline would serve the public convenience and necessity, the takings complained of did serve a public purpose). The

commitment of most of the capacity on the new pipeline, which supported the Commission's finding of need, *see* Certificate Order P 41, included local utilities that serve natural gas customers in Ohio and Michigan and electricity customers in Michigan. *Id.* P 9. NEXUS also demonstrated that new gas-fired generating facilities were planned in the region. *Id.* P 38.

Accordingly, Oberlin has failed to make a "strong showing" that it is likely to succeed on the merits — i.e., that its particular view of sections 3 and 7 of the Natural Gas Act must prevail over the Commission's established interpretation.

B. Oberlin Has Not Established An Irreparable Injury

Oberlin also has not shown that it "will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434; *NAACP*, 769 F.3d at 387. Oberlin cites no authority to support its claim that possible condemnation of property justifies extraordinary relief. *Cf., e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."), *quoted in Anderson v. Kelley*, No. 92-6663 (6th Cir. Dec. 15, 1993); *Anchor Pointe Boat-A-Minium Ass'n v. Meinke*, 860 F.2d 215, 218 (6th Cir. 1988) ("the Fifth Amendment merely requires the party be compensated for the taking of private property").

In any event, in making its certificate determination, the Commission addressed parties' eminent domain concerns. The Natural Gas Act, not the Commission itself, confers eminent domain powers on certificate holders. If the Commission finds that the construction and operation of proposed interstate pipeline facilities are needed and, therefore, issues a certificate of public convenience and necessity, it is Natural Gas Act section 7(h), 15 U.S.C. § 717f(h), that authorizes the certificate holder to acquire the necessary land or property to construct the approved facilities through eminent domain. Nevertheless, in addition to finding public need for the Project, the Commission found that NEXUS had taken sufficient steps to minimize adverse impacts on landowners, has affirmed that it will make good faith efforts to negotiate with landowners for any needed rights, and will resort to the use of eminent domain proceedings only if necessary. *See* Certificate Order PP 49-50.

C. A Stay Would Substantially Injure Other Parties

The Court also must consider whether a stay would "substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434; *NAACP*, 769 F.3d at 387. Here, enjoining the FERC-issued certificate and halting the Project, while the agency considers rehearing requests, would substantially injure not only NEXUS, but also its shippers and the millions of customers that they serve. As to NEXUS, courts have recognized that entities have a protected property interest in

permits issued by the government. *See, e.g.*, *3883 Conn. LLC v. Dist. of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay"), *discussed in Paeth v. Worth Twp.*, 483 F. App'x 956, 962 (6th Cir. 2012).

But a stay also would seriously jeopardize the availability of additional capacity needed to transport natural gas to markets in the Great Lakes region. *See, e.g.*, Certificate Order P 40 ("There is also no evidence that available capacity exists on other pipelines to provide the 885,000 [dekatherms] per day of service currently subscribed by the NEXUS shippers."). Such an outcome would harm not only the certificate holder, but also the eight project shippers that have executed long-term supply agreements with NEXUS, including local gas and electric utilities that serve millions of residential and small commercial customers. *See id.* P 9.

D. The Public Interest Does Not Favor A Stay

Finally, the public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Hamlin Testing Labs., Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221, 222 (6th Cir. 1964) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a stay request. *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968). *Cf. Mich. Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 173 F.2d 784, 788 (6th Cir. 1949) ("'Congress has entrusted the administration of the Act to the Commission not to the courts'") (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 617 (1944)); *Hamlin Testing Labs.*, 337 F.2d at 222-23 ("[W]e consider it proper, with the limited knowledge we now have, to give at least interim respect to the expert judgment of the Commission as a coordinate agency of government specially created to further public purposes in this area.").

Here, a stay of the Project would not serve the public interest. The Commission found a strong showing of need in issuing the certificates to provide natural gas to meet the region's growing demand. *See* Certificate Order PP 33-51. A stay would frustrate these objectives. *See* FERC Stay Order P 11 ("any delay in the construction of the NEXUS Project would affect the in-service dates of a project that the Commission has found to be required by the public interest.").

CONCLUSION

For the foregoing reasons, Oberlin's motion for stay pending appeal should be denied.

Respectfully submitted,

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February 15, 2018

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(a), I certify that this Response in Opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,175 words.

I further certify that this Response in Opposition 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 Response in Opposition has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ *Carol J. Banta*
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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.

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