NOTES

City of Oberlin v. FERC: The D.C. Circuit Questions the "Public Benefit" of Export Market Demand in Pipeline Eminent Domain Proceeding

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I. OVERVIEW

On November 20, 2015, Nexus Gas Transmission, LLC (Nexus) applied for permission from the Federal Energy Regulatory Commission (the Commission) under section 7 of the Natural Gas Act to construct and operate a new natural gas pipeline.[1] Beginning and ending within the United States, the pipeline stretches approximately 257 miles long and moves 1.5 million dekatherms per day (dth/day) of shale gas to markets in Ohio, Michigan, and Ontario, Canada.[2] Between 2012 and 2015, Nexus contracted with eight different entities, establishing long-term agreements for 885,000 dth/day, amounting to 59% of the pipeline's 1.5 million dth/day capacity. Nexus contracted with eight entities, four affiliates of its sponsors, and two Canadian companies serving customers in Canada. Nexus's long-term agreements with the Canadian shippers amounted to 260,000 dth/day.[3]

On August 25, 2017, the Commission granted Nexus a certificate of public convenience and necessity,[4] and two months later, on October 1, 2017, Nexus filed a condemnation suit in the United States District Court for the Northern District of Ohio against the City of Oberlin, Ohio, and the

1. City of Oberlin v. FERC, 937 F.3d 599, 603 (D.C. Cir. 2019).
2. *Id.*
3. *Id.*
4. *Id.* (citing Nexus Gas Transmission, LLC, 160 F.E.R.C. ¶ 61,022 (Aug. 25, 2017)).

Coalition to Reroute Nexus (the Petitioners).[5] The district court found in favor of Nexus, holding that it "had the right to exercise eminent domain to condemn certain easements over Petitioners' properties,"[6] and on July 25, 2018, the Commission denied the City of Oberlin and the Coalition to Reroute Nexus's requests for rehearing over its issuance of the section 7 certificate.[7] In its denial order, the Commission made three findings: "First, it found that Nexus's long-term agreements were 'the best evidence' that the pipeline served unmet market demand. . . . [s]econd, it approved Nexus's proposed 14% return on equity. . . . [and [t]hird, it found that the pipeline [did] not represent a significant safety risk to the public."[8]

On appeal to the United States Court of Appeals for the District of Columbia, the Petitioner-landowners challenged the Commission's denial of their request for rehearing and sought vacatur of "the Commission's order . . . granting Nexus a Section 7 certificate."[9] First, the Petitioners argued that the Commission erred in finding that Nexus's long-term agreements were the best evidence of project need because the Commission relied on Nexus's long-term agreements for "a paltry 59 percent of new capacity" in contravention of a Commission Certificate Policy Statement.[10] Second, they argued that the long-term agreements were not "meaningful evidence of project need because half of them [were] with affiliates of the pipeline's sponsors."[11] Third, the Petitioners argued that the long-term agreements were not strong evidence of market demand "because a substantial portion of them [were] dedicated for export."[12] Finally, they attacked "the Commission's approval of the specific formula that Nexus used to design its initial consumer rate"[13] and "the Commission's finding that the pipeline [did] not represent a significant safety risk to the public."[14] After oral argument, Nexus filed a motion to dismiss for lack of subject matter, arguing that the court lacked jurisdiction because the Petitioners were not "aggrieved" under the Natural Gas Act and the Petitioners no longer suffered redressable injuries

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5. *Id.* (citing Nexus Gas Transmission, LLC v. City of Green, No. 5:17CV2062, 2017 WL 6624511, at *3 (N.D. Ohio Dec. 28, 2017)).
6. *Id.*
7. *Id.* (citing Nexus Gas Transmission, LLC, 164 F.E.R.C. ¶ 61,054 (July 25, 2018)).
8. *Id.*
9. *Id.*
10. *Id.* at 605.
11. *Id.*
12. *Id.* at 606.
13. *Id.* at 608.
14. *Id.* at 610.

in fact because "Petitioners and Nexus executed easement agreements that settled the issue of compensation for Nexus's takings."[15]

The court *held* that the Petitioners were aggrieved within the meaning of the Natural Gas Act and thus were justified in seeking rehearing of the Commission's order granting Nexus a certificate of public convenience and necessity.[16] Plaintiffs suffered redressable injuries-in-fact because they were "put to the choice of having to either reach an agreement with a pipeline seeking to access [their] property or have [their] property condemned."[17] The Commission reasonably determined that Nexus's long-term agreements were the best evidence of project need because, even though the agreements "represented only 59% of [the pipeline]'s capacity, the Commission determined that existing pipelines could not absorb that amount of gas."[18] Furthermore, Nexus's long-term agreements with affiliate shippers constituted evidence of need because "the Commission rationally explained that . . . it found no evidence of self-dealing . . . and because Nexus bears the risk for any unsubscribed capacity."[19] However, the Commission failed to adequately justify its determination that it was lawful to credit the company's contracts with foreign shippers serving foreign customers as evidence of market demand.[20] The court *held* that (1) the Commission did not act arbitrarily and capriciously in approving the company's proposed return on equity of 14% and hypothetical capital structure of 50% equity and 50% debt because it "applied its established policy balancing both consumer and investor interests to the particular pipeline at issue"[21] and (2) that the Commission did not impermissibly delegate its obligations under the National Environmental Policy Act to independently review the pipeline's potential adverse impacts on public safety.[22] *City of Oberlin v. FERC,* 937 F.3d 599 (D.C. Cir. 2019).

15. *Id.* at 604.
16. *Id.*
17. *Id.* (citing Gunpowder Riverkeeper v. FERC, 807 F.3d 267, 271-72 (D.C. Cir. 2015)).
18. *Id.* at 605.
19. *Id.* at 606.
20. *Id.* at 607.
21. *Id.* at 609
22. *Id.* at 610-11.

II. BACKGROUND

A. Eminent Domain

Congress enacted the Natural Gas Act in 1938 (the Act), just seven years after the construction of the first natural gas pipeline.[23] Congress created the Act in order to regulate the sale and transport of natural gas in interstate commerce and to "protect consumers from price exploitation."[24] In furtherance of this goal, the Act declared natural gas pipelines to be in "the public interest"[25] and delegated the federal power of eminent domain to natural gas companies for the construction of interstate pipelines.[26]

Before exercising the power of eminent domain, however, the Act requires that the pipeline company obtain a "certificate of public convenience and necessity" (CCN) from the appropriate regulatory authority.[27] While the Act originally vested such authority in the Federal Power Commission (FPC), the Department of Energy Organization Act of 1977 abolished the agency and created the United States Department of Energy.[28] The same Act created the Federal Energy Regulatory Commission and endowed it with the FPC's regulatory authority.[29] Thus, the Commission is responsible for granting CCNs under the Act.[30]

Before granting a CCN, the Commission must make several determinations in reviewing a pipeline's application. First, it must determine that the applicant "is prepared to develop the [pipeline] project without relying on subsidization by the sponsor's existing customers."[31] Next, the Commission may only issue a CCN if "the public benefits to be achieved from the project can be found to outweigh the adverse effects."[32]

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23. *See* Valerie L. Chartier-Hogancamp, *Fairness and Justice: Discrepancies in Eminent Domain for Oil and Natural Gas Pipelines*, 49 TEX. ENVTL. L.J. 67, 74 (2019).

24. *Id.*

25. 15 U.S.C. § 717a (2018).

26. *See id.* § 717f(h) ("[A pipeline] may acquire [land] 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.").

27. *Id.* § 717f(c).

28. Chartier-Hogancamp, *supra* note 23, at 74 n.64.

29. *Id.*

30. *See* FED. ENERGY REGULATORY COMM'N, AN INTERSTATE NATURAL GAS FACILITY ON MY LAND? WHAT DO I NEED TO KNOW? 1, 18 (2015), https://www.ferc.gov/resources/guides/gas/gas.pdf ("In accordance with the Natural Gas Act (a law passed by the United States Congress in 1938), the FERC certificate gives the company the right to ask a state or federal court to award the needed property rights to the company where voluntary good faith negotiation has failed.").

31. Certification of New Interstate Nat. Gas Pipeline Facilities, 88 F.E.R.C. ¶¶ 61,227, 61,750 (1999), *clarified*, 90 F.E.R.C. ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 F.E.R.C. ¶ 61,094 (July 28, 2000).

32. *Id.* ¶ 61,747.

In assessing the need for the project, the Commission is required to consider such factors as "long-term agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount capacity currently serving the market."[33] In assessing potential adverse effects, the Commission will consider the interests of the "[l]andowners whose land would be condemned for the new pipeline right-of-way under eminent domain rights conveyed by the Commission's certificate."[34] As stated by the Commission, the landowners' interests include "avoid[ing] unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way."[35] Additionally, applicants must provide evidence of the benefits to be achieved with the construction of the pipeline in the form of "contracts, long-term agreements, studies of projected demand in the market to be served, or other evidence of public benefit of the project."[36]

While the Commission has broad authority to grant certificates of public necessity and convenience for the construction of natural gas pipelines, it has limited authority to regulate the transfer of natural gas across national borders under section 3 of the Act.[37] Section 3 mandates that no person shall import or export natural gas "without first having secured an order of the Commission authorizing it do so," and it requires the Commission to issue such orders unless it finds that either import or export "will not be consistent with the public interest."[38] Furthermore, after passage of the Act, Congress transferred section 3's regulatory authority to the Secretary of Energy.[39] Later, the Secretary of Energy delegated limited authority to the Commission to regulate the construction and siting of import and export facilities.[40]

B. Rates

Under the Natural Gas Act, the Commission also has a duty to regulate the rates that a pipeline charges its customers.[41] A pipeline's rate

33. *Id.*
34. *Id.*
35. *Id.* ¶ 61,748.
36. *Id.* ¶ 61,750.
37. *See* EarthReports, Inc. v. FERC, 828 F.3d 949, 952-53 (D.C. Cir. 2016).
38. 15 U.S.C. § 717b(a) (West through P.L. 116-112).
39. *See* Rover Pipeline, LLC, 158 F.E.R.C. ¶ 61,109 n.43 (Feb. 2, 2017) (citing 42 U.S.C. § 7151(b) (2012)).
40. *See id.*
41. *See* Sierra Club v. FERC, 867 F.3d 1357, 1376 (D.C. Cir. 2017) ("[T]he fundamental purpose of [the Act] is to protect natural gas consumers from the monopoly power of natural gas

consists of three elements: the cost of construction and operation; the "rate base" or the total value of its assets; and the rate of return on investments made.[42] Together, these elements determine the total amount of revenue that a pipeline may earn through its consumer rate.[43] The rate of return is determined on two elements, namely, the pipeline's debt and equity.[44] A pipeline's ratio of debt to equity is known as its "capital structure."[45] The Commission must review and approve a pipeline's initial rate if it finds the rate is in the "public interest."[46] In reviewing a pipeline's proposed initial rate, the Commission may rely on long-term approvals, but the use of one capital structure in one case will not automatically justify its use in another.[47] Once approved, the pipeline's initial rate will remain in place until the pipeline or the Commission initiates ratemaking procedures under sections 4 and 5 of the Act.[48] Finally, permanent rates created under sections 4 and 5 must be just and reasonable.

C. *Environmental Safety Under NEPA*

As it conducts its section 7 certificate review, the Commission must complete an environmental review of the pipeline project and prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act.[49] As part of this process, the Commission must "identify the reasonable alternatives to the contemplated action and . . . look hard at the environmental effects of [its] decision."[50]

III. THE COURT'S DECISION

In the noted case, the Court of Appeals remanded the Federal Energy Regulatory Commission's (the Commission) order authorizing Nexus Gas

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pipelines . . . FERC carries out that purpose by, among other duties, regulating the rates that a newly authorized pipeline can charge its customers.").

42. *See id.* (citing N.C. Utils. Comm'n v. FERC (NCUC), 42 F.3d 659, 661 (D.C. Cir. 1994)).

43. *See id.*

44. *Id.*

45. *Id.*

46. *See* Atl. Ref. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 390-91 (1959).

47. *See Sierra Club,* 867 F.3d at 1378.

48. *See* Mo. Pub. Serv. Comm'n v. FERC, 601 F.3d 581, 583 (D.C. Cir. 2010) ("[R]egular rate setting provisions are codified under § 4 and § 5 of the [Natural Gas Act]. Section 4 allows pipelines to initiate proceedings to set or modify permanent rates, while § 5 allows FERC to do so on its own authority." (citing 15 U.S.C. § 717c-d (West 2020))).

49. *See* 42 U.S.C. § 4332(C) (2018).

50. *See* Corridor H Alts., Inc. v. Slater, 166 F.3d 368, 374 (D.C. Cir. 1999) (citing Citizens Against Burlington, Inc. v. Busey IV, 938 F.2d 190, 194 (D.C. Cir. 1991)).

Transmission, LLC to create an interstate natural gas pipeline and use the power of eminent domain to gain easements over the Petitioners' property for further explanation of "why it is lawful to credit long-term agreements for export toward a Section 7 finding that an interstate pipeline is required by the public convenience and necessity."[51] First, the court determined threshold issues in favor of the Petitioners. Particularly, the court found that it had subject matter jurisdiction under the Natural Gas Act and that the Petitioners had standing under Article III of the Constitution.[52]

Next, the court considered whether or not the Commission's finding that Nexus's long-term agreements were the best evidence of project need was supported by substantial evidence.[53] Dismissing two of the Petitioner's arguments, the court found merit in their argument that Nexus's long-term agreements with foreign shippers could not serve as substantial evidence of market demand.[54] The court determined that it could affirm the Commission's finding of public convenience and necessity "only if the Commission's inclusion of the export long-term agreements in its analysis was proper."[55] Thus, because the Commission had failed to adequately explain the legality of its inclusion of the export long-term agreements, the court remanded the order for further explanation.[56]

Finally, the court relied on long-term precedent to find that the Petitioners' attack on the Commission's approval of Nexus's rate design was without merit[57] and rejected the Petitioners' arguments against the Commission's finding that the pipeline did not represent a significant safety risk to the public.[58]

The court began by dispatching Nexus's motion to dismiss the landowners' petition for lack of subject matter jurisdiction.[59] First, the court determined that it had jurisdiction over the petition under the Natural Gas Act, explaining that any party aggrieved by an order of the Commission may petition the court for review of the order.[60] Further, the court reiterated its prior holding that "landowners like Petitioners, who are

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51. City of Oberlin v. FERC, 937 F.3d 599, 611 (D.C. Cir. 2019).
52. *Id.* at 604.
53. *Id.* at 605.
54. *See id.* at 606.
55. *Id.*
56. *See id.* at 607.
57. *See id.* at 610.
58. *Id.*
59. *Id.* at 603.
60. *Id.* (citing the Natural Gas Act of 1938, 15 U.S.C. § 717r(b) (2018)).

'forced to choose between selling to a FERC-certified developer and undergoing eminent domain proceedings,' are 'aggrieved within the meaning of the [Natural Gas] Act.'"[61]

Finding that the Petitioners were sufficiently aggrieved, the court then analyzed their Article III standing.[62] First, the court relied on its long-standing precedent to find that the Petitioners were injured in fact when they were "put to the choice of having to either reach an agreement with a pipeline seeking to access [their] property or have [their] property condemned."[63] The court then reasoned that the existence of a compensation agreement between Nexus and the landowners was thus irrelevant to the injury in fact determination.[64] Next, the court found that the landowners' injuries were directly traceable to the Commission's orders and further that their injuries were likely to be redressed should the court vacate the commission's orders.[65] In this respect, the court reasoned that the Commission's orders authorized Nexus to condemn the Petitioners' land, and that in addition a vacatur would likely lead to Nexus's removal of any newly constructed pipeline facilities and further remediation.[66] For these reasons, the court found that the Petitioners had proper standing.[67]

With the threshold jurisdictional issues out of the way, the court proceeded to analyze the Petitioners' challenges to the Commission's ruling, first establishing its standards of review. In considering vacatur, the court stated that it "must set aside a decision of the Commission if it is arbitrary or otherwise contrary to law."[68] Further, the court explained that "where an agency's 'explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy.'"[69] Lastly, the court noted that "[t]he Commission's factual findings are conclusive 'if supported by substantial evidence.'"[70]

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61. *Id.* at 604 (citations omitted) (quoting Sierra Club v. FERC, 867 F.3d 1357, 1365 (D.C. Cir. 2017)).
62. *Id.* ("To establish Article III standing, a petitioner must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." (citing Spokeo, Inc. v. Robins*,* 136 S. Ct. 1540, 1547 (2016))).
63. *Id.* (citing Gunpowder Riverkeeper v. FERC, 807 F.3d 267, 271-72 (D.C. Cir. 2015)).
64. *See id.*
65. *Id.*
66. *See id.* at 605.
67. *Id.*
68. *Id.* (citing TNA Merch. Projects, Inc. v. FERC, 857 F.3d 354, 358 (D.C. Cir. 2017)).
69. *Id.* (quoting BP Energy Co. v. FERC, 828 F.3d 959, 965 (D.C. Cir. 2016)) (citing Maher Terminals LLC v. Fed. Mar. Comm'n, 816 F.3d 888, 892 (D.C. Cir. 2016)).
70. *Id.* (quoting 15 U.S.C. § 717r(b) (West 2020)).

Next, the court considered the Petitioners' three-pronged attack against the Commission's finding that Nexus's long-term agreements were the "best evidence" of project need. First, the Petitioners argued that "the Commission contravened its Certificate Policy Statement by relying on Nexus's long-term agreements for a paltry 59 percent new capacity as the best evidence of project need."[71] Particularly, they argued that the Commission's "policy statement only allows long-term agreements to serve as 'strong evidence of market demand' when they represent 'most of the new capacity' of the pipeline and 59% is not most of the new capacity."[72] However, the court rejected this argument on the grounds that the Certificate of Policy Statement contains a "flexible inquiry" rather than a "bright-line rule."[73] The court explained that the Commission has authority under the statement to consider a "wide variety of evidence to determine the public benefits of the project."[74] The court found that the Commission reasonably considered the evidence, noting that although the long-term agreements represented just 59% of the pipeline's capacity, the Commission found "that existing pipelines could not absorb that amount of gas."[75] Thus, the court ruled, "[T]he Commission reasonably concluded . . . that the long-term agreements . . .were the best evidence of project need."[76]

Next, the court considered the Petitioners' second argument, that the pipeline's long-term agreements were not "meaningful evidence of project need because half of them [were] with affiliates of the pipeline's sponsors."[77] In this argument, the Petitioners challenged the legitimacy of the affiliate agreements, claiming that they were "not necessarily the product of arms-length negotiations."[78] The court rejected this argument, determining that the Commission "rationally explained that it fully credited Nexus's long-term agreements with affiliates because it found no evidence of self-dealing . . . and because Nexus bears the risk for any unsubscribed capacity."[79] Further, the court noted that the Commission had reduced "the significance of whether the [long-term agreements] are with affiliated or unaffiliated shippers" when it ceased to require pipelines

71. *Id.* (citation omitted)
72. *Id.* (citation omitted) (quoting 88 F.E.R.C. ¶¶ 61,227, 61,749 (1999)).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

to show specific subscription rates.[80] Lastly, the court explained that the Commission's policy is "to not look behind long-term . . . agreements to make judgments about the needs of individual shippers."[81] For these reasons, the court found the pipeline's long-term agreements with affiliate shippers were valid.

Next, the Petitioners argued that the long-term agreements were not strong evidence of market demand because a significant number of them were dedicated for export. First, they contended that the Commission could not use export agreements to justify project need for a certificate of public convenience and necessity because the Secretary of Energy has exclusive authority over exports under section 3 of the Natural Gas Act. Second, they asserted that crediting the export agreements toward a public need finding would violate the Takings Clause, "as a private pipeline selling gas to foreign shippers serving foreign customers does not serve a 'public use' within the meaning of the Fifth Amendment."[82] In response, the court noted that the argument "raise[d] legitimate questions, which the Commission . . . failed to adequately answer."[83]

In tackling this, the court first established that two of the pipeline's eight long-term agreements were with "Canadian companies serving customers in Canada."[84] It then reasoned that should the Commission not include those agreements in its public need analysis, the pipeline would retain long-term agreements for just 41.6% of its total capacity.[85] Because the Commission had provided no public need analysis at the diminished subscription rate, the court explained it could only affirm the Commission's finding of public convenience and necessity if the Commission's inclusion of the export agreements in its calculation was legitimate.[86]

Next, the court explained that section 7 of the Natural Gas Act permits the Commission to grant a certificate of public convenience and necessity for "the transportation [of natural gas] in interstate commerce."[87] Furthermore, the court noted that it has "explicitly refused to interpret

80. *Id.* at 605-06 (quoting 88 F.E.R.C. ¶ 61,748)

81. *Id.* (quoting Myersville Citizens for a Rural Cmty. v. FERC, 783 F.3d 1301, 1311 (D.C. Cir. 2015)) (first citing Dominion Transmission, Inc., 141 F.E.R.C. ¶¶ 61, 240 (2012); and then citing Appalachian Voices v. FERC, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb 19, 2019)).

82. *Id.* (citation omitted).

83. *Id.*

84. *See id.* (citation omitted)

85. *See id.*

86. *See id.*

87. *Id.* (quoting 15 U.S.C. § 717f(c)(2) (West 2020)).

'interstate commerce' within the context of the Act . . . to include foreign commerce."[88]

The court then found the Commission's response to the Petitioner's Takings Clause argument to be unpersuasive.[89] According to the court, the Commission cited to only one agency authority dealing with the export issue, and, in that one authority, the Commission relied on an "inadequate explanation that such a circumstance does not present a Takings Clause problem because . . . Section 7 authorizes the certificate holder to exercise the right of eminent domain, and 'Congress did not suggest that there was a further test.'"[90] Such reasoning, the court explained, does not answer whether "it is lawful for the Commission to credit long-term agreements for export toward a finding that a pipeline is required by the public convenience and necessity."[91]

Furthermore, the court noted that the Commission failed to adequately answer the question at oral argument when it repeated that in granting the Nexus's certificate of public convenience and necessity, "it was looking at the benefits to the domestic markets."[92] For these reasons, the court remanded the order to the Commission for further explanation of why "it is lawful to credit long-term agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7 of the [Natural Gas] Act."[93]

Next, the court considered the Petitioners' attack on the Commission's approval of Nexus's consumer rate formula. First, the court explained that the Commission has a duty to regulate consumer rates under the Natural Gas Act,[94] noting that in section 7 proceedings, the Commission reviews an applicant's rate proposal and will only approve it if the Commission finds that the initial rate is in the public interest.[95] Then, the court explained that the initial rate will stay "in place until permanent just and reasonable rates are established pursuant to ratemaking procedures under Sections 4 and 5 of the Natural Gas Act."[96] In this case,

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88. *Id.* at 607 (quoting Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149, 152 (D.C. Cir. 1948)) (citing Distrigas Corp. v. Fed. Power Comm'n, 495 F.2d 1057, 1063 (D.C. Cir. 1974)).

89. *See id.*

90. *See id.* (quoting Transcon. Gas Pipe Line Co., 161 F.E.R.C. ¶ 61,250 (Dec. 6, 2017)).

91. *Id.*

92. *Id.*

93. *Id.* at 607-08.

94. *Id.* at 608 (citing Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017)).

95. *Id.* (citing Atl. Ref. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 390-91 (1959)).

96. *Id.* (citing Mo. Pub. Serv. Comm'n v. FERC, 601 F.3d 581, 583 (D.C. Cir. 2010)).

the Commission approved Nexus's proposed return on investment (14%) on the condition that the pipeline "design its initial rate according to a hypothetical capital structure of 50% equity and 50% debt."[97] For this reason, the court found that the Commission "required the pipeline to charge a lower rate than it had originally requested."[98]

Although the Petitioners challenged the rate on the grounds that its designed return on investment was excessive and contended that the Commission failed to tailor its approval of the rate specifically to the Nexus pipeline, the court found, after a close examination of the record, that the Commission had adequately considered the pipeline's particular circumstances.[99] Particularly, the court determined that the Commission "applied its established policy balancing both consumer and investor interests to the particular pipeline at issue, and responded to Petitioners' specific objections."[100] The court reasoned that because Congress delegated discretion to the Commission to approve initial rates that will "'hold the line' and 'ensure that the consuming public may be protected'" until permanent rates are established under the ratemaking process of sections 4 and 5 of the Natural Gas Act, and the Commission concluded, on the record before it, that the initial rate would "hold the line," it was "ill-equipped to second guess the Commission's expert judgment."[101] For these reasons, the court denied the Petitioners' rate formula argument.

Finally, the court considered and rejected both of the Petitioners' arguments against the Commission's finding that the pipeline did not "represent a significant safety risk to the public."[102] First, the court denied the Petitioners' argument that the Commission "impermissibly delegated its obligations under NEPA to independently review the pipeline's potential adverse impacts on public safety" by over-relying on the pipeline's commitment to comply with safety standards promulgated by the Department of Transportation (DOT).[103] The court explained that the DOT has the sole authority to make safety standards for natural gas pipelines.[104] Further, the court noted that it had previously held that is it reasonable for the Commission to reference those standards when

97. *See id.*
98. *Id.* (citing *Sierra Club*, 867 F.3d at 1368).
99. *See id.* at 609.
100. *Id.*
101. *See id.* at 609-610.
102. *See id.* at 610.
103. *Id.*
104. *Id.* (citing Memorandum of Understanding Between DOT and FERC Regarding Natural Gas Transportation Facilities (1993), https://www.ferc.gov/legal/mou/mou-9.pdf).

reviewing a pipeline's safety risks.[105] The court found that the Commission independently considered the pipeline's safety risks, explained how the pipeline's compliance with DOT standards would address the Petitioners' safety concerns, and listed actions that the pipeline committed to take in order to account for gaps in the DOT regulations.[106] For these reasons, the court determined that the Petitioners' argument attacking the safety finding was without merit.

Lastly, the court disagreed with the Petitioners' argument that "the Commission arbitrarily failed to consider moving the pipeline away from residences and buildings." Instead, the court reasoned, because the Commission followed a DOT classification system "that grades each segment of a pipeline based on population density at a given segment's location . . . and subjects 'high consequence areas,'. . . to stricter safety standards,"[107] it did not arbitrarily fail to consider moving the pipeline.

IV. ANALYSIS

The United States Court of Appeals for the District of Columbia Circuit's decision to remand in the noted case provides a momentary pause in the ever-advancing parade of pipeline construction. As the natural gas surplus grows in the United States, thanks largely to the revolution in fracking, perhaps more and more gas transported in the existing pipeline network will be destined for export. As foreign demand for natural gas grows, so too must grow the web of pipelines needed for its delivery to foreign customers. Mile by mile, they have thus enjoyed a fairly frictionless growth, spurred forward at least in part by the exercise of eminent domain in the name of public benefit.

In its decision, however, the court asked a question that may ultimately provide an arrow in environmentalists' quiver: Can export demand serve as evidence of market need in a section 7 public benefit analysis?[108] Under state and federal constitutional law alike, the authority of the sovereign to exercise the power of eminent domain is limited. It must be used "for a public use," and "just compensation" must be paid to the landowner for his or her taken property.[109] While these limits protect

105. *See id.* (citing EarthReports, Inc. v. FERC, 828 F.3d 949, 958 (D.C. Cir. 2016)).
106. *See id.* at 610-11.
107. *Id.* at 611 (citing 49 C.F.R. §§ 192.5, 192.903, 192.901, 192 app. E. (2020)).
108. *See* City of Oberlin v. FERC, 937 F.3d 599, 606 (D.C. Cir. 2019).
109. *See* Kristin J. Hazelwood, *Pipelines, Electrical Lines, and Little Pink Houses: Do Any Limits on "Public Use" Remain in Eminent Domain Law*?, 25 GEO. MASON L. REV. 711, 713 (2018).

the landowner from the tyranny of unjust takings, in a conservation context, they set the stage for a contest between often opposing "public benefits": preservation of natural resources and economic efficiency taking into account all available prudent markets.[110]

Conservation lands are uniquely vulnerable to the exercise of eminent domain for a number of factors. They are "frequently less expensive [than developed areas]; their size makes it easier to assemble the quantity of land needed for the . . . pipeline; and their undeveloped state makes the dislocation of residents less likely."[111] Further, "[i]n addition to the loss of open space for agricultural land, easements for pipelines conveying petroleum products or gas pose significant risks for soil and groundwater contamination."[112] In this context, the eminent domain power delegated by the Natural Gas Act should be limited to considering benefits for the area most affected by the siting of the pipeline. Thus, a ruling affirming the Commission's order would have expanded the eminent domain power to the detriment of those most affected by the taking.

Though questions remain as to whether the crediting of export agreements as part of a finding of public necessity is legal, and, still, the Nexus pipeline may be approved by alternate means entirely, the court's decision in the noted case may yet lead the way to further limiting the FERC's eminent domain power. As we enter an era of increased gas exports, and as part of environmentalists' opposition to much of the burgeoning gas pipeline construction, they should look to highlight a pipeline's agreements with export shippers serving foreign consumers as a means of ensuring a fair, balanced review of the true meaning of "public" necessity.

V. CONCLUSION

The holding in the noted case, despite denying the Petitioners' requests for rehearing, has compelled the Commission to further explain

110. *See* Kelo v. City of New London, 545 U.S. 469 (2005) (ruling that the public benefit of tax revenue generation for the City of New London outweighed the value of Susan Kelo's property right in her house by the Thames River); *see also id.* at 494 (O'Connor, J., dissenting) ("[A]ll private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.").

111. Hazelwood, *supra* note 109, at 717.

112. *Id.* at 718 (citing Megan O'Rourke, Comment, *The Keystone XL Pipeline: Charting the Course to Energy Security or Environmental Jeopardy?*, 24 VILL. ENVTL. L.J. 149, 159-61 (2013)); *see also Emerging Issues*, LAND TR. ALLIANCE, https://www.landtrustalliance.org/emerging-issues (last visited Apr. 3, 2019)).

its order granting the Nexus pipeline eminent domain authority. The Commission must now validate its position that Nexus's agreements with foreign shippers permissibly constituted substantial evidence for a finding that the project was required by the public convenience and necessity under section 7 of the Natural Gas Act.[113] While this alone does not change the law of eminent domain under the Act, it may yet provide an avenue for limiting the eminent domain power looking forward.

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113. *See City of Oberlin*, 937 F.3d at 607-08.

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